

TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A.NO. CR.114/2002

BETWEEN

THE STATE

V

HILTON BARNETT

Before the Honourable Justice P. Moosai

APPEARANCES:

Mrs. Nalini Singh for State

Mr. Larry Williams for the Accused

RULING

By his Motion filed on 9 Mar 2004, the applicant seeks to have the Indictment quashed and/or stayed on the following grounds:

1. That the continued prosecution of the applicant in the circumstances of this case constitutes a breach of the applicant's constitutional right pursuant to the provisions of section 4 (a), (b), (c) of the Constitution.
2. That the continued prosecution of the applicant in the circumstances of this case amounts to an abuse of process of the Court.

The applicant's claim is therefore based firstly on delay under the Constitution and secondly on delay at common law.

DELAY UNDER THE CONSTITUTION

Right to trial within a reasonable time

The applicant cites **The State v Robert Mohammed and Johnny Richardson** H.C.A. No. 131 of 1995 where Baird J., in construing the fundamental rights provisions of our Constitution, was of the view that the Constitution must be construed in a manner consistent with the State's international treaty obligations and came to the conclusion that the right to a fair trial within a reasonable time had been incorporated into our Constitution.

In **The State v Balram Seupersad** H.C.A. No. Cr. 69/02, relying on **DPP v Tokai**, (1996) 3 W.L.R. 149, I came to the conclusion that I was bound by the Privy Council decision of **Tokai** and that the right to a fair trial within a reasonable time had not been incorporated into our Constitution. I also indicated that I was inclined to that view as I had not had the benefit of full argument on the particular issue. In the instant case I have had the benefit of fuller argument from Attorneys on the issue.

The Constitution

Sections 4 and 5 of the Constitution provide, inter alia, as follows:

"4. It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely --

- (a) the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof

except by due process of law;

(b) the right of the individual to equality before the law and the protection of the law.

5. (1). Except as is otherwise expressly provided in this Chapter and in section 54, no law may abrogate, abridge or infringe or authorise the abrogation, abridgement or infringement of any of the rights and freedoms hereinbefore recognised and declared.

(2). Without prejudice to subsection (1), but subject to this Chapter and to section 54, Parliament may not -

(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

(f) deprive a person charged with a criminal offence of the right --

(i) to be presumed innocent until proved guilty according to law, but this shall not invalidate a law by reason only that the law imposes on any such person the burden of proving particular facts;

(ii) to a fair and public hearing by an independent and impartial tribunal;

(iii) to reasonable bail without just cause;...

(h) deprive a person of the right to such procedural provisions as are necessary for the purpose of giving effect and protection to the aforesaid rights and freedoms."

As is immediately apparent, there is no express right to trial within a reasonable time. This is to be contrasted with, for example, the Jamaican Constitution, which expressly entrenches the right to trial within a reasonable time. Section 20 provides, *inter alia*, that --

"(1). Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a

reasonable time by an independent and impartial court established by law..."

In **DPP v Tokai** (1996) 48 WIR 376 [PC] the Privy Council considered the question whether in Trinidad and Tobago long delay in bringing accused persons to trial constitutes an infringement of their constitutional rights, with the result that the Indictment must be quashed, and no further proceedings taken. Lord Keith of Kinkel, in comparing constitutions which included the fundamental right to a speedy trial or trial within a reasonable time, to our Constitution which did not, stated at page 414:

"It is noticeable that this Constitution, unlike some of those in other Caribbean countries and elsewhere, particularly in the USA and Canada, does not include in the catalogue of fundamental rights and freedoms the right to a speedy trial or trial within a reasonable time. The only relevant rights are the right not to be deprived of life, liberty or property except by due process of law and the right to the protection of the law, which include, as section 5 (2) makes plain, the right of those accused of criminal offences to a fair trial. Further, the opening words of section 4 indicate that the rights in question are rights which existed at the coming into force of the Constitution. The present Constitution is that of 1976, but the relevant wording in the original Independence Constitution of 1962 was identical. It follows that the rights in question are rights which were enjoyed at common law before the 1962 Constitution came into force. Neither Constitution purports to vary or enlarge the common law rights."

It would seem that the decision by the framers of our Constitution to omit a right to trial within a reasonable time must have been deliberate. That this is so can be gleaned from what de la Bastide CJ (as he then was) stated in **Sookermany v DPP** (1996) 48 WIR 346 at 352:

"There are many countries whose Constitution or Bill of Rights expressly

provides a right to be tried within a reasonable time. Trinidad and Tobago is not among them. One of the questions for decision in this case is whether the omission of any express right to trial within a reasonable time from the Constitution of Trinidad and Tobago has any practical effect or whether, as the appellant contends, the inclusion of such an express right in the Constitution or Bill of Rights of any common-law country serves simply to express in writing exactly the same rights which existed at common law without any written formulation. The right is expressed in the Constitutions of many Commonwealth countries in identical language, viz.,

"whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."

This provision must have been on the menu of standard provisions which was on offer at the time when the framers of our 1962 Independence Constitution made their selection. It would appear to me to be strange if the presumably deliberate omission from our Constitution of any reference to a right to be tried within a reasonable time should have had no effect whatever when our position is compared with that of other countries which chose to incorporate such a right in their Constitutions. I do not think that that the relevant time, i.e. in 1962, the state of the authorities in England or elsewhere in the Commonwealth would have justified anyone coming confidently to the conclusion that the insertion of such an express right was otiose because there already existed a common-law right of equal scope. Admittedly, the fact that the framers of the Constitution may have been unaware of the existence of the same right at common law does not preclude it from being recognised. Its omission from the expressly recognised rights, however, suggests that they, the Constitution makers, did not wish to create any such right if it did not exist, or to confirm and indorse it, if possibly it did."

See also **Charles v The State** [2000] 1 W.L.R. 384 [PC]. In **Boodhoo et al v AG** Privy Council Appeal No. 8 of 2003, the Privy Council expressly approved of what de la Bastide CJ said in **Sookermany ante** in coming to the conclusion that there is no constitutional right to trial within a reasonable time. I therefore subscribe to the view that the omission of any right to trial within a reasonable time in our Constitution was deliberate. In that regard I respectfully differ from Baird J. who found in **Mohammed and Richardson ante** that as Parliament made no reference express or implied to a fair trial within a reasonable time, it could not be said that Parliament expressly or impliedly excluded the concept of a fair trial within a reasonable time.

Baird J. went on to hold that in the face of the silence of Parliament on the concept of a fair trial within a reasonable time, the Court had to construe those rights in such a manner as to conform to Articles 9 (3) and 14 (3) (c) of the Covenant, thereby necessitating the inclusion of a right to a fair trial within a reasonable time. Baird J. thought that the obiter dicta of Lord Steyn in **Ann Marie Boodram v AG Privy Council Appeal No. 65/2000** cast some doubt on the correctness of the decision in **Tokai**. Lord Steyn in **Boodram** indicated that in **Tokai** the Privy Council decided the matter without reference to Trinidad and Tobago's international obligations. Lord Steyn stated at page 15:

"Except for one point it is unnecessary to mention the other grounds of appeal which were placed before the Privy Council. There was, however, an interesting argument about the correctness of the decision of the Privy Council in **Director of Public Prosecutions v Tokai** (1996) 3 W.L.R. 149, where it was held that the provisions of the Constitution of Trinidad and Tobago do not confer on individuals the right to a trial within a reasonable time. In **Tokai** the Privy Council made its decision without reference to Trinidad and Tobago's international obligations to secure to its citizens the right to a trial within a reasonable time. See Articles 9 (3) and 14 (3) (c) of the International Covenant on Civil and Political Rights

and Articles 7 (5) and 8 (1) of the American Convention on Human Rights. The Privy Council did not consider whether by necessary implication there is a right to a trial within a reasonable time under the Constitution. It is unnecessary to decide this point and, in any event, undesirable to do so in a case where the Privy Council has not had the benefit of the views of the Court of Appeal on this important point. The point will be decided when it is necessary to do so."

It might therefore be appropriate to have a closer look at the international obligations of Trinidad and Tobago to consider whether by necessary implication there is a right to a trial within a reasonable time. Articles 7 (5) and 8 (1) of the American Convention on Human Rights provide:

"Article 7 Right to personal property

...

5. Any person detained shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial."

Articles 9 (3) and 14 (1) and (3) of the International Covenant on Civil and Political Rights (International Covenant) provide:

“Article 9

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release...

Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, every one shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law...

3. In the determination of any criminal charge against him, every one shall be entitled to the following minimum guarantees, in full equality:

...

(c) to be tried without undue delay..."

Trinidad and Tobago ratified the **International Covenant** in 1978. It acceded to the Optional Protocol to the International Covenant in 1980. The International Covenant, which was adopted by the General Assembly of the United Nations in 1966 and came into force in 1976, constitutes a commitment by the States which are parties to the Covenant to observe certain fundamental norms of conduct to be supervised by international institutions. The United Nations Human Rights Committee ("UNHRC") is the institution charged with supervising the conduct of the State parties to the Covenant. The Optional Protocol gave individuals right of access to the UNHRC.

On 28th of May 1991 Trinidad and Tobago ratified the **American Convention**. The Convention establish two institutions, the Inter-American Commission on Human Rights ("the Commission") and its judicial organ the Inter-American Court of Human Rights ("the IACHR") to which the Commission could refer disputes. By ratifying the Convention Trinidad and Tobago recognised the Commission's competence to entertain petitions from individuals complaining of violations of the Convention and to make reports and recommendations in respect thereof. It also recognised the compulsory jurisdiction of the IACHR to give binding rulings on the interpretation and application of the Convention. This was subject to a reservation which was primarily designed to

preserve the legitimacy of the death penalty. See **Thomas v Baptiste** *ibid.* paras 4 and 5.

It is clear therefore that part of the international obligations of Trinidad and Tobago at that time included the entitlement to trial within a reasonable time. It is also clear that international conventions do not alter domestic law except to the extent that they are incorporated into domestic law by legislation. In **Thomas v Baptiste** Lord Millet at para 26 sets out the law on this issue:

"Their Lordships recognise the constitutional importance of the principle that international conventions do not alter domestic law except to the extent that they are incorporated into domestic law by legislation. The making of a treaty, in Trinidad and Tobago as in England, is an act of the executive government, not of the legislature. It follows that the terms of a treaty cannot effect any alterations to domestic law or deprive the subject of existing legal rights unless and until enacted into domestic law by or under the authority of the legislature. When so enacted, the Courts give effect to the domestic law, not to the terms of the treaty."

The question therefore arises at this stage, would the incorporation of a right to trial within a reasonable time alter domestic law? Or can I construe the Constitution to conform to our international obligations, bearing in mind that as far as possible, the Constitution should be read and interpreted so as to conform to the international obligations of Trinidad and Tobago: **Lewis v AG of Jamaica** [2001] 2 A.C. 50, at 78F; **Matadeen v Pointu** [1999] 1 A.C. 98 at 114 G-H.

The fundamental rights and freedoms enshrined in the Constitution, save and except section 4 (a) which has an English and remoter ancestry, are framed in the light of the Universal Declaration of Human Rights 1948 and the European Convention for the Protection of Human Rights and Fundamental Freedoms ("**European Convention**"): **Thomas v Baptiste** *ibid.* per Lord Millett para 3. Decisions on the European Convention should therefore shed some light on the interpretation of our Constitution. Article 6 of

the European Convention is headed "Right to a fair trial" and provides so far as material:

"Article 6

Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charges against him, every one is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juvenile or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:
 - (a) to be informed promptly, in the language which he understands and in detail, of the nature and cause of the accusation against him;
 - (b) to have adequate time and facilities for the preparation of his defence;
 - (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
 - (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

It is important to note that what Article 6 seeks to do is to guarantee a fair trial. In **AG's Reference (No. 2) of 2001** [2003] UKHL 68 para 10, Lord Bingham emphasized that "as the heading of article 6 makes clear, the core right guaranteed by the article is to a fair trial. Most of the specific aspects singled out for mention (including the presumption of innocence protected by paragraph (2) and the minimum rights guaranteed to criminal defendants by paragraph (3)) relate to the fairness and perceived fairness of the trial process. The article takes a broad view of what fairness requires: in ordinary parlance a trial might be regarded as fair even though judgment was not pronounced in public. But the focus of the article is on achieving a result which is, and seen to be, fair." It is beyond dispute that the Constitution of Trinidad and Tobago guarantees a right to a fair trial.

The House of Lords and the Privy Council have gone further in examining Article 6 and similar provisions. The Privy Council in **Darmalingum v The State** [2000] 2 Cr. App. R. 445 held, in relation to a provision of the Constitution of Mauritius which was to a great degree modelled on Article 6 of the European Convention, that the right to a fair hearing within a reasonable time by an independent and impartial tribunal contained three separate guarantees, namely: (i) a right to a fair trial, (ii) within a reasonable time, (iii) by an independent and impartial court established by law.

However in **Flowers v The Queen** [2000] 1 W.L.R. 2396 the Privy Council, in relation to a provision of a Constitution of Jamaica which afforded a "fair hearing within a reasonable time by an independent and impartial court established by law", considered that the right to a fair trial within a reasonable time was not a separate guarantee but, rather, that the three elements of section 20 (1) formed part of one embracing form of protection afforded to the individual.

In the latest decision on the issue, **Mills v HM Advocate** [2002] 3 W.L.R. 1597, the Privy Council considered both **Darmalingum** and **Flowers** and held that the right to a fair trial within a reasonable time was a separate guarantee.

In **AG's Reference No. 2 of 2001** *Ibid.*, the House of Lords came to a similar conclusion, Lord Bingham stating at para 12:

"... it is clearly established that article 6 (1), in its application to the determination of civil rights and obligations and of criminal charges, creates rights which although related are separate and distinct:... Thus there is a right to a fair and public hearing; a right to a hearing within a reasonable time; a right to a hearing by an independent and impartial tribunal established by law; and (less often referred to) a right to the public pronouncement of judgment. It does not follow that the consequences of a breach, or a threatened or prospective breach, of each of these rights is necessarily the same."

As the right to trial within a reasonable time is a separate and distinct fundamental right, the inclusion by implication of such a right would be tantamount to the altering and amending of the fundamental rights provision of the Constitution without there being any legal basis in our domestic law. A similar conclusion was arrived at by the Strasbourg Court in a matter concerning a civil right. In **Fogarty v UK** (2002) 34 EHRR 302 the Strasbourg Court said that Article 6 (1) cannot by way of interpretation create a substantive civil right which has no legal basis in the domestic law. I am inclined to the view that there ought to be some kind of legislative sanction for so fundamental a change. *A fortiori*, I do not think that the scope of the due process provision in the Constitution can be extended to accommodate what can only be described as a new and substantive right. Further it must be remembered that the focus at common law when the issue of delay was being considered was really in the context of the accused receiving a fair trial. See also Para 24 of **DPP v Tokai** *ibid.* That was the protection which the law provided for delay that was unjustifiable.

Again in considering whether the scope of the due process provision can be extended to accommodate the right to trial within a reasonable time, it is useful to point out that in **Thomas v Baptiste** *ibid.*, the applicants in the death penalty cases relied, not on their particular right to petition the human rights bodies nor to complete the particular process which they initiated when they lodged their petitions, **but on the general rights accorded to all litigants not to have the outcome of any pending or appellate or other legal process pre-empted by executive action. In other words they were relying, not on the creation of a new and substantive right, but on existing domestic law.** Lord Millett described that general right at para 27:

"This general right is not created by the Convention; it is accorded by the common law and affirmed by section 4 (a) of the Constitution. The appellants are not seeking to enforce the terms of an unincorporated treaty, but a provision of the domestic law of Trinidad and Tobago contained in the Constitution. By ratifying a treaty which provides for individual access to an international body, the Government made that process for the time being part of the domestic criminal justice system and thereby temporarily at least extended the scope of the due process clause in the constitution." **[Emphasis added.]**

I have accordingly come to the conclusion that there is no constitutional right to a trial within a reasonable time. Perhaps at this stage it is worth making the point that an accused person still has a fundamental right to a fair trial. The Court is thereby empowered to provide an adequate remedy to an accused person who complains of delay, including the power to stay the proceedings.

In considering the issue of delay under the Constitution, Lord Keith of Kinkel in the passage cited earlier in **Tokai** *ante* at page 414g indicated that the Constitution of Trinidad and Tobago does not purport to vary or enlarge the common law right. I therefore turn to the common law to analyse the issue of delay.

DELAY AT COMMON LAW

The locus classicus on the common law principles applicable where delay is raised is Attorney-General's Reference (No. 1 of 1990) [1992] 3 All E.R. 169. Lord Lane CJ acknowledged that the Court has a general power to prevent unfairness to an accused. In analysing the different forms an abuse of process might take, Lord Lane considered abuse of process on the ground of delay and stated at pages 174-175:

"However, the most usual ground is that based on delay, that is to say the lapse of time between the commission of the offence and the start of the trial. The number of applications based on this ground has increased alarmingly over the past few years.

The decision of the Divisional Court in R v Derby Crown Court, ex p Brooks (1985) 80 Cr. App. R. 164 for some time seems to have provided the guidelines for courts faced with this problem of delay. Sir Roger Omrod, delivering the judgment of the Court in that case, said (at 168-169):

'In our judgment, bearing in mind Viscount Dilhorne's warning in Director of Public Prosecutions v Humphrys [1976] 2 All E.R. for 97 at 511, that this power to stop the prosecution should only be used "in most exceptional circumstances,"... the effect of these cases can be summarised in this way. The power to stop the prosecution arises only when it is an abuse of the process of the court. It may be an abuse of process if either (a) the prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality, or (b) on the balance of probability the defendant has been, or will be, prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution which is unjustifiable: for example, not due to the complexity of the inquiry and the preparation of the prosecution

case, or to the action of the defendant or his co-accused, or to genuine difficulty in effecting service... 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 **R v Sang** [1979] 2 All E.R. 1222 at 1230, "... 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." '

We would like to add to that statement of principle by stressing a point which is sometimes overlooked, namely that the trial process itself is equipped to deal with the bulk of complaints which have in recent Divisional Court cases founded applications for a stay."

Lord Lane went on at page 176 to analyse the burden of proof and to emphasize that stays should only be imposed in exceptional circumstances:

"Stays imposed on the grounds of delay or for any other reason should only be employed in exceptional circumstances. If they were to become a matter of routine, it would be only a short time before the public, understandably, viewed the process with suspicion and mistrust. We respectfully adopt the reasoning of Brennan J. in J. **Jago v District Court of New South Wales** (1989) 168 C.L.R. 23.

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.

In answer to the second question posed by the Attorney General, no stay

should be imposed unless the defendant shows on the balance of probabilities that owing to the delay he will suffer serious prejudice to the extent that no fair trial can be held, in other words that the continuance of the prosecution amounts to a misuse of the process of the court. In assessing whether there is likely to be prejudice and if so whether it can properly be described as serious, the following matters should be borne in mind. First, the power of the judge at common law and under the Police and Criminal Evidence Act 1984 to regulate the admissibility of evidence; secondly, the trial process itself, which should ensure that all relevant factual issues arising from delay will be placed before the jury as part of the evidence for their consideration, together with the powers of the judge to give appropriate directions to the jury before they consider their verdict. It follows from what we have said that in our judgment the decision of the judge to stay the proceedings in the instant case was wrong. The delay, such as it was, was not unjustifiable; the chances of prejudice were remote; the degree of potential prejudice was small; the powers of the judge and the trial process itself would have provided ample protection for the defendant; there was no danger of the trial being unfair; in any event the case was in no sense exceptional so as to justify the ruling."

In **Barker v Wingo** (1972) 407 US 514, the sixth amendment of the Constitution of the United States of America provided that in "all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury..." Powell J. identified four factors which a court should consider in determining whether a defendant has been deprived of his right to a speedy trial: (i) the length of the delay; (ii) the reasons given by the prosecution to justify the delay; (iii) the responsibility of the accused for asserting his rights; and (iv) prejudice to the accused. In **Bell v DPP** [1985] 2 All E.R. 585 [PC], the Privy Council confirmed the relevance and importance of those four factors and their applicability "to any Constitution, written or unwritten, which protects an accused from oppression by delay in criminal proceedings."

I therefore propose to examine those four factors identified by Powell J. at pages 530 to 532 in **Barker v Wingo** *ibid.* in determining whether the proceedings ought to be stayed on the ground of delay.

1. The length of the delay.

"Until there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance. Nevertheless, because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case. To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge."

The date of the commission of the offence to trial is approximately 10 1/2 years. However this was a fraud matter, in which previous proceedings were instituted against the applicant and others in December 1995 for conspiracy. By January 1998 the other two persons who were charged in those previous proceedings agreed to become State witnesses. This resulted in those previous proceedings not being pursued and the present Information being laid against the applicant on 26 Mar 1998. On 16 Nov 2001, some 3 1/2 years after the Information had been laid, the applicant was discharged at the preliminary enquiry. This in my view is the general length of time a preliminary enquiry would take to be completed. Additionally it should be noted that Defence Attorney was not present on some occasions. This would have an effect in calculating the operative period of delay.

Further the DPP obtained a Judge's warrant for the committal for trial of the applicant on 19 Mar 2002. However the applicant was out of the country so that the warrant could only have been executed on 13th of August 2002. This again would have an impact in calculating the operative period of delay.

The date of arrest (13 Dec 1995) to time of trial (March 2004) is approximately nine years. While everything must depend upon the circumstances of the case, I am prepared to hold that the period of nine years in this case is presumptively prejudicial.

2. The reasons given by the prosecution to justify the delay.

"A deliberate attempt to delay the trial in order to hamper the defence should be weighed heavily against the government. A more neutral reason such as negligence or overcrowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay."

I have to some extent gone into this ground when I was discussing ground 1, the length of the delay. In the instant case, the applicant was charged on two separate Informations for conspiring with others to defraud. The particulars related to certain acts by the applicant between the period 12 May 1993 and 16 May 1994. Both attorneys have agreed, rightfully so, that no complaint can be made of the period between 12 May 1993 and 15 Dec 1995. The alleged fraud was only discovered in July 1995 and reported to the police on or about 25 Aug 1995.

Further I am of the view that the time between the making of the report (25 Aug 1995) and the laying of the Informations and the arrest of the applicant (December 1995), approximately four months, was by any stretch of the imagination, a relatively short period.

In or about July 1995 the Chief Executive Officer at the Trinidad and Tobago National Petroleum Marketing Company Limited ("NP") discovered that certain consultancy professional services were awarded without proper authority, in consequence whereof he made a report to the Fraud Squad office on or about 25th August, 1995. That

report concerned certain contracts being awarded to Deborah Warner that did not conform with NP's tendering procedures. The criminal conduct was alleged to have stemmed from the acts of the applicant which were believed to have occurred during the period 12th May, 1993 to 16th September, 1994.

The complainant, ASP Bickram Baldeo, immediately began investigations into the matter and on 15th December, 1995 he arrested and charged the applicant. There were two Informations laid in this matter, No. 24498/95 and No. 24499/95 both laid in December 1995. Information No. 24498/95 charged both the Applicant and Deborah Warner with conspiracy with other persons unknown to defraud NP of sixty seven thousand, five hundred and four dollars and twenty-five cents (\$67,504.25) by falsely pretending that Deborah Warner was contracted to and rendered professional services to NP during 12th May, 1993 and 16th May 1994 and as such, the said Deborah Warner was entitled to receive payment in the sum of sixty-seven thousand five hundred and four dollars and twenty-five cents (\$67,504.25) for the said services.

Information number 24499/95 was of a similar nature, but charged the applicant and Ingrid Lewis and other persons unknown.

Pausing there, the time between the making of the report and the arrest of the applicant was approximately four (4) months, which by any stretch of the imagination, particularly in fraud matters, was commendable.

Both informations continued to be called together. Both Attorneys have agreed that the endorsements on Information No. 24498/95 accurately reflect what transpired at the Magistrates' Court.

The matter was first called on 15th December, 1995 and adjourned to 27th December, 1995. Neither party was represented at the first hearing.

On 27th December 1995 both parties were represented by attorneys, Mr. Roach appearing for the applicant and Mr. Desmond Allum S.C. leading Mr. Warner appearing

for Deborah Warner. State Attorney had not yet been appointed in the matter. On 27th December, 1995 the matter was adjourned to 13th March, 1996 for mention only.

On 13th March 1996, Ms. Clarke held for Mr. Mendes (as he then was) for the applicant. Mr. Warner appeared for Deborah Warner and indicated he was ready to proceed. It is clear therefore that Attorney for the applicant was not ready on that day. Again State Attorney had not yet been appointed. The matter was then adjourned to 7th October, 1996.

On 7th October, 1996, the applicant's attorney was not present. Mr. Warner was ready to proceed. State attorney had not yet been appointed and the exhibits were still at the Forensic Science Centre. The matter was then adjourned to 7th January, 1997.

On 7th January, 1997 Mr. Mendes appeared for the applicant and indicated he was ready. There was no appearance of any attorney for Deborah Warner. Again State attorney had not yet been appointed. There were also four (4) prosecution witnesses present and they were warned to return. This matter was then adjourned to 17th March, 1997.

On 17th March, 1997 State attorney Ms. Jules (as she then was) appeared on behalf of the State. The Corporal and four prosecution witnesses were present and the State was ready. Attorneys appeared for both accused and were also ready to proceed. The matter was then adjourned to 16th April, 1997.

On 16th April, 1997, attorneys appeared on behalf of the State and the applicant. However attorney for Deborah Warner was absent. The matter was then adjourned to 23rd June, 1997.

On 23rd June 1997, State attorney and attorney for Deborah Warner were not present. Attorney for the applicant was present. The matter was then adjourned to 26th September, 1997.

On 26th September, 1997 State attorney appeared. Attorneys for the applicant and Deborah Warner were not present. The matter was then adjourned to 10th December, 1997.

On 10th December, 1997, State attorney appeared. However attorneys for the applicant and Deborah Warner were not present. On this occasion State attorney indicated that she had to get instructions from the Director of Public Prosecutions (“DPP”). The matter was then adjourned to 26th March, 1998.

On 26th March, 1998 State attorney appeared. There was no appearance by attorneys for the applicant and Deborah Warner. The matter was then adjourned to 7th July, 1998.

On 7th July, 1998 State attorney appeared Mr. Brooks held for Mr. Mendes for the applicant and Mr. Cazabon appeared for Deborah Warner. On this day Deborah Warner was discharged by the court after a discontinuance was issued by the DPP on 6th July, 1998. The matter was then adjourned to 28th September, 1998.

Pausing there, the matter was called fourteen (14) times from December 1995 to 7th July, 1998. State attorney first appeared on 17th March, 1997, that is to say, approximately one year and three months after the parties first appeared in court.

The complainant, in his affidavit filed on 18th March, 2004, sought to explain why State attorney only appeared in the matter on 17th March, 1997. The complainant set out that he only submitted the case docket to the Asst. Superintendent of Police on 16th September, 1996, some nine (9) months after the parties were charged. In my view that would normally be too long a period, but the complainant goes on to explain that he took that long as a result of the disruption that occurred when the Fraud Squad Unit was relocated, and further because of his regular court attendances and other work constraints.

I remain convinced however, even in the light of his explanation, that the case docket ought to have been submitted within four (4) months.

The case docket was forwarded from the office of the Asst. Superintendent of Police to the DPP on 31st December, 1996, that is, some 3½ months after receiving same. That again is not unduly long.

After the police docket was submitted to the DPP on 31st December, 1996, the matter was then called on 7th January, 1997 and adjourned to 17th March, 1997. On 17th March, 1997 State attorney first appeared. I do not think that any complaint can be made with respect to the appointment of a State attorney by the DPP.

In the circumstances the delay from December, 1995 to March 1997 has been satisfactorily explained by the State, although I make the point that the case docket ought to have been submitted by the complainant to the Assistant Superintendent within four (4) months. It should also be noted that as late as 7th October, 1996, some 10 months after the parties were charged, the exhibits were still at Forensic Science Centre. That is not, given our local conditions, an unusually long period.

Again because of the unavailability of the exhibits, it was unlikely that the matter could proceed. Realistically therefore the earliest point in time the matter could have proceeded was 7th January, 1997. State attorney first appeared on the next occasion on 17th March, 1997 and indicated she was ready.

Thereafter until the matter was discontinued against Deborah Warner on 7th July, 1998, State attorney appeared on all but one occasion. It must also be noted that during that period December 1995 to 7th July, 1998, defence attorneys were not always present, thereby contributing to the matter not being heard. But there was also another intervening event of considerable significance.

By letter dated 4th December, 1997 Mr. Sean Cazabon on behalf of Deborah Warner indicated that his client had agreed to become a State witness. Thereafter on 26th March, 1998 Deborah Warner swore to a statutory declaration. Further Mrs. Sophia Chote, attorney for Ingrid Lewis in respect of Information No. 24499/95, indicated by letter dated 5th January, 1998 that her client had agreed to become a State witness. Notices of discontinuance were therefore issued in respect of Deborah Warner on 6th July, 1998 and in respect of Ingrid Lewis on 8th December, 1998. It is obvious that the DPP would have had to spend time weighing the options that were available to him in prosecuting any offences that might have arisen out of the alleged fraudulent transactions. It would therefore seem that, as both Deborah Warner and Ingrid Lewis had agreed to become State witnesses, the Information which forms the basis of this indictment, namely Information no. 3594/95 was laid on 26th March, 1998.

INFORMATION NO. 3594/98

On 26th March, 1998 the information was laid and the matter was adjourned to 7th July, 1998.

On 7th July, 1998 Mr. Brooks holding for Mr. Mendes appeared for the applicant. There was no appearance of State attorney and the matter was adjourned to 28th September, 1998 for mention.

Between 28th September, 1998 and 14th December 1998 the matter was called on three occasions. State attorney appeared, but there was no appearance by Mr. Mendes for the applicant.

On 22nd March, 1999 attorneys appeared for both sides with Mr. Persad holding for Mr. Mendes. The matter was adjourned to 28th June, 1999 for trial at 10.00 a.m.

On 28th June, 1999 attorney for the State appeared. However there was no appearance by Mr. Mendes for the applicant. The matter was adjourned to 23rd August, 1999 for trial.

On 23rd August, 1999 State attorney appeared. The applicant did not appear, and appeared through Mr. Mendes who was present. The matter was then adjourned to 28th September, 1999.

Between 28th September, 1999 and 13th April, 2000, the matter was called on three (3) occasions. Attorneys for both sides appeared and the matter was adjourned on 13th April, 2000 to 7th September, 2000.

On 7th September 2000 Attorneys did not appear and the matter was adjourned to 22nd March, 2001 for trial.

On 22nd March, 2001 Attorneys appeared and the matter was adjourned to 16th July 2001.

On 16th July 2001 Attorneys for the State did not appear. Attorney for the applicant appeared and the matter was adjourned to 8th October 2001.

On 8th October 2001 Attorneys appeared and evidence was led for the first time. Between 8th October, 2001 and 9th November 2001 the matter was called on six (6) occasions and the evidence for the State was led. The prosecution closed its case on 9th November 2001.

On 16th November, 2001, the Magistrate discharged the applicant as she was of the view that no prima facie case had been made out.

Pausing there, it is also to be noted that with respect to the two Informations, namely No. 24498/95 and No. 24499/95, the DPP discontinued proceedings against the applicant on 18th October, 2001.

After the Magistrate discharged the applicant on 16th November, 2001 the applicant went to the U.S.A.

Thereafter the DPP on or about 19th March 2002, acting pursuant to his powers under s.23 (5) of the Indictable Offences (Preliminary Enquiry) Act Chapter 12:01, obtained a Judge's warrant for the committal for trial of the applicant.

The applicant returned to Trinidad on or about 13th August 2002 and surrendered to the warrant and obtained bail.

The matter was listed in the High Court on 13th February 2003 and 17th April 2003, but the applicant was not served with the Indictment.

On 9th June 2003 the applicant appeared and was not ready and the matter was adjourned to 11th June, 2003. On 11th June, 2003 both sides were ready and the matter was adjourned to 17th September, 2003.

On 17th September 2003 and 17th November 2003, the matter was called and adjourned as the applicant was ill on both occasions and did not appear.

On 1st March 2004 the applicant appeared. Attorney for the applicant wished to file the application which is at present before me. The Motion was subsequently filed on 9th March 2004. The State also was not ready and the matter was adjourned to 15th March, 2004.

On 15th March, 2004 the State had not yet filed its affidavits and the matter was adjourned to 17th March, 2004. On 17th March 2004, the Court was unable to hear the application.

Finally on 18th March, 2004 the Attorneys began arguments before me on the Motion.

3. The responsibility of the accused for asserting his rights.

"Whether, and how a defendant asserts his rights is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain."

By letter dated 28 Sep 1998 (both Attorneys agreed to the contents of the letter), Attorney for the applicant wrote to the DPP. It appears that the complaint was not really aimed at the instant proceedings, but was directed towards the inordinate time that the DPP was taking to lay additional charges against the applicant, and towards the discontinuation of the proceedings in Informations numbers 24498/95 and 24499/95. The record also reveals that Attorney for the applicant was not present on a few occasions during the course of the preliminary enquiry. It also appears as if Defence Attorney made no application to try and get the matter proceeded with as expeditiously as possible.

4. Prejudice to the accused.

"Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimise anxiety and concern of the accused; and (iii) to limit the possibility that the defence will be impaired. Of these the most serious is the last... If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defence witnesses are unable to recall accurately events of the distant past. Loss of memory, however, is not always reflected in the record because what he has forgotten can rarely be shown."

During the entire set of proceedings, the accused had been granted bail and was not in custody. However the said letter of 28 Sep 1998 from the applicant's attorney must have suggested to the prosecution that the applicant was anxious to know exactly what he was being charged with. In the instant case the applicant is also contending that sometime in or about 2000, while he was in New York, he contacted his sole witness, Peter Simon, who could corroborate his defence should it become necessary after the enquiry. The applicant goes on further to contend that Peter Simon has now migrated and he is unable to locate him.

In **The State v Balram Seupersad** H.C.A. No. Cr. 69/02, I made the point that in cases of alibi, where allegations were made that witnesses had died, the Court was more likely to draw the inference that an accused had suffered prejudice where statements had been recorded from alibi witnesses. In the instant case, the applicant has throughout been represented by competent counsel. Surely at the time when the applicant met his witness, Peter Simon, in the USA in 2000, seeing that some four years had elapsed since the applicant was charged, it would have occurred to counsel to record a statement from Peter Simon. In any event counsel ought, at the earliest opportunity, to ensure that they take such steps as are necessary to protect their client's interests. Further the applicant

does not disclose where Peter Simon lived, nor does he go on to provide any particulars as to the manner in which Peter Simon would corroborate his defence. In the circumstances, I am of the view that the applicant has not satisfied me on a balance of probabilities that he would suffer prejudice on the ground that Peter Simon cannot be located. In any event it is a matter that can be considered by a jury to determine what weight they should give to it.

I have also taken into consideration the prejudice inevitable in a trial coming on some 11 years after the date of the alleged offence and some nine years after the discovery of the alleged criminal acts.. Further I have taken into consideration the case of **R v Buzalek and Schiffer** [1991] Crim LR 115 which applied **Barker v Wingo** ante. In that case the appellant was convicted of fraudulent trading. On appeal it was argued that the proceedings should have been stayed as the delay of some six-and-a-half-years in bringing the case on for trial constituted an abuse of process. The Court of Appeal dismissed the appeal, holding that the judge had directed his mind to the relevant criteria, making it clear that he regarded the complexity of the documents and of enquiries to be an established factor. The Court of Appeal made the point that the case turned largely on documents, and it would be possible for witnesses' memories to be charged by referring to these. The Court found that it was important to distinguish between the sort of case in which what was going to be in issue at the trial was the recollection of witnesses about some event unsupported by documents, and a case which largely turned upon documents. If for example after a period of six-and-a-half-years, a case was going to have to turn on what witnesses saw in an affray, in the course of an assault, or in a road accident, the passage of time was going to be much more prejudicial than if there was documentary evidence recording what had been said to and said by the parties.

It is clear that in the instant case the State is going to rely to a great extent on the contents of documents in support of its case against the applicant. The passage of time, while long, is not as prejudicial as would otherwise be the case since it would be easy for witnesses to refresh their memory from the contents of the documents.

CONCLUSION

In my view the delay in the instant case was justifiable. The degree of potential prejudice was small. Moreover the jury can be directed to take into consideration all factual issues arising from delay together with such directions as the judge thinks appropriate to ensure a fair trial. In any event taking all the factors into consideration, I am of the view that this is not an exceptional case warranting the imposition of a stay. The applicant's Motion is therefore dismissed. The matter is fixed for trial on 17 May 2004 in the Fourth Criminal Court.

DATED this 8th day of April, 2004.

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PRAKASH MOOSAI
JUDGE