

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA

Claim No. ANUHCv 2011/0069

In the Matter of the Constitution of Antigua & Barbuda.

-and-

In the Matter of an Application by the Claimant, Selwyn CHARLES, alleging a breach of his rights under section 15 of the Constitution of Antigua & Barbuda and for redress pursuant to section 18 of the Constitution.

BETWEEN:

SELWYN CHARLES

(Claimant)

-and-

THE ATTORNEY GENERAL

(Defendant)

Appearances:

Mr. John Fuller and Nelesia Spencer for the Claimant

Mr. Adelai Smith and Kendrickson Kentish for the Defendant

2011: February 3,

2011: March 2,

JUDGEMENT

[1] Floyd, J: The Defendant is the Attorney General and the matter comes before the court by way of Fixed Date Claim Form filed on February 2, 2011.

[2] The Claimant seeks relief on a number of grounds including:

1. A Declaration that his right to a fair hearing within a reasonable time under s. 15(1) has been breached.
2. An Order that the Claimant be released from custody either unconditionally or on bail.
3. An Order that the proceedings in relation to the criminal charges that give rise to his incarceration be stayed.
4. A Declaration that the criminal charges be dismissed on the ground of unreasonable delay, contrary to s. 15(1) of the Constitution.
5. Damages.
6. Costs.

[3] The Fixed Date Claim Form indicates that Selwyn CHARLES was arrested & charged with Break & Enter in August, 2007. He was remanded into custody at HM Prison, Antigua & Barbuda. In July, 2008, the charges were dismissed in All Saints Magistrate's Court, District B, for want of prosecution.

[4] In July, 2008, it is alleged that Mr. Charles was re-arrested for the same offence & again remanded to HM Prison.

[5] In September, 2008, Mr. Charles was committed to stand trial in the assizes scheduled for September, 2008.

[6] Up until this Application & Claim, Mr. Charles was unrepresented by counsel.

[7] It is alleged that Mr. Charles has, therefore, remained in custody since August, 2007 for essentially the same alleged transaction.

- [8] In support of his Claim, Mr. Charles filed an Affidavit on February 2, 2011. In that Affidavit, Mr. Charles reiterates the facts as already set out in his Claim, as to the dates of his incarceration & the reasons therefore. In addition, Mr. Charles indicates that he is married & has two children ages 8 & 15 years. He indicates that he repeatedly asked prison officials to check on the status of his case. No information was apparently forthcoming to him. Mr. Charles indicates that he could not afford an attorney & therefore has not had legal representation until this Application.
- [9] In reply to this, The Defendant filed an Affidavit of Marzelle MARTIN, the Chief Clerk for the Magistrate's Court. She indicates that she has conducted a search for court records pertaining to Selwyn CHARLES. She could find no record of committal or any depositions relating to a charge of Robbery in which Mr. CHARLES was charged jointly with two others.
- [10] Ms MARTIN could find no record of charges being dismissed against Mr. CHARLES, as referred to in paragraph 3 of the Affidavit of Selwyn CHARLES. Ms. MARTIN goes on to say that the witness statements for the criminal charges Mr. CHARLES is facing have not been found. However, she did locate exhibits bearing a date of September 25, 2008 relating to charges of Break & Enter & Larceny against Mr. CHARLES.
- [11] Ms. MARTIN advised that the Learned Chief Magistrate Ivan WALTERS (now retired) had conduct of the case involving Mr. CHARLES. She says the former Chief Magistrate has left the jurisdiction. Ms. MARTIN goes on to say that Laurel JONAS, was clerk to the former Chief Magistrate but that Ms. Jonas has been transferred. It is not indicated where Ms. JONAS was transferred to. I take from the Affidavit of Ms. MARTIN that the assistance of the retired Chief Magistrate & his former clerk is being sought to locate the missing documents. However, as of today, nothing has been found nor filed with this court.
- [12] Ms. MARTIN goes on to indicate that notes of the Learned former Chief Magistrate were discovered for the relevant time period - April 24, 2008 to July 8, 2008. The Affidavit refers to these notes from April 29, 2008 & although difficult to read, they appear to indicate that

the three accused were before the court, including Mr. CHARLES, on charges of Break & Enter & Larceny. One or both of the two co-accused were on bail & Mr. CHARLES was unrepresented.

[13] It appears that the investigation & the file is noted as being incomplete & a short adjournment is sought. Mr. CHARLES apparently advises the court that he has not been able to see his family. The prosecution is granted time to get the file in order & on the next date is to have all statements prepared & served. From a review of the notes, it is clearly not the first time Mr. CHARLES & his co-accused appeared before that Court on those charges.

[14] From the material filed, I take it that it is common ground that there was a committal of Mr. CHARLES to stand trial in the High Court. Mr. CHARLES says that at paragraph 5 of his Affidavit. Ms. MARTIN at paragraph 10 of her Affidavit indicates that she has not found any record that former Chief Magistrate WALTERS transmitted witness statements so as to allow the typing of a deposition in this case, which would occur after a committal, as I understand it.

[15] According to s. 15 (1) of the Constitution of Antigua & Barbuda, any person charged with a criminal offence shall be afforded a fair hearing **within a reasonable time** by an independent & impartial court (emphasis added). Subsection 2 (a) goes on to say that every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty.

[16] S. 18 of the Constitution states that if any person alleges that any provision of ss. 3 - 17 inclusive has been, is being or is likely to be contravened then, without prejudice to any other action that is lawfully available, a person may apply to the High Court for redress. Subsection 2 goes on to say that the High Court may make such declaration & orders & give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of ss. 3 - 17 inclusive. S. 18 is therefore the basis of this Application & of any Order this Honourable Court may make.

- [17] I note as well s. 3 (a) of the Constitution enshrines as a fundamental right & freedom, the right of every person in Antigua & Barbuda to life, liberty, security of the person, the enjoyment of property & the protection of the law (emphasis added).
- [18] I note as well s. 5 (6) of the Constitution holds that if any person arrested or detained is not tried within a reasonable time, then, without prejudice to any further proceedings, he shall be released either unconditionally or upon reasonable conditions.
- [19] I note as well s. 5 (7) of the Constitution holds that any person who is unlawfully arrested or detained...subject to such defences as may be provided by law, shall be entitled to compensation for such unlawful arrest or detention.
- [20] I do not have the benefit of the factual allegations against Mr. CHARLES that form the basis of his criminal charges. I do know, however, what he is charged with: Break & Enter & Larceny. A property offence. I understand that he is jointly charged with two others. I do not have the benefit of knowing the status of the charges as they relate to the co-accused. I can therefore deal only with Mr. CHARLES.
- [21] Mr. CHARLES has been incarcerated on these charges for 32 months, having been arrested & detained in JULY 2008. If I accept the contention of Mr. CHARLES that he was previously incarcerated for the same alleged transaction since AUGUST 2007, then the term of incarceration increases to 42 months. The Defendant has not provided me with any material to dispute this figure. Indeed, the Affidavit of Marzelle MARTIN indicates & attaches notes that confirm Mr. CHARLES was incarcerated & appearing in the Magistrate's Court in APRIL 2008. It was not the first appearance of Mr. CHARLES & his co-accused on those charges in that Court.
- [22] I therefore find that Mr. CHARLES has been incarcerated for 42 months or approximately 3 ½ years.

- [23] The issue of trial within a reasonable time or without unreasonable delay has been examined by courts in this & other jurisdictions. In the case of Gladstone Gooderidge and the Queen, ECSC, Court of Appeal for St. Vincent & the Grenadines, Criminal Appeal No. 13 of 1997 Chief Justice Byron as he then was, indicated “the right to a trial without unreasonable delay is recognized as an amorphous and vague concept incapable of precise definition...The right to a speedy trial promotes both the interests of the individual and of society, though these interests may be in opposition to each other. ” In that case, the court reviewed and commented upon cases that touched upon this issue from the United States, Canada, the United Kingdom & the Caribbean. _
- [24] I note that the determination of whether an accused's right to a trial within a reasonable time has been denied involves, as the Supreme Court of Canada held, “no mere administrative formula...but rather a judicial determination balancing the interests which the section is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of delay.” R. v. MORIN, [1992] 1 S.C.R. 771, 71 C.C.C. (3d) 1, 12 C.R. (4th) 1
- [25] The Court in the Gooderidge case considered two seminal cases in the Caribbean: the first was an Antigua case: Wright George v. Spencer Antigua Civil Appeal No. 5 of 1978, judgment of Berridge J.A. which decided there was no breach of the constitutional right to a fair trial within a reasonable time. In that case, the accused had been released on bail, unlike Mr. CHARLES. The delay was 19 months & was caused by the absence from the state of a vital prosecution witness.
- [26] In the case of Bell v. D.P.P. of Jamaica [1985] 2 All E.R. 585 Bell was arrested in May 1977 & convicted in October 1977. His appeal was subsequently allowed & a retrial ordered. He was eventually discharged in November 1981, the prosecution offering no evidence. It is notable in comparison to the case at bar, that in February 1982 he was arrested & ordered to be retried in May 1982. The Privy Council eventually held that the delay had infringed his constitutional right to a hearing without unreasonable delay.

[27] In these cases, the factors to be considered when determining the constitutional right to a trial within a reasonable time were held to include the following:

1. The length of the delay.
2. The reason or explanation given to justify the delay.
3. The responsibility of the accused for asserting his rights (waiver).
4. The prejudice to the accused
5. The nature of the charges.

[28] When the court examines these factors, it notes that, generally, the longer the delay the more difficult it is to be accepted. Delays can be attributed to either the Crown or the accused & the court must carefully examine the reason given. As the Supreme Court of Canada held in R. v. Askov, [1990] 2 S.C.R. 1199, 59 C.C.C. (3d) 449, 79 C.R. (3d) 273, delay attributable to the Crown would include that which flows from the nature of the case, the conduct of the Crown & its officers, & the inherent time requirements of the case. It is incumbent on the Crown to show that any institutional or systemic delay is justifiable. It is the responsibility of the Crown to bring the accused to trial. Enquiries must also be made as to whether any acts of the accused caused the delay but that is for the Crown to prove.

[29] It must be regarded that in the ordinary course, a very long & unreasonable delay will cause prejudice to the accused. It would, however, be open to the Crown to attempt to demonstrate that the accused has not been prejudiced.

[30] With regard to waiver, since rights enshrined in the Constitution are fundamental to the individual, any waiver of those rights must be clear & unequivocal. It is not up to the accused to vigorously assert his right to trial within a reasonable time. It must be shown that the accused understood this right & specifically waived it. That is not to say that an implied waiver can never exist. It must, however, be clear. For example an accused represented by counsel may consent to a trial date & such informed consent may be sufficient to constitute waiver.

- [31] In the more recent case of Emanuel Johnson Chijioke and the Commissioner of Police of St. Vincent & the Grenadines et al. in the ECSC, High Court of Justice for St. Vincent & the Grenadines, Civil Claim No. 232 of 2010, Justice Monica Joseph ruled that a period of four years and more in prison pending deportation was extraordinary & would require extraordinary circumstances to be regarded as reasonable. At paragraph 76, the Learned Justice held that “the detention of the applicants was, ab initio, lawful. The applicants’ detention became unlawful when the implementation of the deportation order did not take place within a reasonable time.”
- [32] The Learned Justice then considered compensation & considered the reasons why the state did not act within a reasonable time. In the end, she made a compensatory award.
- [33] In the case at bar, I have reviewed the material filed & heard the submissions of learned counsel for both sides. Were it not for the filing of the Consent Order, I would have found that the Claimant’s right to a fair hearing in a reasonable time pursuant to s. 15 (1) & his right to liberty pursuant to s. 3 (a) of the Constitution has been breached. Detention for 42 months with still no date having been scheduled for trial is inordinate delay. The delay is not only significantly lengthy, it is essentially unexplained. It is frankly unacceptable. Little or no paperwork pertaining to the charges against Mr. CHARLES has been located. Other than exhibits dated SEP 25, 2008, no material has been referred to this court. Perhaps most significantly, no Information nor Indictment has been presented. If indeed as it appears, there was a committal, where is that written confirmation? And if Mr. CHARLES, while incarcerated, was committed to appear at a particular assize in 2008 but never did, how does the legal justice system continue to have a hold on him? By what process does he continue to be held? Has the prosecution not lost jurisdiction over Mr. CHARLES? And if jurisdiction has been lost, how is it that Mr. CHARLES has continued to be detained?
- [34] No adequate reason has been given to explain or justify this delay. Indeed, other than a loss of paperwork & documents, no explanation is given for the delay in getting Mr. CHARLES to trial at all.

- [35] Mr. CHARLES has been in custody at HM Prison. He has been unrepresented by counsel. He has apparently not been brought to court to make any appearance whatsoever for what may be years. He can therefore take no responsibility for his situation nor can it be said that he has either expressly or impliedly waived any of his rights.
- [36] The prejudice to Mr. CHARLES is enormous, not only personally due to his situation & his imprisonment, but also due to his inability to deal with his case. He has not been transported to court to deal with his charges, & being incarcerated, he has no other options available to him (other than the application that is before this court today).
- [37] The charges that Mr. CHARLES faces are property offences. Although they refer to allegations of breaking & entering, there is no allegation of physical violence or personal injury.
- [38] As to a remedy, I do not have the jurisdiction to dismiss the charges against Mr. CHARLES, as the Claimant seeks at no. 4 of the Application. For that to occur, Mr. CHARLES would have to be arraigned & the charges, along with the case, formally placed before the court. Since the Indictment is not before this court, that cannot be done. (However, based upon the Consent Order filed, including the agreement by parties to dismiss the charges, I accept that I do, therefore, have the jurisdiction to make such an Order.)
- [39] In light of the serious breach of the Constitutional rights of Mr. CHARLES, in the face of the inordinate delay in his trial, & upon the Consent Order filed, I dismiss the charges against Mr. CHARLES. To allow these charges to continue after today's appearance would simply not be appropriate, & moreover, it would not allow for the maintenance of public confidence in the administration of justice. The charges are hereby dismissed & Mr. CHARLES is to be released forthwith from custody.
- [40] As to the remaining requests for costs & damages, I note that s. 5 (7) of the Constitution

allows for anyone who is unlawfully arrested or detained to be eligible for compensation. As in the case of Chijioke referred to above (but bearing in mind the Consent Order filed) I would have found that Mr. CHARLES was unlawfully detained. His right to a speedy trial was breached, however, when he was committed to the criminal assizes but never transported, his detention became unlawful. He would therefore have been entitled to a compensatory award. In light of the Consent Order filed, which contains, as a component, damages and costs, I make no further comment in that regard.

[41] The terms of the Consent Order filed today are incorporated into this judgment as follows:

- The Claimant's Constitutional right to a fair hearing within a reasonable time, guaranteed by s. 15 (1) of the Antigua and Barbuda Constitution Order 1981 has been violated.
- The Claimant is to be forthwith released from custody at Her Majesty's Prison.
- As a result of the delay in prosecuting the charges against the Claimant, the said charges are dismissed on the ground of unreasonable delay in breach of the provision of s. 15 (1) of the Antigua and Barbuda Constitution Order 1981.
- Damages for breach of the aforementioned constitutional provision are to be paid by the Defendant to the Claimant in the sum of \$25,000.00.
- The Defendant do pay the Claimant the costs of these proceedings in the sum of \$3,500.00.
- The Defendant undertakes not to deport the Claimant in respect of any act or omission of the Claimant prior to today's date.

Justice Richard G. Floyd
High Court Judge
Antigua & Barbuda