COMMONWEALTH OF THE BAHAMAS
IN THE COURT OF APPEAL
SCCrApp. No. 124 of 2020

B E T W E E N

GENEAR MCKENZIE

Appellant

AND

DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

BEFORE: **The Honourable Mr. Justice Jon Isaacs, JA**
The Honourable Madam Justice Crane-Scott, JA
The Honourable Mr. Justice Milton Evans, JA

APPEARANCES: **Ms. Christina Galanos, Counsel for the Appellant**
Ms. Erica Duncombe-Ingraham, Counsel for the Respondent

DATES: **18 November 2020; 20 November 2020; 15 February 2021**

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Criminal Appeal – Constitutional Application – Article 20 (1) Constitution – Right to a trial within a reasonable time – Failure to award cost

In September 2009, the appellant was arrested in relation to a number of offences that included murder and conspiracy to commit murder. After spending two years and eleven months on remand, the appellant was released on bail. In June 2020, the appellant filed suit alleging that her constitutional rights had been infringed upon having not had a trial within more than ten years. She sought to have the proceedings stayed. The judge heard the matter and found that the appellant's right had been infringed upon but did not stay the proceeding outright but instead gave a ruling that the proceedings would be stayed if the appellant's trial had not commenced by the 23 November 2020, or that the matter would be stayed if the trial was not commenced within 30 days thereafter. It is that decision that the appellant appeals on the grounds inter alia "**The Learned Judge erred when she ensured that the Crown had an opportunity to try the Appellant by ordering that even if jury trials haven't resumed on the Appellant's scheduled trial date, the Crown would nevertheless be given a further opportunity to try the Appellant whenever jury trials resume"** and that **"(iv) The Learned Judge erred when she failed and/or refused to grant costs given the unique circumstances of the case".**

Held: appeal allowed to the following limited extent; if the trial of the appellant does not commence on 23 November 2020, through no fault of the appellant or her Counsel, the trial in relation to the appellant is stayed. Costs for the appellant both here and in the court below are to be taxed if not otherwise agreed.

The Judge granted a stay of the proceedings against the appellant on the condition that jury trials in the Supreme Court had to have resumed by the trial date of 23 November 2020; but if not, within one month of the resumption of jury trials. This order is too nebulous and is not sufficiently precise. It is open ended and should jury trials not begin on 23 November 2020, could result in even greater delay and an exacerbation of the breach of the appellant's rights as found by the Judge. The remedy the Judge fashioned could only lead to causing prolonged distress to the appellant in circumstances where the Judge had already found an unreasonable delay to exist and that the appropriate remedy was a stay. This was an unsustainable result and we ought to intervene to correct the Judge's remedy by providing a date certain for the stay to take effect.

It is expected that when an issue is raised by a party before the court, the matter will be addressed by the court, even if only cursorily. It could never be correct for a court to totally ignore a relief sought by a litigant. Even the briefest of treatment by the court of the issue raised is preferable to outright omission. The appellant has undertaken suit against the State to vindicate her rights; and the Judge has concluded that the appellant's right to a fair trial within a reasonable time has been breached. The Judge has gone so far as to craft a relief to reflect an acknowledgement of seriousness of the breach, namely a conditional stay. It is a feature of litigation that the successful litigant is generally entitled to their costs. There is no circumstance in this case to cause the Court to deviate from the general rule.

Mervin Cameron v Attorney General of Jamaica [2018] JMFCFULL 1 considered
Stubbs v The Attorney General [2013] 1 BHSJ. No. 150 considered
Frank Gibson v the Attorney General [2010] CCH.3 considered
Attorney General's Reference (No 2 of 2001) [2003] UKHL 68 considered
Barker v Wingo (1972) 407 US 514 considered
Taylor v. The Attorney General of the Commonwealth of The Bahamas [2013] 1 BHSJ. No. 218. considered

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REASONS FOR DECISION

Judgment delivered by The Honourable Mr. Justice Jon Isaacs, JA:

1. On 18 November 2020, we heard the submissions of Counsel; and we adjourned the hearing with a promise to render our decision as quickly as possible bearing in mind the urgency of the matter. On 20 November 2020, we delivered an oral ruling allowing the appeal in part. We undertook to put our reasons in writing. This is our reasoned judgment.

Background Facts

2. In September 2009, the appellant was arrested in relation to a number of offences that included murder and conspiracy to commit murder; and taken before S&C Magistrate Derrence Rolle, who adjourned the case to 20 November 2009. The magistrate did not sit on the adjourned

date and the case was adjourned to 23 November 2009. The case did not proceed on the adjourned date and was adjourned further. The preliminary inquiry commenced on 12 May 2010 and continued until 18 February 2011, when the magistrate committed the appellant to stand her trial in the Supreme Court.

3. The appellant had remained in custody until granted bail in the Supreme Court on 22 September 2011. Unable to meet the sum conditioned as the recognizance, $25,000.00, the appellant applied to vary her bail; and in August 2012, Senior Justice Jon Isaacs (as he then was) reduced the bail sum to $9,500.00. After spending two years and eleven months on remand, the appellant was released on bail.

4. I make mention of two matters here. First, because the initial bail sum was in excess of $10,000.00 the practice in the Supreme Court is to require a surety to put up a conveyance of land (commonly referred to as "land papers") that is valued as much as or more than the sum conditioned for bail. The appellant's mother was assisting the appellant in securing the bail sum of $25,000.00 but up to the mother's death on 16 March 2012, had been unsuccessful in her efforts.

5. Continuing the narrative, on or about July 2015, the appellant was served with a voluntary bill of indictment directing her to appear before Turner, J (as he then was) to be arraigned. She did; and pleaded, "Not guilty", to the charges. The matter was transferred to Jones, J's (as he then was) court and on 4 December 2015, the appellant appeared before Jones, J. The matter was adjourned to 24 April 2017 as a back-up trial date and to 9 July 2018, as a substantive trial date. The case was adjourned to 11 March 2016 for case management. In the interim, on 4 January 2016, Ms. Galanos was appointed as Counsel to represent the appellant in her trial. As the appellant's fourth ground of appeal raises the issue of costs, and due to the respondent's submission on the issue, I set out here, the pertinent terms of the Registrar's letter appointing Ms. Galanos:

> **"We are pleased to confirm your agreement to represent Mr. (Sic) Mckenzie the defendant in the above-captioned action, on the charge of MURDER.**
>
> **We are also pleased to enclose copies of statements herewith and to advise that the accused is being informed of your appointment.**
>
> **Fees payable are as follows: $1,000.00 for preparation and the first full day in Court and $300.00 for each subsequent full day in Court. Adjourned date for mention is set for March 11th 2016 before Justice Roy Jones.**

Whilst disbursement or charge for consultation with, for example, a medical expert or the attendance of the same in Court will, in an appropriate case and for a reasonable sum be honored, it is recommended that whenever practical the prior approval of the Registrar be obtained.

Thank you for your assistance herein and we trust that you find this case to be legally interesting and rewarding to conduct."

6. On 11 March 2016, the appellant appeared before Madam Justice Guillamina Archer-Minns ("the Judge"), and the Court started the case management process. The Judge adjourned the case to 18 November 2016. On the adjourned date, the Judge continued the case management process and adjourned the matter to 20 January 2017.

7. The matter came before the Judge on 20 January 2017 and Ms. Galanos produced a "Defendant's Questionnaire" that contained certain requests of the Prosecution. Over the course of the next three adjournments, i.e., 24 February 2017, 10 April 2017 and 21 April 2017, Ms. Galanos advised the Judge that she had yet to receive all of the items she had requested from the Registrar's Office.

8. It appears that the appellant's detention record was not included among the papers provided to the appellant and despite many requests of the Prosecution to provide her with a copy of her detention record, to date, the Prosecution had not produced the same. The appellant contended that the detention record is a critical piece of material that she requires to substantiate her claim that she was oppressed to give her Record of Interview. Another requested item was the appellant's medical records created upon her admission to the Prison. On this occasion the prosecutor, Ms. Viola Barnett, indicated that she would serve Ms. Galanos with all outstanding documents on 24 April 2017; and that she was also seeking to have the matter heard earlier due to its age. The Judge advised the parties that she was still in a trial, hence, the matter was unlikely to come off; but she adjourned the matter to 24 April 2017, for mention. As foreshadowed by the Judge, on 24 April 2017 the case could not go on due to the ongoing trial before her. Therefore, the matter was adjourned to 1 May 2017.

9. On 26 April 2017, upon the Appellant’s application before the Judge to vary her bail conditions so as to have the electronic monitoring device (EMD) removed because it embarrassed her whenever it sounded off while she was at work entertaining tourists, the Appellant secured the variation but was made to surrender her passport. It appears that the appellant had secured employment at the Pink Sands hotel on Harbour Island as a house attendant on 29 October 2015.

10. On 1 May 2017, the parties appeared before the Judge who indicated that she was determined to start the trial on 8 May 2017, the date she instructed the jury to return to court. Only four of the Prosecution witnesses were present. On the 8th, the trial did not start due to multiple

reasons, including the illness of the appellant. Other reasons may have been that the Prosecution was not ready to proceed and the Judge was occupied in another trial. Nevertheless, the matter was adjourned to 15 May 2017 but not before the Judge, dissatisfied with the lack of an original sick certificate to explain the appellant's absence, issued a warrant for her arrest.

11. On 15 May 2017, the appellant did not appear as she was still on sick leave; but Ms. Galanos appeared and, the original sick slip having been produced, the Judge cancelled her warrant of arrest. The Judge adjourned the matter to 18 May 2017, but the appellant was still on sick leave. The prosecution was also experiencing a difficulty because one of their witnesses was due to have a baby in August 2017 but had taken ill. In deference to this situation, the Judge advised the parties that she would not set a trial date before October 2017. The Judge then gave a backup trial date of 13 November 2017, and a substantive trial date for 9 July 2018. A pre-trial review was set for 3 November 2017.

12. It is unclear what transpired on 3 November 2017, but on 10 November 2017, the Judge advised the parties that although the date of 13 November 2017 had been given as a backup date for the trial to begin, she was engaged in an ongoing trial; and so the Judge enquired whether the appellant's case could be adjourned to be heard by another judge. The parties agreed to this; and the matter was adjourned to 13 November 2017, for the trial to commence before Evans, J (as he then was). Unfortunately, Evans, J declined to hear the case due to an apparent familial connection to one of the appellant's co-accuseds.

13. The matter came on before the Judge again but she had only recently empanelled a jury in another case and, therefore, could not proceed with the appellant's case. The Judge attempted to find another backup trial date, as all of the parties were ready to proceed at that time. She adjourned the case to 26 February 2018 as a backup trial date and instructed the parties to return on 26 January 2018, for a pre-trial review. On the adjourned date, Ms. Galanos informed the Judge that the appellant's detention record had not been provided to the Defence.

14. On 26 February 2018, the case could not proceed because Ms. Eleanor Albury, Counsel for one of the co-accuseds, was in another trial. The matter was fixed for trial on 22 October 2018 and the Judge told the Crown that this matter ought to take precedence over any other matter. However, on the adjourned date, the Judge was engaged in another murder trial. Over the passage of the next two years the case came on for hearing on several occasions for case management until a trial date of 23 November 2020 was fixed on 15 November 2019.

15. At paragraph 38 of her affidavit in support of her constitutional application that had been filed in the Supreme Court on 17 June 2020 the appellant sought to show the prejudice she had experienced due to the delay, and averred as follows:

> **"38. The constant delay in bringing this matter on for trial has adversely affected my personal life as follows:**

a. On 12th March, 2019, I was lawfully married to Edward Preddie, who is from Trinidad. A copy of my marriage certificate is now produced and shown to me and is attached hereto and marked Exhibit "GM4". My husband is currently in the country on a work permit and he is employed at Island Site Development (ISD). Since our marriage, I made several attempts to apply for a spousal permit for my husband. However, my passport, which was surrendered as stated above, is a requirement in this process. Even though my husband's employer renewed his work permit until August of 2020, we both still feel extremely uncertain and unstable about the situation as with all jobs, there is no guarantee that they will keep him employed and renew his work permit once it expires.

b. I have a six year old daughter and a four year old daughter and I am unable to obtain a passport for them without my passport.

c. It has been extremely difficult for me to find a job, as most jobs require you to produce your passport. In May of 2019, I was hired by Bahama Subs & Salads on Prince Charles. They constantly asked for my passport and I was unable to give it to them because I had to surrender it as stated above. Therefore, I was living in a constant state of fear and uneasiness that I would be terminated at any time for failure to produce my passport. I eventually ceased my employment with Bahama Subs & Salads in or about August of 2019.

d. Because of the difficulty I was experiencing in finding a job, I decided that it perhaps would be best if I started my own business. However, my passport is also a requirement in this regard.

e. I am unable to travel. Before I was lawfully married to Edward Preddie, he wanted to take me to Trinidad to meet his family. However, as I had to surrender my passport, I was unable to go. Further, I am unable to go on any family vacations whatsoever. My sisters travel to the United States of America at least twice per year and I would love to go with them to do something as simple as shopping for school supplies for my children; but without my passport, I can't even do that.

f. As this matter has been hanging over my head for nearly ten years, I frequently experience bouts of depression and sadness.

> **I an (sic) in a constant state of uncertainty and instability and as such, I cannot plan anything significant for my future, as I simply don't know my fate as it relates to this trial. As such, sometimes it is hard to get out of bed in the mornings to face another day."**

The Stay Application in the Supreme Court

16. On 17 June 2020, the appellant filed an Originating Notice of Motion seeking, inter alia the following reliefs:

> a. A declaration that Article 20(1) of the Constitution of The Bahamas, which affords the applicant the right to a fair hearing within a reasonable time by an independent tribunal established by law has been infringed;
>
> b. A declaration that Article 20(2)(c) of the Constitution of The Bahamas, which affords the applicant adequate time and facilities for the preparation of her defence has been infringed;
>
> c. An order that the proceedings against the applicant be stayed;
>
> d. An order that the Applicant's passport be returned to her in any event;
>
> e. Costs;

17. In the hearing before the Judge, the appellant contended, inter alia, that the only evidence against the appellant was a contested record of interview - contested because it was allegedly extracted by oppression - and in any event, it did not implicate her in any of the offences with which she was charged. The appellant had also filed an affidavit in support of her application.

18. The Judge concluded that the appellant's Article 20(1) right to a trial within a reasonable time had been breached. There does not appear to have been any analysis by the Judge of the factors which are to be considered before arriving at such a conclusion. See **Barker v Wingo** (1972) 407 US 514 and **Taylor v. The Attorney General of the Commonwealth of The Bahamas** [2013] 1 BHSJ. No. 218.

19. Thereafter, the Judge went on to determine what remedy should be afforded to the appellant. In performing that exercise the Judge remarked:

> **"44. The Court so finds in these circumstances, there has been a breach of the Applicant's constitutional right to receive a trial within a reasonable time. The Court is cognizant that the Applicant herein is seeking, a stay of the proceedings, an ultimate remedy. However, the Applicant has not proved on a balance of probabilities that the breach of her constitutional right in this regard would result in her not receiving a fair trial, which is a prerequisite of granting a stay. In all of the**

> **circumstances, the Court finds that a fair trial can be had as there are no exceptional circumstances advanced before the Court to impress upon the Court to exercise its discretion to grant a permanent stay of the proceedings.**
>
> **45. The Court notes that there are any number of other remedies as outlined in the case of The Attorney General's Reference No. 2 of 2001 available to an applicant whose rights may well have been contravened pursuant to the Constitution of The Bahamas. The appropriate remedy depends on the nature of the breach which in this case, is one of delay in the prosecution of the matter.**
>
> **46. There are any number of safeguards embodied within the trial process which will ensure that the Applicant receives a fair trial. Mere delay in and of itself is not sufficient for the Court to invoke the ultimate remedy. The Court is further of the view that this case is not complex in nature and the Respondent has advised that the matter is ready for trial."**
>
> **47. In all of the circumstances of this case, the Court hereby orders that the matter is brought on for trial on its Fixed Trial Date of 23 November 2020 subject to the resumption of jury trials otherwise, no later than one month thereafter. Should the matter not proceed to trial within the time specified herein the matter is thereafter considered stayed in relation to the Applicant only.**

20. Thus, the Judge did not grant fully the relief the appellant sought. Instead, on 7 October 2020, the Judge made an order to the following effect:

> **"In the event that jury trials have commenced by 23rd November, 2020, the Crown must commence the trial against the Appellant on 23rd November, 2020 otherwise the matter is stayed; OR**
> **In the event that jury trials have not commenced by 23rd November, 2020, the Crown must commence the trial against the Appellant within thirty (30) days after jury trials have commenced."**

The Appeal

21. The appellant was no doubt disappointed that the Judge had not granted the stay outright. Hence, she launched her appeal against the Judge's order by filing a document intituled, "Notice of Appeal or Application for Leave to Appeal Against Judge's Refusal to Grant Stay" on 26 October 2020. She relied on the following grounds:

> **"(i) The Learned Judge erred when she failed and/or refused to grant a stay of the said proceedings against the Appellant considering the unique circumstances of the case;**
>
> **(ii) The Learned Judge erred when she ensured that the Crown had an opportunity to try the Appellant by ordering that even if jury trials haven't resumed on the Appellant's scheduled trial date, the Crown would nevertheless be given a further opportunity to try the Appellant whenever jury trials resume;**
>
> **(iii) The Learned Judge erred when she failed and/or refused to award damages given the unique circumstances of the case;**
>
> **(iv) The Learned Judge erred when she failed and/or refused to grant costs given the unique circumstances of the case;**
>
> **(v) The Learned Judge erred when she failed and/or refused to return the Appellant's passport to her given the unique circumstances of the case;**
>
> **(vi) That under all of the circumstances of the case, the Learned Judge's decision is unsafe or unsatisfactory;**
>
> **(vii) That the Appellant was not treated fairly;"**

22. The eighth ground is merely a generally expressed holding ground and of no moment to this appeal.

23. We note at the outset that the respondent had admitted in their submissions that this case is not one with complex issues albeit it does involve three defendants, a number of witnesses and a possible voir dire. We understand this concession to mean that this factor inures to the appellant's benefit in her complaint that a trial has not been had within a reasonable time.

Ground (i) - The Learned Judge erred when she failed and/or refused to grant a stay of the said proceedings against the Appellant considering the unique circumstances of the case.

24. Ms. Galanos submitted that the Judge erred when at paragraph 44 of her judgment she said that:

> **"... the Applicant has not proved on a balance of probabilities that the breach of her constitutional right in this regard would result in her not receiving a fair trial, which is a prerequisite of granting a stay."**

25. Ms. Galanos argued that were the Judge's reasoning in this regard, to wit, there must be proof that a fair trial cannot still be had, be the threshold an applicant must cross in every case of delay, "then the remedy of a stay would not be appropriate in any case; even in cases where the delay is 20 plus years long".

26. In **Attorney General's Reference (No 2 of 2001)** [2003] UKHL 68, [2004] 2 AC 72 Lord Bingham said, inter alia, at paragraph 22 that "the threshold of proving a breach of the reasonable time requirement is a high one, not easily crossed".

27. The Judge found at paragraph 36 that:

> **"In these circumstances, it is the Court's view that eleven plus years having elapsed without a trial being had is an inordinate amount of time, therefore, the constitutional rights of the Applicant have indeed beenbreached."**

28. The respondent has not appealed this finding of the Judge. Thus, a breach of the appellant's Article 20 right to a trial within a reasonable time having been established to the satisfaction of the Judge, she then had to decide what relief ought to be accorded to the appellant in the circumstances.

29. In a case emanating from Barbados and heard by the Justices of the Caribbean Court of Justice ("the CCJ"), **Frank Gibson v the Attorney General [2010] CCH.3**, that is more widely known for that court's decision that indigent defendants ought to be provided with the facilities of an expert should they so desire, if the State relies on one of their own (the equality of arms principle), the CCJ also considered Gibson's complaint about the five years or so that he had been awaiting trial and that this breached his section 18 right to a fair hearing within a reasonable time. This section is akin to our Article 20 of the Constitution which states:

> **"20. (1) If any person is charged with a criminal offence, then unless the charge is withdrawn, the case <u>shall be afforded a fair hearing within a reasonable time</u> by an independent and impartial court established by law." [Emphasis added]**

30. At paragraphs 62 to 64 the court said:

> **"[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. Quite apart from prejudicing the operation of section 13(3), to so hold, as some other jurisdictions have done, would create too great a risk of unnecessarily placing trial courts in the uncomfortable position of having to choose between equally undesirable**

alternatives, namely: to permit a possibly dangerous criminal to avoid being tried or else to raise to an unacceptably high level the threshold for deeming unreasonable obviously inordinate delay. Having an inevitable permanent stay or dismissal of the charge as the single sanction for breach of the reasonable time guarantee may well reward the guilty, who escape being brought to justice, even as it does little or nothing for the innocent who cannot regain the time they have lost suffering under a cloud of suspicion or worse, being remanded in custody. We accept the view of the Inter-American Court of Human Rights that "the State's duty to wholly serve the purposes of justice prevails over the guarantee of reasonable time" [FN34]. The fundamental objective of the reasonable time guarantee is not to permit accused persons to escape trial but to prevent them from remaining in limbo for a protracted period and to ensure that there is efficient disposition of pending charges. The guarantee is an incentive to the State to provide a criminal justice system where trials are heard in a timely manner.

[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 [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.

[64] Where breach of the reasonable time guarantee is established before trial the court should consider issuing a

suitable declaration denouncing the breach and making an order that expedites the hearing. If the accused is in custody then the court must have regard to section 13(3) of the Constitution which requires the release on bail of the accused. If at the trial there is a conviction then the trial judge should always consider a reduction in the severity of the sentence in light of the delay. In this context the question may arise as to whether the severity of a mandatory sentence can be reduced on this ground but this is a matter that is far too important for us to comment upon without receiving specific submissions on it from counsel." [Emphasis added]

(See **Stubbs v The Attorney General** [2013] 1 BHSJ. No. 150.**)**

31. Their Lordships continued at paragraph 68:

> **"[68] While the overall delay is serious it must be balanced by the fact that Gibson is accused of an extremely serious crime committed in a particularly gruesome manner. The general public and the family members of the victim have a deep interest in the accused being brought to trial. In all the circumstances, we were not of the view that a permanent stay or dismissal of the charge was warranted in this case. Instead, we held that at this stage the appropriate relief was to: uphold the finding that there had been a breach of Gibson's right to a hearing within a reasonable time; alter the conditions for his release by granting him bail with a surety in the sum of $10,000.00 on the condition that he report twice weekly on Mondays and Fridays at the police Station closest to his residence and by ordering further that any passport or travel document now in his possession or issued to him be deposited and retained by the Commissioner of Police pending completion of his trial or the dismissal of the charge against him; stay temporarily the criminal proceedings and issue the additional orders alluded to at [41] above so as to ensure either that a fair trial is held as soon as possible or else an opportunity be provided for arguments to be made to us as to whether the stay ought to be removed or be made permanent."**

32. In the Jamaican case of **Mervin Cameron v Attorney General of Jamaica** [2018] JMFCFULL 1 after referring to Lord Hobhouse's statement in Attorney General's Reference, speaks of this complacency in the following terms at paragraph 132 to 133:

> **"[132] The consequence of Lord Hobhouse's approach is that no matter how egregious the delay, no matter how dilatory the state is, as long as the trial can be said to be fair such a trial can never ever be barred unless there is some undermining of the trial process itself or some evidence of abuse of power or manipulation by the state. This is (sic) explains why, in Jamaica, trials are taking place in quite a few instances nine years after the incident. To borrow the words of the Canadian court, a culture of complacency has taken root and that culture has been nourished by the view that it matters not how long it takes as long as the defendant can meet the prosecution case then it cannot be said that a fair trial is no longer possible. If Lord Bingham's approach represents the law under the new Charter then section 14(3) is completely useless in terms of securing a stay without proof of the inability to get a fair trial.**
>
> **[133] I do not think that this is what the Jamaican people want under the new Charter. They want a system that disposes of criminal cases within an acceptable timeframe. The consequence of Lord Hobhouse's interpretation in Jamaica has been that trials have been taking longer and longer to come to trial. Any judge who has been in the criminal courts in Jamaica sees that there is no great urgency in getting matters tried on the date they are set. It is common to hear from the Crown and regrettably from the defence, 'Oh it is only the first trial date' meaning that there is no need to get alarmed about the trial not taking place because it is only the first trial date."**

33. At paragraph 63 of **Gibson** (supra) the CCJ stated:

> **"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."**

34. The difficulty I have with the formulation of this ground is that the Judge did grant a stay albeit a conditional stay. It cannot be said therefore that the Judge failed and/or refused to grant a stay. I would in the circumstances approach the appellant's complaint as one challenging the failure of the Judge to stay the criminal proceedings immediately.

35. Inasmuch as the Judge concluded that a stay was the appropriate remedy to reflect the constitutional breach due to delay, and the respondent was content with that conclusion since

they have not filed a respondent's notice challenging her choice of relief, it remained only for the Court to consider that aspect of the appellant's appeal which seems, to us, to segue nicely into ground (ii) as I have paraphrased it below.

Ground (ii) - The learned Judge erred by giving the Crown an opportunity to try the Appellant on some indeterminate date

36. Lord Bingham had said at paragraph 24 in **Attorney General's Reference** (Supra):

> **"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 before the hearing, the appropriate remedy may be a public acknowledgement of the breach, action to expedite the hearing to the greatest extent practicable..."**

37. It is apparent that the Judge sought to heed Lord Bingham's advice but in the process arrived, in our view, at an unwieldy result. The Judge granted a stay of the proceedings against the appellant on the condition that jury trials in the Supreme Court had to have resumed by the trial date of 23 November 2020; but if not, within one month of the resumption of jury trials. This order is too nebulous and is not sufficiently precise. It is open ended and should jury trials not begin on 23 November 2020, could result in even greater delay and an exacerbation of the breach of the appellant's rights as found by the Judge.

38. The Judge was clearly aware "**that there are any number of other remedies**" that she could have granted to the appellant instead of the "nuclear option" of a permanent stay. She concluded that a stay was the appropriate remedy in the appellant's case; and that was what she granted, albeit a conditional stay.

39. The Judge did afford the respondent a further opportunity to prosecute the appellant when she fixed 23 November 2020 as a date to do so. This may be viewed as an attempt by the Judge to balance the rights of the appellant not to be kept in suspense as to her fate or to agonize over a possible adverse outcome of her trial against the interest of the society in general and the victim's family in particular in the successful prosecution of those who were responsible for his death.

40. In **Cameron** (supra) Sykes, J observed at paragraphs 165-6 that:

> **"[165] The evidence is that the DPP declined to use her powers to have the case brought to the Home Circuit Court. There is no indication when the preliminary inquiry will resume or even if it will resume. On this understanding what would be the point of setting a specified time within which to complete the preliminary inquiry when the evidence suggests that this is not**

> **likely to happen? There is no evidence that the concerns of the DPP have been addressed.**
>
> **[166] Mr Cameron has established a violation of his rights under section 14(3) of the Charter of Fundamental Rights and Freedoms. I am of the view that a stay of the preliminary inquiry is appropriate. A consequential order is that the Crown cannot seek to try Mr Cameron for any offence, whether by indictment or information or any other mode of trial whatsoever for any offence arising out of the facts of the case which led to him being charged with the offence of murder. Costs to the claimant to be agreed or taxed."**

41. At paragraph 269 d) of **Cameron**, Fraser, J (with whom Anderson, J agreed) provided the following relief, inter alia:

> **"d) Unless there is earlier intervention by the Director of Public Prosecutions the preliminary inquiry must be completed and a determination made as to whether the claimant should be committed for trial on or before May 30, 2018, failing which, any trial of the claimant on the charges on which he is currently before the Parish Court shall be stayed."**

42. Unfortunately, the remedy the Judge fashioned could only lead to causing prolonged distress to the appellant in circumstances where the Judge had already found an unreasonable delay to exist and that the appropriate remedy was a stay. In our view this was an unsustainable result and that we ought to intervene to correct the Judge's remedy by providing a date certain for the stay to take effect.

Ground (iii) - The Learned Judge erred when she failed and/or refused to award damages given the unique circumstances of the case

43. Ms. Galanos indicated to us that the appellant was not vigorously pursuing this ground; and we consider that her restraint is warranted for the reasons expressed in paragraph 69 of **Gibson**:

> **"[69] As to the issue of the propriety of an award of damages which was specifically raised in this case, we disagree with the court below that such an award could only have been warranted if Gibson had established proof of damage or if he had been unlawfully detained or abused. Depending on the circumstances 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. It would, however, be**

> **repugnant to the public conscience that such an award should be afforded to an accused for the breach of that latter right when there is still the possibility that the accused may be tried and convicted for the offence with which he has been charged. 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. And 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. It would therefore be inappropriate now to make any award of damages for this breach."**

Ground (iv) - The Learned Judge erred when she failed and/or refused to grant costs given the unique circumstances of the case

44. The appellant submits that in the circumstances of this case she ought to have received her costs in the action and that the Judge erred when she did not make an award of costs. The respondent submitted that on their review of the Judge's decision, she did not address the issue of costs raised by the appellant. Yet, they go on to submit that the Judge was correct to do so. This is baffling. It is expected that when an issue is raised by a party before the court, the matter will be addressed by the court, even if only cursorily. It could never be correct for a court to totally ignore a relief sought by a litigant. Even the briefest of treatment by the court of the issue raised is preferable to outright omission.

45. The respondent submitted that as Counsel for the appellant was appointed to represent the appellant at his trial by the Registrar of the Supreme Court, it is to the Registrar that she must look to for her costs. This submission ignores the very letter from the Office of the Registrar relied upon by the respondent. The letter limits the ambit of Counsel's remit to the trial itself. It makes no provision for bail applications or constitutional applications. Even if a defendant requires the services of an expert, he would be well advised to first seek the approval of the Registrar for payment of the attendant charges before engaging such services lest the charges be deemed exorbitant subsequently by the Registrar. The letter dated 4 January 2016, states, inter alia:

> **"Whilst disbursements or charge for consultation with, for example, a medical expert or the attendance of the same in Court will, in an appropriate case and for a reasonable sum be honored, it is recommended that whenever practical the prior approval of the Registrar be obtained."**

46. The appellant has undertaken suit against the State to vindicate her rights; and the Judge has concluded that the appellant's right to a fair trial within a reasonable time has been breached.

The Judge has gone so far as to craft a relief to reflect an acknowledgement of seriousness of the breach, namely a conditional stay. It is a feature of litigation that the successful litigant is generally entitled to their costs. There is no circumstance in this case to cause the Court to deviate from the general rule.

47. Thus, the costs of the appeal and in the court below are the appellant's; such costs to be taxed if not otherwise agreed.

Conclusion

48. Although we are not entirely satisfied that the Judge carried out an adequate analysis of the issues and factors involved when hearing a constitutional application to arrive at her conclusion that there has indeed been an Article 20(1) breach, she has nevertheless found that there was a breach of the appellant's right to a fair trial within a reasonable time. We hold the view, however, that the relief she has crafted cannot be sustained because as presently structured, viz, its open-endedness, it defeats the relief she thought was the appropriate remedy.

49. Thus, we allow the appeal to the following limited extent, that is to say, that if the trial of the appellant does not commence on 23 November 2020, through no fault of the appellant or her Counsel, the trial in relation to the appellant is stayed.

50. The costs of the action are as indicated above.

The Honourable Mr. Justice Isaacs, JA

The Honourable Madam Justice Crane-Scott, JA

The Honourable Mr. Justice Evans, JA