THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE
PORT OF SPAIN

CR No. 116 of 2014

BETWEEN

THE STATE

AND

NYRON DANIEL
RICHARD RAYMOND
JODI CRUICKSHANK

Before the Honourable Mr. Justice Hayden A. St.Clair-Douglas

Date of delivery: January 14, 2021

Appearances:

Ms. Giselle Ferguson-Heller and Ms. Indira Chinebass for The State
Mr. Kelston Pope for Nyron Daniel
Mr. Chase Pegus for Richard Raymond
Mr. Brent Winter for Jodi Cruickshank

Ruling on Application to Stay Proceedings

1. The applicant, Jodi Cruickshank, is before this court, along with two others, charged with offences of robbery with violence, shooting with intent, possession of a firearm and possession of ammunition. All of the offences are alleged to have been committed on December 17, 2005 at Santa Cruz. Jodi Cruickshank has asked this court to exercise its inherent jurisdiction and accede to his application which contends that

these proceedings should be stayed as an abuse of the process of the court. The basis of Mr. Cruickshank's contention of abuse is the delay, which has extended to 15 years, from the date of the alleged offence without a trial having taken place. The application contends that, in the circumstances, the continuation of the proceedings is manifestly unfair and unjust, and it tends to bring the administration of justice into disrepute.

Background

2. On December 17, 2005 three armed men carried out a robbery at Gomez Supermarket at Cantaro Village, Upper Santa Cruz. The faces of the robbers were covered. An alarm was raised as the robbery was being carried out and a person who happened to be nearby confronted the robbers. He was carrying a licensed firearm. There was an exchange of gunfire. The robbers escaped.

3. Cruickshank was arrested on January 19, 2006. He, and the other accused, were formally charged on January 23, 2006 with offences related to the robbery.

4. A preliminary enquiry commenced at the Magistrate's Court and the accused were committed to stand trial on April 28, 2008. The application states that the depositions taken during the committal proceedings were received at the Office of the Director of Public Prosecutions on May 20, 2009. This has not been disputed. The indictment against the accused was filed on August 26, 2014.

The identification issue

5. Cruickshank states that he first appeared at the High Court on June 9, 2015. He was unrepresented. Counsel was appointed on his behalf on April 7, 2016. Counsel pursued the usual requests for disclosure along with the taking of instructions. The instant application makes it clear that the guilt or innocence of the applicant Cruickshank revolves around the issue of identification. For purposes of discussion of the instant application the issue is cast in the following manner: does the prosecution evidence prove that he was one of the persons who robbed Gomez Supermarket on December 17, 2005.

6. The narrative of events makes reference to counsel's requests for disclosure of material by the prosecution. There is a complaint that some of the material requested has not been supplied. The requested material related to identification procedures carried out by the police upon the arrest of the applicant Cruickshank. Identification Parade Forms and extracts from the Station Diary of the relevant Police Station have been requested, along with copies of statements given by eyewitnesses. Counsel has repeated his requests for this material: the first descriptions of the suspects as recorded by the police; the ID Parade Forms which ought to have come into existence at the time of the Identification Parades; the extracts from the relevant Police Station Diaries relating to the Identification Parades. While some diary extracts have been supplied to counsel for Cruickshank, the prosecution has not supplied the first descriptions, nor have they supplied the ID Parade Forms.

7. A significant portion of this application is devoted to persuading this court that the evidence of visual identification which the prosecution will seek to rely on is unreliable. I intend no disrespect to counsel's thorough summarization of the evidence of the various witnesses, and I express no view with regard to counsel's contention that the evidence is unreliable. A careful reading of the submissions reveals that counsel has sought to combine an application which seeks to stay delayed proceedings as an abuse of process, with an application to withdraw a case from the consideration of the factfinder because of the substandard quality of evidence of visual identification. The latter application has been made before the evidence has actually been presented.

8. As I understand the applicable principles, these two types of application ought not to be combined.

9. The appellant in *R v F*[1] had been charged with counts of buggery and indecent assault. There had been delayed reporting of the alleged sexual abuse. The appellant had given notice at the outset of the trial that he intended to request a stay of the proceedings on the ground of abuse of process, based on the delayed reporting of the

[1] [2011] EWCA Crim 1844, [2012] Q.B. 703, [2012] 2 W.L.R. 1038, [2012] 1 All E.R. 565, [2011] 2 Cr. App. R. 28.

alleged sexual abuse. The judge declined to rule on the application at the outset and the trial proceeded. The judge considered the application to stay at the close of the prosecution case.

10. In making his application the appellant argued that the prosecution evidence was weak as at the close of its case. The judge was of the view that, apart from potential prejudice that is inherent from prolonged delay, no specific prejudice had been established. The judge could find no "real satisfactory explanation" for the complainant's delay in reporting the alleged incidents. The judge concluded that "a jury properly fully directed could not safely return a verdict of guilty on the evidence before them and that, therefore, the matter should be stopped at this stage". The jury was discharged.

11. On appeal by the Crown, the English Court of Appeal stated that an application to stay proceedings for abuse of process on grounds of delay and a submission of "no case to answer" were two distinct questions which must receive distinct and separate consideration. An application to stay for abuse of process on the grounds of delay had to be determined in accordance with the principles set out in *Attorney General's Reference (No.1) of 1990*[2]. By contrast, an application to stop the case on the grounds that there is no case to answer had to be determined in accordance with *R. v Galbraith*[3]. In attempting to determine whether a conviction would be safe, or whether a jury could safely convict, the judge would be evaluating the weight and reliability of the evidence, which was the task of the jury. The proper question for the judge was whether, on an overall view of the evidence, the jury could properly convict.

12. The Court of Appeal stated that an application to stay for abuse of process ought ordinarily to be heard and determined at the outset of the case, and before the evidence was heard, unless there was a specific reason to defer it to a later stage. An application to stop the case on the grounds that there was no case to answer required a different approach and a different type of evaluation.

[2] [1992] Q.B. 630, (1992) 95 Cr. App. R. 296.
[3] (1981) 73 Cr. App. R. 124

13. It has long been recognized that *R v Turnbull*[4] has established the appropriate approach to the issues of the evaluation of evidence of visual identification, and the determination of the way in which a case that is based wholly or substantially on the correctness of one or more identifications of the accused, should proceed. The judge has the responsibility of warning the jury of the special need for caution before convicting an accused in reliance on the correctness of one or more visual identifications. The judge must inform the jury why it is necessary that they should exercise caution; he must direct them to closely examine the circumstances under which the identification came to be made.

14. How do the responsibilities of the judge in an identification case accord with his duty to evaluate the evidence on a no-case submission of insufficiency of evidence? The Privy Council has advised that where a trial judge considers that the quality of identification evidence is poor and insufficient to found a conviction, and there is no other evidence to support that identification evidence, he should withdraw the case from the jury. This can only be done, however, at the close of the prosecution's case.[5] What is significant is that this assessment is to be made *after* not *before*, the evidence has been presented.

15. In consonance with the approach set out in *R v F*[6], I take the view that an application to stay proceedings for abuse of process on grounds of delay and an assessment of the quality of identification evidence are distinct matters which must receive distinct and separate consideration. The law is clear that the latter assessment is not to be undertaken until the prosecution's evidence has been presented. For these reasons, I decline to rule on the strength or otherwise of the proposed evidence of visual identification in the case for the prosecution. This ruling will concentrate exclusively on the issue of delay and the contention of abuse of the process of the court.

[4] [1977] Q.B. 224, [1976] 3 All E.R. 549, (1976) 63 Cr. App. R. 132, [1976] 3 W.L.R. 445.
[5] *Daley v R* [1994] 1 A.C. 117, [1993] 3 W.L.R. 666, [1993] 4 All E.R. 86, (1994) 98 Cr. App. R. 447.
[6] [2011] EWCA Crim 1844, [2012] Q.B. 703, [2012] 2 W.L.R. 1038, [2012] 1 All E.R. 565, [2011] 2 Cr. App. R. 28.

Delay - the passing of time

16. I have noted that the offences with which the accused is charged are alleged to have occurred on December 17, 2005, while the indictment was filed on August 26, 2014. He made his first appearance at the High Court on June 9, 2015. The instant application has gone into the minutiae of time elapsed at the various stages that have brought the applicant to the current stage in proceedings. That analysis demonstrates, for example, that the conclusion of the preliminary enquiry took 2 years, 3 months 10 days, and that that time period was the "responsibility" of the Port of Spain Magistrates' Court. There is a similar enumeration of the time between the arrival of the depositions at the Office of the Director of Public Prosecutions and the filing of the indictment (5 years, 3 months, 6 days); and the High Court (6 years 14 days – as of September 2020).

17. The application speaks of the "dilatoriness" on the part of the Magistrates' Court in transmitting the depositions to the Office of the Director of Public Prosecutions. The applicant states that there was here a "patent contravention" of s 25(1) of the Indictable Offences (Preliminary Enquiry) Act, Ch 12:01, which stipulates that at the conclusion of the preliminary enquiry the Magistrate "shall, without delay" transmit the complaint, the depositions and exhibits and other material to the Director of Public Prosecutions. The application notes that, in aggregate, there exists a cumulative delay of approximately 14 years and 8 months (as at the date the application had been filed – September 2020).

18. The delay that the applicant complains about is, regrettably, typical rather than unusual. It accords with the progress of other matters that make their way to the High Court and through the process of pre-trial review and eventual trial. The Court of Appeal has observed, in *Sookermany v Director of Public Prosecutions*[7], that the right of an accused to be tried within a reasonable time must in every case be balanced against the interest in the public of having him tried. In performing this balancing exercise, the court is entitled to take into account the prevailing system of legal

[7] (1996) 48 WIR 346

administration and the prevailing economic, social and cultural conditions that obtain in the specific local jurisdiction.

19. This analysis should not be interpreted as endorsing, condoning or turning a blind eye to prosecutorial sloth, or police investigative inefficiency, or to the endemic delays of the courts. This court acknowledges that, to the extent that it is part of the equation, it is part of the problem. It is not intended to enumerate areas of deficiency or inefficiency or areas where improvements could, perhaps obviously, be implemented. This is a ruling on an application to stay proceedings, it is not a white paper or similar report. It is, admittedly, not an answer to the instant application to stay the proceedings to say that the delay is typical, that this is one of many matters that have been delayed. But it is an acknowledged approach to the problem of delay to say that there is an inherent public interest in having trials of serious criminal offences proceed, despite that delay.

Prejudice to the applicant - presumptive prejudice

20. In seeking to demonstrate prejudice to the applicant the application deals first with presumptive prejudice and refers to the decision of the English Court of Appeal in *R v Telford Justices, ex p Badhan*[8]. In *Badhan*[9] a complaint of rape was made 15 years after the alleged offence; charges were consequently brought against the defendant. The defendant applied for judicial review of the justices' refusal of his application that they should not proceed as examining justices to inquire into the allegation after such a lapse of time. The Court of Appeal granted his application, holding that the justices had an inherent jurisdiction to refuse to inquire into an offence on the ground that to do so would be an abuse of process. The court stated that it would be an abuse of process for a prosecution to be brought so long after the commission of the alleged offence and that it was no longer possible for the accused to have a fair trial, irrespective of whether the alleged victim was to blame for the lapse of time.

[8] [1991] 2 Q.B. 78, [1991] 2 W.L.R. 866, [1991] 2 All E.R. 854, (1991) 93 Cr. App. R. 171.
[9] ibid.

21. *Badhan*[10] was decided in December 1990. In April 1992 the Court of Appeal returned to the question of abuse of process arising out of delay in *Attorney General's Reference (No 1 of 1990)*[11]. The foundational basis of the contention of abuse in *Attorney General's Reference*[12] was different from that which had obtained in *Badhan*[13]. There had been a delayed complaint of rape in *Badhan*[14]; the alleged victim had not gone to the police until some 16 years after the alleged offence. In *Attorney General's Reference*,[15] the "disputed incident" was an arrest made by a police officer. Complaints were made about the conduct of the police officer at the time of the arrest. An investigation had been commenced and adjourned pending the outcome of criminal proceedings against the persons who had been arrested. There was, therefore, on the part of the police officer, a currency of awareness of the allegation of wrongdoing, unlike the state of affairs in *Badhan*[16]. After the arrested persons had been acquitted the police officer was served with summonses alleging assault occasioning actual bodily harm. This was less than two years after the arrest. His trial at the Crown Court was due to proceed just over two years after the disputed incident. He submitted that, in view of the delay, the proceedings constituted an abuse of the process of the court.

22. The court in *Badhan*[17] had stated that, in cases where the length of elapsed time is due to some act or omission on the part of the prosecuting authority which is "unjustifiable", where an accused can show on the balance of probability that he has been or will be prejudiced in the preparation or conduct of his defence, then an abuse of process will be found. On the issue of presumptive prejudice, the court further suggested that where the period of delay is long the court can infer, without proof, that there has been prejudice to an accused.

[10] ibid.
[11] [1992] Q.B. 630, [1992] 3 W.L.R. 9, [1992] 3 All E.R. 169, (1992) 95 Cr. App. R. 296.
[12] ibid.
[13] [1991] 2 Q.B. 78, [1991] 2 W.L.R. 866, [1991] 2 All E.R. 854, (1991) 93 Cr. App. R. 171.
[14] ibid.
[15] [1992] Q.B. 630, [1992] 3 W.L.R. 9, [1992] 3 All E.R. 169, (1992) 95 Cr. App. R. 296.
[16] [1991] 2 Q.B. 78, [1991] 2 W.L.R. 866, [1991] 2 All E.R. 854, (1991) 93 Cr. App. R. 171.
[17] [1991] 2 Q.B. 78, 91.

23. The Court of Appeal in *Attorney General's Reference*[18] acknowledged that a court has the power to intervene to prevent its process from being used to perpetuate an abuse. It cited *R v Derby Crown Court, Ex parte Brooks*[19], where it was noted that an abuse will have arisen if the prosecution has manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality, or where 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. Having confirmed and acknowledged that the power exists, the court in *Ex parte Brooks*[20] went on to point out the purpose for which the power must be used:

> 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, for, as Lord Diplock said in *Sang* (1979) 69 Cr.App.R. 282, 290, [1980] A.C. 402, 437: '… the fairness of a trial … is not all one-sided; it requires that those who are undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted.'

24. In *Attorney General's Reference*[21] the Court of Appeal considered it appropriate to add to that statement of principle only by stressing a point that it thought was sometimes overlooked: that the trial process is itself equipped to deal with the bulk of complaints that typically form the basis of applications for a stay.

25. In tracing the development of the law, the court in *Attorney General's Reference*[22] noted recent departures from the guidelines established by *Ex parte Brooks*[23] which were 'not easy to reconcile'[24]. The court noted that the earlier and stricter rule, as set out in *Ex parte Brooks*[25], appeared to have been broadened by subsequent decisions. The court found itself 'albeit reluctantly, forced' to agree with the proposition, part of

[18] [1992] Q.B. 630, [1992] 3 W.L.R. 9, [1992] 3 All E.R. 169, (1992) 95 Cr. App. R. 296.
[19] (1985) 80 Cr. App. R. 164, 169.
[20] ibid.
[21] [1992] Q.B. 630, [1992] 3 W.L.R. 9, [1992] 3 All E.R. 169, (1992) 95 Cr. App. R. 296.
[22] [1992] Q.B. 630, [1992] 3 W.L.R. 9, [1992] 3 All E.R. 169, (1992) 95 Cr. App. R. 296.
[23] (1985) 80 Cr. App. R. 164, 169
[24] [1992] Q.B. 630, 642.
[25] ibid.

the point of law referred to the appeal court for its consideration, that proceedings upon indictment may be stayed on the grounds of prejudice resulting from delay in instituting proceedings even though that delay had not been occasioned by any fault on the part of the prosecution. The court's reluctant acquiescence was based, in part, on the decision in *Badhan*[26] (which, it is to be noted, did not relate to proceedings on indictment but dealt with the power of examining justices to refuse to inquire into an offence), and in part, on the recognition that the circumstances under which complaints of abuse arising out of delay may arise are infinite.[27]

26. But despite its recognition of the power to stay proceedings on the ground of "mere delay giving rise to prejudice and unfairness," the court restated the earlier principles and reminded itself of the observation of Lord Morris of Borth-y-Gest in *Connelly v Director of Public Prosecutions*[28] that

> … generally speaking a prosecutor has as much right as a defendant to demand a verdict of a jury on an outstanding indictment, and where either demands a verdict a judge has no jurisdiction to stand in the way of it.

27. For these reasons the Court of Appeal ruled, in *Attorney General's Reference*[29], that stays imposed on the grounds of delay or for any other reason should only be employed in exceptional circumstances. The court stated that even where the delay can be said to be unjustifiable (that is to say, where there has been more than presumptive prejudice), the imposition of a permanent stay should be the exception rather than the rule. Still more rare should be cases where a stay can properly be imposed in the absence of any fault on the part of the complainant or prosecution. Delay due merely to the complexity of the case or contributed to by the actions of the defendant himself should never be the foundation for a stay.

[26] [1991] 2 Q.B. 78, [1991] 2 W.L.R. 866, [1991] 2 All E.R. 854, (1991) 93 Cr. App. R. 171.
[27] [1992] Q.B. 630, 643.
[28] [1964] A.C. 1254, 1304.
[29] [1992] Q.B. 630, [1992] 3 W.L.R. 9, [1992] 3 All E.R. 169, (1992) 95 Cr. App. R. 296.

28. The approach to the question of delay as established in *Attorney General's Reference*[30] continues to be the approach that courts should take. *R v F*[31] confirms that this is so whether that delay has come about because of delayed reporting of the offending (as with long delayed allegations of sexual offending) or caused by inefficiencies in the investigative or judicial process.

Prejudice to the applicant – actual prejudice

29. In addition to asserting presumptive prejudice brought about by substantial delay, the applicant asserts that he has suffered actual prejudice. One might expect the applicant's assertion of prejudice to demonstrate an inability to advance a component of his defence, perhaps because of the loss or destruction of a potential exhibit, or the death of an alibi witness or a witness able to testify to the events that founded the charges. This is not the basis of the assertion of prejudice. The applicant's hearing questionnaire makes it clear that his defence will assert an alibi, and that he does not intend to call any witnesses to support his alibi.

30. The applicant asserts his claim to actual prejudice by inviting continued scrutiny of the prosecution's evidence of visual identification. The applicant contends that he has been "gravely prejudiced" because of the death of one of the prosecution's eyewitnesses, as well as "the non-production of crucial items of documentary evidence … necessary to establish material irregularities in the Identification Parade procedure."

31. The applicant's complaint regarding the death of the witness should, perhaps, be put into context. The witness was, at the time of the alleged robbery, an elderly man. He had been shot during the exchange of gunfire. There would appear to be inconsistencies between an unsigned, typewritten document which purports to be his initial statement, and his testimony during the committal proceedings. At the Magistrate's Court, when he was asked to pick out the person he had purportedly seen

[30] ibid.
[31] [2011] EWCA Crim 1844, [2012] Q.B. 703, [2012] 2 W.L.R. 1038, [2012] 1 All E.R. 565, [2011] 2 Cr. App. R. 28 [37] – [38].

during the robbery he did not point to any of the three persons charged with the offence, but instead pointed to another person who had been sitting awaiting his turn to be called before the magistrate. In these circumstances it is not difficult to understand counsel's fervent desire to put questions to this witness in cross-examination.

32. In the context of an application to stay proceedings as an abuse of process on the basis of delay, the question must be asked whether the death of such a prosecution witness may appropriately be described as prejudicial to the defence. A defendant and his counsel may understandably be disappointed to learn of the demise of this witness; but has that defendant been prejudiced?

33. What the applicant is, in reality, complaining of in respect of the death of the prosecution's witness is that his death has deprived the applicant of the facility of cross-examining him, supposedly to advantageous, dramatic effect. I do not intend to trivialize the value of cross-examination and the impact of useful or helpful answers in cross-examination in the case for the defence. But this complaint presupposes that the cross-examination of the witness will have resulted in useful or helpful answers; I do not consider it appropriate to assume this to be the fact.

34. In any event, the potential "disadvantage" to a party from its inability to cross-examine an opposing witness is not an infrequent occurrence in criminal trials. It is the type of occurrence which is routinely dealt with by appropriate directions to the factfinders that remind them of the disadvantage, and that often highlight points that might have been made if cross-examination had been possible. This is an example of the type of trial occurrence that the Court of Appeal likely had in mind when it observed, in *Attorney General's Reference*[32], that the trial process is itself equipped to deal with the bulk of complaints that typically form the basis of applications for a stay.

35. With regard to the disclosure complaint made by the applicant, I do not consider it necessary to attempt to discern or divine the reason for the non-production of

[32] [1992] Q.B. 630, 642.

materials related to the conduct of the police investigation and the Identification Parades. I consider it sufficient simply to note that this is not the type of failure or omission that is attributable to delay.

36. What, then, of the applicant's complaints? Shorn of embellishment, they amount, in my assessment, to what has come to be known as presumptive prejudice which will almost inevitably arise out of the fact of long delay. This is, regrettably, a feature of the landscape of criminal prosecutions in Trinidad and Tobago. The other complaint relates to the lost opportunity of cross-examination of a witness that might have assisted the defence. I note that the applicant would have been able to complain about non-disclosure at a delayed trial in much the same way as at a prompt trial.

37. This is, decidedly, not an exceptional case.

38. Our Court of Appeal has confirmed[33] the principle that the imposition of a stay of proceedings should not be used to punish the prosecuting authorities or the police for its deleteriousness. The delay in the circumstances of this case is clear, but a close evaluation reveals that that delay has not resulted in a situation where the applicant cannot receive a fair trial.

39. In the circumstances of the instant application and for the reasons I have articulated, the application for a stay of these proceedings is refused.

Dated this 14th day of January, 2021

Hayden A. St.Clair-Douglas
Judge

[33] *Dularie Peters v The State* Cr App No 34/2008 [37]