[2016] JMSC Crim 1

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CRIMINAL DIVISION

REGINA v KENRICK SUTHERLAND

HEARD: 29TH JUNE, 6 – 8TH JULY AND 29TH JULY 2016

Mr. Leroy Equiano for Kenrick Sutherland

Mr. Jeremy Taylor, Deputy Director of Public Prosecutions, on behalf of the Crown

ABUSE OF PROCESS APPLICATION – WHETHER DEFENDANT'S RIGHT TO TRIAL WITHIN A REASONABLE TIME HAS BEEN BREACHED – SECTION 14 (3) OF THE JAMAICA CONSTITUTION (CHARTER OF FUNDAMENTAL RIGHTS AND FREEDOM) – WHETHER STAY OF PROCEEDINGS SHOULD BE GRANTED.

STRAW J

[1] This is an application by Mr. Kenrick Sutherland for a permanent stay of proceedings in respect of an indictment preferred in the Home Circuit Court against him. The indictment charges him with the offence of murder of one David Vernon committed on the 27th of September 2008. He was arrested and charged for the said offence on the 3rd of October 2008. The matter has not yet proceeded to trial up to the time of the hearing of this application. Before proceeding to examine the legal issues and authorities relevant to the

application, it is important to set out the history and chronology of the proceedings. Both counsel in the matter assisted the Court with such as well as written submissions and authorities.

[2] CHRONOLOGY HIGHLIGHTS

- After arrest, the accused was joined by two other co-defendants, DH and CA in January and March 2009 respectively.

- A preliminary hearing commenced in the then Corporate Area Resident Magistrate's Court on the 18th day of August 2009 and the case committed to the Home Circuit Court for mention on the 7th of January 2010.

- Legal representation for all three (3) defendants was not settled until the 25th of June 2010.

- Between July 16th to 3rd December 2010, disclosure and Plea and Case Management hearings conducted.

- First Trial set for the 17th of January 2011. On that date, the matter was returned to the mention list to settle legal representation for the Applicant, Mr. Sutherland.

- Between 28th January 2011, after representation settled, various mention dates set for bail applications. Trial date then set for the 18th of July 2011.

- On the 18th of July 2011, it is noted that Crown witnesses and 2 of 3 Defence Attorneys absent.

- 3rd trial date set for the 18th of October 2011. On that date, it is noted that the sole eye witness, LS was pregnant and attending clinic.

- 7th of December 2011 - 4th trial date - one Defence Attorney absent. Crown witness absent.

- 12th of March 2012 - 5th trial date. Crown witness again absent. Crown to initiate steps under section 31D of the **Evidence Act** to have witness statement tendered into evidence.

- 2nd of July 2012 - 6th trial date. Crown to refresh steps re section 31D. Matter returned to trial list. There is no indication why steps needed to be refreshed and why matter not commenced. The inference to be drawn is that Crown was not ready to proceed.

- Between July 2012 and July 5th 2013, matter apparently off the trial list until trial set for 25th November 2013. DH absconds bail in March 2013.

- November 25th 2013 - 7th trial date –Section 31D steps to be refreshed.

- February 24th 2014 - 8th trial date. Bench warrant issued for CA.

- June 30th 2014 - 9th trial date. CA dead. Proof of death provided.

- December 8th 2014 - 10th trial date—Section 31D steps to be refreshed. No Defence Counsel present.

- June 8th 2015 - 11th trial date. Matter returned to mention list as legal representation for applicant, KS to be settled.

- Between July 17th 2015 and March 11th 2016, legal representation for KS. KS hospitalized. Trial set for the 20th June 2016 - 12th trial date.

[3] Court informed that Mr. Equiano represents KS. Witness LS, was said to be ill, having now been located. Two (2) police witnesses ill. A third no longer a serving member in the force. It is to be noted also that on that date the Court had embarked on another trial and in any event, the matter could not be reached.

- On the 29th of June, matter set for mention to facilitate this application for abuse of process. It is to be noted that during the dates set for hearing of the application, the Court was informed that LS cannot be located again

and that the Crown would again have to refresh steps under section 31D if the trial is to proceed on any subsequent date.

- It is to be noted also that Mr. Sutherland was a patient at the National Chest Hospital for several months apparently in 2012, having contracted tuberculosis while in custody.

- It is to be noted also that Mr. Sutherland was offered bail in December 2012, according to Mr. Equiano, mainly on medical grounds. This bail has been reduced on two subsequent dates but Mr. Sutherland remains unable to take up the bail offer.

- It is to be noted also that there is one civilian witness and several police witnesses in matter. Based on my perusal of file, LS has never been present in court and there is no indication as to why on the various dates the matter did not proceed under the **Evidence Act**. There is no indication that matter was ready but not reached, however Mr. Equiano does admit that on trial date of 24th February 2014, the Court was engaged in another trial, but the Crown was still not in a position to proceed.

- It is to be noted also that, on that occasion, (24th February 2014) the trial was listed for priority. On that date, three (3) police witnesses present. Defendants DH and CA absent and bench warrants ordered.

SUBMISSIONS OF MR. EQUIANO ON FACTS

[4] Mr. Equiano states that the issue is one of identification, and the Applicant has been in custody for eight (8) years. The witness, as of the date of submission, cannot be located again. He states that as far back as June 27th 2012, the Defence was informed that the Crown would be using section 31D of the **Evidence Act** because the main witness could not be located. Between the

several mention and trial dates, the other two (2) accused persons went on bail. One has since died and the other absconded. Mr. Equiano submits that, even if he had been on bail, the burden of delay would be highly prejudicial to the defendant. This prejudice outweighs any other interest. The Defence has a statement from one alibi witness but it is not in the format for it to be put into evidence. This witness is an elderly lady who is out of the jurisdiction. A second potential witness should have returned to give a statement but never did. The defendant had also wished to rely on a co-accused who died six (6) years after arrest.

SUBMISSIONS ON THE LAW

COMMON LAW

[5] According to Counsel, proceedings should be stayed based on the common law principle of delay, which is no fault of the accused. He has suffered prejudice because of inefficiency on the part of the prosecution .The delay has affected his ability to properly defend himself as he has lost contact with two potential witnesses. One has migrated and said to be elderly and very ill, there is no contact with the other. Mr. Equiano relies on the principles outlined in **Attorney General Reference No 1. Of 1990** [1992] QB 630; **R v Oxford City Justices, Ex parte Smith** 75 Cr App R. 200; and **R v West London Magistrate Ex parte Anderson,** 80 Cr App. R. 14.

SUBMISSONS ON CONSTITUTIONAL RIGHTS

[6] Section 14 (3) of the **Jamaican Constitution** states –

> *(3) Any person who is arrested or detained shall be entitled to be tried within a reasonable time and* **-**

Mr. Equiano submits that while the **Constitution** guarantees the accused the right to trial within a reasonable time, it does not define what constitutes such a

period. The Applicant is therefore seeking the protection of the Court for a determination that the period for which he has been charged and not tried does not constitute a reasonable time and is therefore a breach of his constitutional right. Counsel then referred the Court to the jurisprudence of other jurisdictions, in particular Canada, as section 11(b) of the **Canadian Constitution Charter of Rights and Freedom** has a similar provision for trial within a reasonable time.

[7] He has submitted that the Canadian Court has established time guidelines in which cases are to be disposed of (**R v Morin** [1992] 1 SCR 771**; R v Askov** [1990] 2 SCR 1199. In **Askov**, in relation to a trial for Conspiracy to Commit Extortion, a delay of two (2) years following committal was held to be unreasonable and a stay of proceedings ordered. In **Morin**, the Supreme Court revisited the issue of delay. Sopinka J listed the factors in considering the issue of unreasonable delay:

> *The general approach to a determination as to whether the right has been denied is not by the application of a mathematical or administrative formula but rather by a judicial determination balancing the interests which the section is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of delay. As I noted in Smith, supra '[i] It is axiomatic that some delay is inevitable. The question is, at what point does the delay become unreasonable?" [p.1131]. While the Court has at times indicated otherwise, it is now accepted that the factors to be considered in analyzing how long is too long may be listed as follows:*
>
> *The length of delay;*
>
> *Waiver of time periods;*
>
> *The reasons for delay, including*
>
> *[a] inherent time requirements of the case,*
>
> *[b] actions of the accused,*
>
> *[c]actions of the Crown,*
>
> *[d] limits on institutional resources, and*
>
> *[e] other reasons for delay; and*
>
> *4. prejudice to the accused.*

> *These factors are substantially the same as discussed by this Court in Smith, supra, at p.1131, and in Askov, supra at pp. 1231-32.*
>
> *The judicial process referred to as ''balancing 'requires an examination of the length of the delay and its evaluation in light of other factors,. A judicial determination is then made as to whether the period of delay is unreasonable. In coming to this conclusion, account must be taken of the interests which s. 11[b] is designed to protect.*

[8] In **Askov,** the court examined this right and stated at paragraph 2 of the judgment:

> *Under s. 11 [b] of the Charter, any person charged with an offence has the right to be tried within a reasonable time and this right, like other specific s. 11 guarantees, is primarily concerned with an aspect of fundamental justice guaranteed by s. 7.The primary aim of s.11[b] is to protect the individual's right and to protect fundamental justice for the accused. A community or societal interest ,however, is implicit in the section in that it ensures, first, that law breakers are brought to trial and dealt with according to the law and , second, that those on trial are treated fairly and justly. A quick resolution of the charges also has important practical benefits, since memories fade with time, and witnesses may move, become ill or die. Victims, too, have a special interest in having criminal trials take place within a reasonable time, and all members of the community are entitled to see that the justice system works fairly, efficiently and with reasonable dispatch. The failure of the justice system to do so inevitably leads to community frustration with the judicial system…*

[9] Counsel has submitted that the constitutional right guaranteed under section 14 (3) of the **Charter** which replaced Section 20(1) of the **Jamaica (Constitution) Order in Council** has brought a new regime into existence and so previous authorities are somewhat defunct. The **Charter** has dispensed with prior norms of constitutional interpretation and erected a new constitutional paradigm.

[10] He referred the court to cases from other jurisdictions including Europe as well as a Privy Council decision originating from Zimbabwe **- Re Mlambo** 1991 (2) ZLR 339. He has asked the court to be guided by the Canadian cases where established time limits are trigger points.

SUBMISSIONS OF CROWN

[11] In relation to the factual circumstances, Mr. Taylor has asked that the Court consider that the applicant is charged with the serious offence of murder and the evidence is one of identification/recognition. The Applicant was arrested three (3)

months after the incident when he was pointed out by LS on the street to the police. He has asked the Court to balance individual interest and the serious public interest. He referred the court to an article, '**Abuse of Process in Criminal Cases'** by Morrison P, President of the Court of Appeal, in which he summarized the principles relevant to delay at paragraph 60. This includes the following:

> *vi. In any event, if the trial judge does not grant a stay, it will be his duty in directing the jury to bring to their attention all matters arising out of the delay which tell in favour of the defendant.*

He submits therefore that any inability to locate witnesses at this time, should be dealt with by an appropriate direction to the jury by the trial judge.

SUBMISSIONS ON THE APPLICABLE LAW

[12] It is the contention of Mr. Taylor that Mr Equiano is in error in drawing any distinction between the common law and the **Constitution** as the **Constitution** is a codification of the common law. He also submits that Section 20 (1) of the **Jamaica (Constitution) Order in Council**, which spoke to a person being afforded a fair hearing within a reasonable time by an independent and impartial court, is quite similar to section 14 (3) of the Charter.

[13] Mr. Taylor referred the court to **Connelly v DPP** [1964] AC 1254. Lord Morris of Borth-y-Gest stated that the inherent power of a court to prevent abuses of its process and to control its own procedure must in a criminal court include a power to safeguard an accused person from oppression or prejudice. (see: pg 1301-2)

[14] Counsel also referred to the court of appeal decision in **Stephen Grant v R** [2010] JMCA Crim 77 where Harris JA (as she then was) approved the definition of abuse of process as formulated in the Privy Council decision of **Hui Chi Ming v R [1992] 1 AC 34**. She stated as follows at paragraph 26:

> *At common law, the court is empowered to prevent an abuse of the court's process, particularly in circumstances of delay. An abuse of process of the court*

> *is described as something so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all other respects a regular proceeding.*

[15] Harris JA in **Stephen Grant** approved and applied principles laid down in **Bell v DPP & Anor** (1985) 22 JLR 268 at paragraph 34:

> *In assessing the criteria by which the court should be guided in determining the question of the infringement of section 20[1] ,in Bell the Board adopted the approach of the Supreme Court of the United States in the case of **Barker v Wingo** [1972] 407 US 514. In that case the Supreme Court of the United States gave consideration to the sixth amendment to their Constitution which provides, inter alia, that an accused is entitled to a speedy and public trial in all criminal prosecutions. The applicable factors for considerations are:*
>
> *[a] the length of the delay.*
>
> *[b] the reasons advanced by the prosecution for the delay*
>
> *[c]the responsibility for the accused for asserting his rights, and*
>
> *[d] the prejudice to the accused.*

[16] Harris JA also referred to the statement of Powell J in **Barker v Wingo** that the length of the delay is to some extent the triggering mechanism and until there is some delay which is presumptively prejudicial, there is no necessity for enquiry into the other factors that go into the balance (see: paragraph 35). She also referred to Powell J's exposition in relation to the justification of the delay at paragraph 36 of her judgment:

> *At page 531, he stated*
>
> *"Closely related to length of delay is the reason the government assigns to justify the delay. Here too, different weights should be assigned to different reasons. A deliberate attempt to delay the trial in order to hamper the defence could 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 the defendant. **Finally, a valid reason, such as missing witness, should serve to justify appropriate delay."** [Emphasis added]*

[17] Mr. Taylor referred the Court to several authorities discussed and listed below and submitted that the principles reflected apply to any consideration of section 14(3) of the **Charter** and asked the court to reject any reliance on the Canadian cases. He has submitted that the 1962 and 2011 legislation show that

thematically and linguistically they are the same. Accordingly pre-charter interpretations still apply unless they are set aside by statute or the Courts.

EXAMINATION OF AUTHORITIES CITED BY CROWN

[18] It is to be noted that the position of a stay in circumstances of unreasonable delay will extend to a case in which no actual proof of prejudice to an accused has been established (per Harris JA in **Stephen Grant** (paragraph 32)). The longer a delay in a particular case the less likely that the accused can still be afforded a fair trial (per Lord Templeman in **Bell**).

[19] In **R v Crawley and others** [2014] EWCA Crim. 1028, Leveson P spoke of the two categories of cases in which the court has the power to stay proceedings for abuse of process. [1] Where the court concludes that the accused can no longer receive a fair hearing; and [2] where it would otherwise be unfair to try the accused or, put another way, where a stay is necessary to protect the integrity of the criminal justice system. Leveson P explained further:

> *"The first limb focuses on the trial process and where the court concludes that the accused would not receive a fair hearing it will stay the proceedings; no balancing exercise is required. The second limb concerns the integrity of the criminal justice system and applies where the court considers that the accused should not be standing trial at all, irrespective of the potential fairness of the trial itself."*

[20] It is to be noted however that Leveson P added a caveat (at paragraph 18) that it was clear from the authorities that there is a strong public interest in the prosecution of crime and in ensuring that those charged with serious criminal offences are tried. Thus a stay of proceedings which in criminal offences is effectively a permanent remedy should be a remedy of last resort.

[21] Mr. Taylor has referred the court to decisions handed down since the passage of the Charter which have been consistent with pre-Charter jurisprudence. These include the Privy Council decision of **Tapper v DPP** [2012] 1 WLR 2712. However **Tapper,** which deals with post conviction delay was decided in relation to section 20 of the Constitution.

[22] The other case was **Paul Brown & Jeffrey Litwin v R** [2015] JMCA Crim 30 where Panton P, at paragraph 31, referred to **Tapper** and reiterated the decision of the Board that 'not even extreme delay between conviction and appeal 'in itself', will justify the quashing of a conviction which is otherwise sound.' Again however, there was no examination of the Charter. However, it is to be noted that in **Boolell v The State (Mauritius)** [2006] UKPC 46, the Privy Council had to consider the issue of delay in relation to section 10(1) of the **Constitution of Mauritius** which contained a guarantee in similar terms as our now repealed section 20 (1) and debated the point raised in **Darmalingum v The State** [2000] 1 WLR 2303, whether there is a breach of section 10(1) only if there is sufficient element of unfairness or prejudice, or whether there is a breach if unreasonable delay without more has been established, notwithstanding that the trial itself may be regarded as having been fair (per Lord Carswell at paragraph 22 who delivered the judgment of the Board). Lord Carswell pointed out that in **Bell v DPP,** the Board had inclined towards the former proposition. He stated also (at paragraph 23f) that it was apparent that in considering the issue, the Board did not approach the requirement of a hearing within a reasonable time as a free standing constitutional guarantee. He referred to Lord Templeman's judgment in **Bell** at page 950-951

> *"Their Lordships agree with the respondents that the three elements of section 20, namely a fair hearing within a reasonable time by an independent and impartial court established by law, form 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. But the court may nevertheless be satisfied that the rights of the accused provided by section 20(1) have been infringed although he is unable to point to any specific prejudice."*

[23] Lord Carswell indicated that a similar approach had been applied in **Flowers v the Queen** [2000] 1 WLR 2396, also an appeal from Jamaica to the Privy Council. He pointed out that the inconsistencies between these cases were considered in **Dyer v Watson** [2004] 1 AC 379 and concluded that the resolution of the issues was to be found in the decision of the House of Lords in **Attorney General's Reference No 2 of 2001** [2004] 2 AC 72.

[24] In that case it was decided by a majority of a nine (9) member (House of Lords) panel that though a lapse of time was a breach of Article 6.1 of the **European Convention** to have charges heard within a reasonable time, the appropriate remedy would not necessarily be a stay but would depend on all the circumstances of the case. Lord Carswell then set out Lord Bingham's summary of his conclusions at paragraphs 24 and 25 of that judgment and stated that the following propositions should be regarded as correct in the law of Mauritius. These propositions would also apply to this jurisdiction as the board in **Tapper** stated that the law as stated in **Attorney General's Reference No 2** and **Boolell** represents the law in Jamaica (paragraph 28)

> *In **Boolell,** Lord Carswell concluded as follows at par 32:*
>
> *...[i] If a criminal case is not heard and completed within a reasonable time, that will of itself constitute a breach of section 10[1] of the Constitution, whether or not the defendant has been prejudiced by the delay. [ii]An appropriate remedy should be afforded for such breach, but the hearing should not be stayed or conviction quashed on account of delay alone unless [a] the hearing was unfair or [b]it was unfair to try the defendant at all.'*

[25] This is to be contrasted with the approach taken in Canada and the United States. The prevailing view in the Supreme Court of Canada as indicated in the cases cited by Mr. Equiano appears to be that a breach of section 11(b) must lead to a stay of proceedings. In the USA, the Supreme Court has held that a violation of the speedy-trial right will result in dismissal of the indictment (**Barker v Wingo**). It is clear therefore that the changes wrought by section 14 (3) of Charter in listing the element only that trial is to be within a reasonable time, has not made the pre Charter decisions irrelevant.

[26] In **Boolell,** Lord Carswell (at paragraph 33) referred to the series of propositions set out by Lord Bingham of Cornhill at paragraphs 52-55 of the judgment in **Dyer** which were material to the reasonableness of the time taken to complete the hearing of a criminal matter. These paragraphs are set out below and I will be guided by them as well as other relevant factors extracted from the relevant authorities to assist me in a proper determination of this application. Mr. Taylor has properly highlighted these in his written submissions.

"52. In any case in which it is said that the reasonable time requirement (to which I will henceforward confine myself) has been or will be violated, the first step is to consider the period of time which has elapsed. Unless that period is one which, on its face and without more, gives grounds for real concern it is almost certainly unnecessary to go further, since the Convention is directed not to departures from the ideal but to infringements of basic human rights. The threshold of proving a breach of the reasonable time requirement is a high one, not easily crossed. But if the period which has elapsed is one which, on its face and without more, gives ground for real concern, two consequences follow. First, it is necessary for the court to look into the detailed facts and circumstances of the particular case. The Strasbourg case law shows very clearly that the outcome is closely dependent on the facts of each case. Secondly, it is necessary for the contracting state to explain and justify any lapse of time which appears to be excessive.

53. The court has identified three areas as calling for particular inquiry. The first of these is the complexity of the case. It is recognised, realistically enough, that the more complex a case, the greater the number of witnesses, the heavier the burden of documentation, the longer the time which must necessarily be taken to prepare it adequately for trial and for any appellate hearing. But with any case, however complex, there comes a time when the passage of time becomes excessive and unacceptable.

54. The second matter to which the court has routinely paid regard is the conduct of the defendant. In almost any fair and developed legal system it is possible for a recalcitrant defendant to cause delay by making spurious applications and challenges, changing legal advisers, absenting himself, exploiting procedural technicalities, and so on. A defendant cannot properly complain of delay of which he is the author. But procedural time-wasting on his part does not entitle the prosecuting authorities themselves to waste time unnecessarily and excessively.

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. Thus it is not objectionable for a prosecutor to deal with cases according to what he reasonably regards as their priority, so as to achieve an orderly dispatch of business. It must be accepted that a prosecutor cannot ordinarily devote his whole time and attention to a single case. Courts are entitled to draw up their lists of cases for trial some time in advance. It may be necessary to await the availability of a judge possessing a special expertise or the availability of a courthouse with special facilities or security. Plans may be disrupted by unexpected illness. The pressure on a court may be increased by a sudden and unforeseen surge of business. There is no general obligation on a prosecutor, such as that imposed on a prosecutor seeking to extend a custody time limit under section 22(3)(b) of the Prosecution of Offences Act 1985, to show that he has acted 'with all due diligence and expedition.' But a marked lack of expedition, if unjustified, will point towards a breach of the reasonable time requirement, and the authorities make clear that while, for purposes of the reasonable time requirement, time runs from the date

when the defendant is charged, the passage of any considerable period of time before charge may call for greater than normal expedition thereafter."

[27] The final issue left to the court is now to examine all the relevant factors as pertain to the circumstances of this particular case.

LENGTH OF DELAY

[28] The applicant has been in custody for seven (7) years and nine (9) months since his arrest for the charge of murder. Without more, one can conclude that he has not been afforded a trial within a reasonable time. It is also open to me to infer prejudice without any actual proof of prejudice has been established (per Harris JA in **Stephen Grant**). However, I would still have to examine the issue of actual prejudice and how it may be dealt with.

REASONS ADVANCED BY THE PROSECUTION FOR THE DELAY

[29] There have been twelve (12) trial dates between 17th November 2011 to 20th June 2016. On none of those dates is there any information given to the Court that the Crown was ready. In fact, the sole eyewitness has not attended court since the preliminary examination was concluded in 2009. She was however unable to be located for some time between 28th January 2011 and July 2011. At that time the Crown commenced proceedings to facilitate the tender into evidence of her statement . By the time of the third trial date she was apparently located but said to be absent as attending the clinic. At both the 4th and 5th trial dates in the months of March and July 2012, she is absent again and the Crown again was to take steps under the **Evidence Act.**

[30] I bear in mind that a missing witness can serve to justify delay (**Barker)**, but by that time the Crown should have been adequately forewarned of the witness' propensity and to take appropriate steps. At the same time, it is apparent that the applicant was absent from court for a substantial period in 2012 due to illness as indicated above. However between 2013 and June 2015, a time span covering five (5) trial dates, the Court dealt with various issues including bench warrants

ordered for co-accused, proof of death of co accused as well as settling legal representation again for the applicant. The last issue continued up to 20th June 2016, when Mr. Equiano appeared in Court on his behalf. However, even on that date, the witness who was again located was said to be ill. Other witnesses were also out of place.

[31] At the end of the day, it could be said that this case experienced the perfect storm of reasons that could cause delay including overcrowding of Court cases in our Court system. This led to inordinate time spans between adjournment to facilitate administrative issues as well as the original period of delay in setting the matter for trial on the first date.

BEHAVIOUR OF ACCUSED

[32] There is no evidence for any blame to be attached to Mr. Sutherland. There is no indication that he was the cause of Counsel being absent. It does appear in the first appearances he had a different Counsel. But Mr. Equiano has appeared in the matter from as far back as December 2012 and this is a case of assignment of Legal Aid Counsel. He contracted tuberculosis while in the custody of the State, so the delay in 2012 is justified. In the periods where it is indicated that representation was to be settled, it is not clear if Mr. Equiano was contacted to be present in Court as the Crown was ready. The matter could have been rolled over to an early date. While there are pockets of periods that could be used to justify delay to some extent, I embrace the principles stated by Lord Bingham in **Dyer** and approved and quoted by the Board in **Boolell** that 'it is incumbent on contracting states so to organize their legal systems as to ensure that the reasonable time requirement is honoured'. It has been enshrined in our Charter as a fundamental right to be protected. While "negligence and overcrowded courts weigh less heavily" as the Court attempts to balance the rights of the individual against the public interest in having serious criminal cases tried, "the ultimate responsibility rests with the government."

PREJUDICE TO APPLICANT

[33] Mr. Equiano has asserted actual prejudice to the applicant in being able to have defence witnesses present as well as the presence of the co-accused. As I have indicated, if the time is unreasonable, no actual proof of prejudice is necessary. However, there is no blame to be placed on the Crown for a Defendant who absconds. The issue is whether, the Applicant can still have a fair trial. Mr. Equiano has provided no evidence as such to assist the Court with the proper consideration of this issue. He has said that the statement of the witness overseas is not in the proper format for the statement to be tendered in evidence, but this is merely a submission. Also, Mr. Equiano could pursue the possibility and request some assistance from the Crown in arranging for a video link in relation to the said witness. I also bear in mind that delays which impact the ability of defendants to place certain evidence before a jury are to be addressed by the trial judge in his summation to a jury.

CONCLUSION

[34] The evidence in this case is not complex. As indicated previously it involves identification (recognition). There is one eye witness and several police witnesses. There should have been no difficulty in having the matter resolved earlier, in particular between 2013 and 2015 when it appears the accused was no longer hospitalized. The Applicant cannot be blamed for the delay. In balancing both individual and public interest, I bear in mind that I am also not to shut my eyes to 'the practical realities of litigious life even in a reasonable well-organised legal system' (**Dyer)**. While, I certainly cannot conclude that we are so well organized at this time, it is well known that this jurisdiction has an epidemic of serious crimes and 'the public interest demands that the continued escalation of the crime of murder be deterred' (per Harris JA in **Stephen Grant)**.

[35] In spite of the pockets of justified delay, I am of the view that that Applicant's right to a trial within a reasonable time has been breached. The Crown has not

presented a detailed explanation for the extended periods of delay. However, I also of the view that he would still be able to be afforded a fair trial and that the behaviour of the Crown has not been such that he ought not to be so tried. The jurisprudence holds the view, that under such circumstances, a stay of the proceedings ought to be the remedy of last resort as it is exceptional. In the article referred to on ***Abuse Of Process*** by Morrison P, he included in the summary as the first position on the issue of delay, the following:

> *i.* *"The grant of a permanent stay is exceptional and the defendant bears the burden of showing on a balance of probabilities that, owing to the delay, he will suffer serious prejudice to the extent that no fair trial can be held. But, ultimately, this is a question to be considered in the round, on the basis of a single appreciation of what is or is not unfair."*

[36] I am not of the view that this unfairness has been established to the extent that I should grant the order sought by the Applicant. I will, however caution in very strong terms that this matter should be expedited as quickly as possible and will be making appropriate orders to that effect. I will also, again adjust the bail offered to the applicant by a further reduction. I end with this word of caution to the Crown in the words of a Jamaican proverb, "take sleep and mark death".