IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

CASE ANUHCR 2013/0085 (& ANUHCV 2020/0016)

REGINA

V

WAYNE MIGUEL

APPEARANCES

The Director of Public Prosecutions Anthony Armstrong and Ms Shannon Jones-Gittens for the Crown.

Mr Andrew Okola for the defendant.

2020: MARCH 10, 12

MAY 20[1]

RULING

On application in the criminal division for stay for delay as an abuse of process,

And on parallel application in the civil division for stay for delay as a breach of the Constitution.

1 **Morley J**: Wayne Miguel aged 59 (dob 31.01.61) is the defendant on indictment ANUHCR 2013/0085, facing one count of fraudulent conversion between 28.10.05 and 25.09.09 of $475390ec belonging to the famous novelist Ken Follett for whom he worked as a gardener and

[1] Delivery of ruling delayed from 02.04.20 owing to coronavirus.

maintenance manager of a property in Jumby Bay named Bannanquit, and who is alleged to have abused a visa creditcard given to him as part of his duties.

2 Miguel was charged on 24.05.10, his case was received from the Magistrates Court at the High Court on 06.11.13, the indictment was signed on 15.07.14, and he was first listed before Thom J on 16.09.14 (though he was absent with permission). As at today's date, he has still not been tried, nor ever had a trial listing.

3 Counsel Okola argues, concerning the proceedings in the criminal division, the delay, with prejudice arising, amounts to an abuse of process so the indictment should be stayed; he also attempts to argue parallel proceedings under case ANUHCV 2020/0016 filed on 24.01.20 in the civil division for essentially the same, namely the criminal proceedings should be stayed for delay, with damages, being in breach of **s15 Constitution of Antigua & Barbuda.**

4 In this Ruling, I will answer the following questions:

a. Has there been delay worthy of complaint?
b. If so, has the delay caused prejudice?
c. Absent prejudice, might a stay ever arise?
d. Does a stay arise in this case for abuse of process?
e. Are the parallel proceedings inappropriate?

5 To assist in answering there has been oral argument on 10 and 12.03.20, with written submissions offered in the criminal division by the defence dated 23.01.20 and by the Crown dated 20.02.20, with in the civil division a fixed date claim form filed on 24.01.20 with attendant affidavit arguing largely the same, as yet without response from the office of the Attorney General as the civil proceedings were assigned to my court on 25.02.20 and I indicated no separate proceedings, if needed, should be processed until after this Ruling.

6 This ruling was first due on 02.04.20. I will add there has been delay in its delivery owing to the coronavirus outbreak, leading to lockdown on that very date and the courts not sitting for some weeks after, but it should not be thought the lockdown has influenced the ruling as it was completed beforehand.

The case

7 The prosecution case is Miguel was employed by Follett as a handyman from 1997. In 2004, as by now trusted staff to maintain Bannanquit, he was given a Cooperative bank visa credit card, 4988232173000495, with which he was permitted to make purchases, keeping receipts for fax or fed-ex to Follett's UK staff for account reconciliation. After a period, Miguel indicated to his UK line manager Claire Wager goods were cheaper if paid in cash, so he would withdraw cash and send receipts for the items so purchased. Between April and July 2009, Tony Polhill visited Bannanquit to fit a new kitchen, noticed transactions reported by Miguel appeared too costly, and simultaneously Miguel stopped using the card. Suspicions aroused, it was noted Miguel had purported to buy 87 fans in four years, and study of the receipts from apparently different companies suggested they had come from the same misleading source, with identical font and stamps, while enquiry revealed some companies did not exist and goods were overpriced. Suspicious receipts were gathered into a grey boxfile and lodged by Polhill on 23.10.09 with Antigua counsel Monique Gordon, retained by Follett to progress the case. Miguel was summonsed to a meeting on Antigua with Follett's general staff manager Charlotte Quelch for 01.12.09 and did not attend, nor offer explanation, nor attend a rescheduled meeting. He was dismissed on 04.12.09 and he handed in the visa card to Flora Jacobs, who on Antigua was the manager of Bannanquit.

8 Criminal investigation began on 14.12.09 when Follett's staff passed the file to Sgt Lisborn Michael of Antigua CID. From the committal bundle lodged on 06.11.13, the following can be observed, with some receipts copied: Dawn King of Dawn's nursery said an invoice on 03.10.06 for $5175ec had not been created by her; Yvonne Destin of Destin Lumber Yard said the same of three invoices, for 04.08.05 for $990ec, 28.10.05 for $440ec, and another on 28.10.05 for $250ec, totalling $1680ec; Stephen Gomes of Westrading said the same of two invoices, for 02.12.05 and 16.03.06, for uncited amounts; Owen Clashing of Oacis Plants said the same of two invoices, for 24.04.06 for $1320ec and 26.04.06 for $660ec, totalling $1980ec; Rita Edwards of Kennedys Enterprises said the same of one invoice for 25.07.06 for $1692ec; Lawrence King of Kings Glass Processing said the same of an invoice on 16.03.07 for $380ec; and David Goddard of Paint Plus said the same of one invoice for 10.03.08 for $2700ec. The total of denied invoices on the papers is $13607ec.

9 Other investigation features were as follows:

a. On 21.12.09, a search warrant was obtained, (exhibit LM1).

b. On 31.01.10, the search warrant was executed, when Miguel was arrested on suspicion of submitting false invoices to the value of $475390ec, handing over an Acer laptop and 1gb thumbdrive (LM5).

c. On 03.02.10, he was interviewed for 'fraud' with his attorney Charlesworth Browne, (LM2), saying he had not committed fraud. He explained he had always produced receipts for items purchased and which had always been for Bannanquit. He admitted to creating false invoices on his laptop, but for legitimate cash purchases of equipment, later installed by John Gallard, being complemented for his bookwork by Rebecca Hart, who was Follett's finance manager. At first he had a manager named Lynn Bayliss, and later Karen Studurds, finally replaced by Claire Wager. He worked with Gallard, Owen (aka Tallboy, already deceased), Helena Bougen, and Flora Jacobs.

d. On 12.02.10, his laptop was forensically examined by PC Vonda-Kay Frederick, recovering some materials purporting to be false receipts or invoices (though these do not seem formally exhibited).

e. On 24.05.10, he was further interviewed for 'fraud' with his attorney now Alex Fearon, (LM3). He said the visa card had had a limit of £2000gbp, he had made cash withdrawals, from Bank of Antigua, Scotiabank, and ABIB, but would consult his managers Hart and Wager. He had been instructed for accounting purposes to create the false invoices by his 'former boss', whose name he could not remember but whose name he had given in the first interview.

f. On 02.06.10, Jeanette Rosen handed to Sgt Michael a grey boxfile (LM4, which had been received from Tony Polhill on 23.10.09 at her office, being the chambers of attorney Monique Gordon where Rosen was office administrator), in which there were queried receipts submitted by Miguel, said to be issued by 33 companies, of which investigation suggested only seven existed (LM6), while 26 did not (LM7).

g. LM8 is said in the committal bundle to be 'invoices from different companies (tendered, admitted and marked into evidence)', which may be, though unclear, the receipts and invoices copied in the bundle and shown to the witnesses listed in the paragraph 8 above.

Case history

10 Progressing through the courts, the case history seems as follows

a. On 24.05.10, Miguel was charged.

b. On 06.11.13, the committal bundle arrived from the Magistrates Court in the High Court.

c. On 15.07.14, the indictment was signed by the DPP, and filed on 31.07.14.

d. On 16.09.14, there was a first listing before Thom J at the beginning of the Michaelmas assize, though the defendant was absent with permission, and adjourned to 03.11.14.

e. Thereafter, before Thom J, it seems the case was listed on 22.02.15, 12.05.15, 22.09.15, 12.01.16, which all appear to be once each assize, and merely adjourned for trial to be fixed.

f. In addition, the case was listed on 17.02.16, again adjourned for trial to be fixed.

g. Moreover, after arrival in November 2013 at the High Court the case was listed seven times for bail variation to allow travel outside assize sittings, being listings in August 2014, September 2016, December 2016, January 2017, June 2017, November 2017, and July 2018.

h. Thom J having retired in May 2019, the case was next listed before John J, temporarily on Antigua as successor, on 03.05.19, 01.07.19 and 19.07.19, and though he wanted to get the case on, timed out, again adjourning without a trial starting.

i. The case was then transferred to my court to bring it on, with a first appearance before me on 24.01.20, noting the application for a stay for delay, on which date there was the parallel filing, and thereafter rapid case management to process the stay application on 10, 24, 25 and 27.02.20, with full argument on 10 and 12.03.20.

The complaint

11 The bedrock of Counsel Okola's complaint is as follows:

a. Since charge on 24.05.10, almost 10 years have passed (within four days), with never a trial listing, in that longevity there having been as many as three defence counsel (Fearon, now dead; John Fuller, now retired; and since late 2019 Okola), while Miguel has remained under restrictive conditions of bail, including inability to travel and reporting thrice weekly to police.

b. The passing time has meant inevitably memories must have faded so that it will now be difficult to explain what every receipt was for.

c. Moreover, throughout the ten years, the defence have not been given access to the laptop and thumbdrive (LM5), nor have they been offered copies of the receipts in the grey boxfile (LM4), nor of what PC Frederick found on LM5.

d. Concern is raised that witnesses helpful to the defence may be unavailable, like Owen who had died by 2010, and a 'Cletis Lama' who it is said has died since, or who were not listed among prosecution witnesses but were mentioned in interview and will now be difficult to trace, in particular Lynn Bayliss and Karen Studurds based in the UK (and perhaps John Gallard and Helena Bougen in Antigua).

e. Finally, it is argued the case is flawed, in that there is no direct evidence of how any money was spent dishonestly, and the count on indictment if tried is obviously duplicitous, as it wrongly rolls up the total of allegedly fraudulent receipts over four years, whereas a trial would require specimen counts breaking down precise amounts obtained on specific receipts and dates.

12 Before turning to the law, the argument on the facts as offered by Counsel Okola requires some swift observation.

a. It is unpersuasive to argue –

   i. Potential defence witnesses may be untraceable, like Bayliss, Studdurds, (and perhaps Gallard and Bougen), if no defence effort has yet been made to trace them;

   ii. Owen has died, as he had done so prior to investigation, meaning his death cannot be attributed to delay; and

   iii. Cletis Lama has died since the investigation, without offering when nor his precise relevance while he was never mentioned in both interviews.

b. The likelihood the indictment is flawed for trial is not related to the delay and so is largely irrelevant to the present argument, instead merely showing inattention to the case.

c. The fact the defence has not been served by the prosecution with copies of LM4, what PC Frederick found, nor given access to LM5, has no relevance to delay where copies and access have not been requested it seems prior to late 2019.

13 What has happened in this case is the defence have done virtually nought, never pressing for it to come on as a trial, nor ever preparing or researching witnesses for detailed answer to the charge, hoping the case will time out as unfairly now too old.

14 But equally, the Crown has not pressed for the case to come on, nor prepared in detail, by reflecting on the flawed indictment, analyisng the critical material in LM4, examining LM5, and formally exhibiting what PC Frederick found.

15 Neither party has done much in ten years.

16 Moreover, having arrived into the High Court list on 16.09.14, there has been no case management, so that it has been traversed for 'dtbf', as endorsed on files, meaning 'date to be fixed', through the assizes ad serriatum, through seven, being 17 months up to 17.02.16, and then it has not even been listed, except for bail variation six times, until 03.05.19, being 39 months since 17.02.16.

17 In sum, between 16.09.14 and 03.05.19, in 56 months it has never been listed for trial nor case managed. Thereafter, though John J hoped to try the matter, listing it three times, in May and July 2019, as a visiting judge he did not quite have enough time, and so the case has come to me in January 2020.

18 The narrow question seems, what is the consequence of the 56 month trial delay, 16.09.14 to 03.05.19, in the context of charge being almost ten years ago? Unhappily the time it took the case to come to the High Court from the Magistrates Court, 24.05.10 to 16.09.14, is sadly unremarkable in the context of progress of materials back then through the lower court, with thereafter happily a timely filing of the indictment and first appearance. Efficiency is today being much improved, but such were then often the timings in 2010-14, particularly for fraud matters, which as policy, rightly or wrongly, have been in a secondary position to murders, shootings, stabbings, and sexual offences. Moreover, the delay since 03.05.19 to today is comprehensible, as John J could not try the case, though wished to, and in my court the matter has come on quickly for resolution of the delay argument. For these reasons, the court will focus on the period 16.09.14 to 03.05.19, being almost five years.

19 Concerning the five years, it is important to recall there was a time before it there was only one High Court Judge doing criminal cases on Antigua (though there are now two), which led to a backlog of cases, which will have contributed to a degree of delay, of many cases, this being one, through no fault of any party, be it the prosecution, defence, or court.

Delay worthy of complaint

20 The first question is, has there been a delay worthy of complaint?

21 The answer is plainly yes, on the principle of *res ipsa loquitur*, namely that 'the thing speaks for itself'. The administration of justice requires the support of the public, and in my judgment the public will blanche at so simple a case taking ten years to come on, it being presented to assize six years ago on 16.09.14 and in five years never listed for trial, noting in addition it was continuously adjourned for a 'date to be fixed', in the period 16.09.14 to 17.02.16, yet no one fixed it. In this context, it is criticisable there was no case management when its listing could have been discussed.

22 From 2017, with approval from the Chief Justice, responsibility for trial listing has been slowly gathered to the judges working with the Registry, performing case management, monitoring case readiness, witness availability, and fixing trials.

23 Hitherto, listing has been an uncertain affair, with trial listings being decided at short notice as the court comes free, largely by the ODPP[2] deciding on priority and examining in what next case witnesses are ready. It can be immediately seen how this case in such a system would not come on, as so many witnesses are based in the UK, so that without case management to fix a trial well in advance, short notice listing would be likely unsuccessful, with so many witnesses off island, and would therefore unlikely occur. In this way a case like this could drift endlessly in the list, as indeed it has.

[2] Office of the Director of Public Prosecutions.

24 Discussing with counsel who has been responsible for trial listing, the defence blame the prosecution saying they have long been ready for trial and the ODPP did not call it on, while in response the ODPP blames the defence saying they too have long been ready and the defence did not ask for the trial to be listed. It is noticeable since 16.09.14, up to 03.05.19, including bail variations, the case has been 13 times listed, yet no one – the Crown, the defence, nor the Court – gripped the case and fixed it for trial; and all the while in the hitherto system no party has seemed responsible as without case management the system has been fundamentally flawed with no mechanism for gripping the case.

25 In my judgment, the hitherto system failed. Though it has now been replaced, nevertheless this case has been overlong delayed. It is no excuse simply to say it was the old system, and so 'oh well': it failed, predictably, and this should be said clearly. I expect there are many other cases long delayed in the old system, not called on, though this Ruling does not require they be identified.

Prejudice

26 There being delay, the second question is, has it caused prejudice?

27 It is common sense that as time passes memory fades. It is arguable a delay of ten years means ipso facto memories will have faded to a point where a trial is unfair.

28 But more analysis is required. The nature of what has faded needs examination. This is a receipts case. They have not faded; they are in a box; though what the purchases were for might. This is not a case where there is an eyewitness to a shooting, where precision and reliability of what was seen is in issue which may fade as human memory; instead, the case calls for an explanation of the readily perusable paperwork in LM4.

29 For persuasive argument to arise there has been faded memory, I would expect a review by defence counsel of the receipts with an explanation of what has faded and why, cross-referencing what the defendant says he cannot remember with also what other defence witnesses might say they too cannot now remember: it is not enough simply to assert fading memory; more needs to be done to show detail.

30 The test for prejudice meriting a stay is whether on balance faded memory means Miguel cannot get a fair trial (or it would be unfair to try him). As such, in my judgment there is indeed here opportunity to argue prejudice for faded memory, but more needs to be done, and could have been, so that not being done, the burden being on the defence to show on balance, I find the defence have not shown prejudice to the required standard. The point is uncomfortably moot. Defence counsel has not shown it is probable there has been prejudice, when he might have done if he had worked harder on the case.

Stay absent prejudice

31 The third question is, absent prejudice, might a stay ever arise? In other words, is a delay of ten years in a case concerning the simple abuse of a credit card, of itself, so unreasonable as to amount to an abuse of process meriting stay, whether or not prejudice has been shown.

32 To answer, some legal review is needed, on 'abuse of process' and what is 'unreasonable'.

33 The doctrine of abuse of process is best first explored in **Connelly v DPP 1964** AC1254, where Lord Devlin said the court exercising common law has a residual discretion to refuse an indictment proceeding to trial in such circumstances where to do so would constitute an 'abuse of process', this power being '*an inescapable duty to secure fair treatment for those who come or are brought before them.'*

34 When to exercise the power to stay proceedings as an abuse of process is explored from **D3.66** in **Blackstones 2017**, where inter alia it says:

> At **D3.67**::….the constitutional principle which underlies the jurisdiction to stay proceedings is that the courts have the power and the duty to protect the law by protecting its own purposes and function…the courts have an inescapable duty to secure fair treatment for those who come or are brought before them…It is well established that the court has power to stay proceedings in two categories of

cases, namely (i) where it will be impossible to give the accused a fair trial, and (ii) where it offends the court's sense of justice and propriety.

At **D3.70**: Two key questions run through many of the authorities: (1) to what extent is the accused prejudiced? (2) To what degree are the rule of law and the administration of justice undermined by the behaviour of the…prosecution?

At **D3.72**: …the defence bear the burden of establishing abuse on the balance of probabilities.

At **D3.74**: …the defence may...apply for the proceedings to be stayed on the ground of abuse of process if (a) there has been inordinate and unconscionable delay due to prosecution inefficiency…

35 Various cases have been brought to the attention of the court, which will be set out below, loosely ascending by year.

36 In **R v Derby Crown Court ex p Brooks 1985** 80 Cr App R 164, the test is *'it may be an abuse of process if either (a) the prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by law or to take unfair advantage of a technicality, or (b) on the balance of probability the defendant has been, or will be, prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution which is unjustifiable',* and *'the ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness both to the defendant and the prosecution.'*

37 In analysing delay meriting a stay, Lord Templeman in **Bell v DPP Jamaica 1985** 32 WIR 317 approved US dicta from Powell J in **Barker v Wingo 1972** 407 US 514, requiring assessment of four features: *'the length of delay; the reasons given by the prosecution for delay; the responsibility of the accused for asserting his rights; and prejudice to the accused'*.

38 Lord Lane CJ in **AG ref (No1 of 1990) 1992** QB630 said: *'Stays imposed on the grounds of delay or for any other reason should only be imposed in exceptional circumstances. In principle,*

therefore, even where the delay can be said to be unjustifiable the imposition of a permanent stay should be the exception rather than the rule….No stay should be imposed unless the defendant shows on the balance of probabilities that owing to the delay he will suffer serious prejudice to the extent that no fair trial can be held: in other words the continuance of the prosecution amounts to a misuse of the process of the court.'

39 In **R v Martin (Alan) 1998** AC 917, concerning abuse of process, *'no single formulation will readily cover all cases, but there must be something so gravely wrong as to make it unconscionable that a trial should go forward, such as some fundamental disregard for basic human rights or some gross neglect of the elementary principles of fairness'.*

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, 62, 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. Further, the more time it takes to bring a case to trial the more difficult it may be to convict a guilty person. For a variety of reasons witnesses may become unavailable or their memories may fade, sometimes seriously weakening the case of the prosecution which carries the burden of proof…
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> 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 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….
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> 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. It cannot be reached by applying a mathematical formula although the mere lapse of an inordinate time will raise a presumption, rebuttable by the State, that there has been undue delay. Before making

such a finding the court must consider, in addition to the length of the delay, such factors as the complexity of the case, the reasons for the delay and specifically the conduct both of the accused and of the State. An 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. 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.

62. A permanent stay or dismissal of the charge cannot be regarded as the inevitable or even the normal remedy for cases of unreasonable delay where a fair trial is still possible…

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. As previously indicated at para 42, section 24(1) of the 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. Given the high level of public interest in the determination of very serious crimes, however, it will only be in exceptional circumstances that a person accused of such a crime will be able to obtain the remedy of a permanent stay or dismissal for the breach only of the reasonable time guarantee. Of course, such a remedy will be readily granted in cases where the delay has rendered it impossible to hold a fair trial.

[Underlining added]

41 The test in **R v Maxwell 2011** 1 WLR 1837 is the court can stay where it will be impossible to give the defendant a fair trial, and 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'*.

42 In **Rummun v Mauritius 2013** UKPC 6, Lord Kerr at para 15, relying on **Dyer v Watson 2004** 1AC379 and **Boolell v Mauritius 2006** UKPC 46, identified the three critical features assessing delay were the complexity of the case, the conduct of the appellant, and the conduct of the administrative and judicial authorities.

43 Of note in the two 2011 cases is the need to protect the integrity of the criminal justice system. In this context, especially adding consideration of **Gibson v AG Barbados 2010**, supra, the jurisprudence appears to develop in a new direction considering there is a **Constitution of Antigua & Barbuda**, from 1981, which says at **s15(1)**: ***'****If any person is charged with a criminal offence…he shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.'* The key feature here is that it is a constitutional right a fair hearing shall be within a 'reasonable time'.

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.

45 In **Wyre & Bailey v AG Antigua 2020** ANUHCV2020/306, Actie J noted there can be a failure to hold a trial in a reasonable time, meriting modest damages, though of itself this may not warrant quashing the delayed proceedings, so that a delayed conviction should still stand. In particular the Learned Judge adopted the observations of Lord Bingham in **AG Reference No. 2 of 2001 2003** UKHL 68, concerning the right to trial within a reasonable time, as per **art 6(1) European Convention on Human Rights,** as adopted by the UK in the **Human Rights Act 1998**, where he said at para 24, (relevant to the equivalent provisions of **s15(1) Antigua Constitution**):

> If, through the action or inaction of a public authority, a criminal charge is not determined at a hearing within a reasonable time, there is necessarily a breach of the defendant's Convention right under article 6(1). For such breach there must be afforded such remedy as may …be effective, just and proportionate. The appropriate remedy will depend on the

nature of the breach and all the circumstances, including particularly the stage of the proceedings at which the breach is established. If the breach is established before the hearing, the appropriate remedy may be a public acknowledgement of the breach, action to expedite the hearing to the greatest extent practicable and perhaps, if the defendant is in custody, his release on bail. It will not be appropriate to stay or dismiss the proceedings unless (a) there can no longer be a fair hearing or (b) it would otherwise be unfair to try the defendant. The public interest in the final determination of criminal charges requires that such a charge should not be stayed or dismissed if any lesser remedy will be just and proportionate in all the circumstances. The prosecutor and the court do not act incompatibly with the defendant's Convention right in continuing to prosecute or entertain proceedings after a breach is established in a case where neither of conditions (a) or (b) is met, since the breach consists in the delay which has accrued and not in the prospective hearing. If the breach of the reasonable time requirement is established retrospectively, after there has been a hearing, the appropriate remedy may be a public acknowledgement of the breach, a reduction in the penalty imposed on a convicted defendant or the payment of compensation to an acquitted defendant. Unless (a) the hearing was unfair or (b) it was unfair to try the defendant at all, it will not be appropriate to quash any conviction. Again, in any case where neither of conditions (a) or (b) applies, the prosecutor and the court do not act incompatibly with the defendant's Convention right in prosecuting or entertaining the proceedings but only in failing to procure a hearing within a reasonable time.

46 Moreover, in the **2001 AG Reference,** supra, Lord Bingham whose opinion the majority adopt, concludes at para 29: *'Criminal proceedings may be stayed on the ground that there has been a violation of the reasonable time requirement in art 6(1) of the Convention only if (a) a fair hearing is no longer possible, or (b) it is for any compelling reason unfair to try the defendant'.*

47 Further, concerning how unreasonable delay might arise in the context of the Antigua Constitution, in **R v Larrydow Jacobs et al 2019**[3] 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, noting:

> 21 I remind myself there is a **Constitution on Antigua & Barbuda**, from 1981, which says at **s15(1)**: 'If any person is charged with a criminal offence…he shall be afforded a

[3] CASES ANUCHR 2015/0090, 2015/0093, 2016/0075, 2017/0022, 2017/0050, currently on appeal by the ODPP.

fair hearing within a reasonable time by an independent and impartial court established by law.' The key feature here is that it is a constitutional right a fair hearing shall be within a 'reasonable time'. This begs whether delays in filing an indictment of more than a year are reasonable, absent complexity or some other specific feature fully addressed, and in such absence it might be said res ipsa loquitur as ipso facto unreasonable. And if so, the unreasonable infringement of a constitutional right is intelligent ground to be concerned the administration of justice is being undermined…so that a stay might arise.

22 Though the UK does not have a Constitution, there is some learning on the application of **article 6(1) European Convention of Human Rights (ECHR),** which is in similar language, requiring trial within a reasonable time, having been put into domestic effect by the HRA supra.

a. In **AGs Ref (No.2 of 2001)** 2AC72, the House of Lords ruled that criminal proceedings may be stayed on the ground that there had been a violation of the reasonable time requirement of article 6 only if (a) there can no longer be a fair hearing, or (b) it would otherwise be unfair to try the defendant.

b. However, dealing with (b), at **D3.76**, there is reference to how **in Burns v HM Advocate 2009** 1AC720, coming from Scotland, it was held that the reasonable time requirement must be interpreted and applied in a way that will then achieve its purpose, which is to avoid 'undue uncertainty' on the part of a person charged, and so the matter ought to be examined from the perspective of the individual concerned.

c. In **Dyer v Watson 2004** 1AC379, in the Privy Council Lord Bingham said that the threshold of proving that a trial has not taken place within a reasonable time is a high one, not easily crossed, but added that if the period which has elapsed is one which on its face gives ground for real concern, it is necessary to look into the detailed facts and circumstances of the particular case and it must be possible to explain and justify any lapse of time which appears to be excessive. While there may be no general obligation on a prosecutor to act with all due expedition and diligence, a marked lack of expedition, if unjustified, would point towards a breach of the reasonable time requirement.

23 With the dicta of ***Burns*** and ***Dyer*** in mind, supra, it seems inescapable the delays here create 'undue uncertainty' for a defendant, and no 'detailed facts and circumstances to explain and justify any lapse of time' have been offered.

24 In sum, while there can always be intelligent exploration of whether any prejudice arises, nevertheless, in my analysis arising from the Constitution undue delay can stand apart in appropriate circumstances, as without more as I have judged here, as a ground for staying proceedings.

48 For clarity, **Jacobs et al**, supra is different to this, as in it the concern was how long it took to file an indictment (in each case more than a year), whereas here the concern is that an indictment timely filed has for so long not been called on for trial.

49 Distilling this material, to answer the third question, the answer is yes: 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. 'Undue uncertainty' extended over many years for lesser offending is oppressive in the context of thrice weekly reporting, travel restrictions, and the dread weight of allegation hanging over one, inhibiting employment and standing. It is the responsibility of the court and prosecution to ensure timely trial, not the defendant, who realistically may want trial never to come on, (though his not pressing for trial may affect seeking damages as his conduct must also be considered). To borrow from the CCJ in **Gibson** supra, I *'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'*. With the advent of rights under a Constitution, the jurisprudence concerning abuse of process has moved on, it has evolved: unreasonable delay can be enough.

50 Moreover, in addition, it does arguably become unfair to try a defendant after overlong, in that it embarrasses the 'integrity of the criminal justice system', which can be a 'compelling reason not to try' a defendant, to borrow from the words of Lords Bingham, Kerr and Steyn.

51 This makes sense, that a stay can arise absent prejudice, as otherwise there will never be reason for those responsible for the administration of justice to bring on cases efficiently, within a reasonable time (even if not the fault of the prosecution but as here a systemic flaw), as the burden would instead always fall to the defence to show prejudice, rendering the right enshrined in the Constitution toothless. In this sense, in appropriate cases the right should place a burden on the system to work to a reasonable time, not on the defendant to show it has not and why he cannot be tried fairly.

52 In my judgement, weighing the extraordinary length of the delay, its weak reasons, and the simplicity of the case, notwithstanding the defendant did not press, it is scandalous, to the mind of any informed third party observer, there has been no trial listing over ten years in an uncomplicated case of misuse of an employer's credit card (notwithstanding the understandable distress no doubt the employer has felt), and specifically during the almost five year period 16.09.14 to 03.05.19, with the case not even being listed in 39 months (apart from for bail variation) from 17.02.16 to 03.05.19. The delay in this case brings the administration of justice into disrepute, and so must stop.

53 In this way, to the fourth question, namely does a stay arise in this case for abuse of process, the answer is yes, and for the foregoing reasoning I stay the proceedings.

54 I would add, though there have been discussions, led by the court, about a possible plea to a reduced the amount on the indictment, not formally offered, yet rejected by the prosecution, these have been without prejudice to the defendant, and should have no bearing on the ruling. It must remain moot whether, if the prosecution had reflected further on the indictment reducing the amount down from $475390ec, there may have been a plea.

Parallel proceedings

55 Turning now to the fifth question, are the parallel proceedings inappropriate: in my judgment the answer is yes, wholly inappropriate.

56 To begin, by parallel proceedings firstly I mean in front of another judge.

57 What has happened in this case, and it has been observed to be a growing trend, is counsel has challenged proceedings on indictment as unconstitutional, filing application for redress under the civil procedure rules, seeking damages. This has the effect of slipping argument which should be before the trial judge in the criminal division onto the desk of another judge in the civil division. Every High Court Judge can sit in either, but the structure of proceedings at Registries in the Eastern Caribbean Supreme Court has been usually a constitutional motion on an indictment

has meant a second judge. This must stop. It creates parallel arguments on the same facts in front of two judges, raising the prospect of different decisions leading to mischief and appeals.

58 Good court practice must mean that any constitutional motion concerning proceedings on indictment is argued before the criminal trial judge seized of the case. In this case, having been seized of the trial on indictment on 24.01.20, discussion with the Registry meant on 25.02.20 I was specifically assigned the motion filed on 24.01.20, ANUHCV 2020/0016, which otherwise might have gone to one of three other judges who mostly deal with civil cases. Noting inter alia the timing of the filing, namely the very day the criminal case was first heard by me, 24.01.20, I am of the weary view it contemplated derailing my hearing the criminal trial. Heard separately, the motion might then be appealed separately, possibly all the way to the Privy Council, over many years, halting the criminal trial, adding inexorably to the very trial delay that was the complaint.

59 However, the point goes further. By parallel proceedings, secondly I mean where an appropriate remedy already exists as part of the criminal trial proceedings.

60 If there is a remedy available to the trial judge as part of criminal trial proceedings, then in my judgment it is an abuse of process for the defence to file a constitutional motion. Authority for this lies in the Court of Appeal decision in **Brandt v AG Montserrat 2020** MNIHCV 2019/0009, concerning challenge to the lawfulness of a search of a phone, where Carrington JA (ag), noting *'…the courts have jealously guarded against unwarranted recourse to relief under the Constitution'* , observed the dictum of Lord Diplock in **Harrikissoon v AG 1979** 31 WIR 348 that:

> The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter I of the Constitution is fallacious. The right to apply to the High Court under…the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court … the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous

> or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.

61 Moreover in **Brandt** supra, Webster JA (ag) developed the point, referring to para 10 in a Court of Appeal judgment in **Brandt v DPP Montserrat 2018** MNIHCVAP2018/0003[4], being an earlier constitutional motion by the same defendant, concerning a finding of sufficiency of evidence to warrant jury trial for alleged child sexual exploitation under **s141 Montserrat Penal Code**, which noted:

> This Court must guard against the use of constitutional motions to derail or delay proceedings in the Civil and Criminal Divisions of the High Court. I find that this appeal, and the application before Belle J, involved in essence, the singular issue of the construction to be given to section 141 of the Penal Code, which is a matter eminently suitable for resolution by a judge of the High Court in the sufficiency hearing. It is wholly inappropriate for this Court, or the High Court in its constitutional jurisdiction, to be made to tread upon the criminal jurisdiction of the High Court in the manner undertaken by the Appellant. The procedure used by the Appellant to bring this matter to the High Court as a constitutional claim is entirely wrong and improper.

62 Moreover, in **AG v Ramanoop 2005** 66 WIR 334 at para 25, Lord Nicholls explained:

> …where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the court's process.

63 I therefore look to whether the criminal proceedings could offer remedy, to which the answer is obviously 'yes' as the proceedings could be stayed for abuse, as has happened. In other cases, admissibility could be determined, or procedural irregularity adjudicated within the usual ambit of the work of a criminal trial judge. On the facts of this case, there is no practical need for a

[4] Delivered 29.11.18, unreported.

separate declaration of infringement of right, as sought by the motion, as it is embraced by the decision.

64 In short, there has been no need for a separate filing on the same argument to a different judge. Hereafter, insofar as I am able, I direct that the criminal trial judge shall always be seized of civil motions, whether or not constitutional, raised on criminal trial proceedings; if good reason arises for another judge to adjudicate, the trial judge can explain why.

65 It may be argued, to justify the parallel filing, damages should be ordered by the trial judge for the delay, not usually available on indictment proceedings. I note in the case of **Wyre** supra following motion paid out a modest sum for a delay which did not merit quashing a conviction, and that in the **2001 AG reference** supra there is specific contemplation of damages though proceedings continue. I also note the cases of **AG Trinidad v Tokai et al 1996** UKPC 19 and **Browne v AG St Kitts 2018** SKBHCV 2016/0074 which entertained constitutional motions. However, in this case, reminding myself it has considerable prosecution strengths, I remain mindful the defence have not pressed for trial, nor have done much demonstrable trial preparation work to show prejudice from faded memory, so I conclude it has been a strategy of the defence to keep low and let the delay accumulate; as such, no damages arise as the delay was wanted.

66 To distill matters, so that parallel proceedings are henceforth better managed, subject to being corrected on appeal, the following should be adopted where a civil motion is contemplated on indictment:

a. The issue should be raised at case management with the criminal trial judge;
b. If there is an adequate remedy available at criminal trial, then no separate motion should be filed;
c. If remedy requires a civil motion, then it is filed with the criminal trial judge for resolution;
d. Any decision by the criminal trial judge on a civil motion concerning the criminal trial shall not be appealable until after the conclusion of the indictment proceedings (so as to stop conceivably endless interlocutory appeals being an abuse of process derailing the criminal trial);

e. Any appeal (at the end of the criminal trial) should consolidate the arguments in the criminal and civil proceedings so that all arguments in both divisions come together in one appeal to the Court of Appeal; and finally,

f. Motions which in the considered view of the criminal trial judge are designed on balance to derail a trial, raising mischief to cause the criminal justice process to stall, are an abuse of process, meaning counsel should be mindful may amount to contempt of court.

67 Though the civil application is dismissed, there shall be no order as to costs, as at my direction the OAG[5] did not have to reply to the motion pending this Ruling, and in any event the argument has raised points of much importance requiring consideration.

68 Please note this ruling is not an acquittal. It simply stops the case proceeding further, unless leave is given by the Court of Appeal. Miguel cannot claim to have been found not guilty. He may yet be prosecuted if this ruling is reversed.

69 I should like to thank Counsel for their submissions, which have been well made, by the DPP, and in particular by Counsel Okola, who notwithstanding this contrary ruling on parallel proceedings has fought his corner to the high standard expected of able counsel.

The Hon. Mr. Justice Iain Morley QC

High Court Judge

20 May 2020

[5] Office of the Attorney General.