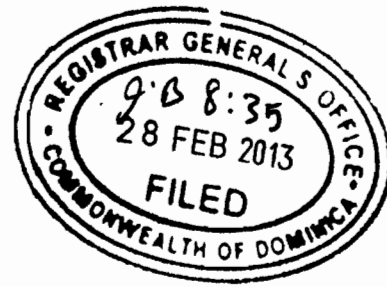


THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
COMMONWEALTH OF DOMINICA



DOM HCV0344/2011

BETWEEN

MARY – ANN LEE

APPLICANT

AND

THE COMMISSIONER OF POLICE

RESPONDENT

Before the Hon. Justice Birnie Stephenson

Appearances:

Mr Geoffrey Letang for the Claimant/Applicant

Mr Clement Joseph for the Defendant/Respondent

2012: September 21

2013: March 1

RULING

1. **Stephenson, J:** This is an application filed by Miss Mary-Ann Lee for the court to permanently stay a charge brought against her. The State opposes the application.

2. Pursuant to an order of Court dated 21st September 2012 and entered on the 18th day of October 2012 the application being dealt herein is the application to stay proceedings.

Preliminary point

The Defendant's Affidavit of the 10th October 2012

3. The Defendant was ordered to file and serve an Affidavit in Response to the Applicant's Affidavit within 7 days of the order that is from the 21st September, 2012. The Defendant's Affidavit was filed on the 10th October 2012.
4. The Applicant filed an Affidavit in response to the said Affidavit on the 17th October 2012. In the said Affidavit the Applicant urged the Court to find that the Respondent's Affidavit is in breach of and in contempt of the Court's order of the 21st September and in breach of the Civil Procedure Rules 2000.
5. I will deal with this matter briefly. The practice and procedure of this Court is to be followed and it is trite law that if there is an Order of Court to file a document by a specified time that document has to be filed unless there is an application made for an extension of time in a timely fashion and leave is granted so to do.
6. This has not been done by the Defendant/Respondent and therefore the said Affidavit filed on the 10th October 2012 is out of time and without leave of the Court and is hereby struck out and it will not be taken into consideration by the Court in this ruling.

The Application

7. The following matters are not in dispute:

- i. On the 26th day of March 2010, the Applicant was charged with the same offence. The said charge was dismissed by Chief Magistrate Evelina Baptiste on the 28th April 2011 for procedural irregularity and want of prosecution.
- ii. The Applicant was granted bail in the High Court with conditions attached and there was also an Order from the High Court prohibiting the Applicant from dealing with any account at any local financial institution whether in her sole name or jointly with any other person without leave of the Court.
- iii. The Applicant has been charged for the offence of theft contrary to section 3(1) of the Theft Act¹. The charge was laid on the 3rd day of May 2011 and alleges that the Applicant between the 1st day of February 2010 and the 19th day of March 2010 at Roseau in the Parish of St George in the District aforesaid did steal two hundred and eleven thousand three hundred and sixty five dollars and eighty seven cents (\$211,365.85) the property of J Astaphan and Co. Ltd with Claudia Victor representing (*"the charges"*).²

Issue

8. The sole issue that arises for decision is whether or not the new criminal proceedings brought in the Magistrate's Court and the prosecution of those charges should be permanently stayed.

¹ Chapter 10:33 of the Laws of Dominica

² DOMMCR2011/1030

Background

9. The Complaint of theft has been laid against the Applicant. This was filed on the 3rd May 2011 and charges Mary-Ann Lee with the offence of theft. This charge is identical to the charge laid against her previously and which was dismissed by the Learned Chief Magistrate.³
10. The current matter is still pending in the Magistrate's Court.
11. On the 21st October 2011 Miss Lee filed a motion seeking a permanent stay of the indictment and prosecution in the matter. At the hearing of the matter on the 21st September 2012 the Court ordered the parties to file written submissions on or before the 13th October 2012. Both parties have since filed submissions together with their authorities upon which they intend to rely on.

Applicant's submissions

12. Learned Counsel Mr Geoffrey Letang argued that the Court should stay the Magistrate's Court proceedings permanently and for the Applicant he contends that there has been excessive delay in the prosecution of her matter. That it is over 30 months since the alleged offence and the hearing of the Preliminary Inquiry and that during that period the Applicant has been attending all the adjourned dates of the Preliminary Inquiry with her witnesses. It was further submitted that the Applicant was not in any material way responsible for the delay. See: **Sieuraj Sookermany –v- Director of Public Prosecutions et anor⁴**
13. Learned Counsel stated that Miss Lee still does not know what case is made against her because of the willful refusal and/or failure on the part of the Prosecution to comply with the Magistrate's Court Order for disclosure. The Prosecution has made excuses to the Learned Magistrate that they cannot locate the file or have access to the said file.

³ See Paragraph 9 (ii) above

⁴ (1996) 48 WIR 346

14. Counsel maintained that these excuses are inexcusable, unjustifiable and without merit and pose unnecessary and undue delay which has significantly impacted her causing her unnecessary expense and frustration as well as her witnesses who have become less inclined and unavailable to testify on her behalf thus causing significant prejudice to Miss Lee's case.
15. It was submitted that the reasons for the delay as offered by Cpl Pacquette on behalf of the Respondent are without merit and that this delay is inexcusable, unjustifiable, without merit and pose unnecessary and undue delay which has significantly impacted negatively on the Applicant causing her unnecessary expenses and frustration to her witnesses as they have become less inclined to testify on the Applicant's behalf causing significant prejudice to the Applicant's case.
16. That the preferring of the new criminal charge is in breach of the Applicant's Constitutional rights in that she was not informed within a reasonable time from the date of filing of the new charge made against her. Details of the charge made out against her pursuant to the Magistrates Code of Procedure Act and that she was not told or informed of any offence alleged to have been committed by the Respondent in respect of the new charge and further, that the procedure followed by the Respondent in initiating criminal complaint/charge is improper or wrong. That in the circumstances it would be highly prejudicial to the Applicant and it would be unsafe and unfair to continue with proceedings founded on these fundamental deficiencies.
17. That when the first charge was dismissed one of her Sureties committed her property used to provide the surety bond elsewhere and would therefore be unable to continue acting as her Surety.
18. Learned Counsel Mr Letang submitted that based on the circumstances outlined and the facts deposed in the Affidavits sworn in support of the Application supported the case for exceptional circumstances required to find that to permit the continuation of the case against the Applicant by

the Prosecution would render such a trial oppressive and unfair. Counsel cited **Jago -v- The District Court of New South Wales et al**⁵

Submissions by the State

19. Learned State Counsel for the Respondent Mr Clement Joseph contended that the delay between the date of institution of the charge and the trial has not been solely due to the Prosecution.
20. The Respondent submitted that the unavailability of dates in the Magistrate's calendar has contributed to the fact that the matter has not proceeded. It was further contended that it is common knowledge that in Dominica that in some cases it takes years to complete Preliminary Inquiries. That the Court ought to take this into consideration based on the Privy Council's ruling in **Bell -v- DPP**⁶. In that case it was said that the problems affecting the administration of justice in the jurisdiction should be taken into consideration. The Respondent pointed out that in the case at bar the charge against the Applicant was reinstituted within 8 days of the charges being dismissed for want of prosecution.
21. Learned Counsel Mr Joseph said that the delay in the prosecution of the matter is also attributable to the many applications made by the Applicant.
22. The Learned State Counsel submitted that the Applicant has failed to show the likely prejudice that would occur should this trial continue. Further, that the Applicant has not shown the Court what evidence will be adduced to support the Applicant's defence and that in fact the Applicant has not disclosed a defence at all.
23. Learned Counsel for the Respondents Mr Clement Joseph contends that mere Affidavits by persons as to their unavailability is insufficient and that the Applicant must prove these witnesses will be able

⁵ (168 CLR 23) referred to in the Article "Stay of Proceedings: Application for a permanent stay in Criminal proceedings" prepared by Dr Robert N Moles, Journal of the Law Society of New South Wales October 2006 at 60

⁶ (1985) 35 WIR 317

to corroborate her. Mr Joseph posited that the unavailability of a Surety is irrelevant to the case at bar and is most certainly not a bar to the continued prosecution of a matter.

24. Mr Joseph emphasized that the Applicant has a heavy burden of proof to show that she would suffer prejudice so that no fair trial could be held and that in such an application the Court should take into account any measures available to the trial judge to mitigate unfairness. Learned Counsel cited ***Sieruraj Sookermany –v- DPP et anor***⁷

a. That the delay as claimed does not amount to an abuse of process. Learned Counsel relied on the Chronology of the case in support of his submission in this regard.

Court's Analysis

25. In ***Connelly –v- DPP***⁸ it was stated that the Courts have an inescapable duty to secure the fair treatment for those who come or are brought before them. The Court has a discretionary power to stay proceedings. Omerod J in ***R-v-Derby Crown Court, ex parte Brooks***⁹ said

"The ultimate objective of this discretionary power [i.e. to stay a prosecution] is to ensure that there should be a fair trial according to law which involves fairness both to the defendant and prosecution, for, as Lord Diplock said in R-v-Sang (1979) 60 Cr App Rep 282 at page 290 "The fairness of trial ... is not all one sided; it requires that those who are undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted".

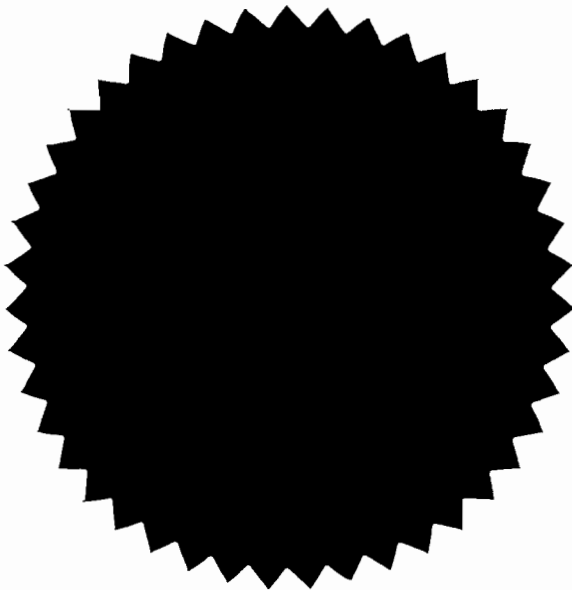
26. The Courts are duty bound and have the power to protect the law by protecting its own purposes.

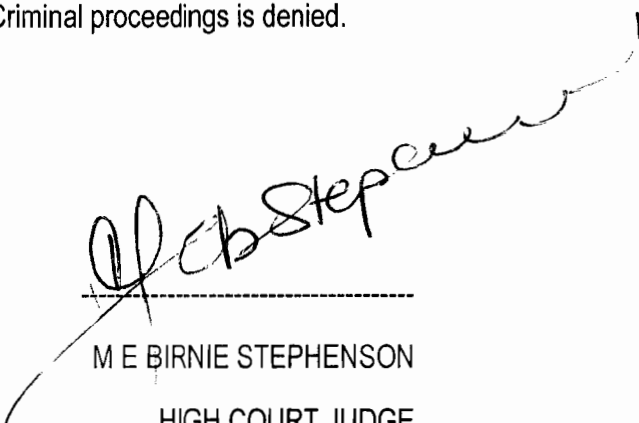
⁷ (1996) 48 WIR 346

⁸ [1964] AC 124 per Lord Devlin

⁹⁹ (1984) 80 Cr App Rep 164 @ 169

31. Criminal proceedings can be stayed on the grounds of delay where there are exceptional circumstances and that Applicant can show on the balance of probabilities that owing to the delay he would suffer serious prejudice to the extent that no fair trial could be held. In my view the Applicant has failed to show that there will be serious prejudice.
32. Counsel has failed to advance any arguments that meet the threshold required to establish abuse of process which would excite the Court to stay the proceedings. I have nothing in the Applicant's submissions that I could properly find a basis to permanently stay the proceedings here in.
33. The Applicant is entitled to a fair trial according to law and I am unable to discern the unfairness which the Applicant claims is being visited upon her.
34. In the premises, the application for stay of the Criminal proceedings is denied.
35. There is no order as to costs.





M E BIRNIE STEPHENSON
HIGH COURT JUDGE