

**EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

SAINT LUCIA

SLUHCVAP2018/0036

BETWEEN:

URBAN ST. BRICE

Appellant

and

THE ATTORNEY GENERAL OF SAINT LUCIA

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste

Justice of Appeal

The Hon. Mde. Gertel Thom

Justice of Appeal

The Hon. Mr. Michael J. Fay, QC

Justice of Appeal [Ag.]

Appearances:

Ms. Natalie DaBreo and Mrs. Cynthia Hinkson-Ouhla for the Appellant

Mr. Seryozha Cenaz, Senior Crown Counsel, and Mrs. Antonia Charlemagne
for the Respondent

2020: March 11;
July 31.

Civil appeal — Appeal from refusal of constitutional relief — Section 8(1) of the Constitution of Saint Lucia — Right to fair hearing within reasonable time — Effect of delay in determination of criminal charge on the right to fair trial — Charge for murder without final disposal or determination after 18 years — Whether right to fair hearing within reasonable time was breached — Delay in trial substantially caused by defendant's actions — Whether delay by a defendant is decisive of whether right to fair hearing within reasonable time has been breached — Remedies for breach of constitutional right pursuant to section 16 of the Constitution of Saint Lucia — Whether indictment should be permanently stayed or quashed — Threshold for grant of permanent stay of criminal proceedings — Whether circumstances justify grant of compensatory, vindictory or exemplary damages

Mr. Urban St. Brice ("Mr. St. Brice") was charged with murder in 2002. To date, the charge for murder has not been finally disposed of or determined on account of a number of

intervening occurrences including several aborted murder trials, various constitutional applications, applications for a stay of the proceedings, judicial review applications and several appeals.

The present appeal arises from a constitutional motion filed by Mr. St. Brice in 2018 seeking declaratory and other relief on the basis that his constitutional and common law rights had been breached as a result of the non-determination of the murder charge. The motion was heard by a learned judge who summarised the issues arising as follows: (i) whether Mr. St. Brice's constitutional right to a fair hearing within a reasonable time had been infringed; (ii) whether Mr. St. Brice had been subjected to inhumane and degrading treatment and false imprisonment; (iii) whether his right to disclosure had been infringed; (iv) whether he had been falsely imprisoned; (v) whether any of the matters raised were *res judicata*; and (vi) whether Mr. St. Brice was entitled to the remedies sought, i.e. the quashing of the indictment, a stay of the proceedings, vindictory, aggravated, exemplary and general damages, and costs.

The learned judge refused the motion and found, *inter alia*, that Mr. St. Brice was largely responsible for the delay in his trial and therefore that his right to a fair hearing within a reasonable time had not been infringed.

Mr. St. Brice appealed. The issues for consideration by the Court of Appeal were: (i) whether Mr. St. Brice's right to a fair hearing within a reasonable time had been infringed; and (ii) the appropriate remedies to be granted if Mr. St. Brice's right was in fact breached.

Held: allowing the appeal to the extent that a declaration is granted that Mr. St. Brice's right to a fair hearing within a reasonable time as guaranteed by section 8(1) of the Constitution of Saint Lucia has been breached; ordering that the criminal proceedings against Mr. St. Brice are permanently stayed; making no order for damages; and ordering costs to Mr. St. Brice here and below to be assessed if not agreed within 14 days, that:

1. A finding that a defendant is largely responsible for the delay in the completion of his criminal trial is not decisive of whether the right to a fair hearing within a reasonable time has been breached, as the time may come where the overall delay is so great, irrespective of who caused it, that the court is impelled to conclude that the right has been breached. At the time the learned judge considered the matter in 2018, almost 16 years had elapsed since Mr. St. Brice's arrest and charge for murder without that charge being determined. The learned judge erred in law by focusing on the cause of the delay in the matter and by failing to directly addressing the question of overall delay in the context of the constitutional guarantee to a fair hearing within a reasonable time, irrespective of who caused, authored or orchestrated it. In the circumstances, the extraordinary time period which has elapsed from the time of Mr. St. Brice's arrest and charge in November 2002 to present, without the murder charge having been finally heard and determined, leads to the insuppressible conclusion that the overall delay has been so great that the reasonable time guarantee in section 8(1) of the Constitution has been violated.

Fa' Afete Taito v The Queen and James McLeod Bennett and Ors v The Queen [2002] UKPC 15 considered; **Dyer v Watson and Anor** [2004] 1 AC 379 considered; **Gibson v The Attorney General of Barbados** [2010] CCJ 3 (AJ) considered; **Prakash Boolell v The State** [2006] UKPC 46 applied; **Elaheebocus v The State of Mauritius** [2009] UKPC 7 applied; **Abeeluck v The State of Mauritius** [2010] UKPC 13 applied; Section 8(1) of the **Constitution of Saint Lucia**, Cap 1.01 of the Revised Laws of Saint Lucia 2015 applied; **Urban St. Brice v The Attorney General** SLUHCVP2012/0027 (delivered 31st October 2016, unreported) considered.

2. A permanent stay of criminal proceedings is an exceptional remedy which ought to be deployed sparingly, carefully and for compelling reasons. While it is that a permanent stay may well reward Mr. St. Brice by permitting his escape from being brought to justice, Mr. St. Brice has spent approximately 17 years and 3 months in prison awaiting the determination or disposal of the murder charge against him. 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. The circumstances pertaining to Mr. St. Brice's case are exceptional such as to warrant the imposition of a permanent stay of the criminal proceedings in order to vindicate the breach of his right to trial within a reasonable time.

R v Horseferry Road Magistrates Court, ex p Bennett [1994] 1 AC 42 applied; **R v DS** [2020] EWCA Crim 285 applied; **The Queen v Scott Crawley and Ors** [2014] EWCA Crim 1028 applied; **Gibson v The Attorney General of Barbados** [2010] CCJ 3 (AJ) applied; **Attorney General's Reference (No. 2 of 2001)** [2004] AC 72 applied; **Prakash Boolell v The State** [2006] UKPC 46 applied; **Darmalingum v The State** [2000] UKPC 30 applied.

3. Mr. St. Brice's application to quash the indictment is now moot in view of the grant of a permanent stay. In any event, there would be no basis for the grant of such an order as the indictment was properly preferred against him. As Mr. St. Brice would have been lawfully arrested and charged at the outset, and his arrest and detention would not have been unlawful, he would also not be entitled to damages for false imprisonment at common law, which could possibly flow from the quashing of the indictment.
4. It has been concluded in several proceedings, including proceedings before the Court of Appeal, that Mr. St. Brice was largely responsible for the delay in the determination of the charge against him. There is no evidence here of dilatory tactics by the State – on the contrary, the Director of Public Prosecutions was always ready to proceed with the matter. In the circumstances therefore, an award of exemplary or vindictory damages would not be appropriate. Having regard to the gravity of the offence and all the circumstances of the case, declaratory relief coupled with the exceptional remedy of a permanent stay of the criminal proceedings would provide an emphatic vindication of the breach of Mr. St. Brice's constitutional right to trial with a reasonable time.

Taikitota v The Attorney General [2009] UKPC 11 applied; **Rookes v Barnard** [1964] AC 1229 applied; **Kuddas v Chief Constable of Leicestershire Constabulary** [2000] EWCA Civ 39 applied; **Walumba Lumba (previously referred to as WL Congo) v Secretary of State for the Home Department** [2011] UKSC 12 applied; **Graham v The Police Service Commission and the Attorney General of Trinidad and Tobago** [2011] UKPC 46 applied; **Attorney General of Trinidad and Tobago v Ramanoop** [2006] 1 AC 328 applied; **Gibson v The Attorney General of Barbados** [2010] CCJ 3 (AJ) applied.

JUDGMENT

- [1] **BAPTISTE JA:** Another chapter in the extraordinary saga of Urban St. Brice. In November 2002, St. Brice was charged with murder. In the year 2020, there is yet to be a disposition or determination of the charge. This is not to say that matters have been in repose. Several things have occurred in the interregnum, including a murder trial and conviction, a successful appeal against conviction in 2007, several aborted murder retrials, various constitutional applications, applications for a stay of proceedings, judicial review applications and several appeals.
- [2] There was nothing exceptional about the criminal case itself. The appeal against conviction was allowed on the ground that the trial judge erred in directing the jury on identification by failing to comply with sections 102 and 136(2) of the **Evidence Act**.¹ As the case wound its way through the court system in its diverse iterations, important pronouncements were made by the High Court and the Court of Appeal regarding delay in the trial process, responsibility for that delay and the issue of a fair hearing within a reasonable time. The courts attributed the delay substantially to St. Brice and held that his constitutional right to a fair hearing within a reasonable time had not been breached.
- [3] The present episode in the saga presents itself as an appeal against the dismissal by a learned judge (“the Learned Judge” or “Her Ladyship”) of an originating motion brought by St. Brice on 12th June 2018, seeking declaratory and other relief in

¹ Cap. 4.15 of the Revised Laws of Saint Lucia 2015.

respect of the alleged contravention of a number of constitutional and common law rights stemming from the murder charge. Her Ladyship summarised the issues arising from the motion as follows:

- (i) whether St. Brice's constitutional right to a fair hearing within a reasonable time had been infringed;
- (ii) whether he had been subjected to inhumane and degrading treatment and false imprisonment;
- (iii) whether his right to disclosure had been infringed;
- (iv) whether he has been falsely imprisoned;
- (v) whether any of the matters raised above are *res judicata*; and
- (vi) whether he is entitled to the remedies sought: the quashing of the indictment, a stay of the proceedings, vindictory, aggravated, exemplary and general damages and costs.

Grounds of appeal

[4] St. Brice's counsel, Ms. DaBreo, invited this Court to allow the appeal on a variety of grounds including that the Learned Judge erred in finding that: (i) St. Brice was largely responsible for the delay in his trial; and (ii) his right to a fair hearing within a reasonable time as guaranteed by section 8(1) of the **Constitution of Saint Lucia**² ("the Constitution") was not infringed. Ms. DaBreo also contended that it would be unfair to try St. Brice given the long delay in the matter.

[5] Mr. Cenac, appearing on behalf of the Attorney General, posited that the two issues decisive of the appeal are: (i) whether St. Brice, given the delay of approximately 16 years, can still obtain a fair trial; and (ii) whether the Learned Judge was wrong in finding that St. Brice was substantially responsible for the delay. Learned counsel, Mr. Cenac, submitted that St. Brice was largely responsible for the delay and argued that the fairness of a trial would not be impaired, even with the passage of time, and that the Crown was ready to proceed with the trial. Mr. Cenac argued against a permanent stay of the criminal proceedings or quashing of the indictment and

² Cap 1.01 of the Revised Laws of Saint Lucia 2015.

highlighted the public interest in ensuring that those accused of serious crimes be brought to justice. He also cautioned against the danger of a defendant manipulating the legal system and being the beneficiary of the delay caused thereby, leading to the possibility of the opening of the proverbial floodgates. Learned counsel submitted that the appeal should be dismissed on all grounds.

Background

- [6] A proper appreciation of the appeal necessitates a look at the contextual history of the matter. This can be conveniently divided into the pre-2012 background and post-2012 background. At a general level, the pre-2012 background is captured in the Court of Appeal's judgment in **Urban St. Brice v The Attorney General**.³ The post-2012 history is addressed in the Learned Judge's judgment, which is the subject of this appeal. Webster JA [Ag.]'s judgment is important in that the Court of Appeal made significant findings with respect to the ascription of the delay and breach of the reasonable time requirement. The Court of Appeal attributed the greater responsibility for the delay to St. Brice and held that the right to a fair hearing within a reasonable time as guaranteed by section 8(1) of the Constitution was not violated, thus affirming the judgment of Wilkinson J in the High Court from which that appeal flowed.
- [7] In considering the motion before her which is the foundation of this appeal, the Learned Judge recognised that Webster JA [Ag.] had traversed the issue of the responsibility for the pre-2012 delay. The Learned Judge also found that St. Brice bore the greater responsibility for the post-2012 delay and, like Webster JA [Ag.], found that St. Brice's right to a fair hearing within a reasonable time had not been infringed.
- [8] At the micro level, the historical narrative begins with St. Brice's arrest and charge for murder in November 2002 for which he was indicted on 21st May 2005. The first trial, which commenced on 9th November 2005, was aborted. The second trial resulted in his conviction for murder and the imposition of a life sentence which St.

³ SLUHC VAP2012/0027 (delivered 31st October 2016, unreported).

Brice successfully appealed.⁴ A third trial commenced in October 2008 and was also aborted. A fourth trial was due to commence on 2nd March 2009 but was adjourned due to the absence of St. Brice's counsel. The trial commenced in November 2009; it was also aborted and a retrial ordered. Between 14th October 2008 and 10th May 2011 there were 33 adjournments for a variety of reasons including absences of defence counsel, two applications by St. Brice to stay proceedings and an application to exclude certain evidence.

- [9] On 10th May 2011, St. Brice's new counsel filed a constitutional motion to stay the fifth trial scheduled to begin on 21st July 2011, alleging breaches of sections 3(1), 3(5), 8(1) and 8(2) of the Constitution. Wilkinson J dismissed the motion and, in so doing found, *inter alia*, that St. Brice bore the greater responsibility for the delay. No negligence was alleged against the State and there was no evidence that, at any time when the matter came on, the State was not ready to proceed. The Learned Judge concluded that, in the circumstances, St. Brice's constitutional rights had not been contravened.
- [10] On appeal, St. Brice only pursued the ground alleging breach of section 8(1) of the Constitution. In delivering the judgment of the Court of Appeal, Webster JA [Ag.] accepted Wilkinson J's conclusion that St. Brice bore the greater responsibility for the delay of his trial and that there was no breach of St. Brice's right to a fair hearing within a reasonable time. Further, on the facts of the case, St. Brice could not seek to rely on his own conduct to secure a permanent stay of his trial. The Court of Appeal held that St. Brice had failed to establish that there was an unreasonable delay in bringing him to trial or that his constitutional right to a fair hearing within a reasonable time had been breached.
- [11] In the present case, the Learned Judge cognised that the Court of Appeal had surveyed the period 2002 to 2011 and made its findings in that regard, thus she

⁴ See *Urban St. Brice v The Queen* Saint Lucia Criminal Appeal No 4 of 2006 (delivered 29th October 2007, unreported).

went on to consider the post 2012 period. Her Ladyship noted that there was ample evidence of adjourned dates and the reasons for same in the evidence from both sides. She found that, with the exception of the brief period from June 2018 to the present when the sittings of the criminal division of the High Court were suspended as a result of security breaches, the preponderance of evidence on this issue still pointed to St. Brice's persistent applications and requests for adjournments, and it was clear that he still remained substantially responsible for the delays occasioned during the post-2012 period. The Learned Judge attributed the delay during that period to St. Brice and his legal practitioners.

[12] The Learned Judge noted that since the Court of Appeal's decision in 2016, the delay had continued. St. Brice had continued to file numerous applications in the civil and criminal courts. In July 2017, he filed applications for leave to apply for judicial review of the decision of the Director of Public Prosecutions to retry his case and for an order that all transcripts of criminal proceedings to date be made available to him, free of charge, for use in the judicial review claim. Both applications were dismissed. St. Brice appealed and that appeal was dismissed in December 2017. In April 2018, St. Brice filed an application to quash the indictment and for a permanent stay of the proceedings before the criminal court; the application is still pending. In June 2018, the motion, which is the subject of this appeal, was filed.

[13] The Learned Judge's finding attributing substantial responsibility for the post-2012 delay to St. Brice and his legal practitioners was clearly open to her on the evidence. It cannot be said that there was no evidence to support it or it was a finding which no reasonable judge could have made. I accordingly affirm that finding.

[14] The Learned Judge was not persuaded on the evidence that even the long delay had breached St. Brice's right to a fair hearing within a reasonable time as provided by section 8(1) of the Constitution. The Learned Judge was also not of the opinion that the time had come where St. Brice would not be in a position to receive a fair trial in the criminal court, given that the criminal trial process is well-equipped to deal

with all the complaints through pre-trial applications, case management orders and even at a trial.

- [15] Although Ms. DaBreo advanced several matters on appeal, the central issue is whether, notwithstanding the finding that St. Brice bore the greater responsibility for the delay in the trial process, the overall delay is now so great to compel a finding that the right to a fair hearing within a reasonable time, as provided by section 8(1) of the Constitution, has been breached and it would be unfair to retry him. If the answer is in the affirmative, the other issue concerns the appropriate remedy attendant upon such breach.

Discussion

- [16] The issue of a defendant's responsibility for delay in completing a trial has engaged the attention of courts at the highest level. In **Fa' Afete Taito v The Queen and James McLeod Bennett and Ors v The Queen**,⁵ the Privy Council stated that 'delay for which the State was not responsible cannot be prayed in aid by the appellants'. In **Dyer v Watson and Anor**,⁶ Lord Bingham recognised that:

"In almost any fair and developed legal system it is possible for a recalcitrant defendant to cause delay by making spurious applications and challenges, changing legal advisers, absenting himself, exploiting procedural technicalities, and so on. A defendant cannot properly complain of delay of which he is the author."⁷

- [17] In **Gibson v The Attorney General of Barbados**,⁸ the Caribbean Court of Justice acknowledged that: '[a]n accused who is the cause and not the victim of delay will understandably have some difficulty in establishing that his trial is not being heard within a reasonable time'.⁹ The Court made the important observation that it is the responsibility of the State to bring an accused person to trial and to ensure that the

⁵ [2002] UKPC 15 at paragraph 23.

⁶ [2004] 1 AC 379.

⁷ See paragraph 54.

⁸ [2010] CCJ 3 (AJ).

⁹ See paragraph 58.

justice system is not manipulated by the accused for his own ends. The Court opined that:

“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 of trial within a reasonable time]”.¹⁰

[18] In **Prakash Boolell v The State**,¹¹ the appellant appealed to the Judicial Committee of the Privy Council on the ground that there was a breach of his constitutional right to a fair hearing within a reasonable time, as guaranteed by section 10(1) of the Constitution of Mauritius. The appeal was founded on the very long delay which occurred between the date when the first statement under caution was taken from him and the eventual disposition of the case by the finding of guilt by the Intermediate Court. The respondent’s counsel conceded that the lapse of time (some twelve years) would, without more, give rise to a breach of section 10(1). He, however, submitted that the delay was largely the fault of the appellant and that he could not in the circumstances take advantage of it to claim a breach of his constitutional rights.

[19] In delivering the opinion of the Board, Lord Carswell stated that it was undeniable that the delay in completing the trial was caused to a considerable extent by the actions of the appellant. From a consideration of the history of the proceedings, Lord Carswell found that it was apparent that the appellant made numerous attempts to exploit and abuse the legal system, making inappropriate use of his legal knowledge and experience. He further opined:

“In that respect the observations of the Supreme Court at p 528 of the Record were fully justified. It is objected on the defendant’s behalf that some at least of the applications were justifiably made, even if they were rejected. But this is not a sufficient answer. If a defendant makes a large number of applications which hold up the completion of a trial, even if all were made in good faith and based on sufficient grounds to be justifiable, he cannot properly complain that there was unreasonable delay, provided that there

¹⁰ See also paragraph 58.

¹¹ [2006] UKPC 46.

was has been (sic) due expedition on the part of the prosecution and the court.”¹²

Lord Carswell continued:

“It is plain, however, from the propositions set out by Lord Bingham in *Dyer v Watson*, at paras 52-55, that it is necessary to consider an amalgam of factors before reaching a conclusion on the reasonableness of the time taken to complete a trial. The defendant’s contribution to the delay may be an important factor, but before dismissing his complaint of delay as a breach of his constitutional rights, the appellate tribunal is obliged to look at the whole picture.”¹³

I note here that the three propositions enunciated by Lord Bingham in ***Dyer v Watson*** as material to determining the reasonableness of the time taken to complete a criminal trial are: (i) the complexity of the case; (ii) the conduct of the defendant; and (iii) the manner in which the case has been dealt with by the administrative and judicial authorities.

[20] Lord Carswell recognised, at paragraph 37 of ***Boolell***, the absence of dispute that the time taken overall, between February 1991 and March 2003, gave ground for real concern and was prima facie unreasonable. His Lordship found that the conduct of the appellant was altogether reprehensible and contributed very largely to the lapse of time. The Board considered that when it became clear that time was dragging on and that the appellant was bent on dislocating the course of the trial and prolonging the proceedings by any means within his power, it was incumbent on the court to take such steps as it could to expedite matters and reach a conclusion. The Board could not escape the conclusion that, however reprehensible the conduct of the appellant, the trial was not completed within a reasonable time and there was, in that respect, a breach of section 10(1) of the Constitution of Mauritius. The Board granted a declaration that the appellant’s right to a trial within a reasonable time under section 10(1) had been infringed, and substituted a fine for the sentence of imprisonment that had been imposed.

¹² See paragraph 35.

¹³ See paragraph 36.

[21] In **Elaheebocus v The State of Mauritius**,¹⁴ nearly nine years had elapsed between the appellant's arrest and the dismissal of his appeal against conviction. The Board concluded, at paragraph 20, that the judicial authorities could not sensibly be regarded as having honoured the reasonable time guarantee in section 10(1) of the Constitution of Mauritius. The Board recognised that the appellant was wholly complaisant in every successive delay which occurred; he was on bail at all times since 17th June 1998 and seems to have been entirely content to postpone the final day of judgment. Notwithstanding, the Board stated that this could provide no answer to the constitutional challenge. Lord Brown delivered the judgment of the Board and opined that if it was no answer in **Boolell**, (where the Board found 'the conduct of the appellant was altogether reprehensible and contributed largely to the lapse of time'), it certainly provides none there. Lord Brown acknowledged that the delay in **Boolell** was significantly longer than in the present case – 12 years elapsed between Boolell's statements to the police under caution and his conviction by the Intermediate Court. His Lordship concluded that it was that extraordinary delay which impelled the finding there of a constitutional breach, notwithstanding earlier authority that the defendant cannot ordinarily complain of delay of which he himself was the author. The Board recognised that a total of 12 years had passed since the appellant's offence (compared to the 15 years referred to in **Boolell**). As a remedy for the constitutional breach, the Board effected a modest reduction in the sentence by quashing the four-year term of penal servitude and substituting three and a half years.

[22] In **Aubeeluck v The State of Mauritius**,¹⁵ one of the issues was whether the delay of 11 years since the commission of the offence infringed the appellant's right to a fair hearing within a reasonable time. The Board recognised that there had been considerable delays in the case. The appellant was arrested in December 1998 and tried and sentenced in 2004. Since then, it had taken a considerable time for his

¹⁴ [2009] UKPC 7.

¹⁵ [2010] UKPC 13.

appeal, first to the Supreme Court and then to the Judicial Committee to be concluded. While acknowledging that a good deal of that delay was caused by the appellant's own lawyers, the Board concluded at paragraph 43, that without analysing each period of delay, it can readily be seen that there has been inordinate delay amounting to an infringement of the appellant's right under section 10 of the Constitution. The three years sentence to penal servitude was quashed and the matter remitted to the Supreme Court for sentencing, with a directive to take into account the inordinate delay in the case.

[23] Section 8(1) of the **Constitution of Saint Lucia** is a fundamentally important constitutional guarantee. It provides: '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.' Section 10(1) of the Constitution of Mauritius contains a guarantee in terms identical to that of section 8(1) of Saint Lucia, that: 'where a 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.' In giving the opinion of the Board in **Boolell v The State**, Lord Carswell stated: '[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.'¹⁶ Lord Carswell said that this represents the law of Mauritius. In my judgment, it also represents the law of Saint Lucia, having regard to the identical nature of the respective provisions.

[24] From the authorities cited earlier, like **Boolell**, **Aubeeluck** and **Elaheebocus**, it is clear that in the face of a challenge founded on section 8(1) of the **Constitution of Saint Lucia**, with respect to the hearing of a criminal charge within a reasonable time, the conduct of an appellant causative of the delay, or the fact that an appellant was largely responsible for the delay, does not necessarily trump the reasonable time guarantee. The time may come where the overall delay is so great, irrespective

¹⁶ See paragraph 32.

of who caused it, that the court is impelled to conclude that the reasonable time guarantee has been breached.

- [25] In delivering the earlier judgment of the Court of Appeal in **Urban St. Brice v The Attorney General**, Webster JA [Ag.] was alive to the effect of delay on the reasonable time guarantee, irrespective of who authored it. In addressing the issue, he noted that St. Brice's contribution to the delay was significant and some of the delay was occasioned by unsatisfactory means, like his counsel not showing up. His Lordship also considered the absence of dilatory tactics by the State and the absence of evidence that the State or defence witnesses were no longer available. In the circumstances, His Lordship found that the point had not been reached where the overall delay was so great, irrespective of who caused it, to lead to a finding that there was a breach of the guarantee of trial within a reasonable time. It is important to note that the Court of Appeal was considering delay in the pre-2012 period. At paragraph 37 of the judgment in the court below, the Learned Judge reasoned as follows:

"It is true that the final disposition of the case has been delayed for a very long time but it is the claimant who still bears the brunt of the responsibility for these delays. The Court must be mindful in not appearing to condone the ability of a party to use the court's own processes to bring about delay and then seek to assert that constitutional rights have been infringed on account of these delays."

- [26] At the time the Learned Judge considered the matter in 2018, almost 16 years had elapsed since St. Brice's arrest and charge for murder without that charge being determined. That being the case, when one considers the overall delay, it is improbable that a finding in terms similar to Webster JA [Ag.] with respect to the overall delay, irrespective of who caused it, could hold six years after the period of delay covered by his judgment, particularly in the context of another section 8(1) challenge based on the reasonable time guarantee. In my respectful view, the Learned Judge erred in law by not directly addressing the question of overall delay in the context of the constitutional guarantee to a fair hearing within a reasonable time, irrespective of the question as to who caused, authored or orchestrated it.

Too much emphasis was placed on the finding that St. Brice was still largely responsible for the delay.

[27] Further, a finding that a defendant is largely responsible for the delay in the completion of the trial is not decisive of the question as to whether the reasonable time guarantee in the Constitution has been breached. Accordingly, the Learned Judge erred in law in not recognising that it is no answer to a constitutional challenge founded on a breach of the reasonable time requirement that the conduct of the appellant largely contributed to the delay. This has been illustrated in a number of cases at the highest level of authority, like **Boolell v The State**. As stated earlier, the twelve-year period of delay impelled the finding of a constitutional breach, notwithstanding earlier authority that a defendant cannot ordinarily complain of a delay authored by him.

[28] The delay in St. Brice is significantly longer than in **Boolell**. Indubitably, the extraordinary time period which has elapsed from the time of St. Brice's arrest and charge in November 2002 to the present, without the murder charge having been finally heard and determined, leads to the insuppressible conclusion that the overall delay is so great that the reasonable time guarantee ordained by section 8(1) of the Constitution has been violated.

The appropriate remedies

[29] In light of the finding that there was a breach of the reasonable time guarantee, the issue now concerns the appropriate remedy to be employed. Section 16(2)(b) of the Constitution 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 empowers the court to make declarations and orders, 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, 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 would be required.

[30] Ms. DaBreo has advocated for a permanent stay of proceedings. The guiding principles applicable to the discretionary jurisdiction to grant a stay in respect of criminal proceedings are now addressed:

- (i) The grant or refusal of a stay engages the exercise of the court's discretion. Prima facie, it is the duty of a court to try a person who is charged before it with an offence which the court has power to try; therefore, the jurisdiction to grant a stay must be exercised carefully, sparingly and only for compelling reasons: see **R v Horseferry Road Magistrates Court, ex p Bennett**.¹⁷
- (ii) 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: see **R v DS**.¹⁸
- (iii) 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: see **The Queen v Scott Crawley and Ors**.¹⁹
- (iv) 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 the remedy of a permanent

¹⁷ [1994] 1 AC 42, per Lord Lowry at page 74 F.

¹⁸ [2020] EWCA Crim 285, per Burnett LJ at paragraph 50.

¹⁹ [2014] EWCA Crim 1028, per Sir Brian Leveson P at paragraph 18.

stay or dismissal for a breach of the reasonable time guarantee: see **Gibson v The Attorney General of Barbados**.²⁰

- (v) 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 in all the circumstances: see **Attorney General's Reference (No. 2 of 2001)**.²¹
- (vi) 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: see **Boolell v The State**.²²
- (vii) The category of cases in which it would be unfair to try a defendant include, but is not limited to, cases of bad faith, unlawfulness and cases (of which **Darmalingum v The State**²³ is an example) where the delay is of such an order as to make it unfair that the proceedings against the defendant should continue: see **Attorney General's Reference (No. 2 of 2001)**. In that case, Lord Bingham opined that while it would be unwise to attempt to describe the category of cases in which it would be unfair to try a defendant in advance, such cases will be recognised when they appear. His Lordship noted that such cases will be very exceptional, and a stay will never be an appropriate remedy if any lesser remedy would adequately vindicate the defendant's right under the European Convention of Human Rights.

²⁰ See paragraph 63.

²¹ [2004] AC 72, per Lord Bingham at paragraph 24.

²² Per Lord Carswell at paragraph 32.

²³ [2000] UKPC 30.

- [31] 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.
- [32] Should a permanent stay be granted in the circumstances of this case? On the one hand, I recognise that a permanent stay may well reward St. Brice who would have escaped being brought to justice. On the other hand, it does nothing for him if innocent, 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 had been in custody since November 2002. At the hearing of this appeal in March, the Court was informed that St. Brice was released on bail in February, that is, less than a month before the appeal was heard. In essence, and quite remarkably, St. Brice had spent approximately 17 years and 3 months in prison awaiting the determination or disposal of the murder charge against him, his trial on the murder charge remaining unresolved after several aborted retrials. 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.
- [33] The circumstances pertaining to St. Brice's case are such as to make it one of those exceptional cases where he ought to obtain the remedy of a permanent stay for breach of the reasonable time guarantee. A permanent stay of the criminal proceedings would certainly be appropriate to vindicate the breach of the reasonable time guarantee.
- [34] Ms. DaBreo's invitation to quash the indictment and the damages for false imprisonment which could possibly flow therefrom, now becomes moot in view of the remedy of a permanent stay. I however would see no basis for so doing. The indictment was properly preferred against St. Brice. Ms. DaBreo contended that (i) there was no evidence to connect St. Brice to the offence; and (ii) there was no basis for his arrest and charge, making his arrest and detention unlawful. In my view, the

proper place to ventilate such matters would be at a trial, where, no doubt, they would be quickly dismissed as utterly baseless. The tort of false imprisonment has two ingredients: the fact of imprisonment and the absence of lawful authority to justify it. St. Brice would have been lawfully arrested and charged at the outset and his arrest and detention would not have been unlawful. He would not be entitled to the damages he seeks at common law. In passing, I note that it is not without significance that in St. Brice's appeal against conviction,²⁴ Rawlins JA, in delivering the judgment of the Court of Appeal, found that the identification evidence was not so weak that the trial judge should have withdrawn the case from the jury.

- [35] Still on the issue of remedies, would St. Brice be entitled to the vindictory, aggravated, exemplary and general damages he seeks? In **Takitota v The Attorney General**,²⁵ the Board stated that an award of exemplary damages is a common law head of damages, the object of which is to punish the defendant for outrageous behaviour and deter him and others from repeating it. One of the residual categories of behaviour in respect of which exemplary damages may properly be awarded is oppressive, arbitrary and unconstitutional action by the servants of the government. It serves, as Lord Devlin said in **Rookes v Barnard**,²⁶ to restrain such improper use of executive power. In this category of case, the purpose of exemplary damages is to restrain the gross misuse of power. According to **Kuddas v Chief Constable of Leicestershire Constabulary**, it must be shown that: 'the conscious wrongdoing by defendant is so outrageous; his disregard for the plaintiff's right so contumelious, that something more than compensatory damages is needed to show that the law will not tolerate such behaviour' as a 'remedy of last resort'.²⁷ The award of damages for breach of constitutional rights has much the same object as the common law award of exemplary damages. Exemplary damages are assessed by reference to the conduct of the tortfeasor.

²⁴ Urban St. Brice v The Queen Saint Lucia Criminal Appeal No 4 of 2006 (delivered 29th October 2007, unreported).

²⁵ [2009] UKPC 11, at paragraphs 12 and 13.

²⁶ [1964] AC 1229.

²⁷ [2002] 2 AC 122 per Lord Nicholls at paragraph 63.

- [36] Exemplary damages apart, the purpose of damages is to compensate the victim of civil wrongs for the loss or damage that the wrongs have caused: see **Walumba Lumba (previously referred to as WL Congo) v Secretary of State for the Home Department**.²⁸ Vindictory damages are an aspect of compensation for false imprisonment. If there is any scope for an award of vindictory damages where exemplary damages are not appropriate, it must be very limited. Such an award could only be justified where the declaration that a claimant's right has been infringed provides insufficiently emphatic recognition of the seriousness of the defendant's default.²⁹ It is not appropriate to award both compensatory and vindictory damages.
- [37] An award of vindictory damages is to be distinguished from compensation, pure and simple, and from exemplary or punitive damages at common law; and it is by no means required in every case of constitutional violation: see **Graham v The Police Service Commission and the Attorney General of Trinidad and Tobago**.³⁰ This appears from what was said by Lord Nicholls in **Attorney General of Trinidad and Tobago v Ramanoop**,³¹ that when exercising this constitutional jurisdiction, the court is concerned to uphold or vindicate the constitutional right which has been contravened. A declaration by the court will articulate the fact of violation, but in most cases more will be required than words. If the person charged has suffered damage, the court may award him compensation. An award of compensation will go some distance towards vindicating the constitutional right. How far it will go depends on all the circumstances, but in principle, it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong.

²⁸ [2011] UKSC 12, per Lord Dyson at paragraph 95.

²⁹ See Lord Kerr at paragraph 256 of *Walumba Lumba*.

³⁰ [2011] UKPC 46 at paragraph 15.

³¹ [2006] 1 AC 328 at paragraphs 18 and 19.

- [38] Traditionally, the primary function of damages has been to compensate the individual for the loss that he or she has suffered (compensatory damages). The Privy Council has awarded what might be classified as vindictory damages where there has been a breach of constitutional rights. The leading case is **Attorney General of Trinidad and Tobago v Ramanoop**. Lord Nicholls recognised that this type of award covered much the same ground as that involved in exemplary or punitive damages. Thus in **Takitota v Attorney General**,³² Lord Carswell stated it would not be appropriate to make an award both by way of exemplary damages and for breach of constitutional rights.
- [39] Importantly, the power to give redress under section 16 of the Constitution for a contravention of the appellant's constitutional rights is discretionary. There is no constitutional right to damages. In some cases a declaration that there has been a violation of constitutional right may be sufficient satisfaction for what happened. As stated in **James v Attorney General of Trinidad and Tobago**,³³ to treat entitlement to monetary compensation as automatic where violation of a constitutional right has occurred would undermine the discretion that is vested in the court by section 16. It will all depend on the circumstances.
- [40] There is, however, no doubt that an award of damages may be an appropriate remedy for breach of any of the fundamental rights including a breach of the right to be tried within a reasonable time. An award of damages for breach of the reasonable time guarantee should be considered as an appropriate remedy only where the accused will no longer be tried or has been tried and acquitted or where his conviction has been quashed. Even in those cases, the making of such an award should not be regarded as automatic but would depend on the particular circumstances of each case.³⁴

³² [2009] UKPC 11 at paragraph 15.

³³ [2010] UKPC 23 per Lord Kerr at paragraph 36.

³⁴ See *Gibson v The Attorney General of Barbados* at paragraph 69.

- [41] 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 a 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 by 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, would, in my judgment, provide an emphatic vindication of the breach of the reasonable time guarantee.
- [42] Vindictory damages cover much the same ground as that involved in exemplary or punitive damages and are not required in every case of a constitutional violation. This case is not an appropriate one for the award of vindictory or exemplary damages. An award of vindictory damages would not be justified in view of the declaratory remedy of the breach of the reasonable time guarantee, coupled with the grant of a permanent stay of the criminal proceedings – the declaratory remedy and the permanent stay provide an emphatic recognition of the breach.
- [43] I am also of the view that the conditions for the award of exemplary damages would not have been established. I note the finding of several courts, including this Court, that St. Brice was largely responsible for the delay. While the latter finding cannot excuse the failure to adhere to the reasonable time guarantee, it is something which the Court can properly take into account in deciding the appropriate remedy. I also pay regard to the absence of dilatory tactics by the State and the fact that the Director of Public Prosecutions was always ready to proceed with the matter. Given the circumstances of this case, an award of damages would not be an appropriate remedy for the vindication of the breach of the reasonable time guarantee. A declaration, coupled with a permanent stay would provide emphatic recognition of such breach.

Miscellaneous matters

- [44] There were other matters raised by the appellant which were commented on by the Learned Judge. The Learned Judge considered the allegations of arbitrary arrest and search, false imprisonment, impropriety on the part of the Director of Public Prosecutions and the police inspector, and inhumane and degrading prison treatment, which were being raised for the first time. I note Mr. Cenac's submission that St. Brice made sweeping and unparticularised allegations in respect of inhumane and degrading treatment, with no facts to support how the authorities humiliated and debased him since November 2002. The Learned Judge expressed the view that having navigated through the criminal trial process, a previous constitutional motion, multiple applications before the criminal court, a judicial review application and appeal, St. Brice may well be estopped from raising these issues at this very late stage, having not done so in the earlier proceedings. Further, some of the issues may still be canvassed in the criminal court. The judge also considered that the right to disclosure can be dealt with by the judge at the criminal trial as well as matters relating to availability of witnesses, evidence, alibi, and the use of depositions at retrial. In light of the proposed disposition of this appeal, it is not necessary to deal with these matters.

Costs

- [45] I now turn to the question of costs. The general rule in our courts is that costs follow the event, although there are numerous occasions where there is a departure from that rule particularly in constitutional matters. St. Brice has succeeded in establishing that there was a breach of his constitutional right to a trial within a reasonable time, and, as I have stated, the circumstances warrant the grant of a permanent stay on the criminal proceedings against him. He has not been successful in recovering any damages from the State. The Attorney General resisted his application in that regard both at first instance and on this appeal. Without resiling in any way from my view that St. Brice was substantially responsible for the delays in bringing the criminal proceedings to resolution, it is my view that he

should recover his costs on appeal and in the court below. It does not appear that the costs of this appeal, or of the proceedings below, are likely to have been significantly higher as a consequence of St. Brice's claim for damages. In those circumstances, I do not propose to make any reduction in the quantum of costs due to him to reflect the fact that his appeal has failed in that respect.

Order

[46] For the reasons given, I would order that:

- (i) the appeal is allowed to the extent that a declaration is granted that St. Brice's right to a fair hearing within a reasonable time as guaranteed by section 8(1) of the Constitution has been breached;
- (ii) the criminal proceedings against St. Brice are permanently stayed;
- (iii) there is no order for damages; and
- (iv) St. Brice shall have his costs here and below to be assessed if not agreed within 14 days.

I concur.

Gertel Thom

Justice of Appeal

I concur.

Michael J. Fay, QC

Justice of Appeal [Ag.]

By the Court

Chief Registrar