IN THE SENIOR COURTS OF BELIZE

CENTRAL SESSION-BELIZE DISTRICT

IN THE HIGH COURT OF JUSTICE

INDICTMENT NO: C 077/2016

BETWEEN:

The King

and

KEYRIN TZIB

Defendant

Appearances:

Mr. Glenfield Dennison, Crown Counsel for the King

Mr. Darrell S. Bradley for the Defendant

2023: October 23; November 6;

December 11

Ruling on Defence Application for Permanent Stay/Quash Indictment Held:

JUDGMENT

Background

[1] **NANTON, J.:** The Crown has indicted the accused for one count of Attempt to murder contrary to **Section 117 and 107 of the Criminal Code Chapter 101 of the Substantive Laws of Belize (Revised Edition) 2003** for an offence which is alleged to have occurred on 6th April 2015.

[2] The accused has filed an application for a permanent stay of the indictment or for the indictment to be quashed/dismissed on the basis that the inordinate and inexcusable delay in bringing this matter to trial makes it impossible for the accused to receive a fair trial.

[3] The Crown, in its written response, submits that the accused is partially responsible for the delay and further contends that the accused has not proven that she is unable to receive a fair trial.

Applicant Submission

[4] The applicant/defence contends that the delay in this matter- approximately 8 ½ years is the fault of the State. They contend that significant periods of delay are attributable to judicial vacancies and other administrative factors and there have been periods exceeding a year when the matter had not been called.

[5] The defence contends that it is impossible for the accused to receive a fair trial for the following reasons:

1) Crown witness Tyrone Young is deceased. The defence intended to elicit from this witness information helpful to the defence including where the witness was seated, the behaviour and posture of the accused on board the vessel and what occurred in the moments immediately prior to the shooting.
2) Key evidence is missing namely the video recording of the accused's interview shortly after the shooting. The defence submits that the transcript is insufficient as the defence case turns entirely on the mental state of the accused. The defence contends that the video recording would have shown her demeanour, state and condition shortly after the

incident and could have constituted corroboration of the distressed state of the accused.

3) The prolonging of this matter directly affects the accused's ability to effectively aid counsel in her defence and continues to degrade her mental state.

Respondent Submission

[6] The Crown submits that it has been ready with case management and has maintained a state of readiness to proceed with this matter since October, 2017.

[7] The Crown indicated that it only conceded to the requests of the defence for time to obtain psychiatric evaluations due to the difficulties in obtaining psychiatric assistance in Belize and due to its understanding that said material would affect the accused's ability to receive a fair trial.

Law/Analysis

Power of the Court

[8] The law on abuse of process is neatly summarized as follows by the editors of **Blackstone's Criminal Practice 2007** at paragraph D 2.64:

> According to County of London Quarter Sessions, ex parte **Downes** [1954] 1 QB 1, once an indictment has been preferred, the accused must be tried unless:
>
> (a) the indictment is defective (e.g., it contains counts that are improperly joined and so does not comply with the Indictment Rules, r. 9);
>
> (b) a 'plea in bar' applies (such as autrefois acquit);

(c) a 'nolle prosequi' is entered by the Attorney-General to stop the proceedings; or
(d) the indictment discloses no offence that the court has jurisdiction to try (e.g., the offence is based on a statutory provision that was not in force at the date the accused allegedly did the act complained of).

To this list must be added cases where it would amount to an abuse of process to continue with the prosecution. Where proceedings would amount to an abuse of process, the court may order that those proceedings be stayed. The effect of a stay is that the case against the accused is stopped.

In **Beckford** [1996] 1 Cr App R 94, Neill LJ said (at p. 100) that the constitutional principle which underlies the jurisdiction to stay proceedings is that the courts have the power and the duty to protect the law by protecting its own purposes and functions. His lordship quoted the words of Lord Devlin in **Connelly v DPP** [1964] AC 1254 that the courts have 'an inescapable duty to secure fair treatment for those who come or are brought before them'. Neill LJ noted that the jurisdiction to stay proceedings can be exercised in many different circumstances but that two main strands could be detected in the authorities:
(a) cases where the court concludes that the accused cannot receive a fair trial;
(b) cases where the court concludes that it would be unfair for the accused to be tried.

In **Derby Crown Court, ex parte Brooks** (1985) 80 Cr App R 164, Sir Roger Ormrod said (at pp. 168–9) that:
The power to stop a prosecution arises only when it is an abuse of the process of the court. It may be an abuse of process if either:

(a) the prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality, or;

(b) on the balance of probability the defendant has been, or will be prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution which is unjustifiable . . .

The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness both to the defendant and the prosecution. The former focuses on the trial process; the latter is applicable where the accused should not be standing trial at all (irrespective of the fairness of the actual trial).

[9] It is therefore well established that the Court has the power to stay proceedings in two categories of cases, namely where it will be impossible to give the accused a fair trial, or where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case.

[10] The defence makes this application pursuant to the first limb. In this first category, if the court concludes that an accused cannot receive a fair trial, it will stay the proceedings without more. 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.

[11] According to the apex court's decision in **Attorney General v Gibson**[1] whether there has been unreasonable delay in bringing an accused to trial is to be decided on a case-by-case basis and not by applying a mathematical formula. Although the mere lapse of an inordinate time raised a presumption, rebuttable by the state, that there had been undue delay, the court had to consider in addition to the length of the delay such factors as the complexity of the case, the reasons for the delay and specifically the conduct both of the accused and the state.

[12] A permanent stay or dismissal of the charge is not the inevitable or even the normal remedy for cases of unreasonable delay where a fair trial is still possible, since the

[1] [2010] 5 LRC 486.

duty of the state to serve the purposes of justice ought to prevail over the reasonable time guarantee afforded to an accused.

[13] In deciding whether to grant relief and, if so, what relief, where there has been unreasonable delay amounting to breach of the right to be tried within a reasonable time, the court has to weigh the competing interests of the public against those of the accused, apply principles of proportionality and take into account all the circumstances of the particular case, especially the stage of the proceedings at which the breach occurred see **R v Henry**[2].

[14] The Court therefore notes that there is a strong public interest in the prosecution of crime and in ensuring that those charged with serious criminal offences are tried. Ordering a stay of proceedings, which in criminal law is effectively a permanent remedy, is thus a remedy of last resort and will only be granted if, owing to the delay, a fair trial is no longer possible.

The Burden/Standard of Proof

[15] The normal rule is that he who asserts the abuse of process must prove it; it follows that the defence bears the burden of establishing abuse on the balance of probabilities (**Telford Justices, ex parte Badhan**[3]).

[16] In the case of delay the Court of Appeal confirmed in **E**[4] that, where delay is said to amount to abuse of process, 'the burden of proof or persuasion lies on the defendant' to show that a fair trial is no longer possible.

Delay

[2] (2018) 93 WIR 205;
[3] [1991] 2 QB 78;
[4] [2012] EWCA Crim 791 per Rix LJ at [22].

[17] The defence contends that the accused would be deprived of a fair trial due a delay of 8 ½ years.

[18] In **Bell v DPP of Jamaica**[5], the Privy Council laid down guidelines for determining whether delay would deprive the accused of a fair trial. The relevant factors were said to be:

1) the length of delay;
2) the reasons given by the prosecution to justify the delay;
3) the responsibility of the accused for asserting his rights; and
4) the prejudice to the accused.

[19] In **A-G's Reference** [6], Lord Lane CJ said that:

> *Stays imposed on the grounds of delay or for any other reason should only be employed in exceptional circumstances...In principle, therefore, even where the delay can be said to be unjustifiable,* ***the imposition of a permanent stay should be the exception rather than the rule****.* ***Still more rare should be cases where a stay can properly be imposed in the absence of any fault on the part of the complainant or prosecution.*** *Delay due merely to the complexity of the case or contributed to by the actions of the defendant himself should never be the foundation for a stay...[N]o stay should be imposed unless the defendant shows on the balance of probabilities that owing to the delay he will suffer serious prejudice to the extent that no fair trial can be held: in other words, that the continuance of the prosecution amounts to a misuse of the process of the court. In assessing whether there is likely to be prejudice and if so whether it can properly be described as serious, the following matters should be borne in mind: first, the power of the judge at common law and under the PACE 1984 to regulate the admissibility of evidence; secondly, the trial*

[5] [1985] AC 937;
[6] (No. 1 of 1990) [1992] QB 630 (at pp. 643-4).

process itself, which should ensure that all relevant factual issues arising from delay will be placed before the jury as part of the evidence for their consideration, together with the powers of the judge to give appropriate directions to the jury before they consider their verdict.

[20] In **Derby Crown Court, ex parte Brooks**[7], Sir Roger Ormrod propounded a general test for abuse of process (quoted at D3.72) but also made specific reference to delay. To amount to abuse of process, the delay must cause prejudice to the accused, and the delay must be unjustified. **In Bow Street Stipendiary Magistrate, ex parte DPP**[8], the Divisional Court made it clear that, to amount to an abuse of process, delay has to produce 'genuine prejudice and unfairness'.[9]

[21] The present application is grounded on delay and as such it is necessary to outline the timeline of events. The chronology of events has been ascertained by this Court through the submissions of counsel on both sides and through a perusal of the Court's record. None of the following facts have been disputed by the parties:

1) The accused was charged on 7th April, 2015.
2) The accused was committed for trial in the High Court of Belize in 2016.
3) An indictment was proffered on the 3rd October, 2016
4) Due to judicial vacancies and the Covid 19 pandemic, the Court was not in a position to commence the trial of this matter prior to September 2022.
5) The matter was called on 28th April 2022 and the defendant did not appear.
6) An arrest warrant and notice for sureties was issued for 23rd May 2022
7) The accused was required to attend Court before Sandcroft J on 3rd May 2022 for recusal of bench warrant- the defendant did not appear.
8) The matter was adjourned and relisted before Lamb J on 26th September 2022.

[7] (1985) 80 Cr App R 164;
[8] (1989) 91 Cr App R 283;
[9] per Watkins LJ at p. 296.

9) The accused was arraigned in September 2022.

10) The matter was listed for trial on 4th October, 2022 but was adjourned due to counsel's illness and unavailability.

11) Due to the impact of Tropical Storm Lisa the matter was rescheduled for trial in Jan 2023 however this date was converted to a pre-trial conference as the new Judge had not yet arrived in Belize.

12) The matter was called before Pilgrim J on 27th February, 2023 and the accused appeared on a bench warrant for failure to appear before Sandcroft J.

13) The matter was called before Justice Pilgrim on 7th March 2023 when the accused filed a petition for bail. A new trial date was set for 8th May 2023.

14) On 9th March 2023 bail was granted to the accused without objection by the Crown. The matter was adjourned to 21st April 2023 for pre-trial review.

15) On 21st April 2023 the matter was case managed before Pilgrim J parties were warned of the trial date of 8th May 2023. The matter was adjourned to 4th May 2023 for a further pre-trial review.

16) On 4th May, 2023 the matter was further case managed by Pilgrim J. On this occasion counsel for the defendant Darrell Bradley requested that an adjournment of the trial date to the 1st week in September for the purpose of sourcing potential defence witnesses. The Crown did not object to the defence's request. The matter was adjourned to 17th July 2023 for mention and a trial date was set for 19th September, 2023.

17) On 17th July 2023 defence counsel indicated that things were in place for the psychiatric evidence for the defence. On this date it was indicated that efforts to retrieve the video footage were unsuccessful. The matter was adjourned to 19th September, 2023 for trial.

18) In September 2023 the matter was re-docketed to this Court as constituted. The matter was rescheduled to 18th September, 2023 for a pre-trial hearing in advance of the trial date of 19th September, 2023.

19) On 18th September, 2023 the defendant was absent due to internet connectivity issues and leave was granted for her to appear through

counsel. Defence counsel indicated that he was not ready to proceed with the trial set for the following day as the medical information for the defence was not yet available. This Court reminded counsel that previous adjournments had been granted to the defence for this reason. The defence requested one last adjournment of one month. The Crown did not oppose the application for adjournment. The matter was adjourned to 16th October, 2023 for pre- trial hearing and a new trial date was set for 7th November, 2023.

20) On 16th October 2023 defence indicated its intention to file the present application. The Court gave the defence a deadline to file its application on/before 23rd October 2023 with the Crown to respond on or before 3rd November, 2023. Defence was warned that no further adjournments to the trial date would be granted for the purpose of obtaining psychiatric evaluations.
21) The Defence filed the present application on 23rd October, 2023 and the Crown responded.
22) The matter was called before Nanton J on 6th November, 2023. On that date the Defence filed a supplemental submission in respect of its application. The Crown indicated that it had only received the supplemental that very day and needed time to respond to same. On that said date Defence requested for the trial date to be vacated as the psychiatric assessments had not been completed as the accused had only been assessed on one occasion. The Crown indicated its readiness to start the trial. The matter was adjourned to 11th December, 2023 for decision on the defence application and depending on the outcome to set a new trial date.

[22] The most significant period of delay is the period of 5 years and 6 months between the preferral of the indictment in October 2016 and April 2022 which is the first record of the matter being called in the High Court. From October 2016 to March 2020 there has not been any explanation advanced for the matter not being

addressed. That period of delay is therefore attributable solely to the Court's failure to properly list this matter before a sitting High Court Judge.

[23] This Court is acutely aware that vacancies in the High Court have created challenges for the timely disposition of matters and that judicial vacancies are a recurring problem in Belize. However, administrative inefficiencies and financial pressures do not excuse delay.

[24] The Covid 19 Pandemic undoubtedly put a strain on the ability of the Courts to deal with and dispose of matters during that two year period (2020-2022).

[25] From April 2022 to present the matter was called numerous times before several High Court Judges and the reasons for adjournments were due to causes attributable to the accused: non-appearances of the accused resulting in the issuance of at least 1 bench warrant, defence requests for adjournments to facilitate medical assessments and sourcing defence witnesses. During this period the matter was set for trial on no less than 5 occasions, and on each of those occasions the trial date was vacated due to defence applications for adjournments.

[26] The Court considers that the length of time of unjustifiable delay is 5 ½ years. **Subsection 6(2) of the Constitution** guarantees the right to be tried within a reasonable time: 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 provisions of **Part 2.3 of the Criminal Procedure Rules 2016** the Court outline that a matter should be completed within 2 years from the date of the First Hearing.

[27] In those circumstances the Court considers that there has been a significant period of delay in bringing this matter to trial. Having decided that there has been unjustifiable delay the Court will next consider whether such delay has deprived the accused of the ability to receive a fair trial.

Prejudice

[28] In some cases, prejudice will be inferred from substantial delay, and the prosecution will then have to rebut that inference of prejudice. Such an inference 'is more easily drawn when dealing with a single brief but confused event which must depend on the recollections of those involved. Similarly, in **Telford Justices, ex parte Badhan**[10], the Divisional Court said that, where the period of delay is long, it is legitimate for the court to infer prejudice without proof of specific prejudice. The period in question in that case was some 15 or 16 years, and so the court was entitled to infer prejudice and conclude that a fair trial was impossible.

[29] The Court finds that the delay in this case is not so substantial so as to create an inference of prejudice. It falls upon the defence to prove that the delay in question has resulted in specific prejudice to the accused.

[30] The Defence has cited the following as proof of specific prejudice:

1) Death of witness Tyrone Young
2) Absence of videotape of accused's interview
3) Accused's degrading mental state affects her ability to effectively aid counsel

Death of Witness Tyrone Young

[31] **Section 105 of the Evidence Act Cap 95** and **Section 123 of the Indictable Procedure Act Cap 96 of the Substantive Laws of Belize** allows the statement/deposition of a deceased witness to be tendered into evidence. The statement of Tyrone Young can be admitted pursuant to either of these provisions. Therefore, the passing of the witness does not mean that that witness' version of events, which the defence contends is capable of supporting the defence case, would not be put before the tribunal of fact.

[32] It would be a matter of pure speculation to suggest that prosecution witness Tyrone Young would have given information that may be helpful to the defence beyond what

[10] [1991] 2 QB 78 at page 91.

he has already said in his statement which was given proximate in time to when the incident occurred.

[33] In addition to this witness there are numerous other prosecution witnesses who were in close proximity to the accused and who witnessed the incident. The defence will therefore have ample opportunity to cross examine these witnesses with a view to putting their instructions before the court.

[34] In any event, the visible temperament of the accused, while it may be supporting evidence, is not determinative of the main issue at trial which is the mental state of the accused.

Whether the Absence of the Videotape of the Interview of the Accused Renders a Fair Trial Impossible.

[35] The principles relevant to cases involving lost evidence were helpfully summarised by Gross LJ in **DPP v Fell**[11], emphasising that a stay is to be granted only in exceptional cases. The burden of proof is on the party seeking a stay; the standard of proof is a balance of probabilities, the civil standard. The party seeking a stay must make good to the civil standard that, owing to the missing evidence, he will suffer serious prejudice to the extent that no fair trial can be held and that, accordingly, the continuance of the prosecution would amount to a misuse of the process of the court. His lordship added that the grant of the stay in a case where it is not suggested that there has been serious culpability or bad faith on the part of the prosecutor or investigator is, effectively, a measure of last resort. It caters for and only for those cases which cannot be accommodated with all their imperfections within the trial process. It would, however, be 'a very different situation' if evidence had gone missing through serious culpability or bad faith.

[36] In **Medway**[12], the accused was convicted of robbery. It was alleged that he robbed an elderly lady of her handbag. A closed-circuit television camera was operating in

[11] [2013] EWHC 562 (Admin) (at [15]);
[12] [2000] Crim LR 415.

the area, but the police, having looked at the film, decided that it contained nothing of value. The tape was destroyed. The judge refused to stay the trial as an abuse of process in the absence of the tape. The Court of Appeal dismissed the appeal, saying that there was no evidence of malice, and nothing to show that the absence of the tape made the conviction unsafe. The Court observed that where evidence had been tampered with, lost or destroyed, it may well be that an accused will be disadvantaged, but it does not necessarily follow that he cannot receive a fair trial. The clear implication is that an accused is disadvantaged only if the absence of the evidence might have made a difference to the outcome of the trial.

[37] While the videotape of the accused's interview may have been helpful to view her demeanour, no conclusion as to her mental culpability- which is the main issue in this case- could have been made on the basis of video footage. Whether the accused was distressed or not is insufficient to launch a defence to the charge of attempt to murder. The real issue is the accused's mental status that can only be determined by expert evidence capable of substantiating a potential defence. The record of the interview as well as the psychiatric assessments conducted before and after the offence would be of more assistance in this respect. Such assessments are indeed available.

[38] Therefore any prejudice caused by the absence of the tape is not serious because it is uncertain that the footage would have assisted the defence. There is no question of malice or intentional omission, as opposed to oversight as to the safe keeping of the tape. The absence of a video tape with limited evidential value does not render a fair trial impossible.

The Mental State and Anguish of the Accused

[39] The history of assessment is as follows:

1) Assessment of Ingrid Clare Psychiatric Nurse Practitioner dated 24 November 2011 -Patient treated for Anxiety and depressive disorder- not able to cope well with her current posting at coast guard. Recommendation that she be placed on office duties.

2) Assessment of Ingrid Clare Psychiatric Nurse Practitioner dated 14 April 2015 – Patient was diagnosed as suffering from Post-Traumatic Stress Disorder but was found to be fit to stand trial
3) Assessment of Dr Richard A. Alovera Psychiatrist dated 30 September, 2015 – Patient found to be suffering from Bipolar affective disorder current episode being manic with psychotic symptoms. The patient was found to be competent to stand trial.

[40] The most recent report of Dr Aloverea deems the accused competent to stand trial. The passage of time therefore has not been shown to have impeded her ability to instruct counsel. There is no support for such a contention.

[41] The defence has also not demonstrated that the passage of time inhibits the defence from exploring this as a defence to the charge. In this regard it is the mental state of the accused at the time the offence was committed that can amount to a viable defence to the charge. The accused was assessed prior to and immediately after the alleged commission of the incident. The defence has indicated that it has sought further assessments in an effort to substantiate its defence. In fact the defence has been granted several adjournments to facilitate these assessments and has returned to the court on more than one occasion requesting further time as the accused herself has not made herself failed to make herself available for further assessments.

[42] This Court rejects the contention that due to the delay the accused would be impeded in her defence and/or unable to instruct counsel.

Disposition

[43] A permanent stay is *"a remedy of last resort."* This discretion *"must be exercised carefully, sparingly and only for compelling reasons"* such as in exceptional cases where the delay makes it impossible to conduct a fair trial or the accused has suffered prejudice.

[44] The burden, on a balance of probabilities, is on the accused to prove the impossibility of a fair trial or prejudice. The Court finds that the defence has offered

little evidence of the impossibility of a fair trial. The passage of time does not necessarily mean a fair trial is no longer possible.

[45] The Court has no reason to conclude the trial of this matter cannot proceed forthwith. The present Court is prepared to set this matter for trial as early as January 8th before the commencement of the new Law Term.

Candace Nanton

High Court Judge