

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Case No. 88/92

BETWEEN

ANTHONY ELLIOT                      APPLICANT/ACCUSED

AND

THE STATE                              RESPONDENT

**BEFORE THE HONOURABLE MADAM JUSTICE ALICE YORKE-SOO HON**

APPEARANCES:

State: Mr. Ricky Rahim

Accused: Miss J. Charles

**RULING**

The Accused, Anthony Elliot is charged with the murder of one Lynda Charles which occurred on the 2<sup>nd</sup> day of December, 1987 at Belmont. By Notice of Motion filed on the 15<sup>th</sup> September, 1999 the Accused sought to invoke the inherent jurisdiction of the Court to stay his Prosecution and to order that his trial not be proceeded with, without an order of the Court.

In support of the said Motion the Accused filed an Affidavit sworn to by him on 15<sup>th</sup> September, 1999 (hereinafter called "The Principal Affidavit). A supplemental Affidavit was also sworn to and filed on 22<sup>nd</sup> October, 1999. He relied upon the following grounds:

- (1) That the continuation of his prosecution in respect of the charge, the subject matter of the indictment herein, amounts to an abuse and/or misuse of the process of the Court having regard to the inexcusable and/or inordinate delay occasioned to him.

- (2) It is an abuse and/or misuse of the criminal process for the Director of Public Prosecutions to proceed with the trial after 12 years from the date of the alleged commission of the offence.
- (3) The continuation of the prosecution is unlawful in that it is manifestly unfair to continue the same as it all tends to bring the administration of justice into disrepute.
- (4) The continuation of the prosecution is contrary to the principles of fundamental justice; it is not in accordance with due process of law, it deprives him of the protection of the law which is guaranteed to him by the common law and by the Constitution of the Republic of Trinidad and Tobago.
- (5) The trial is an abuse of process and is unlawful, in that having regard to the inordinate and/or unreasonable and/or inexcusable delay, continuation of the prosecution violates both his common law rights and constitutional rights that guarantee him a trial within a reasonable time and for the determination of the prosecution against him in accordance with the principles of fundamental justice and in conformity with the protection of the law.
- (6) The delayed Trial has prejudiced the fair trial of the matter and it constitutes oppression against him.

Attorney for the State, relied upon an affidavit in response sworn to by Inspector of Police Martin Morrain and filed on 29<sup>th</sup> November, 1999.

The Applicant was arrested for the offence on 2<sup>nd</sup> December, 1987 and charged on 4<sup>th</sup> December, 1987. He was committed to stand trial on 13<sup>th</sup> May, 1988 but not tried until 6<sup>th</sup> April, 1993. Indeed the Indictment was not prepared until 14<sup>th</sup> August, 1992. On 22<sup>nd</sup> April, 1993 he was convicted which said conviction was quashed on 17<sup>th</sup> June, 1997 and a retrial was ordered. His trial was last fixed on 25<sup>th</sup> November, 1999.

Attorney for the Applicant submitted that a period of 12 years having lapse from 2<sup>nd</sup> December, 1987 to present, such delay in itself is inordinate, inexcusable and led to the Accused suffering grave prejudice in that the Scientific Officer Mr. Carlton Cowie is now unavailable for cross examination. Further the ability of the Applicant to put his case fairly and adequately to the Jury would be adversely affected if the trial were to now proceed and because of the said delay the Applicant has extreme difficulty in recollecting his whereabouts on the date of the alleged offence.

Attorney for the State on the other hand submitted that any delay which occurred was reasonable and justifiable having regard to all the circumstances of the case. Further the Applicant will not suffer any kind of prejudice from the absence of Scientific Officer Cowie because it is the option of the State not to seek to tender the Certificate of Analysis prepared by Mr. Cowie. In any event it is always open to the defence to call its own evidence in order to challenge the Prosecution's case bearing in mind of course that there was no burden on the Accused to prove anything.

It is not disputed that this Applicant is now incarcerated for a period of twelve (12) years in connection with the offence charged. During this time he had a trial which resulted in his conviction albeit some five (5) years later.

It is well settled that the Constitution of Trinidad and Tobago does not expressly provide for a right to a Speedy Trial or a trial within a reasonable time although it does confer upon a person charged with a criminal offence the right to a fair trial. ***In Attorney General's Reference (No. 1 of 1990)*** (1992) 1 QB 630 (pg 643-44), the Court of Appeal in England stressed that a stay on the grounds of delay was to be imposed only in exceptional circumstances:

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

In ***George Tan Soon Gin vs Judge Cameron (1992)2AC*** the Court adopted a broader approach:

***“Naturally, the longer the delay the more likely it will be that the prosecution is at fault, and that the delay has caused prejudice to the defendant: and the less that the prosecution has to offer by explanation, the more easily can fault be inferred”.***

In ***Baker v Wingo (1972) 407 U.S. 514*** the Supreme Court of the United States considered that the right to speedy trial was designed to protect three interests of the Defendants namely:

- (1) to prevent oppressive pre trial incarceration
- (2) to minimise anxiety and concern of the Accused
- (3) to limit the possibility that the Defence will be impaired. Of these the last was considered the most serious.

In the case of **Reid v the Queen (1980) AC 343** the Court considered that whether a stay is granted depends on some of the same questions which arise when considering whether or not to order a retrial. These included:

- (1) The seriousness or otherwise of the offence
- (2) Its prevalence
- (3) Whether the first trial was prolonged and complex
- (4) The expense and length of time of a new trial
- (5) A criminal trial is always an ordeal for the defendant which he ought not to undergo through no fault of his own unless the interest of justice requires that he should do so.

It is important that a retrial should take place without undue delay. This was emphasized in the case of **Bell v DPP (1985) 1 AC 937** Lord Templeman said at page 954 –

***“A period of delay which might be reasonable as between arrest and trial is not necessarily reasonable between an order for retrial and the retrial itself”.***

In this case bearing the above considerations in mind this Court notes that:

- (1) The Applicant is charged with a very serious offence - that of murder. A crime which is not only very prevalent but one which occurs almost daily in our society
- (2) the previous trial was not long and complex and so the expense and length of time for which the Court and the Jury would be engaged is not expected to be extravagant.

The Applicant in this case rely on the specific difficulties in relation to the evidence. He states at paragraph 13 of his Principal Affidavit that:

“I have been severely prejudiced and compromised in the preparation of my defence in that:

- (a) I have extreme difficulty in recollecting my whereabouts on 2<sup>nd</sup> December, 1987 so as to properly instruct my Attorney at Law
- (b) My ability to adequately instruct my Attorney at Law with respect to other issues which arise in the State’s case has also been affected”

One can well appreciate the memory failure which can occur over a period of twelve (12) years. However, while the Applicant states quite clearly that he is unable to recollect his whereabouts on 2<sup>nd</sup> December, 1987, he did not say what were the other issues to which his memory was also affected. There is also sufficient opportunity for him to refresh his memory from the proceedings at the first trial in which he gave very detailed evidence as to his whereabouts as well as the other issues in the case – for example his explanation of the presence of certain chemical compounds on his hands.

There was no complaint from the Applicant about the delay of his first trial. He was committed on 13<sup>th</sup> May, 1988 but not tried until 6<sup>th</sup> April, 1993 a period of over five (5) years from the date of his arrest. In the case of **Sinanan v the State (1992) 44 WIR 349 Bernard C.J. at PP 364-65** listed the many difficulties faced by the courts of Trinidad and Tobago at that time. For example that serious crimes of violence including murders have been an almost every day occurrence over the past seven (7) years; that the courts had been burdened over those years with many complex matters in criminal appeals with many persons on death row and the lack of trained support staff.

The Applicant’s case falls within the period referred to above and any claim to delay cannot be looked at in vacuo but must bear relation to these circumstances at least from the time of arrest to the time of his first trial.

What then of the period of his conviction to retrial and the listing of the matter for retrial? He was convicted on 22<sup>nd</sup> April, 1993. On 17<sup>th</sup> June, 1997 his conviction was quashed and on 12<sup>th</sup> January, 1998, the matter made its way on the Cause List, at which hearing the Applicant was unrepresented although he indicated that Ms. Charles was his Attorney.

At paragraph 7 of the Applicant's Principal Affidavit he stated that a copy of the written judgment of the Court of Appeal was not made available until 30<sup>th</sup> November 1998.

His Attorney advised him that it was absolutely necessary to obtain a copy of that judgement before the trial could begin since the Court of Appeal ordered that the Scientific Officer Carlton Cowie ought to be produced for cross examination and that the evidence of the State's witness Clifford Andrews was of a highly prejudicial nature and as such ought not to be admitted.

However paragraph (5) of the Affidavit of Martin Morrain in response sets out that it was not absolutely necessary to obtain a written copy of the said judgement before the commencement of the retrial since the extempore judgement delivered on 17<sup>th</sup> June, 1997 was clear, unambiguous and of the same terms as that of the written judgement, Attorney for the Applicant being present when the extempore judgement was delivered. This court accepts the evidence of Martin Morrain and finds that it was not absolutely necessary to obtain a copy of the written judgement prior to the commencement of the retrial. The Applicant himself at paragraph 8 of his Principal Affidavit stated that since 3<sup>rd</sup> December 1997 he was served with an Indictment for the retrial which was next listed for 21<sup>st</sup> January, 1998.

A history of these proceedings show as follows:

- (1) that on 12<sup>th</sup> January 1998 – The Accused was unrepresented but indicated that Miss Charles was his Attorney. The matter was adjourned to 21<sup>st</sup> June, 1998.
- (2) On 21<sup>st</sup> June, 1998 both the Defence and the State were not ready. Miss Charles had surgery and needed six (6) weeks for recovery. It was adjourned to 16<sup>th</sup> March, 1998.
- (3) On 16<sup>th</sup> March, 1998 both sides agreed on an adjourned date for trial and it was adjourned to 27<sup>th</sup> March, 1998.
- (4) On 27<sup>th</sup> March, 1998 both sides were ready. No reason was stated for the adjournment. It was adjourned to 4<sup>th</sup> May, 1998.
- (5) On 4<sup>th</sup> May, 1998 both sides were ready. Again no reason given but the matter was adjourned to 1<sup>st</sup> October, 1998.
- (6) On 1<sup>st</sup> October, 1998 the Defence informed the court of a pending matter at the Privy Council and it was adjourned for a date to be fixed.
- (7) Six months later Attorney for the accused wrote the Director of Public Prosecution requesting that the matter be fixed for trial. It was then put to the Cause List for 2<sup>nd</sup> July, 1999 at which time both sides were again ready and the matter was adjourned to 7<sup>th</sup> October, 1999. Again on 7<sup>th</sup> October, 1999 and 21<sup>st</sup> October, 1999 the matter was adjourned to 25<sup>th</sup> October, 1999 and then to 30<sup>th</sup> November, 1999 for the hearing of his Application.

In instances where both sides were ready and the matter did not begin, one of the reasons could be that another matter was engaging the court's attention. Indeed that was the very reason that this Application was transferred to this Court. The Judge before whom it was listed was engaged in a trial

A closer look at the above record shows that except for the Cause List hearing on 12<sup>th</sup> January, 1998 where the Accused was unrepresented and except for 21st January, 1998 where both sides were not ready, both sides were ready on most occasions on which the Applicant's case came up for hearing. What is significant is that between 1<sup>st</sup> October, 1998 to 16<sup>th</sup> April, 1999 the Applicant had a pending matter before the Privy Council – a period of some six (6) months. His Attorney wrote the Registrar requesting that the matter be fixed for trial on 16<sup>th</sup> April, 1999. Three days later a response was dispatched putting the matter on the Cause List for 2<sup>nd</sup> July, 1999. So that it was the Applicant by having his case before the Privy Council caused a delay of some six (6) months.

A great deal of Attorney's submissions focused on the unavailability of the Scientific Officer for cross examination. She submitted that his absence would result in irreparable prejudice to the Applicant. At the first trial, the Trial Judge refused an application by the Defence to call his witness for cross examination. The Court of Appeal held that such a refusal amounted to a wrongful exercise of the Trial Judge's discretion. It is a fundamental principle that an Accused person is entitled as of right to have the opportunity to cross examine those who accuse him. The absence of this witness for a second trial would again cause severe prejudice to the Applicant since again he would not be able to cross examine him. The importance of the cross examination of this expert witness is to enable Attorney to show that the Applicant who was a peddler selling star lights on Frederick street and who on the day in question had burnt two (2) packets by way of demonstration at the time and that there was a similarity of the compounds which were found on the swab's and those taken from the hands of the Applicant thereby rendering a plausible explanation for the presence of the compounds.

Section 19 of the Evidence Act Chap.7:02 makes the Certificate of Analysis admissible without calling Mr. Carlton Cowie.

In the case of **DPP v Tokai (1996) AC 856** the Privy council held that where complaint was made of undue delay before trial the traditional procedures of the criminal courts of Trinidad and Tobago were usually sufficient to secure the fairness of the trial. In an exceptional case the trial judge would grant a stay of the proceedings and if he did not do so he had a duty to direct the Jury with regard to all matters arising from the delay which were favourable to the defence. Any injustice caused by his failure to give satisfactory directions were rectifiable in an appeal

Mr. Rahim for the State submitted that if the Certificate of Analysis goes into evidence in the absence of the witness, the Defence is entitled to call evidence to contradict it. The Applicant can challenge the contents of the certificate and the lack of opportunity to cross examine Mr. Cowie is not sufficient to cause irreparable damage. Indeed Mr. Rahim even went further to suggest that the case for the State did not depend upon this evidence and it may very well be that the State may not attempt to tender the certificate of analysis at all. Miss Charles attempted to persuade this court that if the State omits this evidence altogether it will still be prejudicial to the Applicant.

The Court finds it difficult to agree with that submission. The case for the State is based on strong circumstantial evidence. The removal altogether of one link in the entire chain of circumstances must have the effect of weakening the prosecution's case and this could only prove advantageous to the Applicant. The admissibility of the Certificate of Analysis without the opportunity for the Applicant to cross examine the Scientific Officer Carlton Cowie would not be fair. His right to cross examination would be severely infringed. The trial judge then must ensure fairness and that in the respectful view of this Court must mean that the Certificate of Analysis would not be allowed in evidence.

Miss. Charles relied upon the decision in the case of *Charles Carter and Carter v the State* Privy Council Appeal No. 33 of 1998. In that case a delay of some twelve (12) years was held to be both unreasonable and unjustified. Indeed the delay was considered to be both considerable and disturbing. However it was stressed that the complaint in Carter was not just on the ground of delay but also on the ground that it was quite wrong that the Appellants had been put on a 3<sup>rd</sup> trial after so many years when one conviction was already quashed and one jury was unable to reach a verdict. It was unacceptable that the Prosecution having failed twice should continue to try to secure a conviction. For the prosecution to continue was wrong in principle and constituted a misuse of the criminal process.

The instant case can be distinguished from *Charles and Carter's case* in that in *Carter* it was the combined effect of the delay and the number of trials (3) which led the Privy Council to hold that the trial judge ought to have stayed the proceedings. In this case there was only one trial.

Accordingly, the ruling of this Court is that the Applicant has been unable to show that owing to the delay he will suffer serious prejudice to the extent that he is unable to obtain a free trial

The interest of justice require that this Applicant face a second trial.

The trial judge has a duty to direct the jury as to any matter arising from the delay which is favourable to the Defence. The traditional procedures of the Criminal Courts are sufficient to secure the fairness of the trial of this Applicant.

Accordingly this motion is dismissed. No order as to costs.

Taking into account the intervening Christmas Holidays this trial is fixed for the next available time which is 3<sup>rd</sup> January, 2000. Accused is remanded in custody.

Dated this 10<sup>th</sup> day of December 1999.

Alice Yorke-Soo Hon  
Judge