IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CRIMINAL DIVISION

CASE NO. 190/08 (3)

BETWEEN	**RICARDO BRITTON**	**1ST APPLICANT**
AND	**ROHAN MCCARTHY**	**2ND APPLICANT**
AND	**REX**	**RESPONDENT**

IN OPEN COURT

Mr. Keith Bishop and Mr. Janoi Pinnock appeared for the 1st Applicant

Mr. Lloyd McFarlane and Mr. Russell Stewart appeared for the 2nd Applicant

Miss Claudette Thompson, Director of Public Prosecutions (Ag), Miss Morganne Kellier and Mr. David Bowes instructed by the Office of the Director of Public Prosecution appeared for the Respondent

Heard: 18th December 2024 and 23rd January 2025

Criminal Law – Murder – Abuse of Process – Jurisdiction of the Court – Delay – Prejudice – Right to Fair Trial – Right to a Trial Within a Reasonable Time – Permanent Stay of the Indictment – Charter of Fundamental Rights and Freedoms sections 14(3) and 16(1)

L. PUSEY J

[1] Justice must proceed with purposeful urgency, respecting the rights of both the accused and the accuser. When the passage of time skews the balance and when proceedings drag on interminably, the very essence of fairness begins to unravel. Thus, a call to dismiss is not a call to forget, it is a call to preserve the higher ideals of fairness, underscoring the truth that justice, to remain just, must also be timely.

BACKGROUND

[2] The Applicants, Mr. Ricardo Britton and Mr. Rohan McCarthy, were jointly charged in 2006 for a murder which occurred in 2004. Their first trial, held in 2009, before a judge and jury, resulted in their convictions in 2010. However, the Applicants appealed. In

2012, the Court of Appeal allowed their appeal, overturning both the convictions and sentences. The Court of Appeal further directed that a retrial occurs before the end of the 2012 Michaelmas term.

[3] Unfortunately, due to delays, the retrial did not proceed as scheduled and began in 2014, two years after the appellate decision. This retrial resulted in a hung jury and a new trial was ordered to commence. There were several plea and case management hearings leading up to the commencement of the third trial. There were two attempts in 2016 to have the trial commenced. However, the trial was adjourned on each occasion. There were also attempts to have the trial commence in 2017 and 2018.

[4] In 2018, on the trial date, it was determined that there was not a state of readiness and the matter was sent back for plea and case management hearings. There were six plea and case management hearings and one pre-trial readiness hearing before a new trial was set to commence on October 28, 2024. The matter was adjourned on this date because Crown witnesses were not available at the time the matter was brought up. The trial was then set for November 4, 2024, wherein it was disclosed that the transcript for the first trial was not available and the Crown undertook to take steps to procure same. The trial was then adjourned to November 6, 2024 on which date the Crown was still unable to disclose the requested transcript.

[5] Consequently, the Applicants have each filed Notices of Application seeking Court Orders to permanently stay the indictment. Mr. Britton's application, supported by his affidavit evidence, was filed on November 6, 2024. Similarly, Mr. McCarthy filed his application, along with supporting affidavit evidence, on November 22, 2024. The Court will not provide a detailed account of the information contained in the affidavits, instead it will reference only those portions essential for resolving the issues at hand.

[6] It is noteworthy, as emphasized by Counsel Mr. Bishop during his oral submissions, that the Respondent's Counsel did not contest the Applicants' evidence by submitting either a formal response to the applications or affidavits in rebuttal. Instead, Counsel

for the Respondent proffered written submissions in opposition of the application. The court will highlight how it treats with this later in the judgment.

ISSUES

[7] The main issue for the resolution of this matter is whether in all the circumstances proceeding with a third trial would be an abuse of the court's process?

SUBMISSIONS

[8] The parties gave both oral and written submissions in this matter. The court has summarized these submissions. Where necessary, however, the court has stated and addressed submissions made.

1st Applicant's Submissions

[9] In his written and oral submissions, Mr. Bishop, representing Mr. Britton, emphasized that paragraphs 3 to 4 of Mr. Britton's affidavit evidence were unchallenged. He highlighted the critical question of whether a 20-year delay could be deemed reasonable under section 14(3) of the Charter of Fundamental Rights and Freedoms. Reliance was placed on the case of **Mervin Cameron v Attorney General of Jamaica** [2018] JMFC Full 1 ("**Mervin Cameron Case**") where a trial within a reasonable time was discussed at length.

[10] Mr. Bishop underscored that the issue of delay is central to determining whether the right to a trial within a reasonable time has been breached. He argued that systemic delays have long plagued the justice system, relying on the case of **R v Morin** [1992] 1 SCR 771 to outline the factors for assessing excessive delay: (i) the length of the delay; (ii) waiver of time periods; (iii) reasons for the delay; and (iv) prejudice to the accused. He noted that these principles were refined in **R v Jordan** [2016] SCC 27, which regrouped them under four main criteria: (i) the accused must establish a basis for the inquiry; (ii) the court must objectively assess what constitutes a reasonable time for a case of this nature; (iii) the court must evaluate how much of the delay is

attributable to the state; and (iv) the court must determine whether the state-attributable delay exceeds reasonable limits without justification.

[11] Mr. Bishop argued that applying these principles requires the court to consider the overall delay. He acknowledged some inherent delays but asserted that only 400 of the 7,300 days of delay were attributable to the case itself. He noted that no delays were caused by the applicants, as they made no applications for a change of venue, exclusion of evidence, adjournments due to illness, changes in counsel, or a bench trial. Additionally, there was no evidence of explicit or implicit waiver of their rights. Counsel further submitted that the Crown's handling of the case was marked by unjustified delays. He argued that the Crown failed to account for the six-year period from 2004 to 2010 before the first trial, as well as the two-year gap following the 2012 Court of Appeal order for a retrial. Moreover, the Crown provided no explanation for the delays following the end of 2014 retrial, as outlined in paragraphs 24 and 25 of Mr. Britton's affidavit.

[12] Mr. Bishop stressed the significance of institutional delays, noting that accused persons often wait up to five years for a trial despite an increase in judicial resources over the past 30 years. He argued that judicial precedent mandates limits on such delays, which typically result from systemic issues like scheduling conflicts, courtroom availability, and staffing shortages. He submitted that detailed affidavit evidence from the Crown was necessary to assess institutional delays, yet no such evidence was provided. Reliance was placed on **Herman King v The Queen** [1968] 2 All ER 610 and the **Mervin Cameron Case**.

[13] Finally, Mr. Bishop submitted that the unavailability of the alibi witness, due to her stroke, to give evidence and the serious knee injury of Mr. Britton among other things, as highlighted in the affidavit of Mr. Britton at paragraphs 20 to 31, the fairness of the trial cannot be maintained as they are super prejudicial in light of the unjustified delay and as such the indictment must be permanently stayed.

2nd Applicant's Submissions

[14] Mr. McFarlane adopted Mr. Bishop's submissions insofar as they applied to the 2nd Applicant. He however indicated that he thought it useful to specifically speak on the unavailability of the alibi witness since this witness is the girlfriend of the 2nd Applicant and the 2nd Applicant could speak from his personal knowledge of his observations as to the medical status of the witness.

[15] Mr. McFarlane directed the court's attention to the affidavit evidence provided by Mr. McCarthy, particularly paragraph 15, which outlines the Applicant's defence of alibi. In his affidavit, Mr. McCarthy states that the alibi witness suffered a stroke in or around 2022. This condition has rendered her unable to speak intelligibly and left her incapacitated for several months. Mr. McCarthy asserts that he is personally aware of the witness' condition due to their shared parental responsibilities, allowing him to observe her incapacitated state first hand.

[16] Counsel submits that this personal knowledge elevates Mr. McCarthy's observations beyond hearsay, as they are rooted in direct experience. While he cannot medically diagnose the witness or provide expert evidence regarding her condition, his account demonstrates that the witness is presently incapable of giving evidence. Counsel further notes that Mr. McCarthy believes hospital records documenting her condition exist, but he has been unable to obtain them due to their recent lack of contact.

[17] Mr. McFarlane also addresses the Crown's position that the Applicants are not without remedy, as section 31D of the Evidence Act permits the admission of the record of the witness' evidence from the first trial. However, Counsel submits that the procedural safeguards under section 31D are insufficient to mitigate the substantial prejudice caused by this witness' unavailability especially because no initial statement was ever taken from this witness. Further, the Applicant is deprived of the critical opportunity to present live testimony from this witness and to benefit from her potential cross-examination, which would be essential to the defence.

[18] In support of this, Counsel relies on authorities of **Shawn Campbell & Ors v R** [2024] JMCA Crim 30. In that matter, the Court of Appeal addressed the cumulative prejudice arising from prolonged delays, the erosion of evidence, and the inability to secure key witnesses. Paragraph [81] of the judgment is particularly instructive, as it underscores the inherent unfairness caused by the absence of a critical witness in cases where credibility and recognition are central issues.

[19] Counsel submits that the circumstances of the present case are analogous. The defence's inability to call the witness due to the passage of time is highly prejudicial and undermines the fairness of the trial. This prejudice is further exacerbated by the prolonged delay of over two decades, which has significantly impaired the Applicants' ability to mount a robust defence.

[20] Counsel concludes by emphasizing that the unavailability of the witness' live testimony, coupled with the overarching delay, creates a situation where the Applicant is deprived of a fair trial. This prejudice extends not only to Mr. McCarthy but also to his co-defendant, as the fairness of the proceedings is compromised for both parties. In light of these considerations, Counsel respectfully submits that the trial should be permanently stayed to uphold the principles of justice and fairness.

The Respondent's Submissions

[21] Counsel Miss Thompson contended that the determination of whether there has been a breach of the right to a trial within a reasonable time involves a subjective analysis. She cited **Reckford Maitland v R** [2022] JMCA Crim 5, particularly paragraphs [24] to [25], which she interpreted as suggesting that there is no universally defined standard for what constitutes a "reasonable time." Instead, the assessment must balance the prejudice suffered by the accused against the broader public interest. She also relied on **Herbert Bell v DPP and Anor** (1985) 22 JLR 268 ("**Bell v DPP**"), which outlines relevant factors for consideration: (i) the length of the delay; (ii) the reason for the delay; (iii) the defendant's assertion of their right; and (iv) prejudice to the defendant.

[22] Miss Thompson acknowledged that 20 years have elapsed since the Applicants were charged. However, she argued that the period of delay relevant to this application should commence from 2016, the date when the third trial was scheduled to begin, given that two trials and an appeal occurred between 2004 and 2014. While recognizing institutional delays, Counsel maintained that such delays do not inherently render the third trial unfair.

[23] Counsel further submitted that prolonged delays alone do not obligate a trial judge to dismiss a case. The primary duty of the judge is to ensure that the trial process remains fair to the accused. She relied on the authorities of **Tussain Whyne v R** [2022] JMCA Crim 5, **Attorney General's Reference (No. 2)** [2002] 2 AC, and **Melanie Tapper v DPP** [2012] UKPC 26, emphasizing that a stay of proceedings is not the default remedy for breaches of the reasonable time guarantee. For a dismissal to be warranted, the court must determine that proceeding with the trial would breach the accused's right to a fair trial due to resulting prejudice. Miss Thompson argued that the Applicants would not face prejudice if the trial proceeds and urged the court to carefully balance the rights of the accused against the interests of the victims.

[24] Miss Thompson submitted that the prejudice faced by the Applicants could be mitigated to ensure a fair trial. She suggested that access to transcripts could address concerns related to memory issues, while adequate directions could alleviate challenges posed by the "paper trial." Additionally, she argued that the first transcript should have been available at the time of the appeal and should not now serve as grounds for staying the indictment. Miss Thompson further expanded on these points during her oral submissions, which have been comprehensively addressed in the remainder of this judgment.

LAW AND ANALYSIS

Preliminary Point

[25] While the court's jurisdiction was not directly contested, it becomes pertinent in light of the Applicants' allegations of breaches to their constitutional rights. Typically, such

matters are often addressed by the Full Court, comprising a panel of three judges. This raises the question: is this court competent to adjudicate the current applications? The answer is unequivocally yes. Although the applications involve allegations of constitutional breaches, the remedy sought, a permanent stay of the indictment, falls within this court's jurisdiction. Unlike other constitutional remedies that may require the Full Court's intervention, this remedy is one that this court is fully empowered to grant.

[26] The Court of Appeal addressed the issue of a single judge adjudicating constitutional remedies in the case of **Ministry of National Security v Douglas** [2023] JMCA Civ 9. Based on my analysis of the appellate court's reasoning, while there is no explicit constitutional prohibition against a single judge granting such remedies in suitable cases, the court emphasized the importance of procedural fairness. In this regard, it is incumbent upon a single judge considering the granting of a constitutional remedy to invite submissions from the Attorney General on the appropriateness of such a remedy. The court is not proceeding on this basis.

[27] The court holds the discretion to refuse the continuation of criminal proceedings where they constitute an abuse of process, including the power to shield the accused from oppression or undue prejudice at common law (see: **The Queen v Byron Johnson & Ors** (unreported), Supreme Court, Jamaica, Case No. HCC 20/04, delivered 30 November 2011). This authority to stay an indictment stems from common law and is inherent in the court's jurisdiction. It is exercised to uphold fairness for all parties and to prevent the judicial process from being misused.

[28] Campbell J in **The Queen v Byron Johnson & Ors** supra stated at paragraph 10:

> *The court has an inescapable duty to secure this fairness to those who are brought before them. The answer to Lord Devlin question posed in Connelly, "Are the courts to rely on the Executive to protect their process from abuse?" must acknowledge that the "inescapable duty" that he opines is on the court, takes on greater significance and demands greater vigilance from a court which is the guardian of the Constitution. The Charter of Fundamental Rights and Freedoms, secured by the Jamaican people, will be diminished and demeaned, if the courts "contemplate for a moment*

the transference to the executive of the responsibility for seeing that the process of law is not abused." Woodhouse, J. in ***Moevao v. Department of Labour*** *[1980] 1 N.Z.L.R. 464, 475-476, said:*

> *"It is not always easy to decide whether some injustice involves the further consequence that a prosecution associated with it should be regarded as an abuse of process and in this regard the courts have been careful to avoid confusing their own role with the executive responsibility for deciding upon a prosecution. In the Connelly case Lord Devlin referred to those matters and then, as I have said, he went on to speak of the importance of the courts accepting what he described as their 'inescapable duty to secure fair treatment for those who come or are brought before them.' He said that 'the courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused' ([1964] A.C. 1254, 1354...). Those remarks involve an important statement of constitutional principle. They assert the independent strength of the judiciary to protect the law by protecting its own purposes and function. It is essential to keep in mind that it is 'the process of law,' to use Lord Devlin's phrase, that is the issue. It is not something limited to the conventional practices or procedures of the court system. It is the function and purpose of the courts as a separate part of the constitutional machinery that must be protected from abuse rather than the particular processes that are used within the machine. It may be that the shorthand phrase 'abuse of process' by itself does not give sufficient emphasis to the principle that in this context the court must react not so much against an abuse of the procedure that has been built up to enable the determination of a criminal charge as against the much wider and more serious abuse of the criminal jurisdiction in gene."*

[29] While not explicitly articulated in the applications, their substance and scope strongly indicate that they constitute an abuse of process application. This court has therefore proceeded to consider the merits of the applications on that basis.

[30] The common law powers to order a stay in proceedings against an abuse of process is linked to the constitutional guarantee of a right to a fair trial. This court is of the view that the constitutional guarantee expands, enhances and cements the common law powers that a court has to protect against an abuse of process. However, and most importantly, the constitutional guarantee does not deprive this court of that power to protect against an abuse of process.

[31] In the circumstances of this case, I am of the view that if the Court is satisfied that a trial of the accused would not be fair in the circumstances then there would be an

abuse of the process and the Court can use its common law powers to enter a permanent stay of the proceedings. The process of determining whether there is an abuse of process where the court is considering the effects of delay, are almost identical to that of establishing whether the right to a fair trial is violated as a result of delay. The court will therefore examine the reasoning of the courts, in relation to the violation of the Constitutional right to a fair hearing and will apply those principles to arrive at a determination of whether the court can exercise its common law powers to permanently stay the trial because of an abuse of process.

[32] A permanent stay of indictment, as I understand the common law principles, does not equate to an acquittal. While it effectively halts the prosecution from pursuing the charges against the defendant, it constitutes a dismissal of the case without adjudicating guilt or innocence. This means the charges technically remain extant but are rendered inert, barring further prosecutorial action. However, there are circumstances in which the Crown may seek to revive proceedings by applying to have the stay lifted. Therefore, this court, constrained by its common law jurisdiction, is precluded from entering a verdict of acquittal following the imposition of a permanent stay of indictment upon an abuse of process application, as doing so would extend beyond its judicial remit and encroach on principles governing the operation of the Full Court.

Is the delay an abuse of process?

[33] The right to a fair trial is a cornerstone of Jamaica's justice system, enshrined in the nation's Constitution and reinforced by its commitment to the rule of law. Under section 16(1) of the Jamaican Charter of Fundamental Rights and Freedoms:

> *"[w]henever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."*

This provision reflects Jamaica's adherence to international human rights norms, including those outlined in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

[34] The right to a fair trial encompasses several critical safeguards. These include the presumption of innocence until proven guilty, the right to legal representation, the ability to cross-examine witnesses, and access to evidence. Additionally, trials must be within a reasonable time and this is outlined at section 14(3) of the Charter of Fundamental Rights and Freedoms which states that *"any person who is arrested shall be entitled to be tried within a reasonable time…"* These protections collectively aim to uphold the integrity of the judicial process, ensuring that justice is administered equitably and transparently. These protections also exist to protect the accused against prejudice arising from inordinate and unjustified delays which undermines the integrity of the judicial process.

[35] The prejudicial effect of inordinate and unjustified delays was discussed in the case of **Bell v DPP** as cited by the Respondent. However, I concur that a more contemporary restatement and application of this principle is articulated in **Reckford Maitland v R,** also relied upon by the Respondent. In **Reckford Maitland v R**, the Appellant was twice convicted of murder: first in 2007, a conviction quashed on appeal in 2010 with a retrial ordered, and again in 2013, leading to another appeal. By 2022, the court identified constitutional breaches, including excessive delays and missing trial records, quashing the conviction and entering an acquittal. At paragraphs 24 to 26 of the judgment, Brown JA (Ag), as he then was, provided an insightful discussion on the concept of a trial within a reasonable time, he opined:

> *[24] In **Bell v DPP**, at page 322, the UKPC accepted that a consideration of whether a reasonable time had elapsed could not be divorced from "past and current problems which affect the administration of justice in Jamaica". In short, there is no universally accepted standard of a 'reasonable time' within the which hearing of a criminal trial should take place. In **Curtis Charles, Steve Carter and Leroy Carter v The State** (1999) 54 WIR 455 ('**Charles and Carter v The State**'), Lord Slynn of Hadley in discussing the propriety of a re-trial, spoke to the differing circumstances and, by extension, the reasonable time standard, which obtained in England and Trinidad and Tobago, and unequivocally regarded any comparison between the two as wrong. He referred to Lord Widgery CJ's remarks in **R v Saunders** (1973) 58 Cr App Rep 248, at page 255, that it was outside the court's knowledge for a re-trial to take*

> *place three and a half years after the commission of the offence, and added this comment, at page 461: "However, it would be wrong to apply conditions and practices in England in this matter to cases in Trinidad and Tobago ..."*
>
> *[25] Brooks JA, (as he then was) in **Lescene Edwards v R** [2018] JMCA Crim 4 (reversed on appeal to the UKPC on other grounds), at para. [47], made two observations on their Lordships' judgment in Bell v DPP. Firstly, **Bell v DPP** did not go so far as to say how long is too long. Secondly, their Lordships accepted that in considering whether the right guaranteed under section 16(1) of the Charter had been breached, the court is engaged in balancing two competing principles; namely, prejudice to the appellant and the public interest that the guilty should be punished.*
>
> *[26] Therefore, in order to determine whether the appellant's right under section 16(1) of the Charter has been breached, the court must take into its consideration three factors: (a) the length of the delay, (b) the reasons advanced in justification of the delay, and (c) the appellant's responsibility to assert his right (see **Bell v DPP**, at page 324; **Lescene Edwards v R**, at para [48]).*

[36] This authority is instructive to evaluate the present case based on the factors outlined. It is worth noting that these factors closely align with those established in **R v Morin** and **R v Jordan** as relied on by Counsel for the Applicants. However, the framework articulated in **Reckford Maitland v R** being a precedent from our jurisdiction, is more directly applicable.

[37] The court accepts Miss Thompson's assertion that the test for determining the prejudicial effect of delay is subjective. While the authorities provide a structured framework or formula that guides the court's analysis, there is no fixed benchmark. This inherently leaves room for variability in outcomes from case to case, even when the same factors are applied.

[38] The factors outlined in **Reckford Maitland v R**, such as the length of delay, reasons for delay, and prejudice, are inherently open to interpretation and weighting, which may lead different conclusions even when presented with similar facts.

[39] This subjectivity exists because the test involves a qualitative judgment of various factors rather than a straightforward calculation. While the framework offers guidance,

it does not guarantee uniformed outcomes. This highlights the importance of judicial discretion and the need for thoughtful, case-specific application of the principles. The court will consider the circumstances of each case and make a determination

(i) the length of the delay

[40] There is some dispute surrounding the length of the delay. Mr. Bishop and Mr. McFarlane submitted that the delay is 20 years, that is from the time of the Applicants were charged in 2004 until present. Miss Thompson is of the view that because there were two trials and an appeal, this delay would not have started until when the third trial was to commence and did not commence.

[41] The court disagrees with Miss Thompson's position that, for the purpose of assessing whether the delay has resulted in an abuse of process, the focus should not be solely on the total time elapsed since the Applicants were charged. The court acknowledges that, the existence of the prior proceedings cannot be entirely disregarded. However, given the outcome of the appeal and the second trial, it is effectively as if no trial has occurred. The overall period since the Applicants were charged until today forms part of the broader context of the right to a trial within a reasonable time. This means that though two trials have already occurred, the court must assess whether a fair trial can be conducted now, at this juncture, given the circumstances of the substantial delay. It is pellucid that the further removed the trial is from the incident, the more difficult it is to ensure a fair trial and as such the entire period must be considered (see: **Bell v DPP**).

[42] The court agrees that it would be inaccurate to claim that no steps were taken at all to initiate proceedings for the Applicants since they were charged, as the prior trials demonstrate some level of procedural advancement. However, including the entire period from the Applicants' initial charging to the present circumstances is necessary to provide a comprehensive assessment of all delays, as the time attributable to prior proceedings may inherently be connected to the overall delay in commencing the third

trial (see: **Bell v DPP** where the length of delay was determined to be the time elapsed between the date of arrest and retrial).

[43] As Mr. Bishop observed, despite the procedural history of two prior trials, this upcoming trial represents the critical juncture as it is this trial which would determine the Applicants' fate. Therefore, this trial must meet the high standard of fairness required by law. If the passage of 20 years has compromised the ability to conduct a fair trial due to faded memories, loss of evidence or other prejudicial factors, then the existence of the previous trials holds little weight. While they provide historical context, they do not mitigate the fundamental requirement that the present trial must be fair. The focus must remain firmly on whether the accused can now receive justice in accordance with the principles of fairness. In light of this, I accept that the length of the delay is 20 years.

[44] In **Reckford Maitland v R**, where the length of the delay was seven years, Brown JA (ag) said the following:

> *[28] The length of the delay in Bell v DPP (between the date of arrest and retrial) was five years. Lord Templeman described that period as "presumptively prejudicial" (see page 324 of the judgment). In Charles and Carter v R, a delay of nine years was politely described as "considerable and disturbing", per Lord Slynn at page 461. Brooks JA, exercising considerable restraint, found the 10 years it took for Lescene Edwards v R to come on for trial to be "unacceptable" (see para. [49] of this court's judgment).*
>
> *[29] If, as was suggested in Bell v DPP, in the face of delay which is "presumptively prejudicial", there is no necessity for further inquiry into the factors which must be placed in the scale, then this is a case which meets that threshold…*

The court notes that the learned judge referenced cases where delays of five years or more were deemed inordinate and unacceptable. In **Bell v DPP**, for instance, a delay of five years was characterized as "presumptively prejudicial." Similarly, Brown JA (ag) expressly concluded that the delay in in **Reckford Maitland v R** met the threshold for being presumptively prejudicial.

[45] In the present case, the delay exceeds 20 years which is more than double the delay considered in the cases cited by Brown JA (ag) in **Reckford Maitland v R**. On this basis alone, the court could reasonably find that such a prolonged delay is unacceptable and "presumptively prejudicial." It appears that Brown JA is saying that upon this finding there is no need to go further into the factors which are laid out. Indeed, this seems to be the approach taken by his lordship.

[46] However, in **Flowers v The Queen** [2000] UKPC 41, the Privy Council indicated at paragraph 46 that where the delay is presumptively prejudicial then it is necessary to consider the other factors. This is the position also taken in case of **Tussan Whyne v R** (see: paras [81] and [82]) and this is the position that this court believes should be taken in this case, particularly in consideration of the remedy which the Applicants seek.

[47] In the present case, the delay was inordinate. However, the mere passage of time, on its own, does not constitute an abuse of process nor does it mean that fairness cannot be guaranteed. It must be demonstrated that the delay was not caused or contributed to by the Applicants. Instead, *"…it must be attributable to the 'action or inaction' of the State, for delay not caused by the State cannot be laid at its feet"* (see: **Tussan Whyne v R** at para [82]; **Melanie Tapper v DPP** at paras [24] and [26] citing **Taito v The Queen** [2002] UKPC 15, and **Attorney General's Reference** (No 2 of 2002)).

(ii) the reason for the delay

[48] Counsel for the Applicants argued that, to determine the reasons for the delay or to attribute any portion of it to institutional causes, the court must rely on affidavit evidence, as it cannot speculate about the reasons behind the delay. The court agrees with this submission. In cases of this nature, where an issue is raised as to delay, it is imperative that the parties put before the court evidence on which it may properly assess the cause of the delay.

[49] The Respondent has not provided any affidavit evidence to explain the delay. Moreover, the Respondent's attempt to address these delays within its submissions cannot suffice for this purpose. Submissions are intended to present legal arguments and interpretations, not to introduce or substantiate factual evidence. As such, submissions cannot replace the role of affidavit evidence, which serves to provide a factual basis for the court's consideration.

[50] In the Affidavit of Mr. Ricardo Britton sworn to on November 6, 2024, at paragraphs 16 to 19, some reasons for the delay were advanced. Mr. Britton stated that there were disclosure issues, particularly in relation to the transcript for the two prior trials. He notes that he verily believes that his Counsel has not received the transcript for the first trial in 2010. In relation to the transcript for the second trial, Mr. Britton noted that he verily believes that this transcript was disclosed on October 2, 2024. This he indicates was late disclosure and were the trial to commence on November 4, 2024, his Counsel would not have adequate time to have perused the transcript and prepare himself for trial. Mr. Britton also noted that the main issue in relation to the delays was the availability of the prosecution witnesses. In the absence of any other explanation should the court accept the reasons advanced by Mr. Britton?

[51] The court acknowledges that it has access to the case file and can take judicial notice of the reason for the delays based on the record. However, given the age of the matter and the possibility that the notations in the file may be incomplete, the court believes it would be unsafe to rely solely on the file to make any definitive findings regarding the reason for the delays. However, as a supplement to the reasons advanced by Mr. Britton, the court can accept his evidence and conclude that the reason for the delays in initiating the third trial is due largely to the availability of the prosecution's witnesses and the non-production or late production of trial transcripts.

[52] There is no evidence or submission that any of the delay is attributable to the Applicants themselves. The court must be able to discount the period of delays which are attributable to institutional delays. Mr. Bishop submitted that a discount of 400

days would be a proper discount. However, he has not provided any evidence to support such a discount and as for reasons mentioned earlier, the court cannot rely solely on its file to assist it here.

[53] The court is able to take judicial notice of the fact that the COVID-19 pandemic led to the suspension of jury trials from March 2020 to approximately May 2022. As this case involves a jury trial, it could not have proceeded during that period. Nevertheless, there is no evidence, neither from the Applicants' affidavits nor the court's file, indicating that any trial dates had been set during this time and subsequently vacated due to the pandemic.

[54] It is important to clarify that the Applicants cannot attribute the entirety of the delay in initiating the third trial solely to the Office of the Director of Public Prosecutions. Other state agencies also bear responsibility for contributing to the delays in this matter. Although these agencies are not parties to the current application, it was incumbent upon Counsel for the Respondent to address the absence of these agencies as a party by raising it as part of their arguments or, alternatively, obtaining and presenting relevant affidavit evidence to explain the reasons behind the delays. This omission leaves a critical gap in the Respondent's case, as the court requires a comprehensive understanding of the sources of delay to make a fully informed determination.

[55] The argument has been advanced by Miss Thompson that the non-production of the transcript for the first trial should be given less weight, given that Counsel in this matter has represented the Applicant since the inception of this matter and that the transcript would presumably have been provided for the purposes of the appeal. However, no argument or explanation has been offered as to why Counsel does not currently possess this transcript. That said, it is clear that Counsel is without the transcript, and it has been requested yet remains unproduced.

[56] The responsibility for producing transcripts lies squarely with the courts, and the delay arising from the non-production of this transcript must be attributed to the courts. While

it might have been ideal in these circumstances for Defence Counsel to locate the transcript, independently, the burden of ensuring its availability cannot be transferred to Counsel. Therefore, while Counsel's continuous involvement in the matter is acknowledged, the duty to produce the transcript has to remain with the courts.

[57] All delays attributable to the State, whether arising from the actions or inactions of the Office of the Director of Public Prosecutions, the police, or the Court, must be carefully examined and considered as relevant factors in the overall assessment of this matter. The cumulative effect of such delays, regardless of their source within the State apparatus, directly impacts the administration of justice and the ability of the Applicants to mount a defence. This principle underscores the necessity of holding all state actors to a standard of diligence and timeliness in the conduct of proceedings, as any lapse has the potential to undermine confidence in the judicial process.

[58] Consequently, from the reasons that the court has accepted, it finds that the delays were due in large part to the actions or inactions of the State. Further, there being no evidence by the Respondent in relation to explaining the delay or any evidence in relation to the institutional delay, the court is constrained to find that the delay was inordinate and unjustified.

(iii) prejudice to the accused

[59] In **Bell v DPP,** the Board relied heavily on the Supreme Court of the United States of America decision in **Barker v Wingo** 1972 407 US 514. In **Barker v Wingo**, Powell J identified key considerations in assessing prejudiced to the accused in cases of delayed trials:

> *"Prejudice, of course, should be assessed in light of the interests of the defendants which the speedy trial right was designed to protect. The court has identified three such interests:* ***(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defence will be impaired.*** *Of these, the most serious is the last …* ***If witnesses die or disappear during a delay, the prejudice is obvious. There is also prejudice if defence witnesses are unable to recall accurately events of the distant past****.*

> *Loss of memory however, is not always reflected on the record because what has been forgotten can rarely be shown".*

[60] However, in **Bell v DPP**, although the accused did not explicitly claim prejudice, the Privy Council recognized the inevitable prejudice resulting from the seven-year delay between the incident and the retrial. The Board emphasized that a lack of an express allegation of prejudice does not negate its existence.

[61] The submissions of Counsel in the matter have rightly brought into focus the importance of the prejudice caused to the Applicants by the delay. This is important because it will assist the court in determining whether there is an abuse of process and if so, the remedy which ought to be granted in the circumstances.

[62] In the Canadian Case of **Sanderson v Attorney-General Eastern Cape** 1997 (12) BCLR 1675 (CC), Kriegler J offered the following remarks at paragraph [38] of his judgment concerning the remedy of a permanent stay of prosecution:

> *"… the relief the applicant seeks is radical, both philosophically and socio-politically. Barring the prosecution before the trial begins – and consequently without any opportunity to ascertain the real effect of the delay on the outcome of the case – is far reaching. Indeed, it prevents the prosecution from presenting society's complaint against an alleged transgressor of society's rules of conduct. That will seldom be warranted in the absence of significant prejudice to the accused."*

[63] On the same point, Kriegler J opined in the **Canadian Case of Wild and Another v Hoffert NO and Others** 1998 (3) SA 695 (CC), at paragraph 27, that:

> *"The appellants do not allege, nor is there any suggestion of, trial prejudice here. Consequently, their claim for a stay of prosecution must fail unless there are circumstances rendering the case so extraordinary as to make the otherwise inappropriate remedy of a stay nevertheless appropriate."*

[64] The above authorities reflect the position in our jurisdiction and the various cases relied on by Counsel in the matter from the jurisdiction have reminded us of this. Perhaps the most popular of which is the case of **Shawn Campbell & Ors v R** [2024] JMCA Crim 30 where the Court of Appeal had to determine whether in all the circumstances and in consideration of a 13-year delay whether a retrial should be

ordered. In that case, the Court of Appeal ruled that the balance of justice leaned in favour of no retrial. This was not a decision which was arrived at lightly as the Court of Appeal robustly examined the circumstances of the case and the evidence before it in relation to the feasibility of a retrial and the effect of the delay on same.

[65] In the present case, there is no present incarceration because the Applicants are currently on bail. However, I find that the other factors elucidated by Powell J are to be greatly considered especially in light of the evidence of the Applicants and the arguments of their Counsel. In relation to the issue of prejudice, these are the contentions of Mr. Britton as outlined in his affidavit:

1) **Impaired Alibi Witness**

   The Applicant's alibi witness, Mr. Rohan McCarthy's girlfriend, is no longer able to testify due to severe health complications. She has suffered a stroke, leaving her with significant impairments, including difficulty walking and speaking, which renders her unable to provide the crucial evidence she once offered.

2) **Health and Memory Deterioration**

   The Applicant has been grappling with a serious knee injury sustained in 2014 during a fall while painting at a business establishment. Compounding this, the Applicant has developed memory challenges, severely affecting his ability to recall events from 20 years ago. The absence of familial support, following the death of both parents, has further exacerbated his situation.

3) **Challenges to a Fair Trial**

   The Applicant argues that a fair trial is unattainable due to the unavailability of critical prosecution witnesses. The Crown intends to rely on section 31D applications to introduce statements from these absent witnesses, depriving the Applicant of the opportunity to cross-examine these witnesses. Additionally, the investigating officer retired in 2014 and is no longer available, and the original sketch critical to establishing the spatial layout of the crime scene has

been misplaced. Notably, the individual who initially provided evidence regarding the sketch is not included in the indictment.

4) **Prolonged Anxiety and Reputational Harm**
For over two decades, the Applicant has endured the psychological burden of serious charges looming over him. He lives in constant fear of being remanded in custody, a fear intensified by his prior two-year detention. Having no prior criminal record, the accusations have inflicted enduring stress and irreparable harm to his reputation, leaving him in a perpetual state of emotional and social distress.

[66] Mr. McCarthy had this to say in relation to the prejudice he believes he is caused by the delay:

1) **Impaired Alibi Witness**
The Applicant's primary witness in support of his defence is his girlfriend. Tragically, she suffered a stroke, leaving her unable to communicate intelligibly and rendering her incapacitated for months. This witness had not previously provided any statements, thereby precluding reliance on section 31D of the Evidence Act to admit her testimony. Consequently, the delay attributed to the State has significantly hampered the Applicant's ability to present his strongest possible defence at trial.

2) **Inability to Challenge Deceased Witness's Statement**
A key prosecution witness has passed away over the intervening years. While the law permits the admission of the deceased witness's statement, the Applicant is denied the fundamental right to challenge or cross-examine the contents of this written evidence, further undermining the fairness of the proceedings.

3) **Credibility and the Passage of Time**

> This case hinges on recognition and credibility, yet the 20-year delay between the alleged incident and the third trial attempt poses significant challenges. The extended passage of time leaves the Applicant at a distinct disadvantage, as it compromises his ability to accurately recall events critical to his defence. In a matter where credibility is paramount, this inherent disadvantage is insurmountable and cannot be rectified by judicial direction or intervention.

[67] The court acknowledges the affidavit evidence provided by the Applicants regarding the medical condition of their alibi witness and Mr. Britton's knee injury. In matters involving medical assertions, particularly where there are allegations that they may significantly impact the proceedings, the court finds it essential that expert evidence be presented. Without such evidence, the Applicants' statements on these issues cannot be afforded substantial weight. This is not to suggest that the Applicants are being untruthful or that their observations are inaccurate; rather, it is encouraged that the courts do not rely on lay assessments regarding medical conditions. On the other hand, the Crown has not provided evidence to contradict the assertions of the accused men. Therefore, the court has no choice but to accept the unchallenged and inexpert observations of the accused men that the witness would have difficulty coming to court.

[68] Additionally, while Mr. Britton has cited his knee injury as a factor which may affecting his ability to effectively participate in the proceedings, the court notes his consistent attendance at prior hearings without complaint of physical limitations, including difficulty standing or waiting. Accordingly, this will not be given much weight.

[69] Miss Thompson argued that notwithstanding the significant passage of time, the accused are not precluded from receiving a fair trial and that a permanent stay of proceedings is not warranted in this case. Counsel submitted that the importance of witness demeanor, often cited as a critical factor in ensuring a fair trial, is frequently overstated. Relying on judicial observations by Chief Justice Bryan Sykes in the **Mervin Cameron Case**, Counsel argued that demeanor can be misleading, as

witnesses may adopt expressions to influence perceptions. The focus, therefore, should be on the substantive content of contemporaneously recorded statements, which remain unchanged over time. Unlike live testimony, which may be affected by fading memory or inconsistencies, statements recorded shortly after an incident retain their evidentiary value even after the passage of time.

[70] It was further submitted that reliance on such contemporaneous documents does not place the accused at a disadvantage. On the contrary, the integrity of these documents ensures that the accused are not unfairly prejudiced by the passage of time. Indeed, Counsel argued that the accused are in a stronger position with documented evidence than they would be relying on live testimony from witnesses whose memories may have deteriorated over two decades.

[71] Counsel also emphasized the critical role of judicial directions in ensuring fairness. It was argued that the trial judge has a duty to provide clear guidance to the jury, emphasizing that a trial is not a memory test. Whether the incident occurred one year or 20 years prior, such directions ensure that the jury evaluates the evidence fairly, without undue focus on the limitations inherent in human memory.

[72] Regarding remedies for the delay, Counsel submitted that a breach of the reasonable time guarantee does not automatically necessitate a stay of proceedings or dismissal of the charges. The appropriate remedy must be proportionate to the nature and impact of the delay. Counsel proposed alternative remedies, including a public declaration acknowledging the breach or a discount in sentencing if the accused are convicted. These measures, it was argued, appropriately address the breach without undermining the possibility of achieving justice.

[73] Counsel further argued that a stay of proceedings is a remedy of last resort, reserved for cases where the delay has caused such severe prejudice that a fair trial is no longer possible. Relying on **Tussan Whyne v R**, Counsel pointed out that even egregious delays do not automatically satisfy this threshold. The court must assess

whether the delay has caused serious prejudice to the accused to the extent that the trial's fairness is irreparably compromised.

[74] Finally, Counsel candidly acknowledged that the systemic failure to produce transcripts which has contributed to the delay, is no fault of Office of the Director of Public Prosecution. However, it was submitted that this failure, while regrettable, does render the trial an abuse of process. Counsel urged the court to adopt a balanced approach, taking into account the alternative remedies available to address the breach while preserving the opportunity for justice to be served.

[75] The court acknowledges the submissions of Miss Thompson regarding the applicability of section 31D of the Evidence Act and agrees that it remains valid law. However, its practical implications differ significantly depending on the temporal context of the case. When evidence is presented 20 years after an incident, the challenges posed by the passage of time are substantially more complex than in cases where only five or six years have elapsed. This complexity arises not only from fading memories of witnesses but also from the jurors' ability to assess the circumstances accurately. In this case, some jurors may not have been adults at the time of the incident, which further complicates their ability to contextualize the evidence effectively.

[76] The right to a fair trial demands a level of proximity to the event to enable the tribunal of fact, be it judge or jury, to assess the case properly. The passage of two decades inherently makes this task more difficult. While it is true that both the prosecution and defence witnesses face similar issues with memory loss, this does not create a level playing field. The criminal justice system operates on the principle that the playing field must tilt in favor of the accused, given the presumption of innocence. The accused are not simply in the same position as the witnesses; they bear the weight of the potential consequences, which underscores the need for an even greater level of procedural fairness.

[77] The court also recognizes the constitutional framework within which these rights exist. Unlike the English common law system, which is less focused on entrenched constitutional rights, Jamaica's Charter of Fundamental Rights and Freedoms places these protections at the forefront of the legal system. As Chief Justice Sykes has argued in dissent, in the **Mervin Cameron Case**, which I find to be persuasive here, our jurisprudence should adopt a robust approach to rights violations. In supplement to that argument, the learned Chief Justice opined that the courts must take decisive action which includes striking out cases or granting stays where necessary, to affirm the seriousness of these rights. In the result, this court is of the view that the prejudice caused by the inordinate and unjustified delay cannot be remedied in the ways suggested by Miss Thompson.

[78] This case at bar highlights broader systemic failings. The delays in providing and the absence of transcripts are an indictment of the State as a whole, including the judiciary. The inability to produce transcripts, coupled with the repeated failure to resolve the matter, reflects a failure of the justice system to uphold its responsibilities. It is the State's duty through its various agencies, including the courts, to ensure that justice is delivered fairly and timely.

[79] It is important to note that the Court of Appeal set a timeline for the retrial to be heard. This implies that the Court of Appeal was of the view that a speedy trial was necessary in the circumstances. That timeline was not complied with. The eventual trial ended in a hung jury. It could be argued that the failure to have the first retrial within the time designated and the failure to have the second retrial within a short time, is sufficient reason to deem the conduct of this matter as an abuse of process.

[80] The court cannot, in good conscience, continue to "kick the can down the road" by setting theoretical deadlines for resolving issues such as missing transcripts, particularly when there is no indication that these materials will ever be recovered. To do so would perpetuate the cycle of delay and deny the accused the constitutional guarantees to which they are entitled. A decisive response is necessary to

demonstrate that unjustified and inordinate delays will not be tolerated and to restore confidence in the administration of justice.

[81] So while the court notes that the offence for which the Applicants are charged is serious, that there is a prevalence for this type of offence in Jamaica and that the evidence against the Applicants was sufficient to set out a prima facie case against them, it has to find that the delay has severely prejudiced the Applicants in that embarking on a third trial amounts to an abuse of process. This is especially so considering the cumulative effect following factors:

i. The unavailability of various prosecution witnesses.
ii. The unavailability of the original sketch and its supporting witness which may have supported the defence.
iii. The unavailability of the alibi witness for the Applicants.
iv. The unavailability of the transcript for the first trial and the lack of information regarding when the transcript would become available for there to be disclosure.
v. The psychological impact that the delay in the trial has had on the Applicants which was evidenced through their unchallenged affidavit evidence.
vi. The period of time between the alleged offence and the likely time within which the trial could be accommodated which has already exceeded 20 years.

[82] The court is of the view that no directions or safeguards could adequately address or mitigate the inherent prejudice in this matter. Any attempt to provide instructions to the jury or implement remedial measures would fail to rectify the fundamental issues at hand, leaving the Applicants at a distinct disadvantage. This is particularly significant in a case where the above factors weigh heavily against the fairness of the trial. Subsequently, to proceed under these conditions would undermine the principles of justice and equity, thereby necessitating an alternative resolution to ensure the integrity of the judicial process is preserved.

[83] The court finds the submissions of Mr. McFarlane, as outlined in paragraphs [12] to [18] of this judgment, particularly compelling. His arguments regarding the unavailability of the alibi witness and its consequential impact on the defence were both persuasive and well-founded. The court concurs with his assessment that the absence of this witness introduces significant prejudice to the defence and profoundly affects the overall state of affairs should the trial proceed. This absence cannot be overlooked, as it strikes at the core of the Applicants' ability to present a complete and robust defence.

CONCLUSION

[84] After determining that the delay has prejudiced the Applicants, and after carefully considering all relevant factors, the Court concludes that continuing with the third trial in this matter would constitute an abuse of process. In the interest of justice, the Court is of the view that the trial should not proceed, and hereby issues the following orders:

1. That the indictment dated the 7th day of April 2024 which charges the Applicants, Mr. Ricardo Britton and Mr. Rohan McCarthy, with three counts of Murder be permanently stayed.

2. That the State is barred from initiating any further proceedings against the Applicants in respect of the charges outlined in the above indictment.

3. Formal Order is to be prepared, filed and served by Counsel for the Respondent.