IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE HOME CIRCUIT COURT

NO. HCC 20/04

THE QUEEN vs. BYRON JOHNSON
SOLOMON JOHNSON
DEVON HACKETT
CARLOS WILLIAMS

IN OPEN COURT

Mrs. Diahann Gordon-Harrison for the Crown
Ms. J. Asher for Byron Johnson
Mrs. V. Neita-Robertson for Solomon Johnson
Mr. R. Golding for Devon Hackett
Mr. K. Jarrett for Carlos Williams

Murder – Application for adjournment refused – Matter adjourned Sine Die – Pending resolution of issues – Inordinate pre-trial delay – Reasonable time – Insufficiency of jurors and Part-heard matters – Abuse of process – No permanent stay of proceedings.

21st, 23rd & 30th November 2011.

Campbell, J.

[1] On the 23rd November 2011, I refused an application for an adjournment of the criminal trial of the accused to Monday, 28th November 2011. The matter was adjourned without fixing a date (adjourn sine die), pending the resolution of the issues that had lead to the inordinate delay. These are my reasons for the order:

[2] This matter appeared on the trial list for Court 1 in the week commencing the 21st November 2011. When the matter was called, the Court made inquiries of the prosecuting attorney, as to the date of the incident, the date when the matter first came before the court, the number of trial dates and the reasons why the matter has not been tried.

[3] The Deputy Director of Public Prosecution (DDPP) indicated that the matter was in relation to an incident that took place in December 1999; that the accused were committed to the Circuit Court in the year 2000 and that since then, the matter has had 38 trial dates. The learned Deputy Director of Public Prosecution informed the court that the substantial reason for the several adjournments was the insufficiency of the jurors and the part-heard matters.

[4] The DDPP indicated that there would be a requirement of approximately 68 to 72 jurors in order to ensure that a panel would be struck. Only 41 persons had answered the juror summons. The prosecuting attorney, in answer to the court's query, "*If it is reasonable to assume that all the challenges will be used*," responded that, ". . . *how these courts have normally, usually and typically operated . . . there is normally a reasoned assessment at the outset*."

[5] Nonetheless, I indicated that I could not be satisfied at that stage that it would be necessary for all the challenges available to counsel to be exhausted before we could empanel a jury. I felt it was possible to strike a panel from the numbers that were present. I thus ordered the Registrar to start the empanelling process. In the event, we empanelled eight (8) jurors of the 41 who "came to be book to be sworn". I consulted with counsel and was advised that it would require a further 35 jurors to ensure that the trial could proceed.

[6] I then took the course of summoning Deputy Superintendent Taylor, who has responsibility in the Jamaica Constabulary Force for matters dealing with jurors, and instructed her of our need for a further 35 jurors. We took the adjournment on Monday afternoon and requested that the jurors so found would be made available on Wednesday, the 23rd November 2011. The court

did not sit on the 22nd November 2011. On resumption of the matter on the 23rd November 2011, the Registrar advised that only nine additional jurors were now available through the efforts of DSP Taylor. Both the prosecutor and the defence challenged eight of those jurors.

[7] I then had recalled, the seven jurors who had been challenged by the Crown, in order to empanel from among their numbers, jurors whom the Deputy Director of Public Prosecution was unable to show cause. Two additional jurors were sworn of five jurors so located. There were eleven jurors empanelled and the available jurors had been exhausted. Based on the efforts made and the number of jurors empanelled, I formed the view that we would need a minimum of twenty-three (23) jurors to ensure that we would be able to empanel a jury, and allow both sides to exhaust their challenges should they so wish. I was not satisfied, based on the efforts already taken; we would be able to get those numbers for the remainder of the week.

[8] A substantial number of jurors that were empanelled were in their final week of service and so indicated, the trial, according to defence counsel, would be expected to last two and a half weeks. Having failed in the attempt to empanel a jury, there was nothing to indicate that at any date in the near future would there be a better chance of the matter proceeding. It should be noted that, when asked by the court, none of the counsels at bar were able to say that a delay of eleven years was a reasonable time within which to bring a criminal prosecution in this country. Having formed the view that there was unlikely to be any sufficient numbers of jurors to have their cases tried and being aware that the accused had been in attendance for trial on 38 occasions, I saw no good reason in having the accused return to court before the administrative authorities had made the necessary provisions to facilitate the trial going on, and that the inordinate delay that had been incurred would not be prolonged. The State has a responsibility to put the necessary facilities to ensure that its constitutional mandates are met.

[9] The decision to adjourn the matter without a date was done in the absence of any evidence that the accused had asserted their fundamental right to a trial within a reasonable time, at any stage in the past eleven years that the matter was before the court. In the face of the court's order for the matter to be temporarily stayed until the substantial cause of the delay was remedied, defense counsel urged the court for the matter to be adjourned for a further date. The court has a discretion, where criminal proceedings constitute an abuse of process, to refuse to allow the indictment to go for trial. This includes the power to safe-guard the accused from oppression or prejudice. The power to stay an indictment is one at common law and is inherent in the jurisdiction of the court. It is one that is exercised to ensure fairness to both sides and to avoid the process from being abused. Abuse can arise in many forms, very often the ground is delay.

[10] The court has an inescapable duty to secure this fairness to those who are brought before them. The answer to Lord Devlin question posed in **Connelly**, "Are the courts to rely on the Executive to protect their process from abuse?" must acknowledge that the "inescapable duty" that he opines is on the court, takes on greater significance and demands greater vigilance from a court which is the guardian of the Constitution. The Charter of Fundamental Rights and Freedoms, secured by the Jamaican people, will be diminished and demeaned, if the courts "contemplate for a moment the transference to the executive of the responsibility for seeing that the process of law is not abused." Woodhouse, J. in ***Moevao v. Department of Labour*** [1980] 1 N.Z.L.R. 464, 475-476, said:

> *"It is not always easy to decide whether some injustice involves the further consequence that a prosecution associated with it should be regarded as an abuse of process and in this regard the courts have been careful to avoid confusing their own role with the executive responsibility for deciding upon a prosecution. In the Connelly case Lord Devlin referred to those matters and then, as I have said, he went on to speak of the importance of the courts accepting what he described as their 'inescapable duty to secure fair treatment for those who come or are brought before them.' He said that 'the courts cannot contemplate for a moment the*

transference to the Executive of the responsibility for seeing that the process of law is not abused' ([1964] A.C. 1254, 1354 ...). Those remarks involve an important statement of constitutional principle. They assert the independent strength of the judiciary to protect the law by protecting its own purposes and function. It is essential to keep in mind that it is ***'the process of law****,' to use Lord Devlin's phrase, that is the issue. It is not something limited to the conventional practices or procedures of the court system. It is the function and purpose of the courts as a separate part of the constitutional machinery that must be protected from abuse rather than the particular processes that are used within the machine. It may be that the shorthand phrase 'abuse of process' by itself does not give sufficient emphasis to the principle that in this context the court must react not so much against an abuse of the procedure that has been built up to enable the determination of a criminal charge as against the much wider and more serious abuse of the criminal jurisdiction in gene."*

See Connelly v D.P.P (1964) 48 Cr. App. R. 183, at p. 268-269
Attorney – Generals' Reference (No.1 of 1990) {1992}3 All ER169 at page 176.
Attorney – General of Hong Kong v Cheuung Wai - bun {1993} 2All ER510 at page 514.

[11] The Jamaican Constitution is a member of a family of constitutions, similar, but not identical, in form. One of the main features of those constitutions is the enumeration and entrenchment of certain rights and freedoms. These rights are important safe-guards for the citizens of this country. They proceed on the presumption that the human rights and fundamental freedoms that are referred to are already secured to the people of Jamaica by existing law. Chapter 111 of the Constitution contains the Fundamental Rights and Freedoms. On the 7th April 2011, Chapter 111 of the Constitution was repealed and in its place was substituted The Charter of Fundamental Rights and Freedoms. The section relevant to these proceedings, former S.20 (1), has been inserted in the new Charter as S.16 (1). The side-note to the S.16 (1) reads, "Protection of the right to due process," replacing the repealed "Provision to secure protection of law." S.16 (1) provides;

> *"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."*

[12] The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011, which came into effect after 'wide public consultation and due deliberation,' purports to provide a "more comprehensive and effective protection for the fundamental rights and freedoms of all persons in Jamaica." The Constitution is the supreme law of the land, and the courts are the guardians of the Constitution.

[13] It is the concern of every court to ensure that its process is not abused by any party appearing before it and an inordinate and unjustified delay can, independently of prejudicing the defendant's position at trial or any other prejudice to the accused, lead to an abuse of the court's process. It is fair to assume that the parties in the matter would have made efforts to facilitate the trial. I am sure the several Judges who presided in the matter over the years, would have been concerned by the delay in bringing the matter to trial and would have taken steps which they consider necessary to have the case tried. All of their efforts have come to nought. The Privy Council has recognized that delay in the trial process is common, however, I daresay, delay of 11 years in the pre-trial stage, is rare. An examination of the relevant case will reveal the exceptional nature of the case before the court.

What Constitutes a Reasonable Time?

[14] In **Herbert Bell v The Director of Public Prosecutions and Anor. 1985 UKPC 13**, the accused was arrested and charged in May 1977 and convicted in October 1977, having appealed his conviction, retrial was ordered in March 1979, the case was mentioned several times and the accused admitted to bail in March 1980, in November 1981, the Crown offered no evidence and the accused was discharged. In February 1982 he was rearrested and ordered to stand trial on the 11th May 1982. On 5th May 1982, he applied for constitutional

relief, complaining that his right to trial within a reasonable time was infringed. On the 19th May 1983, Bell's appeal against the decision of the Full Court, dismissing his application, was dismissed by the Court of Appeal. Before the Privy Council, the respondents argued that, the proper course was for the appellant to make his submission of contravention of his rights at the commencement of his retrial. Lord Templeman, who wrote the judgment of the Board, in rejecting that submission said, "If the constitutional right of the appellant has been infringed by failing to try him within a reasonable time, he should not be obliged to prepare for a retrial which must necessarily be convened to take place after an unreasonable time." The Board similarly rejected the submission of the Learned Solicitor General of Jamaica, who relying on the authority of the **Director of Public Prosecutions v Nasralla** (1967) 2 A.C 238, posited that the Constitution of Jamaica conferred no new rights on the individual that were not enjoyed immediately before the coming into effect of the Constitution on the 6th August 1962, and there was no right to a speedy trial at common law, at pp 19, the Board held;

> "***Their Lordships do not accept the submission that prior to the Constitution, the law of Jamaica applying the common law of England was powerless to provide a remedy against unreasonable delay, nor do they accept the alternative submission that a remedy could only be granted if the accused could prove some specific prejudice, such as the supervening death of a witness."***

[15] The judgment then relied on Lord Devlin judgment in **Connelly v D.PP. (1984) 48 Cr. APP.183,** 1964 2 A.C. 1254, which referred to the inherent power of the court to make rules to ensure that the process of the court is used fairly and conveniently by both sides. The judgment recognized that a general power to prevent unfairness to the accused has always been a part of the English criminal law, and at pp 1347, of Lord Devlin's judgment, it is reported "**Nearly the whole of the English criminal law of procedure and evidence has been made by the exercise of the judges of their power to see that what was fair and just was done between prosecutor and accused.**" Lord Templeman

indicated they would be inclined to accept the view of the Jamaican Full Court **that a period of 32 months or thereabout** delay was not unconstitutional, but felt that the court fell into error by comparing pre-trial delay with post-trial delay.

[16] Their Lordships, in **Bell**, accepted that the three elements of S.20 (1) of the Jamaican Constitution formed part of one embracing form of protection afforded to the individual. The longer the delay in any particular case the less likely it is that the accused can still be afforded a fair trial.

[17] The judgment in **Bell** relied heavily on a decision of the Supreme Court of the United States of America, in **Barker v Wingeo 1972 407 US 514**, in which Powell, J. identified four factors in determining whether the 6th Amendment Right, which provides as follows: -

> "*In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . .*"

has been infringed. Powell J, commented on the vagueness of the right, as compared to other procedural rights. The inability of the period of delay to be defined with precision, "*the amorphous quality of the right*" which leads to the "*unsatisfactorily severe*" remedy of dismissal with the harsh consequence that a person guilty of a serious crime will go free without having been tried. The four factors were (a) the length of the delay; (b) the reasons for the delay; (c) the responsibility of the accused for asserting his right and (d) prejudice to the accused.

[18] Four factors from Barker v Wingeo

(a) **The length of the delay**

Until there is delay that is presumptively prejudicial, there is no need for an inquiry. The complexity of the case is a factor. The court in **Bell** found that the delay in that case was presumptively prejudicial.

(b) **The reasons given by the prosecution for the delay**,

Is the delay deliberate? In which instant that would weigh heavily against the prosecution. Or is it due to, negligence or overcrowding, which does not weigh as heavily as deliberate action to stymie the defence, but must be considered since it is the government that has the ultimate responsibility. The Privy Council found in **Bell**, that the authorities were negligent as to the overcrowding, which the respondents in that case alleged. In this case, both the unavailability of sufficient jurors and the part-heards, which the DDPP alleges, are as a result of the negligence of the authorities.

(c) **The responsibility of the accused for asserting his rights**

The strength with which the accused sought to assert his right, Powell, J opines, will be affected by the length of the delay and the reason for the delay. It may very well be that the reasons for the delay in this case may explain the absence before me of any effort on the part of the accused to assert their right. It may very well be the nature of the problem, the shortage of jurors, and the overcrowding in the court system may be seen to be beyond the reach of the judiciary to solve. Whatever the reason, no action to stay the proceedings or to seek constitutional redress was undertaken by the accused. Counsel, Mrs. Neita-Wilson, appeared concerned by the action of the court to address the abuse of its process in the trial of her client. The Privy Council in **Bell** did not lay much store on this ground, as the Board was of the view that the accused may well have thought it would be a waste of time to object to the grant of adjournment or to appeal the orders granting adjournments. This observation by the Privy Council makes it clear that the presiding judge in **Bell's** case was at liberty to refuse the Crown's application for an adjournment as was done in this case, where the duration of the delay was much longer.

(d) **Prejudice to the accused**

Powell, J. opined that the main considerations were (1) to prevent oppressive pre-trial incarceration, (2) to minimise anxiety and concern of the accused, (3) to limit the chance of impairment of the defence. Although the Board in **Bell** found that the accused had not alleged any prejudice, their Lordships felt that there was inevitable prejudice that cannot be left out of the account. The failure to allege prejudice does not, in a case where the accused was alleging a contravention of his right to a trial within a reasonable time, and where the delay from the date of the incident, to the date of the re-trial was seven years, mean that prejudice has to be discounted. In **Bell**, the Privy Council found that the S20(1) rights were infringed, and would have ordered that the accused be discharged and no further prosecutions undertaken against him, however they refrained from so ordering upon being persuaded that the Jamaican authorities would obey the spirit of the law and discharge the accused.

[19] In the instant case, the delay from the date of the incident to the proposed trial date is in excess of twelve years; five years in excess of the period of delay in **Bell;** in the instant case the accused has still not had a trial whereas in **Bell** he had a trial and appeal determined.

[20] In **Sooriamurthy Darmulingum v The State,** (2000) UKPC 30, a Privy Council decision from the Supreme Court of Mauritius, the appellant appeal against **trial delay of eight and a half years**, from the time of his arrest in 1985 to his conviction in May 1993, and **a post-trial delay of five years** between his conviction and the disposal of his case before the Court of Appeal. The majority of the Mauritius Supreme Court held that there was no constitutional delay, "**having regard to all the circumstances of the case, including its complexity and systemic in respect of which one had to accept as normal and inevitable a period of delay."**

[21] In **Sooriamurthy**, the Privy Council regarded the three guarantees in S10 (1) of the Mauritian Constitution, which is pari matera to S20 (1) of the Jamaican Constitution, as being separate guarantees. This was a development from **Bell,** where the Board had held that the right to trial within a reasonable time, "formed part of one embracing form of protection afforded to the individual." The longer the delay in any particular case, the less likely it is that the accused can still be "afforded a fair trial." The separate nature of the guarantees is illustrated in the judgment at paragraph 14 of Sooriamurthy, where it is reported, inter alia;

> "***Hence if the defendant is convicted after a fair hearing by a proper court, this is no answer to a complaint that there was a breach of the guarantee of a disposal within a reasonable time, and even if his guilt is manifest, this factor cannot excuse or justify the breach of a guarantee of disposal within a reasonable time. Moreover the independence of the 'reasonable time' is relevant to its reach. It may of course be applicable, where by reason of inordinate delay, a defendant is prejudice in the deployment of his defence; but its reach is wider. It may be applicable in any case where the delay is inordinate and oppressive."***

[22] The Privy Council calculated the period of delay from the time of arrest to a decision of an intermediary court and concluded that the period of delay was **six years and nine months**, **pre-trial delay**. The court was of the view that this was an inordinately long period. The court found that the post-trial delay **of five and a half years** was a breach of the guarantee for disposal within a reasonable time. The court determined that the remedy for a breach of this kind was to quash the conviction.

[23] The Privy Council rejected the submission that because of the manifest guilt of the appellant, it would be wrong to allow him to escape conviction, and that the case should be remitted to the Supreme Court of Mauritius for the imposition of a non-custodial sentence. Their Lordships opined that although they felt there may be cases where the remedy for such a contravention may be the

substitution of a non-custodial sentence, the case warranted the quashing of the indictment. The pre-trial delay in the instant case was 12 years as against 6.9 years in Sooriamurthy.

[24] In **Flowers v The Queen** (2000) UKPC 41, which was an appeal from the Jamaica Court of Appeal, among the complaints of the appellant before the Board, was a breach of his right to a trial within a reasonable time, caused by the delay incurred from the date he was charged, on April 6th 1991 to the date of the commencement of his third trial, 13th January 1997. The appellant grounded his complaint with the allegation that the delay was in contravention of his S.20 (1) guaranteed right to fair hearing within a reasonable time. Also, his prosecution trial and conviction constituted an abuse of process and was contrary to his common law right to fair hearing because of the inordinate and unjustified delay between his arrest and commencement of his third trial.

[25] The court was of the view that that period of delay of **almost six years in Flowers** was the cause of serious concern. The court, in the course of its judgment, examined the Trinidad appeal to their Lordships Board in **Charles v State** 2000 1 WLR 384, where the appellant had complained that **a delay of nine years before the commencement of his third trial** had been an abuse of process of the court. The Trinidadian Constitution did not enshrine the right to a trial within a reasonable time. The **Charles'** appeal was allowed and the conviction quashed. The court opined that in **Charles**, the matter of delay had been raised before the trial judge; the Board was therefore able to consider the issue and expressed that they would be reluctant to do so in the absence of the matter having being so raised. (See also **Norris Taylor v Reg (**1995) UKPC 35, where a retrial was ordered after six and a half years, and the delay was not raised before the local court).

[26] However, in **Flowers**, the matter had not been previously raised; the Court was of the view that that weighed against the application. In addition, neither had the accused asserted his right to a trial within a reasonable time. The Board

quoted Powell, J. in **Barker v Wingeo**, that "**the defendants' assertion of his speedy trial right, then, is entitled to strong evidentiary weight in determining whether the defendants is being deprived of the right. We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial.**"

[27] There was also a failure on the part of defence counsel to request the transcript of trial. The court found the accused had been convicted on strong evidence, and the prevalence of the offence of murder during the furtherance of a robbery, and the public interest demanded that persons who committed such crimes and whose guilt could be proved should be convicted. The Board found that there was no undue delay in the appellate process. The notice of appeal having been filed on the 15th May 1998 and the judgment of the court was delivered on the 14th July 1998. The hearing before their Lordships Board was in July 2000. The decision in **Darmagulin** was distinguished on the basis that in **Darmagulin**, the delay in the appellate process was undue and inordinate.

[28] In **Flowers** the delay was 6 years from the date of the charge to the commencement of the third trial. The local courts in **Flowers** had managed to try the accused on two occasions and were to commence a third trial within 6 years. In this case, the State had failed to get off the ground once in 12 years. In Trinidad, the case of **Charles** and in the absence of the Constitutional guarantee to a trial within a reasonable time, the Privy Council found that the complaint of 9 years delay before commencement of third trial was justified. It is important to remember the greater normative force that attaches to a constitutional guaranteed right. It was reported in Sooriamurthy at para 14, inter alia:

> **"*It is a matter of fundamental importance that the rights contained in S 10(1) was considered important enough by the people of Mauritius, through their representatives, to be enshrined in their constitution. The stamp of constitutionality is an indication of the higher normative force which is***

attached to the relevant rights. See Mohammad v State (1999) 2 WLR 552, at 562G.”

This court is aware that the people of Jamaica, through their representatives considered S.16(1) important enough to be enshrined in the New Charter.

[29] Finally, in **Gangasing Aubeeluck v State of Mauritius (2010) UKPC**, the Privy Council restated the relevant principles applicable in motions alleging a contravention of the fundamental right to a trial within a reasonable time. The appellant had been arrested in 1998 and tried and sentenced in 2004, the appellate process both to the Mauritian Court of Appeal and to the Privy Council had taken an inordinate length of time, partly due to the appellant's attorneys. The Board, having set aside his sentence, the matter would have to be resubmitted so he would now stand to be sentenced for events that took **place 11 years ago**. It was the view of the Board, without an analysis of each period of delay, that the delay was inordinate, amounting to a breach of the appellant's rights to trial within a reasonable time and as redress for the breach, the Board suggested that the sentencing court may well think that a custodial sentence is not appropriate in the circumstances.

[30] The Board reaffirmed its principles enunciated in **Dyer v Watson** 202 UKPC D1, **Praskash Boolell v State of Mauritius** 2006 UKPC 46, **Haroon Rashid Elaheebocus v State of Mauritius**, 2009 UKPC 7 18, and quoted with approval Lord Brown's judgment, at paragraph 18 and 20 of Elaheebocus.

Inter alia,

18. **“If one asks the fundamental question, does the period which elapsed here between the appellant's arrest in April 1997 and the dismissal of his appeal to the Supreme Court on the 20th January 2006 give ground for real concern as to whether this case has been heard and completed within a reasonable time, there can surely be only one answer: yes. Thus it is necessary for the respondent state to explain and justify what appears overall to be an excessive lapse of time.**

Inter alia,

> 20. **Overall their Lordships felt driven to conclude that the judicial authorities here cannot sensibly be regarded as having honoured the reasonable time guarantee provided for by section 10 of the Constitution. True, the appellant was wholly complaisant in every successive delay which occurred; never once does he appear to have sought to hasten matters, for example, by enquiring when he might finally expect to hear the result of his appeal.**

[31] This court did pose Lord Brown's fundamental question to the lawyers in this case and none was able to say that the 11 years that the four accused had been coming to court, did not breach the accuseds' fundamental right to a trial within a reasonable time. The 11 years delay in **Gangasing Aubeeluck** was incurred in advancing the matter to the Privy Council, in the face of the appellant being obstructive of the process, in the instant case, the State had failed to put the necessary facilitates in place for the hearing of the matter. **Pratt and Morgan v the Attorney General** 1993, 43 WIR 340, provides a useful guide whilst recognizing "that the Jamaican Government faces great difficulties with a disturbing murder rate and limited financial resources at its disposal to administer the legal system." (Page 361D) urged the Government that it should be "possible to complete the entire appellate domestic process within approximately two years." This case is in its eleventh year and is no closer to be tried than it was ten years ago.

Whose Responsibility to Adhere to Constitutional Mandates?

[32] When enquiry was made of crown counsel as to the substantial reason for the delay, we were informed that the insufficiency of jurors and part-heard matters. Both these are matters beyond the reach of the prosecutorial authorities. It has been recognized from the case of **Bell**, that the administrative authorities has an input in the expeditious conduct of cases. The Crown did not allege before me that the defendant was responsible for any substantial part of the delay. Neither was there anything before me to indicate any contribution on the part

of the DPP's office to this delay, true it is that the DPP was actively exercising its right of challenges, against the background of the looming threat that the numbers of potential jurors were inadequate.

[33] The Privy Council in **Procutor Fiscal v John Watson & Paul Burrows**, 2002 UKPC D1, Lord Bingham of Cornhill, having looked at the matter of the complexity of the case and the matter of the conduct of the defendant, neither of which is relevant for our purposes, then considers the third factor that contributes to delay. Speaking in the context of signatories to the European Convention of Human Rights, in an appeal from the High Court of Judiciary, said at paragraph 55;

> *"The third matter routinely and carefully considered by the court is the manner in which the case has been dealt with by the administrative and judicial authorities. It is plain that contracting states cannot blame unacceptable delays on a general want of prosecutors or judges or courthouses or on chronic under-funding of the legal system. It is, generally speaking, incumbent on contracting states so to organise their legal systems as to ensure that the reasonable time requirement is honoured. But nothing in the convention jurisprudence requires courts to shut their eyes to the practical realities of litigious life even in a reasonably well-organised legal system."*

[34] The Court in **Bell** at pages 591-592, stated the States' role in the administration of justice, this way:

> *'Their Lordships accept the submission of the respondents that in giving effect to the rights granted by sections 13 to 20 of the Constitution of Jamaica, the courts of Jamaica must balance the fundamental rights of the individual to a fair trial within a reasonable time against the public interest in the attainment of justice in the context of the prevailing system of legal administration and the prevailing economic, social and cultural conditions to be found in Jamaica, the administration of justice is faced with a problem not unknown to other countries of disparity between the demand of legal services and the supply of legal services.'*

After considering the solutions, the judgment continues;

> *"The task of considering these problems falls on the legislature of Jamaica, mindful of the Constitution of Jamaica and mindful of the advice tendered from time to time by the judiciary, the prosecution services and the legal profession of Jamaica."*

[35] There is copious evidence that the advice have been tendered, Mrs Neita Wilson, a vice president of the Jamaican Bar Association, indicated efforts that have been made to regularize the jury system to make it more functional. The insufficiency of juries is not limited to the capital city, Kingston, with a population in excess of one million citizens. As was demonstrated in this case, the system fails repeatedly to have a sufficient number of jurors. There appears to be seldom any steps taken to ensure for the most basic comfort and convenience of the persons who do answer the call to jury service. In the rural parts of the island, jurors do incur expenses to travel relatively long distances to come to court. Reimbursements of these sums are oftentimes very long in coming. Members of the judiciary have tendered their advice from time to time as have members of the DPP's Office and the legal profession.

[36] It is clear that the court has an inherent jurisdiction to prevent an abuse of its process. This power must include a power to safeguard an accused person from oppression or prejudice. The common law had always provided a remedy for an inordinate delay in the trial process. At common law, such a delayed trial would be an abuse of the process of the court, and judges are empowered to act to keep its process from abuse.

How is a trial judge who is presented with inordinate delay, to act?

[37] In the **Attorney General's Reference No. 2** of 2001 [2003] UKHL 68, the Attorney General referred two points of law for the opinion of the Court of Appeal; we will concern ourselves with the first of the points:

> (1) Whether criminal proceedings can be stayed on the ground that there has been a violation of the reasonable time requirement in Article 6(1) of the European Convention for the protection of

> Fundamental Rights and Freedoms (the Convention) in circumstances where the accused cannot demonstrate any prejudice arising from the delay.

[38] The Attorney General's submission for opinion was provoked by an acquittal, following a prosecution consequent on a disturbance which took place in a prison on the 26th April 1998. Potential defendants were questioned by the police between the 9th June and the 1st July 1998. The police submitted the file to the prosecutorial agencies on the 27th July 1998. On the 11th February 2000, informations were laid. On the 16th June the defendants were committed. Trial was fixed to begin on the 29th January 2001. Before the court, on the commencement of trial, counsel submitted to the trial judge the delay in bringing the prosecution would be in contravention to Article 6 (1). On the 31st January 2001, the judge accepted the submission and ordered that the proceedings be stayed.

[39] Article 6 (1) of the Convention is headed "Right to a fair trial". Only the first paragraph is directly relevant to the reference. It provides:

> *"In the determination of his civil rights and obligations or of any criminal charge against him, everyone 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 interest of morals, public order or national security in a democratic society, where the interests of juveniles 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."*

[40] The Court of Appeal allowed the appeal from the decision of the learned trial judge. The court accepted that a stay should be granted if a fair trial was not possible and would be appropriate if it would be unfair to try the accused at all. Apart from those cases, a stay was not appropriate, although, even in the absence of prejudice, there may well be cases where it could be granted, it normally is not appropriate. Ordinarily, a declaration, a reduction of sentence,

or compensation falling short of a stay, would be a remedy for the breach of the reasonable time requirement. The Court of Appeal referred the Attorney General reference to the House of Lords.

[41] The House of Lords held that Article 6, in its application to the determination of criminal charges, creates rights which are separate and distinct. Thus, there is a separate right to a hearing within a reasonable time as distinct to the right to a fair hearing and public hearing. A complaint of a lack of independence or impartiality may require the court to take steps to ensure those essential qualities are not lacking.

At paragraph 18 of their Lordship's judgment, the question is posed;

> "What, then, should the domestic court do if it is shown before an impending trial that a reasonable time has already elapsed or will have elapsed before the earliest date at which a trial can be held? One may ignore the case in which the reasonable time requirement can be met by accelerating the trial date, because such a case does not raise the problem. One must also assume, in answering this question, that the trial, if it were to take place, would be fair and compliant with article 6(1) in every respect save in its taking place after the lapse of a reasonable time. One must further assume that responsibility for the lapse of time cannot be laid at the door of the defendant: he is a victim, not a cause, of the delay. In Canada it has been held that in circumstances such as these a stay should be granted: *Rahey v The Queen* (1987) 39 DLR (4th) 481; *R v Askov* [1990] 2 SCR 1199; *R v Morin* [1992] 1 SCR 771. A similar answer has been given in the United States: *Doggett v United States* (1992) 505 US 647. In the face of a long and unjustified delay by a prosecutor, the New Zealand Court of Appeal has allowed an appeal against refusal of a stay: *Martin v Tauranga District Court* [1995] 2 NZLR 41."

[42] The House of Lords also examines **HM Advocate v R**, a decision of the Privy Council. The defendant was committed for trial in 2001 on an indictment where two charges that had arisen out of complaints in 1995 along with four others that were in respect of complaints made in 1999 - 2000. He sought to have the earlier charges dismissed on the ground of undue delay. The first instance

judge declined to dismiss the charges, the Court of Appeal upheld that decision. In the Privy Council, it was held that the appeal should be allowed and the two stale charges dismissed.

[43] House of Lords felt that there was an anomaly if the breach of the undue delay right attracted a more far-reaching remedy than the other rights. Article 6 (1) rights were to ensure a hearing, whilst dismissal would mean no hearing. The Court feared that automatic dismissals for breaches would lead to an emasculation of the right, by causing judges to set the standard very high. The judgment noted that "few judges relish the prospect of unleashing dangerous criminals on the public."

[44] Lord Bingham of Cornhill, a member of the majority, said, "There is a category of case where it would be unfair to try a defendant, like bad faith, unlawfulness and executive manipulation. But did accept that the category should not be confined to those cases, but includes cases like **Darmalingum**, where the delay is of such an order, or where there is prosecutorial breach. This kind of breach will be recognizable when they appear." Lord Nichols said, "Of course if the pre-trial delay became so protracted that a fair trial could no longer be held, then the holding of the trial itself would on that ground be a breach of article 6," but this is a different case.

[45] In none of the cases examined has pre-trial delay approximated the delay seen in the instant case. The court has not stayed the proceeding permanently. The adjournment of the matter without a date being fixed (adjourn sine die). In this case, as I have noted, there was no effort to invoke the court's jurisdiction, to prevent the continuation of the delay. In fact, before me, the decision to disallow the adjournment until the 28th November 2011 was protested by counsel for one of the accused. The court had to consider if the accused can waive their rights to a speedy trial, and if so, must the court still maintain its inescapable duty to see that its process is not abused. It appears there is authority to support the proposition that some constitutional

rights can be waived. It may be that the accused are anxious to have 'their day in court,' regardless of how long the process takes. Although this is a case that we would be minded to order a permanent stay in the circumstances, a temporary stay, after the State has remedied the defects, will allow the defendants to have their day that they so anxiously seek.

[46] The order ensures that these accused will not be brought back unless and until proper arrangements are made that will allow the State to put in place a system that will ensure that when a date is fixed there will be a sufficiency of jurors to ensure that the matter goes on. It will also serve to alert the accused that there is a requirement of asserting their rights, and the prosecutorial authorities, to prioritize their older matters, that makes it unlikely that we will see another pre-trial delay of this unprecedented duration.