THE REPUBLIC OF TRINIDAD AND TOBAGO

CR 52 0F 2007

IN THE HIGH COURT OF JUSTICE

PORT OF SPAIN

THE STATE

V

GANESH LOCHAN

For Possession of Marijuana for The Purpose of Trafficking

RULING ON APPLICATION TO STAY INDICTMENT ON THE GROUND OF ABUSE OF PROCESS

BEFORE THE HONOURABLE MADAME JUSTICE GAIL GONZALES

Appearances: Ms. Norma Peters and Ms. K Gray Birkette for the State

Mr. Daniel Khan instructed by Mr H Singh for the Accused.

Date of delivery January 6, 2021

Introduction

[1] This is an application by way of motion brought by the Accused to stay the indictment on the ground that the continued prosecution of the Accused amounts to an abuse of process. The application is supported by an affidavit of the Accused.

The Background

[2] The Accused is charged on a one count indictment alleging that on the 20th day of February 2003 at San Juan he was in possession of a dangerous drug namely marijuana for the purpose of trafficking.

[3] The indictment was filed on the 18th May 2007 and the first trial of the Accused began on the 26th day of January 2009 and ended on the 18th March 2009 in a hung jury. A retrial was ordered. On the 3rd of April 2009 the exhibit which consisted of a crocus bag with plant material was returned to Police Constable Osbourne. On the 11th January 2010 Mr D Khan appeared *amicus* for the Accused and a note was made that the notes from the previous trial were outstanding. Between 2010 and 19th February 2018 the matter was called several times before various judges, all noting that the notes from the previous trial were still outstanding. On that day the matter was fixed for trial on the 12th March 2018. The Accused did not appear on the trial date and leave was granted for him to appear through his attorney. He appeared later and was informed of the adjourned date.

[4] It would appear that notes of evidence of the first the trial were made available sometime in early 2017. It turned out that these notes were incomplete and did not include the evidence of the Accused, his stepfather and the evidence of what transpired at the *locus in quo*. It also appears that the notes of the rebuttal evidence called by the prosecution, did not form part of the notes of evidence. A request was made by Mr D Khan for the notes in its entirety. Pursuant to this request in 2019 the Accused received another copy of the incomplete notes. To date no reason has been advanced as to why the notes of evidence remain unavailable.

The Application

[5] The Accused filed this application on the 30th October 2020 contending that a delay of $17^{1}/_{2}$ years has rendered any continued prosecution unfair because he has suffered prejudice. He deposed that his witness Stephen Carimbocas who gave evidence at the trial in 2009 is now deceased. The notes of evidence from the first trial do not contain his courtroom testimony, neither does it contain his testimony at the scene. The notes of the evidence of the two prosecution witnesses given at the scene are also not available making it difficult for him to test their credibility.

[6] The scene of the incident has changed so drastically over the 17 plus years that a jury would be unable to see that the officers could not have seen the incident, the way they said that they did. The Accused also contends that he cannot recall the details of the case except that he was there and that he was not in possession of any drugs. The ordeal he says has caused him great hardship and anxiety over the years.

[7] Sometime in 2017 the State indicated that the evidence consisting of the crocus bag with 11 packets of marijuana was destroyed by the police. The circumstances surrounding the destruction of the exhibit were not placed fully before the court, suffice it to say the Accused is not alleging mala fides on the part of the prosecution. The Accused contends that the destruction of the exhibit means that he cannot get a fair trial, as the jury is now deprived of the opportunity to see that the officers could not have retrieved the bag in the manner that they said that they did. The Accused is saying that the length of the delay is $17^{1}/_{2}$ years, caused essentially by an eleven-and-a-half-year delay in getting the complete notes of evidence. During this time the Accused did all in his power to assert his right to a timely trial by raising the issue of the unavailability of the notes with various judicial officers before whom he appeared. He is not responsible for the delay.

[8] The Accused is relying on the presumption of prejudice based on the delay of $17^{1}/_{2}$ years. The Accused is saying that a delay of over 17 years naturally gives rise to a presumption of

prejudice. He also contends that it is not in the public interest to try him on the indictment after all these years.

[9] The Accused relied on the personal hardship he endured in attending court over the years and the anxiety he suffered and continues to suffer, from fear of conviction. He considers the anguish of having to face a trial and argues that if he is convicted justice will not be served, as sending him to prison some 17 years after the incident will not act as a deterrent, as the imposition of a sentence is so disconnected from the incident. He argues that his case falls into an exceptional circumstance as envisaged in the case of **Dularie Peters**.

[10] The Accused is relying on the case of the **State v Dularie Peters**[1] that the test to be applied is whether the Accused will suffer serious prejudice to the extent that no fair trial was possible owing to the delay. He argues that the court must examine the cause of the delay, whether the Accused asserted his rights to a trial during the delay and whether the court can employ any measures to mitigate any prejudice that the Accused may suffer. The Accused acknowledges that the case of **Peters**[2] says that "*where the apprehended unfairness could be cured by the trial judge's exercise of his discretion during the trial process the trial should be not stayed...*" He argues, however, that the prejudice he is likely to suffer cannot be cured by any directions to the jury or the regulation of the admissibility of evidence and therefore the indictment should be stayed.

[11] The Accused is relying on dicta in **Peters** where the Court found that the indictment should not be stayed but that the matter should be "*ventilated in open court and brought to its determination*" in the interest or welfare of the public. The Accused is arguing that on the facts of his case, the offence being a victimless crime, it is not in the public interest that the matter be ventilated in open court. In determining whether the case should be ventilated he is asking me to consider that the case is weak, the police officers have retired and the likelihood of conviction is low.

[1] Cr App No 34 of 2008
[2] Supra

The Response of the State

[12] The State acknowledges, citing the case of **Beckford v R**[3] that the Court has jurisdiction to stay proceedings for an abuse of process. However, the Court's powers to stay proceedings should only be exercised where the prosecution amounts to an abuse of process and is oppressive and vexatious.

[13 The prosecution is contending that the court's power to stay proceedings for delay may be exercised where (a) the prosecution has manipulated or misused the process of the court to deprive the Accused of a protection provided by the law or to take unfair advantage of a technicality or (b) on a balance of probabilities the Accused has been or will be prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution. The prosecution relies on the case of **Derby Crown Count ex parte Brooks**[4]**.**

[14] The State argues that there has been no misuse or manipulation of the Count's processes by the State, therefore, the Court should not exercise its discretion in favor of staying the proceedings. They argue that they are not responsible for the delay as both the State and the Accused were awaiting the notes of evidence

[15] The State agreed with counsel for the Accused that the test to be applied is the test laid down in the case of **Dularie Peters v The State**: "*will the Accused suffer serious prejudice to the extent that no fair trial was possible owing to dela*y." However, they argue that the Accused has not established on a balance of probabilities that he has suffered prejudice that cannot be remedied by directions to the jury.

[3] [1996] 1 Cr App R 94
[4] [1985]80 Cr App Rep 164

The Issues

[16] The issues I had to determine were

(a)whether I should grant a stay for an abuse of process due to delay and

(b) whether I should grant a stay for abuse of process due to the destruction of the exhibit.

(a) Whether a stay should be granted due to abuse of process as a result of delay

The Law

[17] It is well established that, at common law, the Court has a discretionary power to stay proceedings for an abuse of process, firstly, where it will be impossible to give the Accused a fair trial and secondly, where it offends the Court's sense of justice and propriety to be asked to try the Accused in the particular circumstances of the case[5].

[18] In **Attorney-General's Reference (No. 1 of 1990)**[6] , Lord Lane CJ acknowledged that the Court has a general power to prevent unfairness to an Accused. The Courts have a discretionary power to stay proceedings where there is an abuse of process. In the case of **Hui- Chi Ming v R**[7] the Privy Council defined an abuse of process as "*something so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all other respects a regular proceeding*". The Court's discretionary power to stay proceedings due to an abuse of process should only be exercised in exceptional circumstances[8] .

[19] According to **BLACKSTONE'S**[9], the Court's power to stay proceeding where there is an abuse of process can arise in two circumstances (a) cases where the Court concludes that the Accused cannot receive a fair trial and (b) cases where the Court concludes that it would be unfair for the Accused to be tried. Cases of prosecutorial delay will fall into category (a). The Accused is

[5] R v Maxwell [2011] 4 all ER 941 at para 13
[6] [1992] QB 630
[7] [1991] 3 All ER
[8] R(Ebrahim) v Feltham Magistrates' Court [2001] EWHC Admin 130
[9] Blackstone's Criminal Practice 2020 Section D3.68

not alleging prosecutorial delay. Where the Accused is not relying on prosecutorial delay the position was clearly stated by Lord Lane CJ in **Attorney General's Reference (No 1)** [10] which was referred to by Weekes JA in the case of **Peters**:

"*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. 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."*

[20] The test to be applied is whether the Accused will suffer serious prejudice to the extent that no fair trial could be had due to the delay. In other words, the test is whether it would be impossible for the Accused to get a fair trial because of the delay.[11]. It is for the Accused to prove on a balance of probabilities that it would be impossible for him to get a fair trial due to the inordinate delay. Once he establishes that, it is then for the prosecution to prove beyond a reasonable doubt that a fair trial is in fact possible.

Analysis and discussion

[21] In **DPP v Tokai**[12], Ibrahim JA, relying on the dicta in **Tan v Cameron**[13] identified the issues that arise in cases where an abuse of process due to delay is alleged. These are

1. the length of delay,
2. the reason for the delay,
3. the defendant's assertion of his right and any prejudice to the defendant; and
4. the public interest in the disposition of charges of serious offences and in the conviction of those guilty of crime.

[10] Supra
[11] Peters
[12] CA 116/1994
[13] [1993] 2 ALL ER 493

The length of the delay.

[22] In this case the Accused was charged on the 20th February 2003 and indicted in May 2007. His first trial was concluded on the 18th March 2009. Thus six years elapsed between the charge and the first trial. There is no evidence of undue delay during this period and given the prevailing circumstances, the first trial can be said to be completed within a reasonable time.

[23] The order for retrial was made on the 18th March 2009. The length of delay from then to the date when the application was filed on 30th October 2020 is about 11 years and seven months. I find that this is the period of delay to be considered.

The reason for the delay

[24] In this case, the reason for the delay is a combination of factors, however the predominant reason appears to be the unavailability of notes of evidence of the previous trial. In **Boodram v The State** [14] Lord Steyn stated:

> "*The duty rest on the court system to ensure that on a retrial counsel for the defence is provided with the transcript of the first trial or relevant part of it. That was the approach adopted by the Privy Council in* ***Flowers v The Queen [2000] 1 WLR 2396,2415F-G*** *and their Lordships reaffirm it*".

In this case neither the prosecution nor the Accused is at fault, in the sense that it was not in the power of either the State or the Accused to produce the notes of evidence. Clearly the court was responsible for that failure.

[25] Ten months after the order for retrial, there was an endorsement that the notes from the previous trial was still outstanding.[15] There is no indication that a request was made for the notes previously. The first request made by counsel for the Accused, for the notes of evidence was on the 9th February 2012[16]. This was almost three years after the order for retrial. The Judge then

[14] [2001] All ER (D) 178 (Apr) para 32
[15] See page 17 of GL4 in the application of the accused
[16] See page 21 of GL4 in the application of the accused

directed counsel for the Accused to write requesting the notes. There is no evidence before me that either side wrote the Registrar requesting the notes.

[26] On 8th October 2013 there was an indication from the State that the notes were typed but they were requesting a week, ostensibly to have the notes. On the 7th July 2015 there is a notation that a request for the notes had been made. On the 21st June 2017, roughly 8 years and three months later, the notes of evidence were still outstanding both sides were ready the trial was estimated to last 10 days. On the 11th July 2017 Mr Khan for the Accused was engaged at the Court of Appeal.

[27] On the 19th September 2017 the Accused was ready, except that, with the coming into force of the Criminal Procedure Rules of 2017 he was now required to file a Form 4. A week later when the matter was called Counsel for the Accused was again engaged at the Court of Appeal and the State was unable to locate the exhibit in the matter. The following, month on the 30th October 2017 the position had reverted again to both sides awaiting the transcripts. There were four adjournments awaiting the transcripts until the matter was fixed for trial on the 12th March 2018, nine years after the order for retrial.

[28] On the 12th March 2018 the Accused arrived late for his trial and was advised of the adjourned date. Sometime in 2017 the long awaited notes of evidence were received but it was incomplete. Pursuant to a request for the missing parts of the notes of evidence Mr Khan again received a copy of the incomplete notes of evidence. On the 30th October 2020 this application was filed.

[29] Clearly when one looks at the history of the matter the State was not at fault. It is rare to grant a stay in absence of fault on the part of the prosecution. I now have to consider whether during this period of delay the Accused asserted his right to a trial within a reasonable time.

Has the Accused asserted his right to trial?

[30] Can the Accused say that he asserted his right to a trial during the period of delay? In resolving the issue, the question really is, has the Accused contributed to the delay? On at least three occasions during the period of 11 years and seven months the Accused was ready to

proceed despite the unavailability of the notes. However, the first time he indicated that he was ready without the notes was on the 21st June 2017. This was eight years after the order for retrial. Subsequently he reverted to saying that he was not ready and was awaiting the notes.

[31] There is no law that states that on a retrial, the failure to have the notes of evidence of the first trial, will automatically render the trial unfair. Absence of notes of evidence from a previous trial does not in and of itself render a subsequent trial unfair or prejudicial[17]. There is also no law that if counsel has done all in his power to secure the notes of evidence on a retrial, but the notes of evidence are not made available he will be found to be negligent in his duties. It seems that every effort was made by counsel to secure the notes in this case.

[32] Although it was not cited in this case, the oft cited case of **Boodram v the State**[18] does not support the contention that the unavailability of the notes of evidence in the case of a retrial renders the trial unfair. Neither does it support the contention that if an attorney is aware that there are notes from a previous trial and he does everything in his power to obtain it and still fails to do so, he has defaulted in his duty. The **Boodram** case had more to do with the responsibility of counsel on a retrial, than it had to do with a retrial where the notes are unavailable. Every case for a retrial has to be determined on its own facts, to determine whether it is absolutely necessary to have the notes of evidence. While having the notes of evidence is the best practice and the court should make every effort to make them available in a timely manner, that has to be weighed against any prejudice that can be caused by delay in obtaining those notes. In every case a balancing exercise has to be done.

[33] Counsel must balance the need for the notes of evidence against resulting delay from waiting on those notes. At some stage counsel must determine at what stage it is more prejudicial to his client to continue waiting. In this case I do not think that, that balancing exercise was done. This was not a case of a retrial on appeal where the first trial was found to be prejudicial, unfair or oppressive to the Accused or that the conviction was found to be unsafe, so that the notes would be necessary, to ensure a fair trial. This was a simple matter which turned on the credibility

[17] CV 2016 -01052 Shareed Mohammed v The AG
[18] [2001] UK PC 20

of the witnesses and in which the jury could not agree. In this case unlike the case in **Boodram** the same attorney represented the Accused at the first trial and in the present trial, so counsel was aware of all matters pertaining to the case. Counsel would have also had instructions from the Accused and his own notes from the trial. While the failure cannot be attributed the Accused, the failure to be ready for trial even without the notes after all these years seems unjustifiable. The Accused did not assert his readiness even up to immediately before filing this application.

[34] Counsel fulfilled his duty when he decided to wait on the notes and secondly when he officially requested the notes three years later. I attribute no fault to him for the first three years because it was clear that the Court understood and was aware of its responsibility to produce the notes. After his formal request three years after the order for retrial, to which he received no reply, he should have begun that balancing exercise referred to and determine whether it was more prejudicial to his client to continue to wait or to proceed to trial. It is unreasonable for the Accused to wait almost 8 years to get the notes of evidence, notes that were not absolutely necessary for the retrial. It is also unreasonable that the Accused vacillate on being ready without the notes and then say that he asserted his rights. The assertion of that right to trial must be as clear and consistent as the circumstances would allow. I was satisfied on a balance of probabilities that the Accused contributed to the delay to some extent, by waiting on the notes of evidence for such an inordinate period of time.

Presumptive prejudice

[35] I turn to consider whether there was presumptive prejudice due to the length of the delay. In the case of the **Dularie Peters v The State**[19] Weekes JA said "*The courts have recognised that in some circumstances the period of delay may be of the order sufficient to rise a rebuttable presumption of prejudice"*. After quoting dicta from **R v Bow Street Metropolitan Stipendiary Magistrate ex parte DPP**[20] , she went on to say:

[19] Supra
[20] [1990] 91 Cr App R 283

"*The position then is that in this jurisdiction which have the constitutional right to trial within a reasonable time, the mere fact of inordinate or excessive delay may be sufficient to raise a presumption in the appellant's favour that he will be prejudiced. Under the common law however the fact remains that the mere spectre of prejudice is not sufficient to warrant a stay, that prejudice must be enough in all the circumstances to render the continued prosecution unfair."*

[36] While in some cases, a delay of, 11 plus years may raise a presumption of prejudice which has to be rebutted by the prosecution, in our jurisdiction mere presumption of prejudice is not enough. The Accused has to prove actual prejudice on a balance of probabilities.

Actual Prejudice

[37] Has the Accused suffered real prejudice? He says he has. He deposes to various occurrences since the order for retrial including his personal hardship to support his contention that he has suffered real prejudice. I will examine each in turn.

(i) His stepfather has since died

[38] The accused is contending that he will suffer real prejudice because his witness Stephen Carimbocas testified of the change in the *locus in quo* over the years. He died in 2012 and there are no notes of his evidence. His evidence purportedly supported the Accused's contention that the officers were not being truthful in their testimony. In determining whether the Accused will suffer real prejudice, the judgment of Fulford LJ in the case of **P v PR**[21] , a case cited by the State, provides guidance:

"In considering the question of prejudice to the defence, it seems to us that it is necessary to distinguish between mere speculation about what missing documents or witnesses might show, and missing evidence which represents a significant and demonstrable chance of amounting to decisive or strongly supportive evidence emerging on a specific issue in the case. The court will need to consider what evidence directly relevant to the appellant's case has been lost by reason of the passage of time. The court will then need to go on to consider the importance of the missing

[21] [2019] EWCA Crim1225

evidence in the context of the case as a whole and the issues before the jury. Having considered those matters, the court will have to identify what prejudice, if any, has been caused to the appellant by the delay and whether judicial directions would be sufficient to compensate for such prejudice as may have been caused or whether in truth a fair trial could not properly be afforded to a defendant"

[39] In this case, because the witness gave evidence at the first trial, it is not mere speculation what he is likely to say if called again. However, every trial even those involving the same parties and the same issues has its own dynamics. The fact that a witness was called previously is no guarantee that he would come up to proof if called again. The Accused is in the position of any other Accused, that is, a witness if called may or may not support him. He cannot be said to be placed at any disadvantage by the unavailability of this particular witness. When the Accused says that the witness' testimony will support him, that the officers could not see what they said they did and that they could not have retrieved the bag from the river in the manner they said that they did, that is his opinion of how he hopes the jury would view the evidence. That may not turn out to be so and therefore there is no basis for this court to find that he would suffer real prejudice by the unavailability of this witness.

[40] He is also contending that the scene has changed over the years and the witness would be able to testify of this. It would indeed be strange if the *locus* has not changed in over 17 years. In any event the judge must give a direction on the effects of any changes due to the passage of time whether evidence is called of this fact or not. The judge must direct the jury to take into account the effects of delay and in this case the effect of any change of the scene. If the Accused is contending that the change in the scene has put him at a disadvantage the jury must be directed to take into account such disadvantage in favour of the Accused, in determining whether the prosecution has satisfied them to the extent that they feel sure.

[41] The Accused therefore has not satisfied me that it is more likely than not that he would suffer real prejudice by the unavailability of this witness. Further, even if he is disadvantaged that such prejudice cannot be remedied by carefully crafted directions to the jury.

(ii)The notes of evidence of the two police officers at the locus in quo are missing

[42] The Accused is contending that the missing portion of the notes of the two police officers has caused him real prejudice because he cannot test their credibility against their previous testimony. The Accused deposed that he was informed by his attorney that it was the cross examination of the prosecution witnesses at the scene that raised and cemented reasonable doubt in the mind of the jury. That is only the opinion of counsel and highly speculative. There is no way of knowing what role this bit of evidence played in the outcome of the matter and what bit of evidence cemented the outcome. The evidence at the scene was a very small portion of the evidence as a whole. At the end of the day the issue is one of credibility and there is other evidence from which the jury can assess the general credibility of the witnesses.

[43] The Accused deposed that the witnesses "*may remember what areas to prepare and collude for*[sic] *and also there is no way to show that the officers were shown to give evidence that was not convincing*". Again this is highly speculative and does not satisfy me that it is more likely than not that the Accused would be disadvantaged by the unavailability of the notes of evidence as it relates to the evidence at the scene.

[44] In **P v PR** Fulford LJ had this to say: *"… there is no presumption that extraneous material must be available to enable the defendant to test the reliability of the oral testimony of one or more of the prosecution's witnesses. In some instances, this opportunity exists; in others it does not. It is to be regretted if relevant records become unavailable, but when this happens the effect may be to put the defendant closer to the position of many Accused whose trial turns on a decision by the jury as to whether they are sure of the oral evidence of the prosecution witness or witnesses, absent other substantive information by which their testimony can be tested"*. I am not satisfied that it is more likely than not that the Accused would suffer any real disadvantage by the unavailability of the notes of evidence of the officers at the scene of the incident.

(iii)The Accused cannot recall the details of the incident

[45] The Accused argues that he cannot recall the details of the incident except that he was there but he had no drugs in his possession. The notes of his evidence at the first trial are not

available for him to refresh his memory. The Accused does not need the notes of his previous testimony to refresh his memory he can do so from the notes his counsel took at the first trial. He also has available to him the written instructions he gave his attorney, to undertake the first trial. Any witness including an Accused is entitled to refresh his memory from a contemporaneous document. The issue of whether a document is contemporaneous for memory refreshing is a matter for the Court. I am not satisfied that the Accused will suffer any disadvantage by his failure to recall details as he can refresh his memory from the written instructions given to counsel. In any event this issue can remedied by an appropriate direction on the effects of delay and how the jury ought to treat a lapse of memory after 17 years.

(iv)The public interest

[46] The Accused is contending that it is not in the public interest to try him, because this is a victimless crime. The State argues that the prevalence of the offence of drug trafficking and the serious destabilization it causes in communities makes it a matter of public interest to prosecute this matter. This court agrees with counsel for the State. The effects of drug trafficking can be felt throughout all communities in this country and it is not true to say that it is a victimless crime. Society as a whole fall victim to drug trafficking offences. The Accused has failed to satisfy me on a balance of probabilities that it is not in the public interest to prosecute this matter.

(v)Exceptional Circumstances

[47] The Accused is suggesting that in all the circumstances it is unfair to try him because of the hardship and he has suffered over the years. The anxiety he suffers when he considers the possibility of going to jail. These are not the factors that the Court should have regard to when considering whether it would be fair to try the Accused, the court must be satisfied that the prosecution is so vexatious, that it must intervene to protect its own processes or that the prejudice of the accused cannot be remedied within the trial process.

[48] In **Sieuraj Sookermany** the Court found that there where there were measures available to the trial judge to negate the prejudicial effect of the delay and to avoid unfairness to the

defendant, no stay should be granted. If the trial judge should find that no such measures are available, the judge would be right to order a stay of proceedings

[49] In the case of **The State v Selwyn Thomas**[22] a similar application was made to have the indictment stayed for abuse of process due to delay. The judge found that the period of delay was 29 years. The Accused alleged that he could not remember the events surrounding the charges and his Attorney deposed that the Accused was unable to give instructions. The Accused had allegedly given a statement upon his arrest but there were no contemporaneous notes surrounding the giving of the statement. The Accused was a minor at the time and there ws no evidence of any parent or guardian being present, or independent person witnessing the statement. The Accused was assessed by two psychiatrists. One for the State and one for the defence. The result was that both concluded that while he was fit to plead he would not be able to give instructions due to his poor memory and his inability to give instructions. The Court found that whilst the statement may be excluded on a *voire dire* there was no remedy to cure the Accused's inability to give instructions. The court found that there was a presumption of prejudice due to the 29 years of delay and actual prejudice by the inability to give instructions.

[50] The case of **Thomas**[23] is distinguishable from the case for the Accused. The Accused is saying that his case presents exceptional circumstances because the prejudice he is likely to suffer cannot be cured. However, the court is of the view that the Accused has not shown that it is more likely than not that it would be impossible to get a fair trial. Further even if he suffers prejudice I am satisfied that that any potential prejudice can be remedied during the trial process by appropriate directions

[51] On this issue I am satisfied that there was a delay of 11 years and 7 months. Neither the Accused or the state caused that delay. The Accused contributed to a small extent to that delay by waiting inordinately for notes of evidence. Those notes were not absolutely necessary on the

[22] CR 00239/98
[23] Supra

facts of the case. I am not satisfied that the Accused suffered any prejudice that cannot be remedied during the trial process. I am further not satisfied that it is not in the public interest to continue the prosecution of this matter.

(b) Whether a stay should be granted due to the destruction of the exhibit.

The Law

[52] The case of **R (Ebrahim) V Feltham Magistrates Court**[24] gives guidance on the court's approach in exercising its discretion to stay the proceedings. The Court should consider

(i) fairness to both the defendant and the prosecution, and

(ii) that the trial process itself is equipped to deal with the bulk of the complaints on which applications for a stay are founded.

(iii) whether there was an element of bad faith or at the very least some serious fault on the part of the police or the prosecution authorities

[53] There must be evidence of some malice on the part of the prosecution in the destruction of the evidence to allow for the exercise of the Court's discretion to grant a stay. According to the dicta of Mantell L.J. in **R v Medway**[25], a case cited by the State there would need to be something wholly exceptional about the circumstances of the case to justify a stay on the ground that evidence has been lost or destroyed.

[54] One such circumstance might be if the interference with the evidence was malicious.[26]In the local case of **The State v Paul (Michael), Abraham (Sherwin), Homer (Peter), Minotte (Gerald) and Oliver (Jermaine)**[27], Volney J. dismissed the defendant's application for stay of proceedings. In that case, officers took videotapes of the scene of a raid conducted in Arima. The videotapes were subsequently destroyed. Although Volney J. found that the erasure of the tapes

[24] [2001] EWHC Admin 130
[25] [1999] EWCA Crim 839
[26] supra
[27] HC 333/1998

was a deliberate act, he was unable to find evidence of *mala fides* and, therefore, did not allow the application for a stay.

[55] Similarly in **R v Howell**[28], the defendant was charged with causing death by dangerous driving. The vehicle was destroyed before the trial and the defendant applied for a stay of proceeding on the ground that the vehicle had been destroyed before the trial. The application was dismissed. The Court of Appeal agreed that the trial judge was correct in relying on the absence of manipulation by the prosecution, inter alia, in arriving at the decision to dismiss the application.

[56] Generally, similar principles abound in the Canadian cases. In **R v. Waldron**[29], the police seized marijuana growing equipment which was subsequently dismantled and destroyed five days after by the police evidence property manager. The Court found that while the property manager negligently ignored his duty[30] to retain the equipment, it was clear the destruction was not done to defeat disclosure obligation or to prejudice the Accused at his trial .The appellant did not adduce any evidence to demonstrate that the police destruction of evidence deprived him of the opportunity to make full answer and defence. The Court found that the destruction of the material did not amount to an abuse of process. The defendant must show that the prosecution or police acted in bad faith in destroying the evidence.

[57] The relevance of fault on the part of the prosecution in these cases should not be overemphasized[31]. The Court's main consideration must be whether despite any prejudice to his case, the defendant may still be able to have a fair trial. In **Clay v Clerk to South Cambridgeshire Justices**[32], the Accused was involved in a vehicular accident. The police released the car to the insurer and allowed the company to dispose of the vehicle. It was argued that the failure by the police to retain the vehicle resulted in the proceedings amounting to an abuse of process.

[28] [2001] EWCA Crim 3009
[29] 2003 BCCA 442
[30] Under Canadian Criminal Code s.15, there is a duty placed upon law enforcement to preserve evidence for at least 60 days after seizure. No such duty statutory duty exists in Trinidad and Tobago.
[31] Blackstone's Criminal Practice 2020
[32] [2014] EWHC 321 (Admin)

Pitchford LJ concluded that "the question of whether the defendant can have a fair trial does not logically depend upon whether anyone was 'at fault' in causing the exigency that created the unfairness"[33]. He went on to state that the issue was whether any disadvantage [or prejudice] to the defendant by the destruction of vital evidence could be avoided by "judicious regulation of the trial".

[58] In **Medway**[34] the Court stated that although it recognised that the defendant would be disadvantaged by the loss or destruction of evidence, this did not mean that the defendant could not have a fair trial. In **Ebrahim (supra)** the Court found that "if there was sufficient credible evidence, apart from the missing evidence, which, if believed, would justify a safe conviction, then a trial should proceed, leaving the defendant to seek to persuade the jury or magistrate not to convict because evidence which might otherwise have been available was not before the court through no fault of his".

[59] The burden of proof rests on defendant on a balance of probabilities: **R v Paul (Michael)** (supra). In that case, Volney J dismissed the applications on the ground that the applicants failed to meet the burden of proof. The defendant must show, on a balance of probabilities that he suffered some prejudice as a result of the destruction of the evidence. Volney J, having closely studied the defendant's affidavits, did not find that there was any prejudice by the destruction of the video tapes. He found that the affidavit evidence of the applicants was lacking facts which would suggest prejudice. It was also on this basis that he dismissed the application.

ANALYSIS AND DISCUSSION

[60] The Accused is alleging that the bag containing the plant material was destroyed. He is saying that because it was destroyed he has lost the opportunity of having the jury see the bag to support his contention that the officers were not being truthful. He says that this puts him at a serious disadvantage. There is no evidence from which I can find on a balance of probabilities that the exhibit was destroyed with *mala fides* by the police. In this case the Accused is not

[33] supra
[34] supra

alleging that the prosecution is unable to prove its case by the destruction of the exhibit. He is contending that the jury would be denied the opportunity "*to see this crocus bag and will not be able to see that the officers could have [sic] collected it from the river in the way they said they did"*

[61] There is no evidence from which I can find that the destruction of the bag of marijuana will result in unfairness to the Accused. At the end of the day the issue of whether the bag was retrieved in the manner stated by the officers is a matter of credibility. That has to be determined by the jury. That issue can be fairly determined without the jury actually seeing the physical bag because there are several other factors that will impact on the credibility of the prosecution witnesses, during the trial. The dicta of Fulford LJ in the case of **R v PR** [35] is instructive. At paragraph 65 of the judgement he says:

[62] *"It is important to have in mind the wide variations in the evidence relied on in support of prosecutions: no two trials are the same, and the type, quantity and quality of the evidence differs greatly between cases. Fairness does not require a minimum number of witnesses to be called. Nor is it necessary for documentary, expert or forensic evidence to be available, against which the credibility and reliability of the prosecution witnesses can be evaluated. Some cases involve consideration of a vast amount of documentation or expert/forensic evidence whilst in others the jury is essentially asked to decide between the oral testimony of two or more witnesses, often simply the complainant and the accused.* ***Furthermore, there is no rule that if material has become unavailable, that of itself means the trial is unfair because, for instance, a relevant avenue of enquiry can no longer be explored[36]…".*** He then went on to quote Brooke LJ in the case of **Ebrahim[37]** as saying :

"If, in such a case, there is sufficient credible evidence, apart from the missing evidence, which, if believed, would justify a safe conviction, then a trial should proceed, leaving the defendant to

[35] [2019]EWCA crim 1225
[36] Emphasis mine
[37] supra

seek to persuade the jury or magistrates not to convict because evidence which might otherwise have been available was not before the court through no fault of his."

[63] So that even if the plant material is no longer available, the trial should proceed and it is for the jury to determine whether they are satisfied to the extent that they are sure of the Accused's guilt in the absence of the evidence which is no longer available, through no fault of the Accused. In any event where the court dismisses the application for a stay the trial judge is obligated to direct the jury on the effect that the destruction of the exhibit would have on the case. The judge must also direct the jury that they must consider whether the Accused was placed at a real disadvantage when considering whether the prosecution has made out their case beyond a reasonable doubt.

[64] The Accused has failed to satisfy me on a balance of probabilities that the destruction of the exhibit was an act of malice on the part of the prosecution. They have failed to satisfy me on a balance of probabilities that the Accused would suffer any prejudice as the matters which the exhibit touch and concern is a matter of credibility that could properly be addressed by a direction to the jury.

[65] On both grounds the application for a stay of the indictment for abuse of process is dismissed.For the above stated reasons the matter is to be fixed for trial once jury trial resumes or if the accused elects trial by a judge alone.

Gail Gonzales

Judge