IN THE SENIOR COURTS OF BELIZE

CENTRAL SESSION-BELIZE DISTRICT

IN THE HIGH COURT OF JUSTICE

INDICTMENT NO: C 3/2023

BETWEEN:

THE KING

and

SHAWN HERTULAR Defendant

Appearances:

No appearance for the Crown.

Mr. Andrew Bennett for the Defendant.

2024: March 7th
March 19th

JUDGMENT

MURDER- JUDGE ALONE TRIAL-DECISION

DISMISSAL FOR WANT OF PROSECUTION

[1] **SYLVESTER, J:** Shawn Hertular (hereinafter referred to as "the Accused") was indicted for the offence of murder, contrary to section 117 read along with **section 106(1) of the Criminal Code, Chapter 101 of the Laws of Belize**[1], (hereinafter

[1] Chapter 101 Criminal Code of the Laws of Belize Revised Edition 2020

referred to as "the Code") arising out of a stabbing incident involving the death of Miguel Zaiden, (hereinafter referred to as "the deceased"), on the 21st day of November 2021.

History of the Matter

[2] On the 15th of February 2024, the Trial By Judge Alone was set to begin by agreement with the Prosecution and Defence on the 7th of March 2024 before this Court pursuant to **section 65 A (2)(a) of the Indictable Procedure Act Chapter 96 of the Laws of Belize [2].**

[3] On the 7th day of March 2024, the Prosecutor who had conduct of this matter on the 15th day of February 2024, appeared before this Court on another matter and indicated, that a different Prosecutor will be present to deal with this matter.

[4] The Accused and his Attorney were present.

[5] There was no appearance by the Prosecution and/or their witnesses. Each witness was called, and no one was present. The matter was stood down and later recalled. There being no appearance for the Crown or witnesses, upon an application by the Defence that the matter be struck off for want of prosecution, the Court considered and acceded to the application.

[6] The matter was dismissed for want of prosecution.

[7] Upon a Judge Alone Trial the Indictable Procedure Act Chapter 96 section 65 (c) provides as follows:

"**"**65C. - (1) Where a trial is conducted without a jury, the judge shall, at the conclusion of the trial, give a written judgment stating the reasons for the conviction

[2] Chapter 96 Indictable Procedure Act of the Laws of Belize Revised Edition 2020

or acquittal of the accused person (as the case may be) at, or as soon as reasonably practicable after, the time of conviction or acquittal.

[8] The reasons for the Court's decision are set out hereunder.

[9] This Court's prelude to this judgment is an appreciation that murder is one of the most serious offences in any society and adopts the statement, in the **King v. Calaney Flowers**[3], as per Bulkan JA wherein he opined at par. 33 thus:

> "…..we start from the premise that this case involves one of the most serious offences in any society, which is in turn an acknowledgement of the sacred nature of human life".

[10] Further in the matter of **Attorney General of Trinidad and Tobago v Akili Charles**[4] **,**The Privy Council opined that the circumstances in which a murder charge may be made are many and various. Lord Hamblen stated at paragraph 73 thus:

> "73. It is obvious that the circumstances in which a murder charge may be made are many and various. As recently stated by the Board in *Boodram v Attorney General of Trinidad and Tobago* [2022] UKPC 20 at para 30:
>
> > "The crime of murder is, of course, always very serious; but some murders are even more serious than others. The circumstances of murder cases vary across a wide range, from the terrorist who aims to overthrow a state by killing as many of its citizens as possible to the devoted partner who commits a 'mercy killing' in order to end the unbearable pain suffered by a loved one who is terminally ill…"

[3] Crim. App #2 of 2017 [COA]
[4] [2022] UKPC 31 Para. 73

Factual Matrix

[11] The following is the chain of events prior to the dismissal for want of prosecution:

- On 21st November 2021 the accused was charged with the offence of Murder and has been on remand to the date of the dismissal.

- On the 26th day of September 2022, the accused was committed for trial in the High Court pursuant to section 33 of the Indictable Procedure Act Cap 96, s.33.

- On the 6th day of February 2023, the indictment was filed.

Judges' Notes

- 13th July 2023- Assignment of Mr. Andrew Bennett - Cpl Cob to be bound over-copy of photograph and CD to be served on the crown and defence by 13th July 2023.

- Case Management Conference [CMC] for 26th September 2023.

- On the 26th of September 2023 - Crown filed CMC form-Defence has not filed theirs-defence to file CMC and grounds of objection on or before 5th October 2023. Matter adjourned to 11th October 2023.
- On the 11th of October 2023 - accused wishes to have time to consider sentencing indication-application to be filed by 16th October - agreed facts to be filed by the 19th of October. The matter adjourned to 23rd of October 2023.

- On 23rd October 2023- Defence indicates that Accused [A] via written instructions does not wish to seek a sentencing indication - adjourned to 10th November 2023.

- 10th November 2023 - Crown [names withheld] h/f [name withheld] - Defence A Bennett- Accused present- Crown Counsel no word - adjourned to 13th November 2023.

- 13th November 2023-AB (Andrew Bennett) confirms that he received all disclosure and electronic evidence - defence no longer objecting to the footage-objecting to the interview notes - defence to file grounds of objection on or before 21st November 2023 - all witnesses agreed with the exception of ---------- will have voir dire-crown has spoken to its witnesses and do not anticipate hostile/hearsay applications-adjourned for final CMC 28th November 2023.

- On the 28th of December 2023, to see if grounds filed - not filed Counsel needs assistance in drafting grounds of objection [GOO] - Court ordered ground of objection to be filed on or before the 7th of December 2023 - adjourned to 15th December 2023.

- 15th December 2023 - Court has received the grounds of objection-adjourned to 18th January 2024.

- On the 18th of January 2024 - Crown needs 3 witnesses for the voir dire-defence will call the accused-Voir Dire for trial on 12th and 13th February 2024- adjourned to 12th of February 2024.

- On the 15th of February 2024 – [name withheld] for the Crown-Mr. Andrew Bennet for the accused.

  Crown's submission:

  [Prosecutor] indicated that he is in a predicament, as he is before Justice [name withheld] in the trial of **King v. Brian August** and his junior is not available, Ms. [name withheld].
  He indicated that he has concurred with his learned friend Mr. Bennett and he has no objection, further they proposed the 7th of March, 2024.
  Witnesses for crown on the Voir dire 4.

  Defence Submission:

Objection filed by the Defence on the 7th of December 2023 shall be the basis of the Defence submission during the trial.
The witness for the defendant on the voir dire will be the accused solely.

Court Order:

The matter adjourned to 7th March 2024 at 9:00 am for the hearing of the Voir Dire and Trial.

-On the 7th of March 2024 matter was called. Prosecution and witnesses absent.
Application from Mr. Bennett- [submission]
Court set for *voir dire* and trial.

-Court assigned by Mr. Sandcroft.

-Contacted DPP- to confirm that we are ready to proceed with today's arrangement to replace previous counsel.

-My understanding that Crown Counsel was assigned to this matter. No indication there was a need for adjournment.

-Application - in absence of any application, matter should be struck off for want of prosecution.

Remanded since November 21st, 2021.

The matter stood down to 9:45 am to give the Crown an opportunity to appear, and for the court to rule on application.

NB: [Prosecutor- name withheld] was on the previous matter of **King v. Calaney Flowers** and the court notified him of the matter of Shawn Hertular for today. He indicated that someone would be present from the DPP's office namely, [name withheld].

Judgment:

- At 9:45 am the court resumed.
- There is no one present from the DPP's office.
- The court takes note that this morning in the matter of Calaney Flowers Mr. [name withheld] (Crown Counsel) indicated someone from the DPP office would be present.

-However, no one was present at 9:45 am and onwards.

-No witness for the crown present.

-The Court Police Officer, Jeneah Arzo: Called the names of the witnesses for the crown and none were present.

Court ordered:

- Matter is dismissed for want of prosecution 9:50 am.
- Reasons to follow.

[12] It is important to note that Crown Counsel who was initially involved in this matter, appeared on the 15th of February 2024, and agreed with the Defence that the 7th of March 2024 was an amenable date for the *voir dire* hearing and trial. Further, the said Crown Counsel was present in Court on the morning of the 7th of March 2024, in another matter, and indicated (as per Judge's notes) that another Counsel will be present from the DPP's office namely, [name withheld].

[13] If an adjournment was being sought, Crown Counsel who appeared prior could have requested same from the Court. The Court should accept the words of its officers as sacrosanct. The court should not be taken on a meandering journey that leads to nowhere, save and except to be left in an embarrassing position with neither Counsel nor witnesses present.

[14] The public interest in ensuring perpetrators is prosecuted is not in question. The flouting of the Court's jurisdiction without excuse should not be tolerated. At least, some reason being propounded is better than a total disregard for the Court, this the Court ought to frown upon. There are many avenues that could be utilized if an adjournment is sought or there is an emergency: The utilization of the cell phone, WhatsApp messages and other means of instant communication. The fact that the matter was stood down, thereby giving the prosecution an opportunity to be present or communicate with the Court, yet none was not forthcoming.

IN UNITED NATIONS DEVELOPMENT PROGRAMME: Needs Assessment Report [NAR][5]

[15] The Court notes that in the year 2020, the United Nations through the United Nations Development Programme, conducted a needs assessment of the judicial systems of nine (9) Caribbean countries, including Belize. A Needs Assessment Report [NAR] was provided. The Report highlighted serious backlog of cases and low level of trust and confidence by citizens on Judicial Institutions.

In relation to backlogs of cases, page 9 of the Report states as follows[6]:

> "Another important conclusion of the report is that in all jurisdictions the backlog of cases – particularly in the criminal division – is one of the most challenging issues. The reasons for the backlogs are multifaceted and include primarily the slow pace of investigations by police, inordinate delays in production of depositions, and lack of human and technological resources. **The main consequence of the backlogs is a failure to "provide accessible, fair and efficient justice for the people and states of the Caribbean Community**."

Further, in relation to low levels of trust and confidence by the Citizens the report states[7]:

> "Public perception and communication of justice. The current low levels of trust and confidence by citizens on judicial institutions are a serious challenge that needs to be addressed at various levels across all the Caribbean regions. The starting point is about the actual improvement and facilitation of access to justice services, so citizens encounter fair, fast, and

[5] https://www.undp.org/barbados/publications/caribbean-justice-needs-assessment-judicial-system-nine-countries
[6] Caribbean Justice: A needs assessment of the judicial system in nine countries [executive summary] page 9. Par.4.
[7] Caribbean Justice: A needs assessment of the judicial system in nine countries [executive summary] page 64. Par.3.

equitable services. But also, there is a need to improve the way the judicial system communicates and interacts with citizens."

[16] This Court stresses, the urgency for the administration of justice to work efficiently and effectively. To ensure this, all strands in the legal system must work together; with a common purpose to maintain confidence in the administration of justice, to uphold the rule of law, to lead by example and complete matters without delay.

Needham's Point Declaration[8]:

[17] Further, on the 20th day of October 2023, in Barbados, the Caribbean Court of Justice [CCJ] Academy 2 for Law hosted a conference on Criminal Justice Reform, with countries adopting the **Needham's Point Declaration** on Criminal Justice Reform: Achieving A Modern *Criminal Justice System (in the Caribbean).* This declaration was adopted by all participating countries including Belize. The preamble and introductory parts state that crime should be viewed as a public health emergency and that the criminal justice system needs reform. It sets out the basis for criminal Justice reform as follows:

> **"PREAMBLE**
>
> **Commending** the CCJ Academy for Law for hosting its Seventh Biennial Law Conference from 18-20 October 2023 in the Republic of Barbados and with express gratitude to the Government and people of the Republic of Barbados for their considerable support.
>
> **Observing** that there is an unacceptable situation as it relates to crime in the Member States of the Caribbean Community.
>
> **Further observing** that there are intolerable delays in the administration of criminal justice including unreasonably long periods spent on remand.
>
> **Understanding** that crime is inimical to peace, order, and stability within societies, and therefore stifles social and economic development.
>
> **Understanding** further that a piece-meal and silos-working approach to criminal justice reform will not effectively address the increasing levels

[8] https://ccj.org/needhams-point-declaration-on-criminal-justice-reform/

and complexity of criminality and will not produce effective and sustainable improvements to the criminal justice system.

Recognizing that a transparent and rigorous system of accountability must be instituted to ensure compliance with the new standards and systems of performance.

Welcoming ascription of this Policy Declaration and the principles thereto associated and aspiring that these improvements in the criminal justice system should ideally be realized by all Member States within the next two (2) years.

We the participants at this Conference themed, "Criminal Justice Reform in the Caribbean: Achieving a Modern Criminal Justice System", endorse the following experiences, best practices, and recommendations:

Policy Interventions

1. That crime be viewed as a **public health emergency**, following the lead of the Heads of Government meeting in Port-of-Spain in April 2023.

2. That as a matter of urgency, each Member State of the Caribbean Community **develops, adopts, and implements a holistic and inclusive Criminal Justice Reform Strategy**.

3. That there be urgent provision of adequate human, financial, and other resources to criminal justice institutions and agencies including particularly, the police and prosecution services, the judiciary, and the prison services."

[18] The Needham's Point Declaration created Guidelines to ensure the expeditious completion of matters, by addressing every facet of the criminal justice process, so as to eliminate delays and ultimately eradicate the backlog. Paragraph 19 of the Needham's point declaration states:

> "19 That as a rule, trials should be held within one (1) year of the accused being charged (for indictable offences) and six (6) months (for summary offences). During the necessary transitional stage to this ideal, trials should be held within two (2) to three (3) years of the accused being charged (for indictable offences) and twelve (12) months (for summary offences)".

[19] In the matter of the **State v Prisma Joseph**[9] , Williams J, in examining par. 19 of the Needham's Point Declaration, opined that state functionaries have a responsibility to ensure trials are completed within a reasonable time, since to do nothing about the undesirable practice of delay would be to give, "silent approval to the transgression". He stated thus at paras. 53-56:

> **"[53]** Such delays can and do have a deleterious effect on the rule of law.
>
> **[54]** The Needham's Point Declaration on Criminal Justice Reform: Achieving A Modern Criminal Justice System (in the Caribbean) adopted by the participants at the conference of the Caribbean Court of Justice Academy for Law, on the 20th of October 2023, provides a worthy aspirational benchmark for all persons connected to the justice system: "19. That as a rule, trials should be held within one (1) year of the accused being charged (for indictable offences) and six (6) months (for summary offences). During the necessary transitional stage to this ideal, trials should be held within two (2) to three (3) years of the accused being charged (for indictable offences) and twelve (12) months (for summary offences)."
>
> **[55]** The delay between Mr. Joseph's arrest and getting the matter to trial, on the basis of what is disclosed in the deposition, appears to be solely attributable to functionaries of the State.
>
> **[56]** State functionaries have an obligation to ensure that there is a fair trial within a reasonable time. To do nothing about this unbecoming

[9] DOMHCR2023/0015

and undesirable practice of delay would be to give silent approval to the transgression."

[20] To enable a reduction in the backlogs plaguing this and other courts, the public bar, private bar, state functionaries and every facet of the justice system must work together to ensure the intolerable delays in the administration of criminal justice is reduced and ultimately eradicated. This is a feat that can be accomplished with all hands on deck.

[21] A failure of the court to act as in the present circumstances will be giving silent approval to the transgression of delay as per, Willaims J [above].

Abuse of Process

[22] It has long been established that the court has an inherent jurisdiction to take such steps to prevent an abuse of its process. This power has been held to be incontrovertibly established.

[23] The court's power to stay proceedings to prevent an abuse of its process, could be exercised when the situation warrants, so as to prevent an abuse of its process. This position was explained in Blackstone's Criminal Practice 2003 [10] thus:

"……Lord Edmund Davis approved the statement of Lord Parker CJ in Mills v Cooper ……and referred to the case of Riebold [1967] 1 WLR 674 where a Judge had stayed proceedings. He then said (at p. 55E-F):

> While judges should pause long before staying proceedings which on their face are perfectly regular, it would indeed be bad for justice if in such fortunately rare cases as R v. Riebold their hands were tied, and they were obliged to allow the further trial to proceed. In my judgment, *Connelly v DPP*

[10] Blackstone's Criminal Practice 2003] Page 1053 par. [D2.40 par. 2]

established that they are vested with the power to do what the justice of the case clearly demands.

In view of the above dicta, the existence of a discretion on the part of the trial Judge to stay proceedings must now be regarded as incontrovertibly established. However, it is equally clear that the circumstances in which discretion may properly be exercised are extremely limited. The Judge must be satisfied that the prosecution must be oppressive and vexatious (per Lord Salmon) **or an abuse of the process of the Court** (per Lord Parker CJ)."

[24] In Australia, the jurisdiction to prevent an abuse of the court's process, is bound up in its inherent jurisdiction to dispose of proceedings. In **Ross on Crime**[11] this legal position was stated at par. 1.810 thus:

Court's Power

"Superior Courts possess inherent jurisdiction to take such steps as are necessary to ensure a fair and impartial trial to prevent an abuse of process in civil and criminal matters. In William v Spautz (1992) 174 (CLR) 509; ……Mason CJ, Dawson Toohey and Mc Hugh JJ said (at page 518; 640; 435).

> It is well established that Australian superior Courts have inherent jurisdiction to stay proceedings which are an abuse of process….This jurisdiction to grant a stay of a criminal prosecution has a dual purpose, namely, "to prevent an abuse of process or the prosecution of a criminal proceeding… which will result in a trial which is unfair" Barton v. Queen (1980) 147 CLR 75 at 95-96.

In a footnote the justices said:

[11] Ross on Crime 2nd Edition Lawbook Co. [2004]

Although the term "inherent jurisdiction" has acquired common usage in the present context, the question is strictly one of the powers of a court to stay proceedings. That power arises from the need of the court to be able to effectively exercise the jurisdiction which the court has to dispose of proceedings".

[25] The categories of cases wherein matter can be disposed of for abuse of process are not closed. This proposition finds its support in **Ross on Crime**[12] as follows:

> **Categories not closed**
>
> **"[1.830]** The categories of abuse of process are not closed, but there are two main aspects to the doctrine: first, whether the conduct complained of involves vexation, oppression and unfairness to the accused and, secondly, **whether tolerance of it will bring the administration of justice into disrepute".**
>
> **On the issue of Permanent stay**
>
> **[1.840]** Abuse of process covers a multitude of ills. The power to stay proceedings for abuse of process seeks to further a number of goals, including safeguarding an accused person from oppression and vexation, maintaining fairness in procedure, and precluding the undermining of confidence in courts generally".

[26] The following factors weighed heavily on the Court in making its decision to dismiss the matter namely:

- On the 15th of February 2024, Counsel for the Crown indicated that he had concurred with his Learned Friend [Defence Counsel] and he (Counsel of the Crown) had no objection. Further, they proposed the 7th of March 2024 to the court for trial, which the court accepted. The Court was ready for trial on that date.

[12] Par. 1.830

- On 7th March 2024, the said Crown Counsel who appeared in the matter, appeared as Counsel in a different matter on the said day and informed the Court that a different Counsel is handling the matter and will be present.

- No one appeared and the matter was stood down and resumed at 9:16 am. Upon resumption, neither Counsel for the State nor witnesses were present. The matter was again stood down to 9:45 am, after an application by the Defence was made to dismiss.

- At 9:45 am, when the Court resumed there was no one present for the State, or any explanation or excuse proffered to the Court via any means.

- The Court requested the individual calling of each of the persons named as witnesses in the indictment, including police officers. None of the witnesses were present in Court.

- The Court was left with examining all the factors in the round: the Accused's rights to a speedy and fair trial; the public confidence in the administration of justice; the backlogs that has been a concern for the justice system; blatant disregard for the Court and its process and the rule of law. Accused being on remand since 21st November 2021, awaiting trial, and neither witnesses nor the Prosecutor was present or communicated with the court.

[27] In the present case, when examined in the round, the Court was constrained to dismiss the matter for want of prosecution. This inexcusable delay and/or disregard for the Court and the judicial process cannot be tolerated. If this is allowed to continue, confidence in the justice system would be eroded. If it is allowed to go unnoticed, when looking at the factual matrix, the Court would be flouting its duty as the bastion of justice. Delay in this case is being viewed by this Court in its own peculiar context, and not the length of the delay as was pivotal in cases that dealt with the constitutional guarantee of fair trial within a reasonable time[13].

[13] Constitution of Belize S. 6 (2)

[28] The CCJ in **Hernan Manzanero v Queen**[14], in dealing with the test of fairness, albeit with the process of the *voir dire*, stated at par. 25 thus:

> "……the justice system must continually strive to promote a trial process that is transparent and fair and a judiciary that is independent, impartial, **competent, efficient and effective. [emphasis mine]"**

[29] This Court expresses concern about what transpired in this matter, and that it should not reoccur in the future.

Postscript [Prosecution and Defence]

[30] The Prosecution Office is well advised to examine each file in detail to determine whether there is sufficient evidence to proceed with the matter or not. If witnesses and all the evidence can be presented to the court, to enable a fair hearing, the matter should be proceeded with, with alacrity. However, if these matters are absent, there are other avenues for disposal.

[31] the Defence on the other hand, must be ready at all times to proceed with matters. There is a handful of criminal Attorneys practising at the Criminal Bar, therefore repeated requests for adjournments will only serve to frustrate the court's process and create further backlog. If we are serious about improving the administration of justice, reducing the court's backlog and regaining confidence and public trust, the slothful giants of: delays, procrastinations and absenteeism - must be laid to rest.

DISPOSITION

[32] The Court therefore orders that the matter be struck out for want of prosecution for the reasons above-mentioned.

Derick F. Sylvester
High Court Judge

[14] [2020] CCJ 17 (AJ) BZ