

IN THE HIGH COURT OF BELIZE, A.D. 2023

CLAIM NO. 368 of 2022

BETWEEN

LORENZO SMITH

CLAIMANT

AND

ATTORNEY GENERAL

DEFENDANT

DECISION OF THE HONOURABLE MADAM JUSTICE PATRICIA FARNESE

HEARING DATE: April 17, 2023

APPEARANCES

Iliana N. Swift, for the Claimant
Agassi Finnegan, for the Defendant

DECISION

[1] Mr. Smith was convicted in 2016 of the 2009 murder of his cellmate, Mr. Alfonso Eck, at the Belize Central Prison after a trial by Judge alone. Although written reasons were provided by the Trial Judge in 2017, Mr. Smith continues to await sentencing. He is unable to exercise his right to have an appeal of his conviction heard by the Court of Appeal. This delay is inexcusable and is a violation of Mr. Smith's right, guaranteed to all persons by subsection 6(2) of the *Constitution*, to receive a fair hearing within a reasonable time.

[2] The Attorney General (AG) has failed to adequately explain that the ongoing delay in Mr. Smith's sentencing is reasonable in the circumstances. Despite being a long-standing and well-known problem, delay persists. The Court, albeit also responsible for perpetuating delay, can no longer expect persons to go without meaningful redress of violations of their constitutional rights while we wait for much needed reforms to take effect. I have no confidence that any other remedy besides a permanent stay of proceedings and an award of vindictory damages of \$50,000 will provide Mr. Smith with the appropriate redress in the circumstances.

Legal Framework

[3] The right to be tried within a reasonable time is guaranteed by subsection 6(2) of the *Constitution*:

If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

The requirements outlined in subsection 6(2) give practical meaning and effect to the right of equal protection of law guaranteed by subsection 6(1):

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.

[4] The Court engages in a balancing exercise on a case-by-case basis to decide whether the delay is undue. The Caribbean Court of Justice (CCJ) has held that “the mere lapse of an inordinate time will raise a presumption, rebuttable by the state that there has been undue delay.”¹ Mr. Smith has the burden to show the Court that there has been an unreasonable delay in the conclusion of his trial. The period of time that is considered includes the appellate process.² If he satisfies that burden, the onus shifts to the AG to explain the reasons for and justify the delay.

[5] The Court “must weigh the competing interests of the public and those of the accused and apply principles of proportionality” when assessing whether the delay resulted in a violation of the Mr. Smith’s right to a fair trial within a reasonable of time.³ The reasons for the delay, the complexity of the case, the conduct of the accused and State, and the stage of the proceedings are all relevant factors for the Court to consider.⁴ In *R v. Henry*, a Belizean decision appealed to the CCJ, the CCJ reiterated that the AG cannot rely on “a governmental failure to allocate adequate resources, or for that matter inefficiencies within the justice sector” to justify delay.⁵

[6] If the AG is unable to rebut the presumption of undue delay, the court must then decide the appropriate redress. Remedies for a violation of subsection 6(2) can include a declaration, damages, orders to expedite sentencing, staying proceedings, and quashing the conviction.⁶ In addition to any other relief I feel is just, Mr. Smith has asked that I: (1) declare that his constitutional right to a trial within a reasonable time has been breached; (2) quash the conviction; (3) award compensatory and vindicatory damages; (4) award costs; and (5) award any other relief I find is just. The AG disputes that Mr. Smith’s constitutional

¹ *Attorney General v Gibson* [2010] CCJ 3 (AJ) at para 58 [*Gibson*].

² *R v Henry* [2018] CCJ 21 (AJ) at para 37 [*Henry*].

³ *Gibson* at para 60.

⁴ *Gibson* at paras 58 and 61.

⁵ *Henry* at para 39 quoting *Gibson* at para 60.

⁶ *Henry* at para 41.

right to trial within a reasonable time was breached, but argues that if I disagree, providing directions for Mr. Smith to be sentenced forthwith by a High Court Justice within the Criminal Division is the appropriate remedy. Being a Justice within the Civil Division, the AG argues that I lack the jurisdiction to pronounce sentence.

Issues:

[7] Seven years lapsed between Mr. Eck's death and Mr. Smith's trial and conviction for murder. The focus of Mr. Smith's claim, however, is only the delay in sentencing. His pleadings are clear; he asks this Court for:

A declaration that the Claimant's right under Section 6 of the Constitution, to a hearing within a reasonable time, has been breached as the court has delayed for 5 years in sentencing the Claimant;

Therefore, this claim gives rise to three issues:

- (1) Is the ongoing delay in Mr. Smith's sentencing sufficiently excessive and undue to be presumptively a breach of his constitutional right to a hearing within a reasonable time?
- (2) If yes, has the AG proven that the delay is reasonable in the circumstances?
- (3) If no, is Mr. Smith entitled to the declaration, the order to quash the conviction, and the compensatory and vindicatory damages he requests?

Analysis:

(1) Is the ongoing delay in Mr. Smith's sentencing sufficiently excessive to be presumptively a breach of his constitutional right to a hearing within a reasonable time?

[8] Yes. My finding is supported by an earlier unreported decision of the High Court in *R v. Byron James*⁷ that a delay in sentencing of 12 months was a breach of subsection 6(2) of the *Constitution*. The timelines for sentencing in the *Criminal Procedure Rules, 2016 (CPR)* also support a finding that there has been a presumptive breach.

[9] The affidavit of the Crown Counsel who prosecuted this case, Mr. Kileru, explains that the defendant in another case, Mr. Byron James was also not sentenced in similar circumstances and at the same time as Mr. Smith. Mr. Byron James was successful in a civil claim for breach of his right to trial in a reasonable time before James J. in 2021.⁸ James J. granted Mr. Byron James's request for a declaration

⁷ Civ. Claim No. 576 of 2020.

⁸ Civ. Claim No. 576 of 2020.

that his subsection 6(2) rights were violated because 12 months had passed since the conclusion of evidence and sentencing had not occurred. Mr. Smith has been waiting over 6 years.

[10] When Mr. Smith was tried, the newly enacted *CPR* had only persuasive effect on matters, like Mr. Smith's case, that were commenced prior to the *CPR* coming into force. I find that delays that greatly exceed the timelines in the *CPR* create a presumption of unreasonable or undue delay. *CPR* Rule 2.16 provides that trials are to be immediately proceeded with or dismissed if they are not concluded within 2 years except in exceptional circumstances. *CPR* Rule 2.8, shortens that timeframe to 6 months after arraignment if the accused is in custody. Sentencing is to occur within 21 days of conviction.⁹ At this point, Mr. Smith has waited to be sentenced three (3) times the maximum length specified for the conclusion of the entire trial process.

(2) If yes, has the AG proven that the delay is reasonable in the circumstances?

[11] The burden is on the AG to prove the delay was reasonable. They have failed to satisfy that burden. The only explanation presented to the Court by the AG to explain the delay is the fact that the Trial Judge, Gonzalez J., retired in December 2016. Nonetheless, Gonzalez J. was permitted to finalize any outstanding sentencing matters. He scheduled three (3) sentencing hearings for Mr. Smith in 2017 where Mr. Smith's attorney, Mr. Oscar Selgado, failed to appear without explanation. Sentencing was adjourned *sine die* as a result.

[12] I accept that the conduct of the claimant is one factor the court must weigh when deciding if delay is reasonable. If I accept, however, the AG's argument that seemingly negligent conduct on the part of Mr. Smith's attorney should also count against Mr. Smith, 4/5th of the delay remains unexplained. Moreover, the Court was not provided with any evidence of what steps the Crown Prosecutor, the Office of the Director of Public Prosecutions, or the AG took to address the delay.

[13] Instead, counsel for the AG remarked during the hearing that the High Court cannot be compelled to set dates. Evidence provided by Mr. Smith indicated that inquiries made on his behalf to the Registrar in 2020 and 2021 about a date for sentencing received no response. I am also acutely aware that vacancies in the High Court have created challenges on the timely disposition of matters. While I am sympathetic to the AG's position, the jurisprudence is clear. Administrative inefficiencies and financial pressures do not excuse delay. Access to a fair trial within a reasonable time is the collective responsibility of all participants in the criminal justice system who must communicate and collaborate to ensure that end. To hold otherwise would result in the reasonable time guarantee having "just symbolic meaning".¹⁰

⁹ CPR 2.3(ix).

¹⁰ *Gibson* at para 61.

(3) If no, is Mr. Smith entitled to the declaration, the order to quash the conviction, and the compensatory and vindicatory damages he requests?

[14] I find a declaration is warranted in this case. Mr. Smith's right under subsection 6(2) of the *Constitution*, to a hearing within a reasonable time, has been breached. The AG has not provided sufficient justification that the ongoing delay in Mr. Smith's sentencing, some 6 years after his conviction, is reasonable.

[15] I also find that the circumstances of this case are exceptional and would warrant quashing Mr. Smith's conviction, but for the fact that the decision to be quashed is from a co-ordinate court. Instead, I find it appropriate to stay the proceedings. Like quashing the conviction, a stay of proceedings is to be awarded in exceptional cases where the delay makes it impossible to conduct a fair trial or the accused has suffered prejudice.¹¹ The burden is on Mr. Smith to prove the impossibility of a fair trial or prejudice. No evidence, other than the years without sentence, was presented by Mr. Smith's counsel on his behalf.

[16] Although Mr. Smith has the burden to prove that a stay of proceedings is the appropriate remedy, the circumstances of the case largely speak for themselves. This decision can be distinguished from *Bahadur v The Queen*,¹² where the Court of Appeal held that the Claimant's failure to make submissions on the prejudice were fatal to the claim for constitutional relief. I find that stay of proceedings is the appropriate remedy in this case because prejudice is established by the delay itself and the lack of explanation for the delay creates sufficient doubt that the barriers to a fair trial will be remedied.

[17] Without a sentence, the regulations that govern the appeals of criminal matters operate as a bar to Mr. Smith exercising his right of appeal. At the time of Mr. Smith's conviction, the *Court of Appeal Act*¹³ outlined:

27.-(1) Where a person convicted in the Supreme Court on indictment or information desires to appeal to the Court or to obtain the leave of the Court to appeal he shall give notice of appeal or notice of his application for leave to appeal in such manner as may be directed by appeal rules of court within twenty-one days of the date of conviction if the appeal is against conviction, or of the date of sentence if the appeal is against sentence alone.

...

28.-(1) On every appeal or application for leave to appeal to the Court notice of the grounds of appeal shall be filed within twenty-one days after receipt by the intending appellant from the Registrar, (a) in the case of an appeal against conviction by the Supreme Court on indictment or information, of a copy of the record which shall include a copy of the judge's summing up;

¹¹ *Gibson* at para 63.

¹² Crim. App. No. 10 of 2016.

¹³ Cap. 90 of the Substantive Laws of Belize. These rule were unchanged by the *Senior Courts Act, 2022*.

The judgment under appeal from the High Court is not perfected until it is final. Without a sentence, the High Court has not rendered a final decision. The record, therefore, will not be sent to the Chief Registrar, formerly the Deputy Registrar of Appeals.

[18] I give no weight to the argument that technically, Mr. Smith retains his right to appeal pending perfection of the judgment below. The *Constitution* guarantees a meaningful right to a fair trial within a reasonable time. As I have already mentioned, reasonable time includes the appellate process. Although only to be used in exceptional circumstances, a permanent stay of proceedings “will be readily granted in cases where the delay rendered it impossible to hold a fair trial.”¹⁴ Without a sentence, appealing a conviction is, for all intents and purposes, impossible thereby causing significant prejudice.

[19] Other than *R v. Byron James*, where no written reasons for the decision were provided by James J., I have been unable to find any other Belizean case where the failure to sentence after conviction is at issue. The Court, therefore, has not had to consider a circumstance like Mr. Smith’s where there is a real risk that the breach of his constitutional right to a fair trial will continue if I fail to stay the proceedings. Other jurisdictions have recognized that the delay in sentencing can be violation of the constitutional guarantee of a fair trial within a reasonable time and have acknowledged that a permanent stay can be an appropriate remedy in some circumstances.¹⁵

[20] In response to Mr. Smith’s request that I quash the conviction, the AG urged me to follow the precedent of *R v. Byron James* and order that a sentence be handed down by a set date and stay any further proceedings if that deadline is not met. The High Court, however, did not meet the 6 month deadline set by James J to sentence Mr. Byron James. I have no evidence to support a finding that, unlike Mr. Byron James, Mr. Smith is likely to be sentenced if I order that it be done. Furthermore, the AG has provided no evidence as to why no efforts were made to address the delay in Mr. Smith’s sentence. The AG has also not explained why I should be confident that the High Court is now prepared to conduct a sentencing hearing when it has been unprepared to do so for the last 5 years. The absence of evidence that the status quo will not persist tips the balance of probabilities in support of a finding that a permanent stay of proceedings is the only remedy that will prevent the ongoing violation of Mr. Smith’s constitutional right.

[21] Section 20 of the *Constitution* grants the High Court wide discretion on constitutional motions:

20.-(1) If any person alleges that any of the provisions of sections 3 to 19 inclusive of this Constitution has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the Supreme Court for redress.

¹⁴ *Gibson* at para 63.

¹⁵ See e.g. *R v. MacDougall* [1998] 3 SCR 45; *Dickey v. Florida*, 398 U.S. 30 (1970).

- (2) The Supreme Court shall have original jurisdiction,
- (a) to hear and determine any application made by any person in pursuance of subsection (1) of this section; and
 - (b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3) of this section,

and may make such declarations and orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 3 to 19 inclusive of this Constitution. (Emphasis added.)

There is no doubt that this discretion includes the power to grant a permanent stay of proceedings.¹⁶ A permanent stay is “a remedy of last resort.”¹⁷ This discretion “must be exercised carefully, sparingly and only for compelling reasons.”¹⁸ I find that the length of delay and the fact that an order directing sentencing occur within 6 months had no effect are compelling reasons to order a permanent stay of proceeding.

[22] Mr. Smith has also asked for compensatory and vindicatory damages. The CCJ has held that damages for a breach of the reasonable time guarantee should only be considered “where the accused will no longer be tried or has been tried and acquitted or where his conviction has been quashed.”¹⁹ Therefore, there is no entitlement to damages; the onus is on Mr. Smith to prove damages.²⁰ The AG has argued that an order directing that sentencing occur is the only appropriate remedy in the circumstances and has not made specific arguments as to why damages are inappropriate.

[23] The purpose of constitutional damages has been described as threefold: (1) to compensate the claimant for any losses that resulted from the breach; (2) to vindicate the constitutional right by highlighting the importance of the right and underscoring the gravity of the breach; and, (3) to deter future breaches by the state and its agents.²¹ Although “it has been consistently established that an unlawful deprivation of liberty generally attracts an award of damages,”²² compensatory damages must be proven on a case-by-case basis as loss is subjective. An award for compensatory damage is intended to quantify any actual losses suffered as a consequence of the delay. Mr. Smith has not led any evidence as to any actual loss suffered by the breach. I, therefore, decline to award compensatory damages.

[24] I do, however, find that vindicatory damages of \$50,000 are appropriate in this case because even if I had awarded compensatory damages, they are inadequate to vindicate the breach of Mr. Smith’s right

¹⁶ *R v Horseferry Road Magistrates Court, ex p Bennett*, [1994] AC 42.

¹⁷ *Attorney General v. Henry and Noel* SLUHCVAP2020/0004 at para 140 [*Henry and Noel*].

¹⁸ *Henry and Noel* at para 140.

¹⁹ *Gibson* at para 69.

²⁰ *Bowen v. The Attorney General*, Civ. Claim No. 493 of 2017 at para 32 [*Bowen*].

²¹ *Attorney General of Trinidad and Tobago v. Ramanoop* (Trinidad and Tobago) [2005] UKPC 15 (23 March 2005) at paras 18 and 19 [*Ramanoop*].

²² *Bowen* at para 33.

to a fair trial within a reasonable time. The challenges facing the justice system that contribute to delay are long-standing and well-known, but have continued to persist.²³

[25] Delay in sentencing, in particular, risks leaving innocent persons with a terrible choice. They must choose between waiting in prison for an indeterminate time to have the chance to clear their name through an appeal or ask this Court to permanently stay the proceedings thereby foregoing the opportunity to have the conviction overturned. Mr. Smith will leave this Court not proven innocent of the charge of murder. The stigma of having "gotten away with murder" will follow Mr. Smith and any other person in the same situation whether it is justified or not. This choice alone demonstrates the gravity of the breach and justifies vindictory damages.

[26] But even where the guilt of the claimant is subsequently confirmed, excessive delay in sentencing nonetheless warrants condemnation. The CCJ has recognized that delay when waiting to appeal a conviction or sentence causes trauma to the accused that can affect their health and that of their family.²⁴ In this case, Mr. Smith did not have a sentence and had no idea when, if ever, he would be given one. The evidence before this Court is that Mr. Smith's attempts to have a date for sentencing set received no response from the High Court. He was, in effect, serving an indeterminate sentence which likely had additional health effects.

[27] Vindictory damages are also justified because delay undermines public confidence in the justice system. The public interest in fair trials within a reasonable time is thoroughly explained in *R v. Jordan*.²⁵

[19] ...“Justice delayed is justice denied.” An unreasonable delay denies justice to the accused, victims and their families, and the public as a whole.

...

[22] Of course, the interests protected by [the right to trial within a reasonable time] extend beyond those of accused persons. Timely trials impact other people who play a role in and are affected by criminal trials, as well as the public's confidence in the administration of justice.

[23] Victims of crime and their families may be devastated by criminal acts and therefore have a special interest in timely trials (*R. v. Askov*, 1990 CanLII 45 (SCC), [1990] 2 S.C.R. 1199, at pp. 1220-21). Delay aggravates victims' suffering, preventing them from moving on with their lives.

[24] Timely trials allow victims and witnesses to make the best possible contribution to the trial, and minimize the “worry and frustration [they experience] until they have given their testimony”

²³ E.g. *Henry*; *R v. Byron James*; *Daley v. The Queen*, Crim. App. No. 8 of 2012; *Perez v The Queen*, Crim. App. No 18 of 2012.

²⁴ *Gibson* at para 49.

²⁵ [2016] 1 SCR 631 [*Jordan*].

(*Askov*, at p. 1220). Repeated delays interrupt their personal, employment or business activities, creating inconvenience that may present a disincentive to their participation.

[25] Last but certainly not least, timely trials are important to maintaining overall public confidence in the administration of justice. As McLachlin J. (as she then was) put it in *Morin*, “delays are of consequence not only to the accused, but may affect the public interest in the prompt and fair administration of justice” (p. 810). Crime is of serious concern to all members of the community. Unreasonable delay leaves the innocent in limbo and the guilty unpunished, thereby offending the community’s sense of justice (see *Askov*, at p. 1220). Failure “to deal fairly, quickly and efficiently with criminal trials inevitably leads to the community’s frustration with the judicial system and eventually to a feeling of contempt for court procedures” (p. 1221).

[26] Extended delays undermine public confidence in the system. And public confidence is essential to the survival of the system itself, as “a fair and balanced criminal justice system simply cannot exist without the support of the community” (*Askov*, at p. 1221).

...

[28] In short, timely trials further the interests of justice. They ensure that the system functions in a fair and efficient manner; tolerating trials after long delays does not. Swift, predictable justice, “the most powerful deterrent of crime” is seriously undermined and in some cases rendered illusory by delayed trials (McLachlin C.J., “The Challenges We Face”, remarks to the Empire Club of Canada, published in (2007), 40 *U.B.C. L. Rev.* 819, at p. 825).

These impacts of delay on public confidence in the justice system outlined in *Jordan* help explain why the CCJ has held that, even where the accused’s conduct caused the delay, the Court may still find it necessary to conclude that there has been a breach of the right to trial within a reasonable time.²⁶

[28] I am acutely aware that the voices of Mr. Eck’s family have not been heard in these proceedings. It is during sentencing where the Court directly hears their voices. They too have been denied complete justice as a consequence of the delay. I regret that the knowledge that this decision aims to prevent other families experiencing the consequences of delay will likely offer little comfort to Mr. Eck’s family.

[29] Finally, with the passage of the *Senior Courts Act*²⁷ and *Legal Aid Act, 2023*,²⁸ the Legislature has initiated a program to transform the justice system. These changes aim to address the significant structural challenges that have contributed to the undue delay in this case. To complete the transformation envisioned, adequate human and financial resources must be expended, but the culture of complacency exemplified by this case must change. My aim is that an award of damages will create an incentive for

²⁶ *Gibson* at para 58.

²⁷ Act No. 277 of 2022.

²⁸ Act No. XX of 2023.

sustained action to be taken to prevent delay. In the meantime, Mr. Smith cannot be denied a remedy on the ground that change is coming.

[30] I considered a number of recent cases where vindictory damages were awarded when deciding that an award of \$50,000 is appropriate. Mr. Smith's situation is unique. I did not consider damage awards for false imprisonment because I do not feel they are an equivalent civil law action. Mr. Smith was tried and convicted of murder. I must presume he received a fair trial as the fairness of his trial is not before me. His detention, therefore, is lawful but for the breach of his constitutional right.

[31] Breach of constitutional rights to privacy, unreasonable search, and the protection of one's dignity as the result of unlawful police searches attracted vindictory damages of \$10,000.²⁹ The CCJ upheld an award of \$100,000 for the unlawful search of a corporate office and interference with property rights.³⁰ An award of \$50,000 was issued after the Court held that the claimants' right to equal protection of the law was breached when they were not permitted to answer criticisms during a public inquiry.³¹ The Court in *Bowen*, awarded \$10,000 to a young girl who was detained for 70 days before charges were withdrawn.

[32] I find an award of \$50,000 fairly reflects the amount of damages awarded in Belize and the facts of this case. In *Henry*, the CCJ found that delay of 5 years in hearing an appeal was excessive and undue. If I accept that half of that time is a reasonable time period to wait for an appeal, and discount the year that delay was caused by Mr. Smith's attorney, he could have expected to have his appeal concluded within 3.5 years after he was convicted. Instead, he has waited 6 years, potentially remaining incarcerated for an extra 2.5 years in the event of a successful appeal.

[33] If I extrapolate from *Bowen* the days incarcerated with the amount awarded, vindictory damages of approximately \$150,000 would not be out of line where the detention was wrongful. I am mindful, however, that an award that fails to reflect that success on appeal is not guaranteed, may be seen as a windfall and risks doing its own harm to the public's confidence in the justice system. The award in *Bowen* also reflected that she was a minor when she was arrested. An award of \$50,000 acknowledges the seriousness of the infringement, but is proportionate given the circumstances of the case.

²⁹ *Nunez v. Commissioner of Police*, Civ. Claim No. 773 of 2020; *Codd v. Commissioner of Police*, Civ. Claim No. 49 of 2023.

³⁰ *Titan International Securities Inc. v. The Attorney General* [2018] CCJ 28.

³¹ *Patt v The Attorney General*, Civ. Claim No. 29 of 2022.

Disposition

[34] This Court declares and orders:

- (1) Mr. Smith's right under subsection 6(2) of the *Constitution*, to have a hearing within a reasonable time, have been breached by the excessive and undue delay in his sentencing;
- (2) All proceedings in the criminal trial of Mr. Smith for the murder of Alfonso Eck are permanently stayed;
- (3) Absent any unrelated orders for remand, Mr. Smith is to be immediately released from custody.
- (4) For one (1) year, at no cost, the AG will provide Mr. Smith with access to medical care, including prescription medication, on an out-patient basis, unless Mr. Smith consents to in-patient care, and assist Mr. Smith in locating a qualified physician and/or psychiatrist outside of the Belize Central Prison who will continue to supervise his care and treatment.
- (5) Mr. Smith is entitled to vindicatory damages and is awarded the sum of \$50,000.
- (6) Costs are awarded to the Claimant in the sum of \$5000.

Dated May 3, 2023

Patricia Farnese
Justice of the High Court of Belize