[2018] JMFC Full 1

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CONSTITUTIONAL DIVISION

CLAIM NO. 2017HCV01084

THE HONOURABLE MR JUSTICE BRYAN SYKES
THE HONOURABLE MR JUSTICE DAVID FRASER
THE HONOURABLE MR JUSTICE KIRK ANDERSON

BETWEEN	**MERVIN CAMERON**	**CLAIMANT**
AND	**ATTORNEY GENERAL OF JAMAICA**	**DEFENDANT**

IN OPEN COURT

Hugh Wildman and Barbara Hines for the claimant

Kamau Ruddock and Kimberly Clarke instructed by the Director of State Proceedings for the defendant

Constitutional law – Allegations of violation of right to trial within a reasonable time – Whether violation of reasonable time standard results in grant of stay automatically – How analysis is to be done – Factors to be considered when determining whether reasonable time standard violated – Consequences of violation – Charter of Fundamental Rights and Freedoms, Sections 14 (3) and 16 (1) – Canadian Charter of Rights and Freedoms, Section 11 (b)

October 8, 2017 and March 22, 2018

SYKES J

Mr Cameron seeks constitutional remedies

[1] This is a pre-trial constitutional claim in which Mr Mervin Cameron is alleging that his right to trial within a reasonable time as guaranteed by section 14 (3) of the Jamaican Charter of Fundamental Rights and Freedoms has been violated. Mr Mervin Cameron, a labourer with three previous convictions, – illegal possession of firearm/shooting with intent and receiving stolen goods – was offered bail in September 2017 by Daye J after being in custody since his arrest and ultimately being charged by the police in March 2013. He was charged with two murders. A preliminary inquiry commenced (on date unknown) and has stalled since October 2016. The delay in bringing the matter to trial has led him to ask this court to grant declarations to the effect that his constitutional right to trial within a reasonable time has been violated. He is also asking that an order be issued staying the preliminary inquiry and a consequential order that he be released immediately if the preliminary inquiry is stayed.

[2] Mr Cameron alleges that he was informed by the police that they held persons who had stolen a motor vehicle. That vehicle was alleged to be owned by one of the deceased. The person held allegedly told the police that Mr Cameron sold them a motor vehicle. He denied the allegations put to him and stated that he did not have a motor vehicle in his possession and he had not sold any stolen motor vehicle to anyone.

[3] He states further that he was not placed on an identification parade so that the reliability/accuracy of the identification of him by persons who claimed that he sold them the stolen vehicle could be tested. He was questioned by the police and then charged with the offences of murder and illegal possession of firearm and then placed before the Parish Court Division of the Gun Court for a preliminary inquiry to take place. If what Mr Cameron says is true, and what he has said is the only evidence, then it appears that the Crown is relying on the doctrine of recent possession to ground the charges of murder. On Mr Cameron's narrative there is no suggestion that there is any witness who saw Mr Cameron commit the acts

which caused the death of the two persons. There is no suggestion that there is any forensic evidence linking Mr Cameron to the car. As will be shown, the response from the Crown did not shed any light on the nature and extent of the evidence against Mr Cameron.

[4] He says that his counsel made a bail application on his behalf and in the course of that application high-lighted several flaws in the prosecution case including the absence of an identification parade. The date of the bail application is not stated. Mr Cameron swore that the descriptions given by the persons who say that he sold them the vehicle did not match his features. If this further allegation by Mr Cameron is correct then it suggests that the case against him is weak. Again, the response of the Crown failed to address the nature and quality of the evidence against Mr Cameron.

[5] According to Mr Cameron, the Parish Court Judge refused bail and gave no reasons. He further states that on February 20, 2014, the matter came back before the Parish Court and on that day the judge indicated that she would not be entertaining any application for bail that day. His counsel responded by saying that he would be asking for the reasons for refusing bail and the judge promised to give her reasons in writing. It appears that this was a reference to the bail application to which Mr Cameron referred and not to any bail application made on February 20, 2014.

[6] It may well be that this request for the reasons was the second one since the bail application because Mr Cameron asserts that on Monday, January 13, 2014 his counsel requested reasons for the refusal of bail but was told they were not yet ready. Mr Cameron expresses the view that none of the factors listed in the Bail Act that would militate against a grant of bail applied to him.

[7] Mr Cameron does not say when the preliminary inquiry began but he says that it was scheduled to continue on May 12, 2014.

[8] Regarding the evidence, he states at paragraph 18, 33 and 34 respectively:

18. The case against me is weak and its credibility seriously undermined, as it is clear that the identification evidence is almost non-existent, given the absence of the identification parade which would clearly show that I am not the person who the witnesses have described to the police.

33. The case against me is weak. One of the main witness (sic) for the prosecution … a police officer stationed in St James, stated in his statement and admitted under cross examination in court, that when he spoke with [name excluded] the person who was in possession of the alleged motor car in question, [the same person] admitted to him that the car was brought to him by a tall brown man. That description does not fit me. I am neither tall nor brown. I am short and dark. [statement of police officer exhibited]

34. It is clear that the prosecution's (sic) case is extremely weak and I am held in custody for an offence of which I am innocent.

[9] Mr Cameron contends that the Parish Judge erred in refusing to grant bail having regard to the state of the evidence. He advances the proposition that the absence of reasons for refusing bail suggests that the judge had no reason for refusing bail.

[10] The matter, he says, has been before the court on numerous occasions for continuation but the continuation has not occurred because the prosecution witnesses have not been in attendance. One of the witnesses actually made it to the witness box and since his last day in court (no evidence of that date) he has not returned to continue his evidence. Again, there is no evidence of the numerous dates as described by Mr Cameron.

[11] Mr Cameron states that his counsel made several attempts to have the matter disposed of. These efforts included (a) urging the Parish Judge to have the matter dealt with through the Office of the Director of Public Prosecutions ('DPP') and (b) writing to the Director asking that a voluntary bill of indictment be preferred and the matter transferred to the Home Circuit Court. The letter to the

DPP was written in May 2016. The DPP responded by letter June 2016 in which she acknowledged receipt of the May 2016 letter. In October 2016 the DPP declined to intervene.

[12] Since October 2016 the matter has been before the Parish Court on several occasions but no prosecution witness has appeared.

[13] In February 2017, Mr Cameron's counsel renewed his bail application but that was without success. All this led him to seek constitutional remedy. He filed his claim in March 2017.

[14] In response to this affidavit the Attorney General filed an affidavit in reply. That affidavit added the delays were largely due to the failure of witnesses to attend court on several occasions. The deponent added that Mr Cameron's counsel was absent on several occasions. The deponent confirmed the communication between DPP. It was also said that the DPP indicated that there were several issues to be resolved before the matter could proceed to the Home Circuit Court. Remarkably, there is not a single line from the Crown suggesting that Mr Cameron's narrative of the summary of the evidence against him is incorrect.

[15] It is to be noted that neither Mr Cameron nor the Attorney General indicated the date Mr Cameron was charged, when he was first placed before the court, the number of times the matter has been before the court and what occurred on each occasion. All we know is that he was charged sometime in March 2013. The court will have to make do with what it has. I now turn to the relevant constitutional provisions.

[16] Mr Cameron is charged with one other person. This factor will also be taken into account in assessing whether Mr Cameron's reasonable time guarantee has been violated.

The constitution

[17] Section 14 (3) states:

> *Any person who is arrested or detained shall be entitled to be tried within a reasonable time and –*
>
> *(a) shall be –*
>
> *(i) brought forthwith or as soon as is reasonably practicable before an officer authorized by law, or a court; and*
>
> *(ii) released either unconditionally or upon reasonable conditions to secure his attendance at the trial or at any other state of the proceedings; or*
>
> (b) *if he is not released as mentioned in paragraph (a) (ii) shall be promptly brought before a court which may thereupon release him as provided in that paragraph.*

[18] During the course of argument neither counsel mentioned section 16 (1) of the Charter of Fundamental Rights and Freedoms; a provision which has to be taken into account in the resolution of this matter. Section 16 (1) reads:

> *Whenever 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.*

[19] The two provisions are linked in this way: both provisions may be engaged simultaneously in that a person's arrest and charge may occur concurrently. If that is the case, then the right to tried within a reasonable time (section 14 (3)) and the right to a fair hearing within a reasonable time by an independent and impartial court established by law (section 16 (1)) would be activated simultaneously and immediately. On the other hand, a person may be arrested or detained but not charged and therefore only section 14 (3) is engaged. Section

16 (1) is only engaged when the person is charged with a criminal offence. In the period after detention or arrest and before charge section 14 details what is expected to be done in respect of the person arrested or charged.

[20] Section 14 (3) has no adjectives describing the type of trial to which the person is entitled. That is found in section 16 (1) which says that the hearing should be fair. Section 16 (1) describes the characteristic of the court conducting the trial, namely, impartial, independent and established by law. The adverbial phrase 'within a reasonable time' in section 16 (1) speaks to when the hearing is to take place and not the type of hearing or indeed the type of court. As is well known, adverbs or adverbial phrases never add to the meaning of nouns. The verb that the adverbial phrase modifies or adds to the meaning is 'afforded.' The 'afforded' trial is to take place 'within a reasonable time.'

[21] I am of the view that the expression 'reasonable time' should be interpreted and analysed the same way in both sections.

[22] I now turn to the principles of interpretation applicable to the Jamaican constitution.

The interpretation of written constitutions

[23] It has been said that fundamental rights provisions of constitutions are not like ordinary statutes passed by the legislature. The rights are to be given a generous interpretation. Some have even used the expression purposive interpretation. I understand all this to mean that the starting point is the actual text of the constitution. As with all written texts that are intended to convey meaning the authors of the document use words which have a meaning and convey an understanding at the time they were used. All words in any language that are intended to convey ideas from one mind to another via written text have a prima facie meaning which the author hopes or expects that the reader appreciates. If the reader does not have the understanding of the words used by the author then

no communication has taken place regardless of how elegant the phraseology, the beauty of the syntax and the correctness of the grammar.

[24] The fundamental rights provisions of constitutions have been said to be a living document. The idea here being that the contemporary understanding is more important and should inform the interpretation at the time the constitutional provision is being interpreted rather than seek to understand what the author of the text meant at the time it was written. Assuming this to be true the living document theory has to start with the actual text of the constitution. This must be so because no constitution has all conceivable rights in its bill or charter of rights if there is such a bill or charter. By including some rights, restricting others, and excluding others, the authors of the text of the constitution have indicated their choice of rights.

[25] The authors of a bill of rights can limit the extent of a right by using appropriate language and if that is done then it is not for the courts to say that the text does not mean what it plainly says. The courts are not allowed to inject its own biases using the living document theory as the vehicle for that. It is my view that even if the words of a fundamental right are given an extended meaning such meaning must be within the range of meanings that the actual text can legitimately bear. This, I believe, was the Privy Council's position in **Minister of Home Affairs v Fisher** (1979) 44 WIR 107 where Lord Wilberforce in reacting to the submissions counsel noted that there were two approaches to the interpretation of fundamental rights provisions. At page 113 his Lordship said:

> *The first would be to say that, recognising the status of the Constitution as, in effect, an Act of Parliament, there is room for interpreting it with less rigidity, and greater generosity, than other Acts, such as those which are concerned with property, or succession, or citizenship.*

Also at page 113:

> *The second would be more radical: it would be to treat a constitutional instrument such as this as sui generis, calling for principles of interpretation of its own, suitable to its character as*

> *already described, without necessary acceptance of all the presumptions that are relevant to legislation of private law.*

[26] His Lordship expressed his preference for the second but added this important and often time forgotten injunction at page 113:

> *But their lordships prefer the second. This is in no way to say that there are no rules of law which should apply to the interpretation of a Constitution. A Constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law.* ***Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language****. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences.* (emphasis added)

[27] With this in mind, I turn to the submissions advanced by Mr Wildman and Miss Kamau Ruddock.

The submissions

[28] Mr Wildman submitted that the delay in this case is such that the right guaranteed by section 14 (3) has been violated and the remedy should be a stay. He cites authorities (which will be examined in due course) which he says supported his position. In particular, he urged the court to follow the decision **Barrett Jordan v Her Majesty the Queen and the Attorney General of Alberta, British Columbia Civil Liberties Association and Criminal Lawyers' Association (Ontario) (Interveners)** [2016] 1 SCR 631; 398 DLR (4th) 381. For her part, Miss Ruddock did not accept that there was a violation but if there was the remedy of a stay should only be granted if the court concluded that a fair trial was no longer possible. Although she accepted that the decision on whether a fair trial was still possible despite the lapse of time was a matter for the court, learned counsel's position was that there was insufficient evidence placed before the court

by Mr Cameron for an assessment to be made of whether a fair trial was still possible. I also understand her to be saying, implicitly, as she developed her argument, that Mr Cameron has not made the argument that he could not get a fair trial. To say that a case is weak is not to say that the trial cannot be fair. Miss Ruddock also submitted that there are cases – which will be examined – that show that if a lesser remedy is available and that remedy can provide suitable relief then that remedy should be granted rather that the very drastic one of stopping the prosecution from going forward. I now turn to the authorities cited.

The authorities

[29] I wish to make some general comments. The problem of delays in criminal trials has been plaguing court systems not only in Jamaica and the Commonwealth Caribbean but also in Canada and the United Kingdom. In all jurisdictions mentioned, the courts are acutely aware of the fact that delays are to be avoided because of (a) the stress and possible injustice caused to a defendant who may be acquitted; (b) loss of public confidence in the judicial process; (c) the impact of victims of crimes especially violent crimes against the person. However, as the Privy Council observed in **Bell v Director of Public Prosecutions of Jamaica and another** [1985] AC 937, 953:

> *…the courts of Jamaica must balance the fundamental right of the individual to a fair trial within a reasonable time against the public interest in the attainment of justice in the context of the prevailing system of legal administration and the prevailing economic, social and cultural conditions to be found in Jamaica. The administration of justice in Jamaica is faced with a problem, not unknown in other countries, of disparity between the demand for legal services and the supply of legal services. Delays are inevitable. The solution is not necessarily to be found in an increase in the supply of legal services by the appointment of additional judges, the creation of new courts and the qualification of additional lawyers. Expansion of legal services necessarily depends on the financial resources available for that purpose. Moreover an injudicious attempt to expand an existing system of courts, judges and practitioners, could lead to deterioration in the quality of the justice administered and to the conviction of the*

innocent and the acquittal of the guilty. The task of considering these problems falls on the legislature of Jamaica, mindful of the provisions of the Constitution and mindful of the advice tendered from time to time by the judiciary, the prosecution service and the legal profession of Jamaica. The task of deciding whether and what periods of delay explicable by the burdens imposed on the courts by the weight of criminal causes suffice to contravene the rights of a particular accused to a fair hearing within a reasonable time falls upon the courts of Jamaica and in particular on the members of the Court of Appeal who have extensive knowledge and experience of conditions in Jamaica. In the present case the Full Court stated that a delay of two years in the Gun Court is a current average period of delay in cases in which there are no problems for witnesses. The Court of Appeal did not demur. Their Lordships accept the accuracy of the statement and the conclusion, implicit in the statement, that in present circumstances in Jamaica, such delay does not by itself infringe the rights of an accused to a fair hearing within a reasonable time. No doubt the courts and the prosecution authorities recognise the need to take all reasonable steps to reduce the period of delay wherever possible.

[30] This was the advice thirty one years ago. The concerns are still with us today despite the doubling of the judges of the Supreme Court since **Bell** was decided and the addition of many more court rooms. The numbers of cases have simply exploded. For the last decade at least, murders alone have been in excess of eight hundred per year. The government cannot increase the number of court rooms and judges without limitation because each court room and each judge carry support services which themselves have a cost. There is the recurrent cost of maintenance of the physical plant, the cost in terms of salaries for judges and the cost of the support services. The efficiency of the courts has to improve and how we do what we do needs to become more cost effective.

[31] Mr Wildman relied significantly on the case of **Jordan**. The facts are that Jordan was charged in December 2008, along with ten others, for various drug offences.

He was granted bail in February 2009. Thereafter the case progressed through the normal processes of retaining counsel and the like. By May 2009 all counsel

agreed a preliminary inquiry date for May 2010. By the time of the preliminary inquiry five of the co-defendants had entered guilty pleas. In setting the preliminary inquiry date it was thought that four days was sufficient but at the inquiry it became apparent that the four days would not be sufficient to present all the evidence against all five. The Crown intimated that it could complete its case against four but needed more time to complete the case against Jordan. The preliminary inquiry continued and eventually ended in May 2011 when Jordan and his two co-defendants were committed to stand trial. By then, the preliminary inquiry had taken one year to complete and was completed two and half years after Jordan's arrest.

[32] The case eventually arrived at the trial court. In December 2011 one more codefendant was severed from the charges leaving only Jordan and one codefendant. The trial which led to the appeal eventually commenced in September 2012. His trial ended in February 2013. He subsequently brought an application under section 11 (b) of the Canadian Charter seeking a stay of proceedings due to delay. The trial judge dismissed the application. He was convicted. The Court of Appeal dismissed his appeal and he took his matter to the Canadian Supreme Court. The total time from arrest to trial was forty nine and one half months. He was successful and his conviction was set aside and a stay of proceeding entered. In July 2011 Jordan was convicted of other drug offences committed before the ones on which he was committed to stand trial and received a fifteenmonth conditional sentence.

[33] The trial court judge applied the Canadian Supreme Court's decision of **R v Morin** [1992] 1 SCR 771 and concluded that there was no breach of section 11 (b). In applying that legal standard the judge examined the matter under various heads. The judge looked at inherent delays – that's delays which are inevitable because of the processing of the case, retention of counsel and other matters necessary for a case to progress to trial – the delay was ten and one half months. Of that period, four months were attributable to the defence and two to the Crown. The judge found that in respect of institutional delay – that is delay attributable to

lack of resources such as court rooms, judges and other things necessary for the court to function – the delay was thirty two and one half months and of those nineteen occurred in the preliminary inquiry court and thirteen and one half at the trial court. These times were outside the guidelines set by **Morin** which had decided that eight to ten months was tolerable for the preliminary inquiry court and six to eight months in the trial court. The trial judge also found that had the **Morin** guidelines been adhered to the trial should have taken place in May 2011. The judge considered prejudice to the defendant and concluded that since Jordan was facing other charges any prejudice was minimal. Importantly, the trial judge found that Jordan's ability to meet the prosecution case was not fettered because it did not depend on the memory of witnesses. To use the language from the English cases, Jordan was still able to get a fair trial or put another way, he had not established that a fair trial was no longer possible. In the end the judge concluded that Jordan's Charter right under section 11 (b) was not violated because he did not suffer significant prejudice. The Court of Appeal upheld the decision and affirmed the trial judge's analysis.

[34] Before going on it is necessary to say what the **Morin** framework is. Sopinka J stated at paragraph 26:

> *While the court has at times indicated otherwise, it is now accepted that the factors to be considered in analyzing how long is too long may be listed as follows:*
>
> *1. The length of the delay;*
>
> *2. waiver of time periods;*
>
> *3. the reasons for the delay, including*
>
> *(a) inherent time requirements of the case,*
>
> *(b) actions of the accused,*
>
> *(c) actions of the Crown,*
>
> *(d) limits on institutional resources, and*

(e) other reasons for delay; and

4. prejudice to the accused.

[35] Sopinka J outlined at paragraph 27 what it is the judge is looking for:

> *27 The judicial process referred to as "balancing" requires an examination of the length of the delay and its evaluation in light of the other factors. A judicial determination is then made as to whether the period of delay is unreasonable. In coming to this conclusion, account must be taken of the interests which s. 11(b) is designed to protect. Leaving aside the question of delay on appeal, the period to be scrutinized is the time elapsed from the date of the charge to the end of the trial. See R. v. Kalanj, [1989] 1 S.C.R. 1594, 70 C.R. (3d) 260, [1989] 6 W.W.R. 577, 48 C.C.C. (3d) 459, 40 C.R.R. 50, 96 N.R. 191. The length of this period may be shortened by subtracting periods of delay that have been waived. It must then be determined whether this period is unreasonable having regard to the interests s. 11(b) seeks to protect, the explanation for the delay and the prejudice to the accused.*

[36] At paragraph 28 Sopinka J, repeating the words of a previous decision (**R v Smith** [1989] 2 SCR 1120), noted that although the burden of proof is on the applicant, unexplained delay can lead to an inference of unjustifiable delay. His Honour said:

> *28 The role of the burden of proof in this balancing process was set out in the unanimous judgment of this court in Smith, supra [at pp. 1132-1133 S.C.R.], as follows:*
>
> > *I accept that the accused has the ultimate or legal burden of proof throughout. A case will only be decided by reference to the burden of proof if the court cannot come to a determinate conclusion on the facts presented to it. Although the accused may have the ultimate or legal burden, a secondary or evidentiary burden of putting forth evidence or argument may shift depending on the circumstances of each case. For example, a long period of delay occasioned by a request of the Crown for an adjournment would ordinarily call for an explanation from the Crown as to the necessity for the adjournment. In the absence of such an explanation, the court would be*

> *entitled to infer that the delay is unjustified. It would be appropriate to speak of the Crown having a secondary or evidentiary burden under these circumstances. In all cases, the court should be mindful that it is seldom necessary or desirable to decide this question on the basis of burden of proof and that it is preferable to evaluate the reasonableness of the overall lapse of time having regard to the factors referred to above.*
>
> *I do not read the Askov decision as having departed from this statement although portions of the reasons of Cory J. emphasized certain aspects of the evidentiary burden on the Crown.*

[37] It is not a presumption of delay but a reasonable inference to be drawn from unexplained delay. This is as it should be because the architecture of the law is such that those who seek to deprive persons of their liberty or charge persons with criminal offences need to prove that the deprivation was lawful or have the persons tried within an acceptable time.

[38] In Canada, according to Sopinka J, an inquiry into unreasonable delay is triggered by the applicant who has the legal burden to establish the violation.
This is how his Honour put it at paragraph 31:

> *31 An inquiry into unreasonable delay is triggered by an application under s. 24(1) of the Charter. The applicant has the legal burden of establishing a Charter violation. The inquiry, which can be complex (as may be illustrated by the proceedings in the Court of Appeal in this case), should only be undertaken if the period is of sufficient length to raise an issue as to its reasonableness. If the length of the delay is unexceptional, no inquiry is warranted and no explanation for the delay is called for unless the applicant is able to raise the issue of reasonableness of the period by reference to other factors such as prejudice. If, for example, the applicant is in custody, a shorter period of delay will raise the issue.*

[39] Regarding waiver, Sopinka J stated that the defendant is not to be taken as readily waiving his rights unless the evidence is obvious that he or his counsel, with full knowledge of the facts, decided not to insist on standing on his constitutional right.
This is how it was stated at paragraph 33:

> *This court has clearly stated that in order for an accused to waive his or her rights under s. 11(b), such waiver must be clear and unequivocal, with full knowledge of the rights the procedure was enacted to protect and of the effect that waiver will have on those rights…. Waiver can be explicit or implicit. If the waiver is said to be implicit, the conduct of the accused must comply with the stringent test for waiver set out above. As Cory J. described it in Askov, supra, [at p. 1228 S.C.R.]:*
>
> > *[T]here must be something in the conduct of the accused that is sufficient to give rise to an inference that the accused has understood that he or she had a s. 11(b) guarantee, understood its nature and has waived the right provided by that guarantee.*
>
> *Waiver requires advertence to the act of release rather than mere inadvertence. If the mind of the accused or his or her counsel is not turned to the issue of waiver and is not aware of what his or her conduct signifies, then this conduct does not constitute waiver. Such conduct may be taken into account under the factor "actions of the accused" but it is not waiver. As I stated in Smith, supra, which was adopted in Askov, supra, consent to a trial date can give rise to an inference of waiver. This will not be so if consent to a date amounts to mere acquiescence in the inevitable.*

[40] The purpose of determining whether any period was waived is to find out the time periods that should count against the state under an alleged reasonable time violation. Even if there is no waiver the defendant may engage in conduct that does not count against the state. I agree with Sopinka J.

[41] Under reasons for delay, Sopinka J noted that courts were not in session round the clock. At paragraph 35 his Honour noted:

> *Time will be taken up in processing the charge, retention of counsel, applications for bail and other pre-trial procedures. Time is required for counsel to prepare. Over and above these inherent time requirements of a case, time may be consumed to accommodate the prosecution or defence. Neither side, however, can rely on their own delay to support their respective positions. When a case is ready for trial a judge, courtroom or essential court staff may not be available*

and so the case cannot go on. This latter type of delay is referred to as institutional or systemic delay.

[42] The passage just cited speaks to inherent delay. This theme was continued by Sopinka J in paragraphs 36 to 38:

> *36 All offences have certain inherent time requirements which inevitably lead to delay. Just as the fire truck must get to the fire, so must a case be prepared. The complexity of the trial is one requirement which has often been mentioned. All other factors being equal, the more complicated a case, the longer it will take counsel to prepare for trial and for the trial to be conducted once it begins. For example, a fraud case may involve the analysis of many documents, some conspiracies may involve a large number of witnesses and other cases may involve numerous intercepted communications which all must be transcribed and analyzed. The inherent requirements of such cases will serve to excuse longer periods of delay than for cases which are less complex. Each case will bring its own set of facts which must be evaluated. Account must also be taken of the fact that counsel for the prosecution and the defence cannot be expected to devote their time exclusively to one case. The amount of time that should be allowed counsel is well within the field of expertise of trial judges.*
>
> *37 As well as the complexity of a case, there are inherent requirements which are common to almost all cases. The respondent has described such activities as "intake requirements". Whatever one wishes to call these requirements, they consist of activities such as retention of counsel, bail hearings, police and administration paperwork, disclosure, etc. All of these activities may or may not be necessary in a particular case but each takes some amount of time. As the number and complexity of these activities increase, so does the amount of delay that is reasonable. Equally, the fewer the activities which are necessary and the simpler the form each activity takes, the shorter should be the delay. The respondent suggests that this court should set an administrative guideline for such an "intake period". We decline to do so on the basis of the record that is before us. The length of time necessary will be influenced by local practices and conditions and should reflect that fact. No doubt the intake period in a particular region will tend to be the same for most offences. There*

may, however, be a significant variation between some categories of offences, such as between summons cases and cases of arrest.

38 Another inherent delay that must be taken into account is whether a case must proceed through a preliminary inquiry. Clearly a longer time must be allowed for cases that must proceed through a "two-stage" trial process than for cases which do not require a preliminary hearing. Equally, a two-stage process will involve additional inherent delays such as further pre-trial meetings and added court dates. An additional period for inherent time requirements must be allowed for this second stage. This period will be shorter than in the case of the one-stage trial process because many of the intake procedures will not have to be duplicated.

[43] When speaking of delay by defendants Sopinka J indicated that he meant voluntary actions such as making evidentiary challenges before trial and change of venue applications which have the effect of lengthening the time the matter takes to get to trial. I agree with this.

[44] While we do not have much procedural scope for pre-trial evidentiary challenges in Jamaica this heading of delay would cover any voluntary pre-trial conduct of the defendant that affects the length of time the trial or preparation for trial would take such as asking for disclosure of material that is not necessary or taking hopeless procedural and substantive law points On the Crown side, delay by the Crown would include time it took for necessary disclosure, the extent of the discovery and change of venue application and the like. Sopinka J was careful to

state that dividing the analysis in this way was not to assign blame but to determine the time that counts against the state and the time that does not. I understood his Honour to be saying that what he said was an analytical method to identify who did what, when and why so that the clearest picture possible emerges at the end of the analytical process.

[45] On the issue of limitation of resources Sopinka J stated at paragraphs 42 – 43:

42 Institutional delay is the most common source of delay and the most difficult to reconcile with the dictates of s. 11(b) of the Charter.

It was the major source of the delay in Askov. As I have stated, this is the period that starts to run when the parties are ready for trial but the system cannot accommodate them. In utopia, this form of delay would be given zero tolerance. There, resources would be unlimited and their application would be administratively perfect so that there would be no shortage of judges or courtrooms and essential court staff would always be available. Unfortunately, this is not the world in which s. 11(b) was either conceived or in which it operates. We live in a country with a rapidly growing population in many regions and in which resources are limited. In applying s. 11(b), account must be taken of this fact of life. As stated by Lamer J. (as he then was) in Mills (at p. 935 [S.C.R.]), and approved in Askov (at p. 1225 [S.C.R.]):

> *In an ideal world there would be no delays in bringing an accused to trial and there would be no difficulties in securing fully adequate funding, personnel and facilities for the administration of criminal justice. As we do not live in such a world, some allowance must be made for limited institutional resources.*

43 How are we to reconcile the demand that trials are to be held within a reasonable time in the imperfect world of scarce resources? While account must be taken of the fact that the state does not have unlimited funds and other government programs compete for the available resources, this consideration cannot be used to render s. 11(b) meaningless. The court cannot simply accede to the government's allocation of resources and tailor the period of permissible delay accordingly. The weight to be given to resource limitations must be assessed in light of the fact that the government has a constitutional obligation to commit sufficient resources to prevent unreasonable delay which distinguishes this obligation from many others that compete for funds with the administration of justice. There is a point in time at which the court will no longer tolerate delay based on the plea of inadequate resources. This period of time may be referred to as an administrative guideline. I hasten to add that this guideline is neither a limitation period nor a fixed ceiling on delay. Such a guideline was suggested in Askov and was treated by some courts as a limitation period. I propose therefore to examine in some detail the purpose of a guideline commencing with an examination of its role in Askov.

[46] In the paragraphs that followed these just cited, Sopinka J observed that the guidelines were not to be applied inflexibly but always in the context of the specific case. His Honour was of the view that the purpose of any guideline on institutional delay will not be given so much weight as to emasculate the right to a fair trial within a reasonable time. The state cannot escape its responsibility by pleading lack of resources. The right was given to citizens and the right must be enforced by the courts.

[47] Regarding other reasons for delay, his Honour was taking account of the possibility that the reasons for delay may not fall within any of the previous headings. In one case it was observed that nineteen adjournments were 'instigated by the trial judge' over an eleven-month period. Such delay could hardly be described as institutional delay as defined by his Honour and neither could such delay be attributed to the defence or the Crown.

[48] Finally, under the heading of prejudice to the accused, Sopinka J indicated that section 11 (b) protects 'the individual from impairment of the right to liberty, security of the person, and the ability to make full answer and defence resulting from unreasonable delay in bringing criminal trials to a conclusion' (**[56]**). His Honour observed that the purpose of section 11 (b) 'is to expedite trials and minimize prejudice and not to avoid trials on the merits' **[57]**). In some instances, the court may infer prejudice. And at paragraphs 58 and 59 Sopinka J held:

> *58 Apart, however, from inferred prejudice, either party may rely on evidence to either show prejudice or dispel such a finding. For example, the accused may rely on evidence tending to show prejudice to his or her liberty interest as a result of pre-trial incarceration or restrictive bail conditions. Prejudice to the accused's security interest can be shown by evidence of the ongoing stress or damage to reputation as a result of overlong exposure to "the vexations and vicissitudes of a pending criminal accusation", to use the words adopted by Lamer J. in Mills, supra, at p. 919 [S.C.R.]. The fact that the accused sought an early trial date will also be relevant. Evidence may also be adduced to show that delay has prejudiced the accused's ability to make full answer and defence.*

> *59 Conversely, the prosecution may establish by evidence that the accused is in the majority group who do not want an early trial and that the delay benefited rather than prejudiced the accused. Conduct of the accused falling short of waiver may be relied upon to negative prejudice. As discussed previously, the degree of prejudice or absence thereof is also an important factor in determining the length of institutional delay that will be tolerated. The application of any guideline will be influenced by this factor.*

[49] This then is the analytical framework of **Morin**.

[50] To give further background **Morin** was decided after the important case of **R v Askov** [1990] 2 SCR 1199; 74 DLR (4th) 355. That case decided that an automatic stay of criminal proceedings was the only remedy for a breach of section 11 (b). The Supreme Court was asked to revisit the matter of the remedy for breaches of section 11 (b) in **Morin**. After **Askov**, 'between October 22, 1990 and September 6, 1991, over 47,000 charges have been stayed or withdrawn in Ontario alone' (Sopinka J **Morin [2]**). Some applauded the decision while others took umbrage to what they perceived was 'an amnesty for criminals some of whom were charged with very serious offences' (Sopinka J **Morin [2]**).

[51] In examining the case further it is important to set out the relevant portions of section 11 (b) of the Canadian Charter. It reads:

> *Any person charged with an offence has the right...*
>
> *(b) to be tried within a reasonable time.*

[52] It is to be noted that section 11 (b) of the Canadian Charter does not have any adjectives describing the trial or the court that is to hear the matter. In this regard it is similar to section 14 (3) of Jamaica.

[53] The majority in **Jordan** (joint judgment of Moldaver, Karakatsanis and Brown JJ with Abella and Côté JJ concurring) took the view that the previous case law in Canada was not working well. It had serious doctrinal problems which led to practical difficulties in its application on a day to day basis. The majority of the Supreme Court redesigned the whole approach to the question of delay. In

essence the majority established timelines that if breached resulted in a rebuttable presumptive breach of section 11 (b) of the Canadian Charter of Rights and Freedoms. The majority also built into the new approach considerations that would take account of complex cases and other matters relevant to the determination of whether the remedy of a stay should be granted. Mr Wildman urged the court to follow the Canadian approach.

[54] The majority observed that the jurisprudence that had developed around section 11 (b) itself led to delays because there was an ever increase numbers of stay applications which themselves consumed precious resources from first instance right through to the appellate levels. These applications led to further delays of the trial.

[55] The majority indicated that the **Morin** methodology produced distinctions between 'actual' prejudice and 'inferred prejudice' (**[33]**). They referred to instances where prejudice was 'inferred even when the evidence shows that the accused suffered no actual prejudice' (**[33]**). The majority noted that 'actual prejudice can be quite difficult to establish, particularly prejudice to security of the person or fair trial interests' (**[33]**). One of the consequences of this, the majority held, was 'long delays are considered "reasonable" if the accused is unable to demonstrate significant actual prejudice to his or her protected interests' (**[34]**).

This aspect of the matter will be developed when the case of **Attorney General's Reference (No 2 of 2001)** [2004] 2 AC 72 is examined. In that case Lord Bingham and the majority in that case took the view that as long as a fair trial was possible then no amount of delay will ever result in stay. I am of the view that the fact of a provision dealing with reasonable time is a strong indicator that in Jamaica under the new Charter it may be possible to grant a stay without any evidence that a fair trial was not possible. If that possibility is foreclosed it would mean the undermining of what is now a fundamental right.

[56] The majority held that under the existing guidelines the criminal justice system had lost its way. It encouraged quibbling 'over rationalisations for vast periods of pre-

trial delay' (**[36]**). As an example of what judges were required to do, the majority noted that in **Jordan** itself the Crown was arguing that the trial judge was wrong to characterise most of the delay as Crown or institutional delay. Had he properly assessed the matter he would have attributed only five to eight months to Crown/institutional delay and not 34.5 months.

[57] All this and more led the majority to say that 'a culture of complacency towards delay has emerged in the criminal justice system' (**[40]**) [1] with the consequence

that 'participants in the justice system — police, Crown counsel, defence counsel, courts, provincial legislatures, and Parliament — are not encouraged to take preventative measures to address inefficient practices and resourcing problems' (**[41]**). [2]

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[1] This is the full passage: As we have observed, a culture of complacency towards delay has emerged in the criminal justice system (see, e.g., Alberta Justice and Solicitor General, Criminal Justice Division, "Injecting a Sense of Urgency: A new approach to delivering justice in serious and violent criminal cases", report by G. Lepp (April 2013) (online), at p. 17; Cowper, at p. 4; P. J. LeSage and M. Code, *Report of the Review of Large and Complex Criminal Case Procedures* (2008), at p. 15; Canada, Department of Justice, "The Final Report on Early Case Consideration of the Steering Committee on Justice Efficiencies and Access to the Justice System" (2006) (online), at pp. 5-6). Unnecessary procedures and adjournments, inefficient practices, and inadequate institutional resources are accepted as the norm and give rise to ever-increasing delay.

[2] The full paragraph: The ***Morin*** framework does not address this culture of complacency. Delay is condemned or rationalized at the back end. As a result, participants in the justice system — police, Crown counsel, defence counsel, courts, provincial legislatures, and Parliament — are not encouraged to take preventative measures to address inefficient practices and resourcing problems. Some courts, with the cooperation of counsel, have undertaken commendable efforts to change courtroom culture, maximize efficiency, and minimize delay, thereby showing that it is possible to do better. Some legislative changes

[58] The majority observed that 'the increased complexity or pre-trial and trial processes' aggravate the tolerance for delay (**[42]**).

[59] The minority (Cromwell J with concurrences from McLachlin CJ, Wagner and Gascon JJ) differed fundamentally from the majority. The minority did not think adopting a numerical ceiling approach was appropriate because reasonableness, as a concept, 'requires a court to balance a number of factors, including the

This culture of delay "causes great harm to public confidence in the justice system" (LeSage and Code, at p. 16). It "rewards the wrong behaviour, frustrates the wellintentioned, makes frequent users of the system cynical and disillusioned, and frustrates the rehabilitative goals of the system" (Cowper, at p. 48).

> length of the delay; waiver of any time periods by the accused; the reasons for the delay, including the time requirements for the case; the actions of the parties; limitations on institutional resources; and prejudice to the person charged' and therefore it was necessary 'to consider these factors on a case-by-case basis: the answer to the question of whether an accused is tried within a reasonable time is inherently case-specific' (**[144]**). The minority took the view that any numerical standard should be set by the legislature. Also the minority held that the time limits set by the majority were not supported by the record or by any analysis of the previous jurisprudence. Cromwell J expressed the concern that there was a serious risk that thousands of cases were at risk of being judicially stayed and the ceilings were unlikely to achieve the simplicity sought.

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and government initiatives have also been taken. In many cases, however, much remains to be done.

[60] Cromwell J stated that the time lines established in **Morin** for determining institutional delay 'were established on the basis of extensive statistical and expert evidence.' His honour summarised the minority view in this way:

> *213 If the accused first establishes a basis that justifies a s. 11(b) inquiry, the court must then undertake an objective inquiry to determine what would be the reasonable time requirements to dispose of a case similar in nature to the one before the court (the inherent time requirements) and how long it would reasonably take the court to hear it once the parties are ready for hearing (the institutional delay).*
>
> *214 Next, the court must consider how much of the actual delay in the case counts against the state. This is done by subtracting the periods attributable to the defence, including any waived time periods, from the overall period of delay from charge to trial.*
>
> *215 Finally, the court must consider whether and to what extent the actual delay exceeds the reasonable time requirements of a case, and whether this can be "justified on any acceptable basis". If the actual delay that counts against the state is longer than the reasonable time requirements of a case, then the delay will generally be considered unreasonable. The converse is also the case. However, there may be countervailing considerations, such as the presence of actual prejudice, exceptionally strong societal interests, or exceptional circumstances such as Crown misconduct or exceptional and temporary conditions affecting the justice system. These may either shorten or lengthen the period that would otherwise be unreasonable delay.*
>
> *216 This straightforward framework does not attempt to gloss over the inherent complexity of determining what delays are unreasonable. It merely clarifies where the various relevant considerations fit into the analysis and how they relate to each other. It also simplifies the analysis of prejudice and makes clear that, as a general rule, institutional and Crown delay should be given equal weight. It retains the focus on the circumstances of the particular case and builds on the accumulated experience found in 30 years of this Court's jurisprudence.*

[61] I agree with and accept these propositions by Cromwell J as a good analytical model that can be used in Jamaica.

[62] I accept the validity of Cromwell J's criticism of the majority's position and is part of the reason for me not accepting the approach of the majority. His Honour staged at paragraph 281:

> *281 Developing the proposed ceilings in the absence of evidence and submissions by counsel contrasts with the Court's development of the administrative guidelines for institutional delay in Askov and Morin . In those cases, the Court had the benefit of extensive evidence including statistical information from comparable jurisdictions and expert opinion: Morin , at p. 797. The record in Morin included four volumes of evidence, largely consisting of evidence from three experts with exhibits on the issue of institutional delay across various jurisdictions in Canada — in fact, two volumes of the record were exclusively devoted to such information. This record contained evidence from a solicitor in the region of Durham, the region at issue in Morin , who was a member of the trial delay reduction committee in the region. His evidence included statistical information and information about the efforts made to reduce delay in the region. Furthermore, the record included extensive evidence from Professor Baar, who "has written and consulted extensively on court administration in general and case flow management in particular in Canada, the United States and other jurisdictions": R. v. Morin (1990), 55 C.C.C. (3d) 209 (S.C.C.) , at p. 213. This extensive record enabled the Court to analyze the respective caseloads of provincial courts and superior courts, the increase in caseload in particular regions (including in Durham), reasons for the growth in this caseload, and the abilities of various courts to handle the increasing caseload: see Morin (S.C.C.), at pp. 798-99. The broad range set out in the administrative guidelines in Morin (eight to ten months in provincial court; six to eight months from committal to trial) was derived from the considerable mass of evidence then before the Court.*

[63] The passage just cited highlights considerations which were not dealt with effectively by the majority. The observations of Cromwell J regarding the timelines set by the majority were more pointed in the following passages:

274 The proposed ceilings have no support in the record that was placed before the Court in this case. The Court did not hear argument about the impact of imposing them, which remains unknown.

275 Moreover, the ceilings appear to be illogical. The ceilings accept the Morin guidelines for institutional delay: 8 to 10 months in provincial courts and 14 to 18 months in cases involving a preliminary hearing and a trial: para. 52. This means that the proposed ceilings allow 8 to 10 months for the inherent time requirements of the case in provincial courts, which seems long, while allowing only marginally more inherent time requirements (12 to 16 months) for cases — generally significantly more complex cases — that involve a preliminary inquiry and a trial. As well, under the ceilings, the seriousness or gravity of the offence cannot be relied on to discharge the onus which the ceilings impose: para. 81. Yet under the transitional scheme, this remains a relevant factor: para. 96. The illogical result is that serious offences are more likely to be stayed under the ceilings than under the transitional scheme.

276 ***What evidence there is in the record suggests that it would be unwise to establish these sorts of ceilings. For the vast majority of cases, the ceilings are so high that they risk being meaningless. They are unlikely to address the culture of delay that is said to exist. If anything, such high ceilings are more likely to feed such a culture rather than eliminate it.***

277 Consider the statistical information that we have in the record which is from the Provincial Court of British Columbia. It suggests that the proposed ceiling for the provincial courts is too high to be of any use in encouraging more expeditious justice in the vast majority of cases.

278 The proposed ceiling is set for 18 months in provincial courts. But the median time to disposition of matters in the Provincial Court of British Columbia was 95 days in 2011-2012, with the average being 259 days, both well below the proposed ceiling: B.C. Justice Reform Initiative, A Criminal Justice System for the 21st Century (2012), at p. 30. Of course, these statistics relate to all matters, the vast majority of which (about 95%) are disposed of without trial: p. 33. The time to trial varies widely by court location with the time to the commencement of trial for a two-day case varying in the Provincial Court from 12 to 16 months: p. 34. (I note that this period

> *does not include the period from intake until a trial date is set and measures only to the beginning, not the end of the trial: "Justice Delayed: A Report of the Provincial Court of British Columbia Concerning Judicial Resources" (September 2010) (online), at p. 21.) But there is not much here to lead one to think that the ceilings will do anything to improve the timeliness of the vast majority of criminal cases in the Provincial Court. And, as I will discuss shortly, the ceilings put a small percentage of the total caseload, but a large number of long cases, at serious risk of judicial stay.*
>
> *279 The "qualitative review" conducted by Justices Moldaver, Karakatsanis, and Brown "assisted in developing the definition of exceptional circumstances" and provided "a rough sense of how the new framework would have played out in some past cases": para 106.* ***This examination has not been the subject of adversarial scrutiny or debate, and how it "assisted" in developing the definition of exceptional circumstances is unstated****. In any case, the examination as I have reviewed it suggests that the proposed ceilings are unrealistic and that their implementation risks large numbers of judicial stays.*
>
> *280 What does this examination tell us about the appropriateness of the ceilings? Consider first the superior court cases over the past 10 years in which stays were granted.* ***The average "net" delay was about 44 months, with the median "net" delay being about 37 months. This provides no support for a ceiling of 30 months for superior court cases. The examination is no more supportive in relation to the provincial courts. Looking at provincial court cases in which stays were granted, the average "net" delay was about 27 months and the median was 24.5 months (I have excluded Quebec from this calculation because of the distinctive jurisdiction of the Court of Québec). Once again, my colleagues' examination of the cases fails to support the proposed ceiling of 18 months for provincial court cases.*** (emphasis added)

[64] These are quite significant criticisms which were not, respectfully, fully addressed by the majority. If the minority are correct, then it would seem that the ceiling set for some provinces was way above the mean for delay in those provinces which would mean, as Cromwell J suggests, the ceiling in some instances would not be of much value or put another way it would appear that in some provinces the

judicial system, on the average, was performing better than the time limit set by the majority.

[65] Cromwell J, in my view, demonstrated that the new regime of 'rigid' time limits and exceptional circumstances favoured by the majority was not likely to produce the desired result. His Honour noted that the experience of the United States of America which has, in some instances, time limits set by the legislature had not eliminated complexity in assessing and determining there any given case should be stayed on the ground of delay. Cromwell J noted that even where the legislature stipulated time limits the statutes went on to recognise that there were 'a plethora of different circumstances under which criminal cases may arise' which mean, in the end, the balancing of facts and circumstances of each case when the issue arises has to be undertaken. I strongly suspect that after **Jordan** the battle ground is going to shift to whether the Crown can take advantage of the 'exceptional circumstances' clause in the majority's judgment.

[66] It seems to be that the real problem is trying to have precision in an area that is inherently imprecise. Once the term reasonable is used, that necessarily means that it is a judgment call to be made in each case. There is no one size fits all.

Over time, a body of case law will develop that will inform litigants of the likely view that a court may take in any particular case.

[67] If there are to be specific time limits for each type of case then that is a job for the legislature which is in a position to gather extensive data for analysis. I agree with the reasoning of Cromwell J on this point as reflected in paragraphs 267 – 272:

> *267 Creating fixed or presumptive ceilings is a task better left to legislatures. If such ceilings are to be created, Parliament should do so. As Lamer J. stated in* Mills *: "There is no magic moment beyond which a violation will be deemed to have occurred, and this Court should refrain from legislating same" (p. 942; see also* Conway *, at p. 1697 (concurring)).*

268 Prof. P. W. Hogg's Constitutional Law of Canada (5th ed. Supp.) notes that a number of commentators have advocated that Parliament enact fixed time limits for trials: s. 52.5. The Law Reform Commission in Trial Within a Reasonable Time: A Working Paper Prepared for the Law Reform Commission of Canada (1994) ("Working Paper") pointed to a number of considerations that weigh in favour of legislative standards, instead of judicially imposed ceilings: pp. 5-6.

269 First, courts do not, and should not, function as legislatures. As the Working Paper put it:

> *The courts have been given a greatly expanded role with the Charter, but their essential function has not changed. They do not function as legislating bodies; their principal task is adjudicating conflicts brought before them. Rather, it is the role of Parliament to advance and enhance constitutional rights through legislative standards which the Charter, by its very nature, can provide only in general terms. As Chief Justice Dickson stated in* Hunter v. Southam Inc. *[,[1984] 2 S.C.R. 146, at p. 169]:*

While the courts are guardians of the Constitution and of individuals' rights under it, it is the legislature's responsibility to enact legislation that embodies appropriate safeguards to comply with the Constitution's requirements. [p. 5]

270 The Working Paper also pointed out that legislative timelines can be more easily changed:

> *Another advantage of statutory rules or internal court goals is that they can more easily be adjusted and finetuned: constitutional standards, in contrast, are difficult to amend. This will be particularly valuable in the case of the right to a trial within a reasonable time. [p. 6]*

271 In addition, the Working Paper noted that legislation can more comprehensively address the root causes of delay:

> *In addition, statutory provisions are not restricted to establishing time-limits. A Charter decision can do little beyond setting a maximum allowable delay and*

> *providing a remedy when it is exceeded. While this approach may be satisfactory from the perspective of the individual accused, it does not address the societal interest. Statutory provisions, on the other hand, can address the underlying causes of delay, rather than merely responding to failures to meet the standard. [p. 6]*
>
> *272 Creating presumptive, fixed ceilings is a matter for Parliament, not for this Court, in my respectful view.*

[68] There are some who have advocated that judges must simply 'throw out' the cases. In my view that would not be a rational response to a serious problem. The role of the court is to adjudicate upon individual cases that come before it and not legislate under the guise of adjudication. If there is to be a blanket policy decision that cases should be 'thrown out' after a certain time then such a far reaching decision should be made by the democratically elected Parliament. The legislators would take the risk of them paying the ultimate political price of rejection at the polls. Unelected judges are not the ones to make this kind of decision. Such a policy position should only be arrived at after a comprehensive look at the problem. No court is equipped to undertake this task. The legislature

can look at budgetary allocations, receive submissions from all interest members of the society, secure data about the performance of all the courts from the Parish Courts to the Court of Appeal that are not available to a court hearing a particular matter unless a litigant makes it evidence in the case. This does not mean that the court declines to make the call in any given case when asked to do so. What it means is that litigation is not the place to develop policy and 'enact law' for an issue that has many dimensions to it and which cannot be all examined thoroughly in one case. The call to simply 'throw out' cases is not an appropriate solution. It's charmingly deceptive in that it simply creates the illusion of making progress on a difficult issue and that 'something' is being done.

[69] It must be said that despite their dissent, the minority in **Jordan** accepted that some adjustment was necessary to the **Morin** standard because it was being applied in an 'unduly complicated' manner and therefore 'aspects of the relevant

factors needed clarification' (**[158]**). Cromwell J accepted that 'the [Morin standard] provides little assistance as to how these various factors are to be weighed in order to reach a final conclusion' (**[160]**). Cromwell J proposed what he called '[regrouping] the Morin considerations under four main analytical steps which may be framed as questions to guide a court when confronted with a s. 11 (b) claim.' His Honour was confident that '[d]oing so will make what is being considered and why more apparent, without losing the necessary case-specific focus of the reasonableness inquiry' (**[160]**).

[70] Cromwell J proposed that in any given case the court asks itself four questions. The questions are (**[160]**):

1. *Is an unreasonable delay inquiry justified?*
2. *What is a reasonable time for the disposition of a case like this one?*
3. *How much of the delay that actually occurred counts against the state?*
4. *Was the delay that counts against the state unreasonable?*

[71] Having posed these questions, his Honour went on to elaborate on the considerations under each head and how they should be assessed. Under question 1, it is for the defendant to establish as a threshold matter that there is a basis for a Charter inquiry. I understand Cromwell J to be saying that the court is to look at the time between charge and completion of trial and decide whether that time period triggers a Charter enquiry. If not, then that is the end of the matter because if there is no rational and reasonable foundation to accept, prima facie, that the delay is excessive then the defendant necessarily fails.

[72] Question 2 requires the court to decide - on an objective basis - what amounts to a reasonable time from laying of the charge to the end of trial for a case of the type in question. This part of the analysis according to Cromwell J had two components: (a) institutional delay and (b) inherent time requirements of the particular case. As

noted earlier, institutional delay refers to that time period 'reasonably required for the court to be ready to hear the case (including interlocutory motions) once the parties are ready to proceed' (**[164]**). The inherent time requirement is that time 'reasonably required for the parties to be ready to proceed and to conclude the trial for a case similar in nature to the one before the court' (**[164]**). His Honour then referred to the time guidelines established in **Morin**. In Jamaica we do not yet have sufficient statistical information to assist in setting time lines. This is likely to change in the coming years because there has been published for the first time in Jamaica's history a comprehensive statistical review of the work of the Supreme Court for 2017 and for criminal cases in the Parish Courts. In the absence of such data the judge will have to rely on his or her experience and common sense judgment.

[73] Cromwell J noted that in dealing with institutional delay the court must be mindful that the state does not have unlimited funds to spend on the administration of justice while at the same time recognising that the shortage of resources cannot mean that the right cannot be enforced. The court cannot compel the government to allocate money in any particular manner but there comes a time when the court must conclude that institutional delay cannot exonerate the government

from putting in place the resources to meet the dictates of the Jamaican Charter. I expressly agree with and adopt Cromwell J's position on the four questions to be asked. The previous case law on delay that had developed in Jamaica must now be revisited in light of the new Charter which for the first time in Jamaica has as a fundamental right the right to a trial within a reasonable time as a separate right from the right to a fair trial within a reasonable time. Having said this, I do not accept the further proposition that a violation of section 14 (3) means an automatic stay. The court should consider whether other remedies may cure the breach but in so doing the court must never say that a stay can never be granted.

[74] I have my reservations about the approach of the majority in **Jordan**. I am in agreement with Cromwell J and I am of the view that the concept of

reasonableness is inherently non-specific because it is not a one size fits all. The concept is malleable enough to take account of the very specific factual context of any given case. When the majority said that the **Morin** method was unpredictable that should not be surprising because the wording of the Canadian Charter by the very use of the word 'reasonable' introduced some degree of unpredictability because no two cases are exactly alike. Cromwell J stated that the Canadian Charter only protects against state action (**[152]**). I will not adopt this dictum without reservation because the Jamaican Charter has introduced horizontal application of charter rights, that is citizen against citizen. It may well be the case that in rare instances, a private citizen may decline to provide disclosure in a timely way of material in his/her/its possession. The citizen may also engage in behaviour that creates a risk that a trial for a particular defendant may be unfair if held in a particularly hostile climate of public opinion created by the citizen. [3] However, the general point I wish to make is that in the normal course of things any violation of the reasonable time requirement is more than likely to be committed by the state. Consequently, in the vast majority of case, the unreasonable delay if any will consist of matters that can properly count against the state. Thus if it can be shown that a defendant was ill for five years and unable to stand trial such delay cannot count against the state since it did nothing to delay the trial.

[75] I accept the Canadian approach to the right to fair trial within a reasonable time of incorporating into the right what judges have called the societal interest (eg **Jordan** per Cromwell J at (**[156]**). This is consistent with the position taken by Privy Council in **Bell** (page 953). This is the society's interest in not only seeing that trials take place within a reasonable time but also that persons charged with criminal offences

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[3] **Grant v Director of Public Prosecutions** (1980) 30 WIR 246 where the complaint was that a privately owned newspaper had created a poisonous atmosphere that made a fair trial impossible and the state had failed to do anything about it. One of the solutions suggested in the Privy Council was 'postponement of the trial to allow the adverse publicity to fade in potential jurors' minds' (Lord Diplock pp 304 – 305).

especially serious ones should be tried before a fair, independent and impartial court.

[76] I now turn back to the case of **Bell** to see whether Cromwell J's methodology is at odds with **Bell** which is binding authority on this court. The facts are important. Mr Bell was arrested in May 1977 and convicted in October 1977 for firearm possession and other offences. In March 1979 his conviction was quashed and a retrial ordered. There was delay. Eventually in March 1980 he was granted bail. More adjournments followed. In November 1981 no evidence was offered. This may be an error since it is difficult to see how no evidence could be offered and he was brought back before the court and no one raised the issue of autrefois acquit since no evidence offered in Jamaica usually means a verdict of not guilty is entered after a plea and the defendant is then discharged. Be that as it may, in February 1982 he was rearrested and in May 1982 he was ordered to be retried. It was this second proposed trial that led to his constitutional motion where he alleged that his reasonable time right was violated.

[77] There are important points to note which are fundamental. Mr Bell never alleged that he could not get a fair trial. There is absolutely no discussion of this idea in

the advice of Lord Templeman. Mr Eugene Cotran advanced these submissions on behalf of Mr Bell (page 940):

> *The applicant seeks redress under section 25 of the Constitution claiming a declaration that section 20(1) has been infringed. Mere lapse of time having regard to the circumstances of the particular case can be sufficient to constitute infringement of the Constitution, and the reason for the delay is irrelevant. There was delay of almost three years between the order for retrial and the applicant's rearrest, and the date set for the retrial was five years after his original arrest.*
>
> *Section 20(1) has three elements: (1) the person charged must be afforded a fair hearing; (2) that hearing must take place within a reasonable time; and (3) the hearing must be by an independent and impartial court established by law. Breach of any of these limbs by any organ of the state entitles the individual to redress. What is a*

reasonable time is a question of fact depending on all the circumstances. There may be cases where there is a presumptive delay, meaning that the delay is so long it is clearly unreasonable. This is such a case, and a delay of five years is itself sufficient to be an infringement of section 20(1). A person charged with an offence should not have the matter hanging over him for a long time.

[78] Note that the submission was that the then section 20 (1) encompassed three rights one of which was the reasonable time right. The lawyer submitted specifically that a breach of any of them could lead to redress.

[79] Representing the Director of Public Prosecutions was Mr I X Forte QC Director of Public Prosecutions and later President of the Court of Appeal. Also representing the Director of Public Prosecutions was Mr Algernon Smith then Deputy Director of Public Prosecutions and later a Justice of Appeal. Mr Kenneth Rattray QC, the Solicitor General, and Mr Ransford Langrin later QC and a Justice of Appeal represented the Attorney General before the Board.

[80] Mr Forte advanced these submissions (page 941):

The applicant must prove that he has not been afforded a fair hearing within a reasonable time. The burden is on him to show that his constitutional right has been infringed. The words in section 20(1) "within a reasonable time" are by themselves relative, and in order to determine whether in a particular case a reasonable time has passed regard must be had to the circumstances existing in that case.

The whole scheme of section 20 is to provide for the protection of the law guaranteed in section 13 and to ensure that any person charged is treated fairly by the state. What happened in this case does not amount to oppression by the state and therefore the applicant is not entitled to any redress under the Constitution.

The applicant has to show that the time which has elapsed is so long that in spite of the explanations given by the prosecution for the delay he cannot now have a fair trial. *The question of the unreasonableness of the delay depends on whether or not a fair trial is possible. Section 20 protects an accused from unfair treatment, and a lengthy period before trial cannot by itself be oppressive however long.* ***Only if the applicant can show that the***

> ***delay is oppressive to him and he cannot have a fair trial can he seek redress for infringement of section 20(1).*** (emphasis added)

[81] Note that the argument that he had to show that he cannot get a fair trial was placed directly before their Lordships. Lord Templeman's advice did not rest on this submission. It was ignored completely. By this response I understand the Board to be saying that applicant had no legal or evidential burden to prove that he could no longer get a fair trial.

[82] Mr Algernon Smith for the DPP advanced this proposition (page 943):

> *Even if section 20(1) has been infringed no order should be made under section 25 because adequate means of redress are otherwise available. When the case ultimately comes on for trial the applicant can ask the court by reason of the delay to let the indictment lie on the file and not be proceeded with without leave of the court, or he can invoke the court's jurisdiction to treat the prosecution's conduct as an abuse of the process of the court. The guarantees in the Constitution are not meant to interfere with the ordinary criminal process. Alternatively, the case could be dismissed for want of prosecution on the grounds that the applicant's constitutional right has been contravened. The courts have power to control excessive delay: Reg. v. Fairford Justices, Ex parte Brewster [1976] Q.B. 600. That power existed when the Constitution came into force in 1962 and is enshrined in it.*
>
> ***Alternatively, if the applicant is entitled to redress under section 25 the appropriate order would not be to discharge him but to order a speedy trial****: see Kadra Pahadiya v. State of Bihar [1982] A.I.R. 1167; McBean v. The Queen [1977] A.C. 537 and Thornhill v. Attorney-General of Trinidad and Tobago [1981] A.C. 61* (emphasis added) .

[83] Here we have the proposition that other adequate means of redress existed and should be utilised. The Board rejected this contention. The Board also rejected the submission that a speedy trial order was the appropriate remedy.

[84] Dr Kenneth Rattray submitted this (page 943):

> *The phrase "a fair hearing within a reasonable time by an independent and impartial court established by law" is a composite phrase which must be read and construed as such. Mere lapse of time or delay per se does not constitute unreasonable delay for the purpose of establishing that the applicant was not afforded a fair hearing within a reasonable time within the meaning of section 20(1).*

[85] The Board did not accept this submission either. Lord Templeman relied on and applied the decision of **Barker v Wingo** (1972) 407 US 514 a decision of the Supreme Court of the United States of American which itself identified four factors to be assessed when dealing with the question of delay. **Bell** was approved again by the Privy Council as recently as the **Tapper** case. It must be stated that **Barker** involved a constitutional provision that created the right to a 'speedy trial.' There was no such provision in the Jamaican Constitution then and now. Despite this Lord Templeman saw no intellectual impediment to applying that reasoning in **Barker** to the then Jamaican Bill of Rights.

[86] **Barker** is important because it was the first time the US Supreme Court was being called upon to set out criteria by which the 'speedy trial' provision of the United States of America Federal Constitution was to be assessed although the court had discussed the right is many previous decisions.

[87] In **Barker**, the four criteria to be used to determine whether the right was violated were (a) length of the delay; (b) reasons given by the prosecution to justify the delay; (c) responsibility for the accused of asserting his rights; and (d) prejudice to the accused. Powell J who spoke for the Supreme Court indicated the following considerations under each factor:

(1) Length of delay (pp 530-531)

(a) Whether the delay is presumptively prejudicial. If not then no necessity to consider the other factors because the right to speedy trial (the actual words of the US Constitution); the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case.';

(2) Reasons given by prosecution to justify the delay (p 531)

(a) A deliberate attempt to delay the trial to hamper the defence should weigh heavily against the state;

(b) More neutral reasons such as negligence and overcrowded courts weigh less heavily but nevertheless ultimate responsibility for trying the defendant rests on the state;

(c) Any valid reason for missing witnesses;

(3) Responsibility of the accused for asserting his rights (p 531-532)

(a) Has the defendant asserted his rights. This will be affected by length of delay, the reason for the delay and personal prejudice .

(4) Prejudice to the accused (p 532)

(a) Prejudice to be assessed in light of interest the right is intended to protect. These are '(i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense (sic) will be impaired' (p 532). Of these Powell J noted that the third was the most serious.

[88] In my view there is no difference in effect and outcome in terms of (a) calculating the time between arrest/detention/charge and trial in Cromwell J's approach and that of Powell J. Both cover the same ground but Cromwell J's is more pointed and refined and to that extent preferable. **Bell's** case is now a starting point or foundation on which the more refined analysis is to be erected. As will be seen later in these reasons for judgment when Cromwell J's four questions and subheadings are combined with the other cases a comprehensive list of factors for consideration is established and is sufficient to cover virtually all cases in which the time in question is between arrest/detention/charge and trial. With some

modification I respectfully suggest that it covers the period between conviction and appeal should there be an appeal against conviction.

[89] It should also be noted that in **Bell**, the declaration of breach of the reasonable time aspect of the then section 20 (1) of the Bill of Rights of the Jamaican Constitution was granted without proof that it was impossible for him to get a fair trial. The Board did not grant the additional remedy requested, namely, the defendant be discharged and not tried again on the original or any other indictment, because the Board was assured that the authorities in Jamaica had 'traditional and invariable adherence by the authorities of Jamaica to the spirit and letter of the advice tendered by the Board' (page 955). In other words, had it been necessary a stay would have been granted.

[90] It is also important to note that in **Bell** there was no evidence of specific prejudice and the Board did not require evidence of specific prejudice. Mr Bell's core and only complaint was that his retrial was taking too long. He did not assert any problems with witnesses and the like. The Board reversed the Court of Appeal which had affirmed the Full Court's conclusion that no infringement of the reasonable time requirement had taken place. Crucially, the Board did not say that a stay or the declaration of infringement could not be granted unless the defendant could show that a fair trial was no longer possible. The Board did say that in giving effect to the rights of the defendant 'the courts of Jamaica must balance the fundamental right of the individual to a fair trial within a reasonable time against the public interest in the attainment of justice in the context of the prevailing system of legal administration and the prevailing economic, social and cultural conditions to be found in Jamaica' (page 953).

[91] Mr Wildman relied on two cases from the Cooperative Republic of Guyana.

These were **Garden Sandiford v The Director of Public Prosecutions** (1979) 28 WIR 152 and **Attorney General of Guyana v Persaud** (2010) 78 WIR 335. In **Sandiford**, the facts were that the applicant had been in custody since July 18, 1978 having been jointly charged with another defendant for the offence of murder.

The matter was first called up on July 25, 1978 and after that date there had been adjournments. The constitutional motion brought by Mr Sandiford was dated September 15, 1979. It is not clear when it was filed but I am prepared to assume that it was filed in September 1979.

[92] The explanation for the delay was as follows:

(a) The co-defendant had escaped custody in November 1978 and recaptured on April 24, 1979;

(b) The co-defendant was hospitalised until May 29, 1979;

(c) No magistrate had been presiding on a regular basis over the court where the preliminary inquiry was to be held for several months. In fact the previous magistrate had been elevated to the High Court and no magistrate had been in place on a permanent basis.

[93] The Director of Public Prosecutions included in his affidavit in reply this paragraph which was regarded by Crane CJ as 'vague and indefinite statement':

> *'that the prosecution has always been willing and able to proceed with the preliminary inquiry and will be in a position to do so whenever and as soon as the court is able to proceed with the hearing.'*

[94] Respectfully, there is nothing vague and indefinite about that paragraph. The Director was indicating that he, like the defendant, was ready to proceed but could not. In the language of Canadian jurisprudence this would be called 'institutional delay.'

[95] The learned Chief Justice took the view that a preliminary inquiry was part of the trial process and therefore could properly be taken into account when considering whether there was a violation of the fair trial within a reasonable time provision. I agree with this conclusion of the learned Chief Justice.

[96] In analysing the delay, the Chief Justice broke down the period of delay into segments. The first four months, that is from arrest to the escape of the codefendant, were not regarded as unreasonable delay. In the modern language this would now be called inherent delay. The period from escape to capture of the co-defendant was not considered unreasonable. This would now be considered under the sub-heading of other factors which would be dealt with under delay that can be attributed to the state. This delay would not count against the state since it is reasonable to make effort to recapture the codefendant. This would be an example of action by the defendant that would stop the clock running against the state. This accounts for ten months out of the fourteen between arrest and filing of the constitutional motion. In respect of the final four months the learned Chief Justice had this to say at page 155:

> *What is alarming however, is the excuse proffered on behalf of the Director of Public Prosecutions for not proceeding with the preliminary inquiry during the last four months, ie from May to September 1979, when both the applicant and d'Abreu were in custody.*
>
> *Although no blame can be properly attached to the administration for the notorious shortage of magistrates, the statement in para 8 to which I have referred above is vague and indefinite; it leaves much to be desired. According to that statement, there is no indication whatever when the prosecution will be 'in a position' to proceed with the preliminary inquiry. Only that they will do so 'as soon as the court is able'. Here the prosecution appears to be blaming the court for not proceeding with the matter by indicating 'I am quite willing to proceed with the matter but the court is holding me up by not having enough magistrates'. This attitude, however, gets nobody anywhere because, in the meanwhile, the accused lies rotting in prison. Frankly speaking, I am alarmed to think that that could ever be offered as an excuse for a delay in the hearing. I cannot imagine anything more vague and indefinite in a motion in which there is an allegation that the fundamental right to a fair hearing is being contravened, and much as I dislike saying it, it seems to me para 8 cannot be considered in any other light than being contemptuous of the guaranteed right.*

[97] The learned Director was indicating what is now called institutional delay. The learned Chief Justice accepted that there was a 'notorious shortage of magistrates.'

[98] This case from Guyana is a reminder that 'we do not live in a "Utopia" in which there is always fully adequate funding, personnel, and facilities in order to administer criminal matters' but nonetheless the 'courts must account for both the fact that the state does not have unlimited funds to attribute to the administration of the criminal justice system and the fact that an accused has a fundamental *Charter* right to be tried within a reasonable time' (**[167]**).

[99] The Chief Justice concluded that the four-month period from May to September 1979 'when considered in the overall picture of what transpired during the entire period of fourteen months and taken together with the reasons given by the Director of Public Prosecutions for not proceeding with the preliminary inquiry, constitutes unreasonable delay in the hearing of the preliminary inquiry.' Respectfully, I am unable to accept completely the analysis and conclusion of the learned Chief Justice. His Lordship ignored completely the effect of institutional delay when it clearly existed. I am not saying that the learned Chief Justice had to use the expression 'institutional delay' but it is unfortunate that it was glossed over when it was in fact a real and serious problem.

[100] It would seem to me that the last four months demanded a refined analysis in order to determine whether any account should be taken of institutional delay or not at all. As the minority in **Jordan** indicated institutional delay commences when both sides are ready and there is no court room/judge/anything indispensably necessary that the state needed to provide to accommodate the matter. Had this been done it is open to doubt as to whether his Lordship would have concluded that the additional four months made the delay unreasonable. The way this aspect of the analysis can be managed was indicated by Cromwell J in **Jordan**. His Honour indicated that the period for institutional delay should be shortened in cases where the defendant was in custody or subject to very stringent bail conditions. Perhaps

the decision can now be explained on the basis that the confinement of the defendant meant that the period for institutional delay was going to be shortened considerably.

[101] The **Sandiford** case is also important because of the remedy granted which was that the preliminary inquiry commence before a magistrate within ten days. The remedy shows that a violation of the reasonable time provision does not mean that no hearing should take place.

[102] In **Attorney General of Guyana v Persaud** the defendant had been in custody eight years and no valid preliminary inquiry had been held. He was first charged with murder on April 17, 2000. The defendant had faced three preliminary inquiries, two of which were invalidated by successful challenges in the High Court. The first preliminary inquiry commenced on August 3, 2000 and concluded on November 28, 2000. The second commenced January 3, 2001 and was adjourned sine die on May 30, 2001. The third commenced on December 5, 2002 and ended on February 3, 2004. When he commenced his challenge under the reasonable time provision, he was facing a fourth preliminary inquiry. The trial judge concluded that a violation of the hearing within a reasonable time provision had taken place and ordered (a) a single charge of murder be preferred against the defendants instead of multiple offences that were laid against him; (b) a preliminary inquiry commence within 21 days of his decision and (c) the defendant be released on bail. The Attorney General appealed. The Court of Appeal affirmed the decision of the learned Acting Chief Justice. The judgment of the Court of Appeal does not give details but it appears that the learned Acting Chief Justice gave a detailed analysis of the facts before him and concluded on the facts of the case that the orders made were the appropriate ones. Singh C (Ag) made this important observation at page 343:

> *Each case must be considered on its own merits and apart from the complexity of the case, the length of delay, the conduct of the prosecution and accused, regard must also be had to the availability of institutional resources, systemic delays in the court system and*

the existing court backlog together with our social and economic conditions.

[103] This case, like **Sandiford** concluded that the preliminary inquiry should take place despite the established violation of the hearing-within-reasonable-a-time provision.

[104] I now refer to the case of **Tapper v Director of Public Prosecutions** [2013] 1 Cr App R 9. In that case the Judicial Committee of the Privy Council upheld the Court of Appeal of Jamaica's finding that Miss Tapper's right to fair hearing within a reasonable time had been violated and reduced her sentence accordingly. This case is not authority for any proposition that the remedy of a stay or even a quashing of the conviction can never ever be granted. It is an example of applying what was thought to be the appropriate remedy in the circumstances of that case. To repeat what was said earlier **Bell** was approved in this case.

[105] The important thing to note about these three West Indian cases cited is that the issue of whether a fair trial was undermined never arose for consideration. Also none of the cases actually said that once there was an infringement of the reasonable time provision a stay was the only remedy open to the court.

[106] The final case to be examined is **Attorney General's Reference (No 2 of 2001)** [2004] 2 AC 72. This case was relied on by Miss Ruddock.

[107] In the **Attorney General's Reference** the facts were that on April 26, 1998 there was a prison riot. After an investigation criminal charges were laid against seven prisoners. On June 16, 2000 all were committed to stand trial in the Crown Court. Trial was set for January 29, 2001. When the trial was about to commence, a submission was made that the delay in bringing the defendants to trial was incompatible with article 6 of the European Convention on Human Rights. The judge agreed and ordered a stay on January 31, 2001. On March 14, 2001, the judge lifted the stay and the Crown offered no evidence and all were acquitted. The Attorney General sought the opinion of the Court of Appeal. The Court of Appeal held that a stay was the appropriate remedy if a fair trial was not possible but in the normal course of things a stay would not be appropriate. The usual

remedy would be a declaration, a reduction of sentence or compensation. The matter proceeded to the House of Lords. The majority upheld the view of the Court of Appeal.

[108] The relevant article was article 6 which reads in relevant part:

> *In the determination of …. any criminal charge …everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.*

[109] The Human Rights Act was also implicated. Section 6 (1) reads:

> *It is unlawful for a public authority to act in a way which is incompatible with a Convention right*

[110] Public authority was defined in the statute to include a court. Lord Bingham delivered the leading judgment with which the other judges in the majority agreed although some added a few words of their own.

[111] His Lordship noted that the article 6 guaranteed the core right of a fair trial. From this premise Lord Bingham proceeded to say that a stay should not be granted in the case of delay unless that delay got to the point where a fair trial was no longer possible. His Lordship also held that a stay would only be appropriate where it could be shown that the authorities had acted in a manner that would make a trial of the defendant unfair. Unfairness here included bad faith, unlawfulness and executive manipulation but this list was not exhaustive.

[112] Lord Bingham concluded that if there was a violation of the reasonable time aspect of the right there should not be an automatic stay as some courts had accepted. His Lordship advanced four reasons for this: (1) where the trial has not been fair or was conducted by a tribunal lacking partiality those defects would result in the conviction being quashed and a retrial ordered provided that it could still be held; (2) automatic termination cannot be sensibly applied to civil proceedings; (3) the automatic termination remedy had been shown to have emasculated the right the

guarantee was designed to protect and (4) the decision of the European Court on Human Rights did not support the imposition of an automatic stay.

[113] His Lordship was concerned with the possibility that the reasonable time concept may have the effect of barring a trial whereas the other infringements may result in a quashing of the conviction and a retrial. In his view those components of the rights were far more fundamental than the reasonable time provision. In his view if the reasonable time violation was established before a hearing then the remedy may be (a) public acknowledgement of the breach; (b) action to expedite the hearing; (c) release on bail if in custody if that is possible.

[114] Lord Bingham's position where the violation was established - whether pre or post trial - is stated at paragraph 24:

> *It will not be appropriate to stay or dismiss the proceedings unless (a) there can no longer be a fair hearing or (b) it would otherwise be unfair to try the defendant. The public interest in the final determination of criminal charges requires that such a charge should not be stayed or dismissed if any lesser remedy will be just and proportionate in all the circumstances. The prosecutor and the court do not act incompatibly with the defendant's Convention right in continuing to prosecute or entertain proceedings after a breach is established in a case where neither of conditions (a) or (b) is met, since the breach consists in the delay which has accrued and not in the prospective hearing. If the breach of the reasonable time requirement is established retrospectively, after there has been a hearing, the appropriate remedy may be a public acknowledgement of the breach, a reduction in the penalty imposed on a convicted defendant or the payment of compensation to an acquitted defendant. Unless (a) the hearing was unfair or (b) it was unfair to try the defendant at all, it will not be appropriate to quash any conviction. Again, in any case where neither of conditions (a) or (b) applies, the prosecutor and the court do not act incompatibly with the defendant's Convention right in prosecuting or entertaining the proceedings but only in failing to procure a hearing within a reasonable time.*

[115] Even with this reservation his Lordship did recognise that there may well be some cases where the violation was so egregious that a stay may be appropriate. This is found at paragraph 25:

> *25 The category of cases in which it may be unfair to try a defendant of course includes cases of bad faith, unlawfulness and executive manipulation of the kind classically illustrated by R v Horseferry Road Magistrates' Court, Ex p Bennett [1994] 1 AC 42 , but Mr Emmerson contended that the category should not be confined to such cases. That principle may be broadly accepted. There may well be cases (of which Darmalingum v The State [2000] 1 WLR 2303 is an example) where the delay is of such an order, or where a prosecutor's breach of professional duty is such (Martin v Tauranga District Court [1995] 2 NZLR 419 may be an example), as to make it unfair that the proceedings against a defendant should continue. It would be unwise to attempt to describe such cases in advance. They will be recognisable when they appear. Such cases will however be very exceptional, and a stay will never be an appropriate remedy if any lesser remedy would adequately vindicate the defendant's Convention right.*

[116] Miss Ruddock relied on this case to say that a remedy other than a stay could be ordered. In any event **Tapper** disapproved of the dictum of Lord Steyn in **Darmalingum v The State** [2000] 1 WLR 2303 that the normal remedy for a breach of the violation of the reasonable time aspect of the right to a fair trial is a quashing of the conviction. This is how Lord Steyn expressed it in **Darmalingum** at page 454:

> *The normal remedy for a failure of this particular guarantee, viz. the reasonable time guarantee, would be to quash the conviction. That is, of course, the remedy for a breach of the two other requirements of section 10(1), viz. (1) a fair hearing and (2) a trial before an independent and impartial court. Counsel for the respondent argued however that the appropriate remedy in this case is to affirm the conviction and to remit the matter of sentence to the Supreme Court so that it may substitute a non-custodial sentence in view of the delay. The basis of this submission was that the guilt of the appellant is obvious and that it would therefore be wrong to allow him to escape conviction. This argument largely overlooks the importance of the*

constitutional guarantee as already explained. Their Lordships do not wish to be overly prescriptive on this point. They do not suggest that there may not be circumstances in which it might arguably be appropriate to affirm the conviction but substitute a non-custodial sentence, e.g. in a case where there had been a plea of guilty or where the inexcusable delay affected convictions on some counts but not others. But their Lordships are quite satisfied that the only disposal which will properly vindicate the constitutional rights of the appellant in the present case would be the quashing of the convictions.

[117] It is this aspect of **Darmalingum** that has come under severe attack which culminated in this strongly worded passage of Lord Carnwath in **Tapper** at paragraphs 24 - 29:

24 The proposition that quashing the conviction was the "normal remedy" was not accepted in later cases. In Taito v R. [2002] UKPC 15 the Privy Council described the appellant's reliance on Darmalingum as misplaced (at [23]):

> *"Delay for which the state is not responsible, present in varying degrees in all the relevant cases, cannot be prayed in aid by the appellants. Moreover, Darmalingum was a case where the defendant 'had the shadow of the proceedings hanging over him for about 15 years'… . It was a wholly exceptional case … ."*

25 In Mills v HM Advocate [2004] 1 A.C. 441 Lord Steyn himself accepted (in the light of discussion by Lord Hutton in Dyer v Watson [2004] 1 A.C. 379 , at [121]) that he had been wrong to say that the "normal remedy" in such a case would be to quash the conviction. Commenting on [23] of Taito v R. , he said (at [19]):

> *"It is clear from this passage that the Privy Council took the view that quashing of a conviction is not the only remedy for a breach of the particular guarantee. On the contrary, it is clear that Darmalingum , and its disposal, was regarded as an exceptional case. The holding in Taito is inconsistent with the proposition that the normal remedy for such a breach is the quashing of the conviction."*

26 The same issues had been considered in 2003 in the Attorney General's Reference case [2004] 2 A.C. 72; [2004] 1 Cr. App. R. 25 (p.317) , in the context of the equivalent provision of art.6 of the European Convention on Human Rights . Lord Bingham of Cornhill, with whom the majority agreed, summarised the relevant principles, at [24] – [25]:

[paragraphs already quoted above]

27 This statement of principle was followed by the Privy Council in Boolell v The State [2006] UKPC 46. Lord Carswell, giving the opinion of the Board, derived from it the following propositions, as correctly representing the law of Mauritius (at [32]):

> *"(i) If a criminal case is not heard and completed within a reasonable time, that will of itself constitute a breach of section 10(1) of the Constitution, whether or not the defendant has been prejudiced by the delay.*
>
> *(ii) An appropriate remedy should be afforded for such breach, but the hearing should not be stayed or a conviction quashed on account of delay alone, unless (a) the hearing was unfair or (b) it was unfair to try the defendant at all."*

28 In the light of these cases the significance of Darmalingum as authority has been reduced almost to vanishing-point. At most it is a case on its own facts, explicable, as Lord Bingham suggested, on the basis that, in a straightforward case, the unexplained passage of seven years without any contact with the defendant, made it unfair even to embark on trial. The Board would affirm that the law as stated in the Attorney General's Reference case [2004] 1 Cr. App. R. 24 (p.317); [2004] 2 A.C. 72 and as summarised in Boolell , represents also the law of Jamaica. Although those judgments were not directed specifically at the effect of delay pending appeal, the same approach applies. It follows that even extreme delay between conviction and appeal, in itself, will not justify the quashing of a conviction which is otherwise sound. Such a remedy should only be considered in a case where the delay might cause substantive prejudice, for example in an appeal involving fresh evidence whose probative value might be affected by the passage of time.

[118] The Board accepted that Lord Bingham's observations cited above 'represents also the law of Jamaica' (**[28] Tapper**, Lord Carnwarth). If Lord Carnwarth is correct that Lord Bingham's approach is the law of Jamaica then **Bell** would have had to have been overruled because **Bell** did not require proof of inability to get a fair trial before a stay could be granted. No such argument was made in **Bell** by the applicant. Only the Crown made it and it was not accepted by the Board. What we would have is a conflict of authorities from the Board.

[119] In **Boolell v Mauritius** [2012] 1 WLR 3718 the remedy was a setting aside of the term of imprisonment and replacing it with a fine after a twelve-year delay in getting the matter to completion.

[120] There is the Court of Appeal's decision in **Dalton Reynolds v R** SCCA No 41/97 (unreported) (delivered January 25, 2007). An appeal was launched against a conviction for murder on the basis that there was a breach of the requirement to

have a 'fair trial within a reasonable time.' The appeal took nine years to be heard. The court held that the fair trial within a reasonable time aspect of the right applies to the appellate process. It was also held that the right not to be prejudiced by lengthy delays was not absolute and that right must be balanced against the public interest in seeing that those who are guilty should be punished. It was also held that any 'lengthy and inordinate delay suffered by the appellant does not automatically attract a quashing of the conviction, but may be taken into account, in considering any alteration of the sentence imposed.' It was also said that the strength of the case in proof of conviction should also be considered.

[121] The Court of Appeal concluded that the fundamental concern of section 20 (1) of the Constitution was fairness of the appellate proceedings regardless of how inordinate the delay.

[122] This approach by the Court of Appeal raises a number of issues. The decision suggests that the strength of the evidence is an important consideration in determining whether the reasonable time aspect of the then Bill of Rights was

violated. No reason was given as to why this should be so. Should the court engage in an examination of the evidence to determine the strength? Perhaps that position of the Court of Appeal is justifiable on the basis that the court, in that case, had some material before it **after the trial had taken place and the defendant was convicted.** The evidence was ventilated and a jury assessed it and made a decision. But what of cases like the present where no trial has taken place and three years have passed and the preliminary inquiry has not been completed? Also is it appropriate for even this court to examine the evidence to determine its strength when the prosecution is not required to prove its case beyond reasonable doubt at the preliminary inquiry stage? Is it being said that if the case is considered to be weak evidentially but can still meet the legal standard such cases should be stayed or the conviction quashed?

[123] In any event all this is now primarily of historical interest because the new Charter of Fundamental Rights was separated the reasonable time requirement

and placed it in its own section. It is now a free standing right and must be enforced.

Application to Jamaican Charter

[124] It must be pointed out that in **Tapper**, **Darmalingum**, **Boolell** and **Attorney General's Reference** and **Reynolds** the relevant constitutional provision or article of the European Convention on Human Rights is similar in wording to section 16 (1) of the Jamaican Charter, that is to say, the provision has at least three aspects of the right stated in the specific provision (fair trial in reasonable time; independent and impartial court; public hearing). The approach taken in those cases, applying **Attorney General's Reference**, is that the core right guaranteed is the right to a fair trial and thus any delay regardless of how long should not result in a stay (if the issue arises before trial) and a conviction should not be quashed (if the issue arises after trial) unless there is some unfairness that goes to the root of a fair trial.

[125] The problem with these cases is that they are all post **Bell** and apparently did not take account of the fact that in **Bell** the stay would have been granted but for the

assurance given by counsel on behalf of the state that the declaration that a violation had occurred would be honoured by not trying Mr Bell again. [4] **Tapper**

did not disapprove of **Bell** and clearly regarded it as good law both in reasoning and outcome.

[126] **Bell** was in fact applied in **Tapper** but not on the point of remedies. The point is that their Lordships in **Tapper** would have known the claim made in **Bell, the reasoning** and the outcome. **Bell** affirmed the strength of the reasonable time dimension of the right and it was not read down in order to arrive at the conclusion that the main right was that of a fair trial.

[127] The important thing to note is that all these decisions preceded the enactment of the new Jamaican Charter. It is inconceivable that the legislature and the political executive branch of government would have been unaware of **Tapper** and the jurisprudence on which it was based. There was extensive debate and research that went into the new Charter. As can be seen from reading this new Charter and the former Bill of Rights there are new rights. While it is true to say that section 16 (1) mirrors closely article 6 (1) of the European Convention on Human Rights and so the argument can be made that the people of Jamaica wanted to retain the interpretation of **Tapper** there is now section 14 (3).

[128] **Tapper** and its ancestors preceded the new Jamaican Charter which took the view that the right to a fair trial within a reasonable time after arrest or detention was

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[4] Provided that the courts of Jamaica recognised that a retrial required urgency, the Board would not normally interfere with a finding of those courts that a particular period of delay after an order for a retrial did not contravene the constitutional right of an accused to trial within a reasonable time. But in the present case their Lordships conclude that the decisions of the courts of Jamaica were flawed by failure to recognise the significance of the order for a retrial and the significance of the discharge by the judge. In these circumstances their Lordships will humbly advise Her Majesty that the appeal should be allowed and that the applicant is entitled to a declaration that section 20(1) of the Jamaica (Constitution) Order in Council 1962 which afforded the applicant the right to a fair hearing within a reasonable time by an independent and impartial court established by law has been infringed.

sufficiently important to be given its own section (section 14 (3)). albeit repeated in section 16 (1) which takes effect only after a charge has been laid.

[129] It was Lord Steyn in **Mohammed v Trinidad and Tobago** [1999] 2 AC 111, 123 who said:

> Their Lordships were reminded by counsel, the Director of Public Prosecutions and the SolicitorGeneral, of the traditional and invariable adherence by the authorities of Jamaica to the spirit and letter of the advice tendered by the Board. In these circumstances it would not be appropriate to accede to the request by the applicant that the Board should order that the applicant be discharged and not tried again on the original or any other indictment based on the same facts
>
> *It is a matter of fundamental importance that a right has been considered important enough by the people of Trinidad and Tobago, through their representatives, to be enshrined in their Constitution. The stamp of constitutionality on a citizen's rights is not meaningless: it is clear testimony that an added value is attached to the protection of the right.*

[130] This particular statement was made when referring to **R v King** [1969] 1 AC 304 which decided 'that it matters not whether the right infringed is enshrined in a constitution or is simply a common law right (or presumably an ordinary statutory right)' (page 123). Lord Steyn said that **King** took too narrow a view of the significance of enshrining that right as a constitutional right. If Lord Steyn's observations are applicable generally then it must mean that the section 14 (3) must be taken very seriously and not read down in such a manner and to such an extent that it is deprived of its intended impact. Under this new Charter, the people of Jamaica through their elected representatives, and after twenty one years of debate have decided that trials should not be delayed unreasonably. They have thought this right so important that they have placed it in a separate section of the Charter. In other words, the reasonable time dimension was deliberately separated from the place where it is usually found, that is, in the company of the usual fair hearing/trial formulation. The new placement of the reasonable time hearing must

mean something. In my view, the reasonable time dimension was intended to be elevated and given equal standing with the fair hearing itself. It must be given weight. The expanded influence of the reasonable time dimension as reflected in section 14 (3) must influence how section 16 (1) is interpreted. It is my view that section 14 (3) stands on equal footing with section 16 (1) of the Charter.

[131] It follows from what I have said that Lord Hobhouse's statement in **Attorney General's Reference** at paragraphs 116 – 120 is not applicable to the Jamaican Charter. His Lordship said:

> *116 This reasoning depends, as I have said, on categorising the within a reasonable time obligation as referring to a characteristic of the hearing or determination just as are the fair, "public", "independent", "impartial" and "tribunal established by law" requirements. It is this categorisation which I suggest is fundamentally wrong. A within a reasonable time obligation relates to a quality of the performance, not to the attributes of the service or article—here the hearing or determination—to be provided by the person under the obligation. This may all sound over-sophisticated but it can be simply demonstrated both as a matter of the ordinary use of language and by reference to basic principles of the law of obligations.*
>
> *117 As a matter of the ordinary use of language, one can sensibly talk about a fair hearing or a public hearing or an impartial hearing or about an independent or impartial determination or a determination by a tribunal established by law. All this use is just the use of adjectives or an adjectival phrase to describe the characteristics of the hearing or tribunal itself. But one cannot sensibly or grammatically talk about a within a reasonable time hearing or determination. It is not adjectival; it is adverbial. But it does make sense when it is used in relation to the delivery of the hearing or determination—the performance of the obligation by the person under the obligation. Thus, "When must I have done this by?"— "You must do it within a reasonable time". This is different from "what sort of hearing must there be?"—"A fair hearing". The opinions of my noble and learned friends recognise and stress the difference between breaches of a time obligation and breaches of other obligations: the expiry of a reasonable time can never be reversed;*

the clock can only move in one direction; a situation can be arrived at when one can accurately say it is impossible that there can ever be a determination within a reasonable time. But they do not otherwise recognise that the character of the time obligation is different from that of the other obligations under article 6(1).

118 Turning to the law of obligations, the main answers to the problems raised were worked out in the 19th century and completed in the 20th. Where opportunities for codification arose, they were incorporated in legislation, most notably the Sale of Goods Act 1893 (56 & 57 Vict c 71). There have been landmark judgments such as that of Devlin J in Universal Cargo Carriers Corpn v Citati [1957] 2 QB 401 . It suffices to quote from the summary of the law provided by Lord Diplock in United Scientific Holdings Ltd v Burnley Borough Council [1978] AC 904 , 928:

> *"I will not take up time in repeating here what I myself said in [Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd [1962] 2 QB 26] except to point out that by 1873: (1) Stipulations as to the time at which a party was to perform a promise on his part were among the contractual stipulations which were not regarded as 'conditions precedent' if his failure to perform that promise punctually did not deprive the other party of substantially the whole benefit which it was intended that he should obtain from the contract; (2) When the delay by one party ... had become so prolonged as to deprive the other party of substantially the whole benefit ... it did discharge that other party from the obligation to continue to perform any of his own promises ... (3) Similar principles were applicable to determine whether the parties' duties to one another to continue to perform their mutual obligations were discharged by frustration ..."*

Lord Diplock stated these rules as of general application in the law of obligations. It will be noted that the breach of the punctual performance obligation does not necessarily nor automatically put an end to the obligations of either party to continue to perform. There has been a breach which may call for a remedy in damages for the consequences of that breach; but there still is an obligation to perform the substantive obligation. By a parity of reasoning, the

failure to perform within a reasonable time does not relieve the provider from his obligation to provide a fair trial nor the party not in breach from being required to undergo a fair trial, unless the delay has made a fair trial impossible or has very seriously prejudiced the relevant party. This is effectively the test, mutatis mutandis, which the Court of Appeal applied in the present case and the majority of your Lordships would adopt.

119 But, it will be said, this is an argument based on domestic law not upon the construction of an international Convention. There would be force in this objection if the Convention pointed in a different direction. It does not. Article 5 deals with the right to liberty. One of the categories dealt with is persons arrested on reasonable suspicion of having committed a criminal offence: paragraph (1)(c). Paragraph (3) then provides that such persons shall be promptly brought before a judge "and shall be entitled to trial within a reasonable time or to release pending trial" subject to "guarantees to appear for trial". This article therefore expressly contemplates, and implicitly permits, a trial after a reasonable time has elapsed. The same inference is to be drawn from article 6(1) itself since it covers civil as well as criminal proceedings: "In the determination of his civil rights and obligations". Is a civil claimant, or cross-claimant, to be deprived of the upholding of his rights merely because a more than reasonable time has elapsed? He may have a right to a remedy for the delay, say by the award of interest or by an assessment of whether his damages have been increased by the delay, but the parties cannot be denied a determination of the claim unless the delay and the role of the parties comes into the exceptional category of having made a fair determination impossible or the action abusive.

120 Further, a basic principle of human rights law is the principle of proportionality. The appellants' argument flies in the face of this principle. They would read article 6(1) as prohibiting any trial after the lapse of a reasonable time. This is essentially a mechanical approach. Suppose that the reasonable time is held to have been "t"; an elapsed time of t+1 is a breach and, on the appellants' argument, would involve holding the trial to be a breach. This is an exorbitant construction to place upon article 6(1). Again, it might be a plausible, though heterodox, argument if there was any support for it in the Strasbourg jurisprudence. But again, there is not. I will not repeat the citation of the relevant decisions. The judgments proceed logically from first making a finding of an identified breach and then to the

consideration of the remedy for that breach. None of the judgments contain a finding that the holding of the trial was a breach as opposed to the occurrence of the delay.

[132] The consequence of Lord Hobhouse's approach is that no matter how egregious the delay, no matter how dilatory the state is, as long as the trial can be said to be fair such a trial can never ever be barred unless there is some undermining of the trial process itself or some evidence of abuse of power or manipulation by the state. This explains why, in Jamaica, trials are taking place in quite a few instances nine years after the incident. To borrow the words of the Canadian court, a culture of complacency has taken root and that culture has been nourished by the view that it matters not how long it takes as long as the defendant can meet the prosecution case then it cannot be said that a fair trial is no longer possible. If Lord Bingham's approach represents the law under the new Charter then section 14 (3) is completely useless in terms of securing a stay without proof of the inability to get a fair trial.

[133] I do not think that this is what the Jamaican people want under the new Charter. They want a system that disposes of criminal cases within an acceptable time frame. The consequence of Lord Hobhouse's interpretation in Jamaica has been that trials have been taking longer and longer to come to trial. Any judge who has been in the criminal courts in Jamaica sees that there is no great urgency in getting matters tried on the date they are set. It is common to hear from the Crown and regrettably from the defence, 'Oh it is only the first trial date' meaning that there is no need to get alarmed about the trial not taking place because it is only the first trial date.

[134] There is nothing wrong with the analytical model developed by Cromwell J in **Jordan** with appropriate change in phraseology and a bit of tweaking being applied to civil cases. I would say that a claimant in a civil matter can indeed have his claim barred if he has delayed unduly without any explanation. In Scotland - well before the European Convention on Human Rights – as far back as 1701 the Criminal Procedure Act trials on indictment had to be commenced within 110 days of full

committal. This is how Lord Hope, a Scottish judge, described it in **Attorney General's Reference** at paragraphs 62 - 63**:**

> *62 Under the Scottish system statutory time limits ensure that an accused does not remain longer than is strictly necessary in custody and that once an accused has been fully committed for trial, even if he is not in custody, his trial should take place within one year. On the one hand 110 day rule, which requires that the trial in solemn proceedings of a person remanded in custody must start within 110 days of his full committal in custody, failing which he shall be liberated forthwith and shall thereafter be for ever free from all question or process for the offence: section 65(4)(b) of the Criminal Procedure (Scotland) Act 1995 . This rule, which was first enacted by the Criminal Procedure Act 1701 (c 6), has existed in more or less the same form for more than three centuries. Changes to the period and to the sanction are at present being considered by the Scottish Parliament under the Criminal Procedure (Amendment) (Scotland) Bill but the principle on which the rule was based is not in question. On the other hand there is the 12 months rule, which requires all trials in solemn proceedings to be commenced within 12 months of the first appearance of the accused on petition in respect of the offence, failing which in this case too he shall be discharged forthwith and thereafter be for ever free from all question or process for the offence: section 65(1) of the 1995 Act. Summary proceedings are also regulated by the imposition of statutory time limits.*
>
> *63 The invariable sanction, until now, for a breach of one or other of the statutory time limits has been that the proceedings are brought to an end. Power is given to extend the time limits in certain carefully defined circumstances, but that power is jealously exercised by the judiciary in the public interest against the executive. Due to the vigilance of the judges, the statutory time limits are carefully observed by the prosecutor. Complaints of delay are unusual in cases which are not covered by the statutory time limits.*

[135] This is how seriously the matter was taken by the Scots over two hundred years ago. It has taken the rest of us over two hundred and several constitutions and a number of conventions to begin to do what the Scots have done. Lord Hope pointed at paragraph 64 that in one case in Scotland where no action had been taken for 13 months the charges were dismissed. That case was not covered by

time limits but no one thought it odd that the judge made that decision. The Scots had by then been accustomed to thinking in terms of stopping cases after either a stipulated time had passed or a reasonable time which was apparently much shorter than what others would accept. The culture of efficiency and speed had become part of the Scottish legal culture after two hundred years. Certainly, Lord Hope having been a judge in Scotland was used to thinking in those terms. In Scotland complaints of delay are unusual even in cases not covered by statutory time limits. The difference between Lord Hope and the other judges on the issue of how to respond to delay could not be more stark.

[136] It seems to me, as it did to Lord Hope, that the majority in **Attorney General's Reference** proceeded on the premise that a finding prior to trial that the reasonable time guarantee was violated meant that no trial should take place. A finding of a violation of article 6 (1) meant, for the majority, that any trial after such a finding would be unlawful and section 6 (1) of the Human Rights Act ('HRA') forbade any public authority (including courts) from acting unlawfully. It seems to me that it was the desire to avoid breaching section 6 (1) of the HRA that drove the reasoning of the majority. In order to avoid this, the majority read down the reasonable time requirement and made it secondary to the other features that a fair trial should have. If this is so it seems that the interpretation arrived in **Attorney General's Reference** was directed at avoiding a particular outcome as distinct from an inevitable outcome of pure reasoning flowing from one premise to the other to the conclusion based on the words of the Convention. I say this because there is nothing inherent in the reasoning about a breach of the reasonable time provision that leads to only one conclusion that the remedy must either be a stay or a quashing of the conviction.

[137] Lord Roger, the second Scottish judge in **Attorney General's Reference**, understood the majority to be saying that somehow a violation of the reasonable time provision means that the only remedy must be a stay. I have this understanding as well. I also say that but for section 6 (1) of the HRA the majority may well have had no problem with a conclusion that there was a violation of article

6 (1) the Convention but in their eyes a violation of the article meant necessarily a violation of section 6 (1) which meant that the trial must be stayed.

[138] It seems to me that the correct approach to the new Jamaican Charter is not to read down any rights. The appropriate remedy will depend on the nature of the violation and the context in which the violation took place. I agree with what Lord

Steyn said in **HM Advocate v R** [2004] 1 AC 462 and it is applicable to Jamaica with recognition of the fact that neither section 14 (3) nor section 16 (1) of the Jamaican Charter contains any reference to public hearing. That apart, I agree that if the right to fair hearing and the right to an impartial and independent court are violated then the result is a quashing of the conviction and a retrial where possible. His Lordship also said that at common law the courts did not grant a stay unless it was impossible to have a fair trial. If the issue arose after the trial and conviction, the defendant would have to show that there was some defect that was so egregious that the conviction should be quashed. Lord Steyn then considered the European Convention on Human Rights and noted that the reasonable time guarantee has to be treated differently. He took the view that it was not necessary to show prejudice or to show that a fair trial was not possible in order to establish a violation of the reasonable time guarantee. He stated at pages 470 – 471:

> *The width of the reasonable time guarantee is relevant to the separate question of the remedies available for a breach. There is no automatic remedy. In this case too the role of the Strasbourg court is a residuary one. In the Strasbourg court the only remedies available are therefore declaratory judgments and award of damages. But domestic courts have available a range of remedies for breach of the reasonable time guarantee. In a post-conviction case the remedies may be a declaration, an order for compensation, reduction of sentence, or a quashing of the conviction: see Mills v HM Advocate [2004] 1 AC 441, 449, para 16. In a pre-conviction case the remedies may include a declaration, an order for a speedy trial, compensation to be assessed after the conclusion of the criminal proceedings, or a stay of the proceedings. Where there has been a breach of the reasonable time guarantee, but a fair trial is still possible, the granting of a stay would be an exceptional remedy. In marked contrast to the*

> *fair trial and independence guarantees there is therefore no automatic consequence in respect of the breach of a reasonable time guarantee.*
>
> *A further material difference is that in the case of a breach of the reasonable time guarantee, unlike in the case of a breach of the other guarantees, there is in the nature of things no scope for dismissing the criminal proceedings and ordering a retrial. This underlines the draconian nature of an order for a stay of the proceedings.*

[139] As this passage shows the nature of the reasonable time guarantee is that once it has been violated that time cannot be recovered; it's gone forever. Unlike the violation of fair trial and independent and impartial standards which can be remedied by a new trial or preventing the trial by a particular judge if lack of impartiality is established, the reasonable time guarantee can be remedied by (a) a declaration; (b) damages; (c) speedy trial order; or (d) a stay or (e) a combination of them. Section 19 of the Jamaican Charter enables the court to fashion remedies appropriate for the case including remedies not among the four main ones just mentioned.

[140] In the present case the Attorney General did not see the need to explain why one of our citizens had been in custody for four years without even the completion of the preliminary inquiry and worse, no time table was set for the completion of the first stage of the criminal justice process. It is not hard to see why the Attorney General took this approach. So confident was the Attorney General that it could succeed on the **Attorney General's Reference/Tapper** approach that it was readily accepted that there was significant delay. The only question left was whether there was a violation of section 14 (3). Miss Ruddock submitted that since Mr Cameron has not shown that he cannot get a fair trial then no stay should be granted. **Bell** has shown that this is not a component of the right. And if that was the case under the previous Bill of Rights where the right was part of a single provision then it is even more so when the right stands by itself in section 14 (3) albeit that it is also stated in section 16 (1) which has the fair trial and independent component.

[141] I will now state my conclusions on the way forward in this case. I prefer the judgment of Cromwell J in **Jordan**. I agree with his four questions and I largely agree with the sub-headings under each of them. His scheme provides a suitable analytical framework for examining cases of this kind. It enables consideration of all relevant factors. His criticisms of the majority were not adequately answered by the majority. Even though I agree with Cromwell J I, obviously, could not adopt his Honour's time lines because (a) the Jamaican context is different and (b) there is not as yet any significant statistical data readily available to establish guidelines. In addition, I would not include societal considerations as part of determining whether an infringement of the reasonable time requirement occurred. The society expects criminal trials to take place within an acceptable time frame but that expectation cannot determine the content of the right. The right is conferred on an individual who has been arrested or detained (section 14 (3)) or charged (section 16 (1)) and not on society in general. Only the individual who believes or has been adversely affected by non-adherence to the reasonable time provision has the standing to bring a claim.

[142] There is no logical or rational reason for me to accept that in Jamaica the only remedy for a violation of the reasonable time standard is a stay. Other remedies are available. The remedy must be fashioned to meet the circumstances of the case.

[143] There is no reason to treat the reasonable time guarantee in section 14 (3) and section 16 (1) as inferior to the guarantees of a fair trial/hearing by an impartial and independent court. Time lost can never be regained. It is that quality that makes it difficult to select the appropriate remedy.

[144] The Canadians have taken the policy position that the appropriate remedy for a violation of the reasonable time guarantee is either an automatic stay if the application is made before trial or quashing the conviction if the application is made after conviction. That was a policy decision taken by the Canadian Supreme Court but there is nothing inherent in the right that makes that conclusion inevitable. The

Attorney General's Reference/Tapper approach puts a stay beyond reach and seems to be influenced by thinking that a reasonable time violation means a stay. Both positions are extreme with no middle ground.

[145] The reasonable time guarantee is not a pious statement of principle but intended to have real meaning and substance. The way to give effect to it is not to hedge it around with qualifications such as asking the applicant to prove that a fair trial is impossible. Given this approach to stays it is not surprising that stays are rare. There is no reason to import the common law approach to stays into the Jamaican Charter. In **Bell**, the Board accepted the proposition that in some instance there can be presumptive delay, meaning that the delay is so long it is clearly unreasonable.' The Board concluded that '[i]n the present case it cannot be denied that the length of time which has elapsed since the applicant was arrested is at any rate presumptively prejudicial.'

[146] In determining whether a violation has occurred the analytical model of Cromwell J is useful since it is sufficiently detailed to take account of various nuances of each case. I will now set out the questions to be asked based on Cromwell J's four questions and under each question list the factors that are to be considered. This is the grid that I intend to apply in this case. Some questions will be answered from the evidence presented and some will be answered based on judicial experience in Jamaica and good sense.

[147] It is my respectful view that Cromwell J's approach is a refinement of **Bell**. It is to be noted as well that the great virtue of **Bell** and the Canadian Supreme Court cases is that there was no reference to the common law test to be applied on an application for stay of proceedings. The Charter of Fundamental Rights and Freedoms is a new start. It has clearly stated that a person arrested or detained is entitled to be tried within a reasonable time in section 14 (3). There is no rational or legitimate reason for this right to be encumbered by considerations of whether a fair trial is no longer possible. Implicit in this is an obligation on the state to put in place the resources to ensure that this constitutional standard can be met.

[148] The questions based on Cromwell J's analysis and other cases are:

1. Is an unreasonable delay inquiry justified?

a. has the defendant established that the overall length of time from charge/detention or arrest such that further inquiry is needed? If no, the enquiry stops and the defendant fails. If yes, move to question 2.

2. What is a reasonable time for the disposition of a case like this one?

a. is any of the period attributable to institutional delay?

i. if the person is in custody or subject to stringent bail conditions then the shorter the period attributable to institutional delay because these types of cases should receive priority especially custody cases.

b. What is the inherent time requirement of a case of the nature as the one under examination?

i. the more complex the case the more likely that the inherent time requirements will be greater;

ii. the determination of the inherent time requirement should be determined by statistical evidence or some other objective measure if available, and if not available the experience and sense of reasonableness of the court should be the guide;

iii. the time is not influenced by the availability of counsel for the Crown or the defence.

c. the periods are to be determined using either reliable statistical evidence and where this is absent the court will have to rely on its own experience and sense of reasonableness.

3. How much of the delay that actually occurred counts against the state?

a. *only the period that can count against the state or possibly some private person is included because the sections 14 (3) and 16 (1) is directed mainly against the state but in Jamaica may include private citizens;*

b. *delay attributable to the defendant including waiver does not count against the state or any third party;*

c. *other delay attributable to the defendant such as unreasonable conduct. This includes late changes of counsel, or failure to attend court or counsel's failure to examine disclosed material in a timely way to enable trial dates to be set;*

d. *delays such as periods of emergency, natural disasters such as hurricanes, flooding or illness of a trial participant should not count against the state.*

4. *Was the delay that counts against the state unreasonable?*

   a. *in answering this question, the earlier questions 2 and 3 are to be determined in order to arrive at the time that the trial ought to have taken place;*

   b. *determine whether the time actually taken has exceeded the time that a case of the nature under examination should take.*

5. *Whether the delay was justified on an acceptable basis?*

   a. *If the time taken exceeds what a case of the type under examination should take, is there an acceptable explanation?*

   b. *if the explanation is acceptable then the delay is not unreasonable and therefore no violation has occurred;*

   c. if the explanation is unacceptable then the violation has been established.

6. *Other matters*

a. *proof of prejudice is not required but if present strengthens the case for the defendants;*

b. *absence of prejudice cannot make unreasonable delay reasonable;*

c. *there may be cases where a case does not exceed the time for a case of that nature in the normal course of things but circumstances are such that what would be reasonable normally may well be unreasonable;*

d. *a sudden and temporary condition such as the need to try another case urgently because witnesses are severely ill or may leave the island for extended periods may push a case out of the list and such an occurrence should not account against the state;*

e. *bad faith, abuse of process or gross negligence on the part of the Crown resulting in delay counts more heavily against the state;*

7. *What is the appropriate remedy?*

a. *if the breach is pre-trial, depending on the circumstances of the case the remedies may be*

i. a declaration; ii.

speedy trial order;

iii. compensation to be assessed at the end of the trial;

iv. stay of proceedings;

v. any other remedy the court fashions under section 19 (3) of Charter

b. *if post-trial*

i. not likely to arise since the matter can be raised on appeal from the conviction but theoretically a constitutional challenge may be mounted;

ii. quashing of the conviction.

[149] The reason for this kind of detailed examination can be found in an analysis of the right by Powell J in **Barker**. Powell J said at pages 519 - 522:

> *The right to a speedy trial is generically different from any of the other rights enshrined in the Constitution for the protection of the accused. In addition to the general concern that all accused persons be treated according to decent and fair procedures, there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused. …*
>
> *…*
>
> *A second difference between the right to speedy trial and the accused's other constitutional rights is that deprivation of the right may work to the accused's advantage. Delay is not an uncommon defense tactic. As the time between the commission of the crime and trial lengthens, witnesses may become unavailable or their memories may fade. If the witnesses support the prosecution, its case will be weakened, sometimes seriously so. And it is the prosecution which carries the burden of proof. Thus, unlike the right to counsel or the right to be free from compelled self-in-crimination, deprivation of the right to speedy trial does not per se prejudice the accused's ability to defend himself.*
>
> *Finally, and perhaps most importantly, the right to speedy trial is a more vague concept than other procedural rights. It is, for example, impossible to determine with precision when the right has been denied. We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate. As a consequence, there is no fixed point in the criminal process when the State can put the defendant to the choice of either exercising or waiving the right to a speedy trial…. There is nothing comparable to the point in the process when a defendant exercises or waives his right to counsel or his right to a jury trial. Thus, as we recognized in Beavers v. Haubert, supra, any inquiry into a speedy trial claim necessitates a functional analysis of the right in the particular context of the case:*
>
> *'The right of a speedy trial is necessarily relative. It is consistent with delays and depends upon circumstances. It secures rights to a defendant. It does not preclude the rights of public justice.' 198 U.S., at 87, 25 S.Ct. at 576, 49 L.Ed. 950.*

> *The amorphous quality of the right also leads to the unsatisfactorily severe remedy of dismissal of the indictment when the right has been deprived. This is indeed a serious consequence because it means that a defendant who may be guilty of a serious crime will go free, without having been tried. Such a remedy is more serious than an exclusionary rule or a reversal for a new trial,*[16] *but it is the only possible remedy.*

[150] If we substitute the phrase 'speedy trial with the phrase 'a fair trial within a reasonable time' then the passage makes the point forcibly that the reasonable time right is unlike any other right connected to a trial.

Application to case

[151] Applying the four questions suggested by Cromwell J, I arrive at these conclusions:

1. Is an unreasonable delay inquiry justified?

[152] I would say that four years in the context of this case is sufficient to trigger a section 14 (3) Charter inquiry. There is no dispute that Mr Cameron was arrested in March 2013 and it is common ground that the preliminary inquiry, the first stage of the process has not been completed and no timetable was or has been set for its completion. It is also common ground the Parish Judge has not taken any evidence in the matter since October 2016. This on the face of it would trigger an enquiry into whether the reasonable time guarantee has been violated.

[153] There is no suitable detailed explanation coming from the Crown. There is no explanation, for example of why the Crown was unable or unwilling to utilise the relevant provisions under the Evidence Act regarding the use of police statements in criminal proceedings (section 31D). The point I am making is that the legislature has passed legislation giving the Crown the right to use statements in certain circumstances. If the witnesses were fearful why was the possibility of testifying from a remote facility into the court room equipped with that technology not explored or some explanation for its non-use in this case?

2. What is a reasonable time for the disposition of a case like this one?

[154] The full details of the case against the defendant were not stated by either deponent. There is the suggestion that the police are asserting that Mr Cameron sold the deceased's vehicle to persons from whom the vehicle was recovered. This suggests recent possession is to be an element in the prosecution case and as noted earlier, there appears to be no forensic evidence and no person who saw Mr Cameron actually kill any of the deceased. If this is the state of the evidence against Mr Cameron then there can hardly be any good reason for a delay in excess of three years to complete the preliminary inquiry. Mr Cameron is charged with a co-defendant and the time to dispose of a case of this nature must take account of the fact that there are two defendants. There is no indication from the Crown of the nature of the evidence against the co-defendant.

[155] The delay of four years without completing the preliminary inquiry in the absence of an explanation raises the presumption that the reasonable time standard has been violated. The applicant is not detailed in his recount of the facts but in the circumstances of this case where there is an unexplained four-year delay, the state is not relieved of the obligation to assist the court with a detailed statement of facts of the case. It is the state who wishes to try him and once an enquiry under section 14 (3) is triggered then surely the state must explain why the trial has not taken place. It is not for the applicant to explain why he has not been tried within a reasonable time. All he needs to do is raise sufficient delay to trigger an inquiry.

Regardless of the type of case there are inherent time requirements that cover retention/assignment of counsel, completion of file, disclosure, dates convenient for counsel to make a bail application and getting ready for the commencement of the preliminary inquiry. This may take four to six months. A preliminary inquiry in the absence of some unique feature should be completed in about four to six months. This time takes account of the possibility that the preliminary inquiry may be listed with other matters and the usual delays such as court may start late, late arrival of prisoners, late arrival of counsel and late arrival of witnesses. This time frame applies to both defendants on the premise that the evidence is largely similar against both. Neither Mr Cameron nor the Attorney General indicated the nature

of the evidence against the co-defendant. It is not for Mr Cameron to explain the evidence against the co-defendant. It is for the Crown to say what the evidence against the co-defendant is so that any evidential peculiarities against him may be taken into account. This has not been done.

[156] After committal the depositions are typed, indictment drafted. The defendant may have to retain counsel for the trial or have a legal aid assignment done. Disclosure should also take place. All this may take another three months. The trial should be underway within the next six months even taking into account the heavy lists and even with a co-defendant.

[157] The inherent time requirements from arrest to completion of trial in an ordinary case of murder without complexities via a preliminary inquiry should be about twenty four months even with two defendants. There is no evidence of institutional delays in this case.

[158] The evidence in this case is not fulsome. What is clear is that most of the adjournments were due to absent Crown witnesses. It was said by the Attorney General that defence counsel was absent from time to time but there is no evidence that the absence of counsel prevented the preliminary inquiry from being held or continuing. It may well have been that defence counsel's absence coincided with the dates the Crown witnesses were absent. In any event, the evidential burden would be on the Crown to prove that defence counsel's absence actually held up the inquiry.

3. How much of the delay that actually occurred counts against the state?

[159] The Attorney General has accepted that the majority of the adjournments has been due to absent Crown witnesses. Some adjournments were being attributed to the defence. In my view, the Crown has failed to justify or explain satisfactorily the four-year delay. The affidavit from the Attorney General does not properly or adequately

explain why the last date evidence was heard in the preliminary inquiry was October 2016. The Crown has not properly accounted for this oneyear delay. What we know is that the DPP wrote a letter indicating that some things were to be done. There is no progress report even after one year. The Attorney General, during the hearing, was unable to say whether anything was done to address the concerns raised by the DPP. The Crown also failed to say if and when the preliminary inquiry would be completed. This is symptomatic of the culture of complacency that has taken root in the criminal justice system. This indifferent response by the Crown is the direct progeny of the **Attorney General's Reference/Tapper** jurisprudence.

[160] I am prepared to say that six months is sufficient time for disclosure, completion of file, retaining counsel and other matters necessary for a preliminary inquiry to get under way. This preliminary inquiry should have begun by the latest September 2013. The preliminary inquiry should have been completed at the latest January/February 2014.

[161] In the absence of clear evidence that the defendant contributed to the delay in beginning or continuing the preliminary inquiry the period February 2014 to present has to count against the state. Even if there are difficulties with witnesses, the duty to observe the reasonable time guarantee is on the state. Legislation has been in place for over twenty years to deal with absent witnesses. Assuming resource constraints (and that has not been relied on in this case) the trial should have taken place by the latest January 2015.

[162] The Attorney General has not sought to justify the delay by reference to the fact that two defendants are on trial or any special feature of the evidence to justify the delay.

4. Was the delay that counts against the state unreasonable?

[163] It is now four and one half years since the arrest of Mr Cameron. If account is taken of the inherent time delay that would maximum total of approximately twenty one months to go from arrest to completion of trial. This would take the inherent delay

up to December 2014. If one wants to be generous, then the cut off would be January 2015. This means that the time from February 2015 to October 2017 must count against the state. Time did not stop when the constitutional claim was filed in March 2017. There was no stay which meant that the state could have gone on with the preliminary inquiry. Not even the filing of the constitutional claim commended urgency to the Crown.

What is the appropriate remedy?

[164] I do not think a declaration of violation is sufficient. Mr Wildman is asking for a stay of the preliminary inquiry. Miss Ruddock suggests other remedies less than a stay. This includes orders that the preliminary inquiry be completed in a specified time and this can be supported by consequential orders.

[165] The evidence is that the DPP declined to use her powers to have the case brought to the Home Circuit Court. There is no indication when the preliminary inquiry will resume or even if it will resume. On this understanding what would be the point of setting a specified time within which to complete the preliminary inquiry when the evidence suggests that this is not likely to happen? There is no evidence that the concerns of the DPP have been addressed.

[166] Mr Cameron has established a violation of his rights under section 14 (3) of the Charter of Fundamental Rights and Freedoms. I am of the view that a stay of the preliminary inquiry is appropriate. A consequential order is that the Crown cannot seek to try Mr Cameron for any offence, whether by indictment or information or

any other mode of trial whatsoever for any offence arising out of the facts of the case which led to him being charged with the offence of murder. Costs to the claimant to be agreed or taxed.

[167] In closing I am aware that trials have taken place up to a decade after the offence and in a few instances over seven years after committal for trial. This is no cause for celebration but an indication of how far we have slid. In **Pratt v Attorney**

General [1994] 2 AC 1 the Privy Council barred execution of two men who had been on death row for fourteen years. Their Lordships took the view that the aim should be to hear capital appeals within twelve months of conviction and the entire domestic appeal process should be completed in two years. It can safely be said that the state did not rouse itself to meet these timelines in respect of capital cases and needless to say non-capital cases have not seen any acceleration of their pace through the courts.

[168] The fact that we have these instances of very long delays without any challenge is not a licence for continued indifference but should be occasion for concern. The reasonable time requirement has been downplayed by English jurisprudence. The new Charter has changed all this. It is high time to enforce the reasonable time requirement.

[169] What I have said in these reasons should be applied to the reasonable time requirement in section 16 (1) of the Charter. There is no rational reason to give the same phrase different meanings and in light of section 14 (3) there is no reason to constrict the operation of the phrase in section 16 (1) by subjecting it to the condition that the applicant must prove that he cannot get a fair trial – a virtual impossibility – before a stay and discharge can be granted. **Bell** showed that such a standard was not required even under the old Bill of Rights and there is even less reason now for imposing that standard under the new Charter.

[170] In closing I wish to say that I read the draft of my brother Anderson J's reasons. I doubt whether it is absolutely necessary for the applicant for constitutional relief to raise the matter before the Parish Court. It may be good practice to alert that

court to the proposed course of action but a failure to do so should not necessarily have a deleterious effect on his application. It may be that the problem raised by the applicant can be addressed by that court, not by way of constitutional relief, but perhaps by another remedy that achieves the same result.

Epilogue

[171] I am not to be understood as laying down any general time lines for cases of this nature regardless of where they emanate. Each case ought to be examined on its own facts. The preliminary inquiry in this case was being held in the Parish Court for the Corporate Area and any committal would be for the Home Circuit Court in Kingston. The Home Circuit Court sits all working days during the three Supreme Court terms of Michaelmas, Hillary and Easter. The decision on the facts here may not be applicable to a case from some other parish where the Circuit Court sits only three times per year and generally only for three weeks.

D. FRASER J

Introduction

[172] This matter concerns an issue which is the main bane of many judicial systems — delay. While the origin of this claim relates to a criminal matter and the issue is whether or not the pre-trial process has been so dilatory that the constitutional guarantee of trial within a reasonable time enshrined in section 14(3) of the Constitution has been breached, the problem of delay exists internationally in relation to both criminal and civil matters. On the civil side, in a number of jurisdictions, including Jamaica, while it is acknowledged that the quality of work produced and the cogency of decisions made by judges are generally of a high standard, the time taken from institution of a matter to its completion is sometimes far longer than desirable. Whatever the classification of matters before courts, the popular aphorism long accepted is that, at least on some level(s), “justice delayed is justice denied”.

The Claim and the Relief Sought

[173] By Fixed Date Claim Form dated 29th March 2017 and filed March 30, 2017, the claimant Mervin Cameron sought the following Constitutional relief against the defendant Attorney General:

1. A declaration that the continued arrest of the claimant without being tried for the Offence with which he is charged, constitutes a breach of Section 14(3) of The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011, which guarantees that every person who is arrested or detained in a criminal matter shall be tried within a reasonable time.

2. A declaration that the Preliminary inquiry being conducted by the Half Way Tree Parish Court into charges of murder against the Claimant constitutes a breach of the Claimant's constitutional rights as guaranteed under Section 14(3) of The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011, which guarantees that every person who is arrested or detained in a criminal matter shall be tried within a reasonable time.

3. An Order that the Preliminary inquiry being conducted in the St. Andrew Parish Court by her Honour Ms. Maxine Ellis against the Claimant for the Offence of murder be stayed and that the Claimant be released forthwith.

4. Such further and or other relief that this Honourable court may deem appropriate.

[174] The learned president of the panel now the Chief Justice, having extensively dealt with the matter, I will only add to the outline and analysis of the facts and the law where necessary. In particular while I largely agree with his treatment of the claim, I will highlight those factors that have led me to propose a different remedy/outcome than the learned president has.

The Incompleteness of the Facts

[175] It did not escape the court during arguments, and it has been highlighted by Sykes J in his leading judgment, that all the relevant information was not furnished, to assist the court in coming to a properly informed conclusion. For example, having outlined the relevant affidavit evidence relied on by both sides, at paragraph 15 the learned President states, "*It is to be noted that neither Mr Cameron nor the Attorney*

General indicated the date Mr Cameron was charged, when he was first placed before the court, the number of times the matter has been before the court and what occurred on each occasion. The court will have to make do with what it has."

[176] I will add to the unfortunate paucity of facts placed before the court, the consideration that, especially as the intervention of the learned Director of Public Prosecutions had been sought and obtained by the defendant — to the extent that the Director gave directions to the police concerning the matter — it would have been helpful if the learned Director had been joined in the action, or at least an affidavit filed by the Attorney General's Chambers from her office. That may have shed some light on the directions, or if they were too sensitive for disclosure, at least an indication could have been given as to whether any progress had been made since those directions and if the prosecution was now in a position to properly complete marshalling evidence in the preliminary inquiry.

[177] The Attorney General's Chambers and the Office of the Director of Public Prosecutions may wish in future to consider, ensuring that the prosecuting authority is represented in matters of this nature, where the details of the prosecutorial process and the nuances of criminal practice may be important to the outcome of applications of this type. This in a context where counsel from the Attorney General's Chambers, who are more steeped in civil practice may not have the detailed information of the case, or experience at the criminal bar to provide all the necessary assistance to the court. However, as far as the instant matter goes, as the learned President has said, this court has to "make do" with

the information it has. I will return to this point later, as it has implications for the ultimate disposition of the matter, as well as its precedential value.

The Submissions in Summary

[178] Counsel for the claimant submitted that the preliminary inquiry was a part of the trial process and the claimant had been denied a fair trial within a reasonable time, without any explanation. He maintained that the evidence against the claimant was

inherently weak and there had been chronic non-attendance of witnesses over a long period of time. Further, despite repeated applications for bail the claimant had only belatedly been offered bail in the sum of $1M in June 2017, which he had been unable to take up due to his impecunious state. He contended that in those circumstances the appropriate remedy was a stay. He relied on the cases of ***Gordon Sandiford v the Director of Public Prosecutions*** (1979) 28 WIR 152, ***Herbert Bell v Director of Public Prosecutions of Jamaica and Another*** (1985) 2 ALL ER 585, ***Barrett Richard Jordan v R*** and ***Attorney General of Guyana v Persaud*** 78 WIR 335.

[179] Counsel for the defendant on the other hand submitted that the right to be tried within a reasonable time under section 14(3) of the Charter is not absolute and must be balanced against the public interest in the attainment of justice. While counsel conceded that there had been some prejudice to the claimant based on his having been detained for 4 years and the preliminary inquiry had not yet ended, it was advanced that, if the court found a breach of section 14(3), a stay should not be granted unless no fair trial could be held. There were other remedies she contended, that would be available for such a breach especially where it was not being maintained that there was any deliberate or improper behaviour on the part of the prosecution. She relied on the cases of ***Regina v Herald Webley*** HCC 89/04(1) Jud. Del. 7th December 2006, ***Alfred Flowers v R*** [2000] 1 WLR 2396, ***Herbert Bell v The Director of Public Prosecutions and Another*** (1985), 22 JLR 268, ***Dyer v Watson*** [2004] 1 AC 379, ***Prakash Boolell v The State (Mauritius)*** [2006] UKPC 46, ***Melanie Tapper v Director of Public Prosecutions*** [2012] UKPC 26 and ***Attorney General's Reference No. 2 of 2001*** [2003] UKHL 68.

The Constitutional Guarantees

[180] The focus of the claim is on section 14 (3) of the Charter of Rights which, since April 8, 2011, has been enshrined in the Jamaican Constitution. It reads:

Any person who is arrested or detained shall be entitled to be tried within a reasonable time and —

(a) shall be —

(i) brought forthwith or as soon as is reasonable practicable before an officer authorized by law or a court;

and

(ii) released either unconditionally or upon reasonable conditions to secure his attendance at the trial or at any other stage of the proceedings; or

(b) if he is not released as mentioned in paragraph (a)(ii), shall be promptly brought before a court which may thereupon release him as provided in that paragraph.

[181] This is a section which was introduced with the new Charter of Rights in 2011. Previously the only section in the Jamaican Constitution which spoke to trial within a reasonable time was section 20(1) which read, *"Whenever 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 section has been reproduced as section 16(1) of the new Charter of Rights.

[182] Though a number of the cases cited by both counsel examined the rights guaranteed by what is now section 16(1), that section was not directly prayed in

aid by either counsel. The similarities between the two sections relate to the concept of trial within a reasonable time. The difference is that section 16 (1) additionally requires that that trial should be a fair hearing. Given that the more all embracing right already existed prior to the Charter of Rights coming into force in April 2011, the question is why was it deemed necessary to add section 14(3)? What has it sought to guarantee that was not already covered by section 20 (1),

reproduced as section 16(1)? Are the rights guaranteed by each section at the same level or is there a hierarchy of rights with one set of rights being more sacrosanct than the other? Whether or not the rights are at the same level, do the nature of the rights mean that different remedies may be appropriate for breach of each should this or another court determine that one or other or both sections is/are breached? These are some of the questions which analysis of the cases cited will explore.

The Relevant Case Law

[183] In ***Gordon Sandiford v The Director of Public Prosecutions*** the applicant was charged jointly with another for murder. He was incarcerated for 14 months without the commencement of the preliminary inquiry. He complained in an application for constitutional redress that he had been denied a fair hearing within a reasonable time under art 10(1) of the Guyanese Constitution and that he and his family were suffering undue hardship. The Director of Public Prosecutions (DPP) in reply stated, 'that the prosecution has always been willing and able to proceed with the preliminary inquiry and will be in a position to do so whenever and as soon as the court is able to proceed with the hearing'.

[184] It was held that there was unreasonable delay in the hearing of the preliminary inquiry which contravened the constitutional guarantee of a right to a fair hearing within a reasonable time. The court ordered that the preliminary inquiry must commence within ten days. ***Sandiford*** therefore established that the Preliminary Inquiry stage is a part of the trial process, which, if dilatory, may itself violate a fundamental constitutional due process guarantee.

[185] There are two other significant things to be highlighted from ***Sandiford***. *Firstly*, the fact that the period of fourteen months was disaggregated and an assessment made of the reasonableness of the cause of the delay for different periods. There were three periods of delay. ***i)*** Four months from when the applicant was first brought before the court to the time when his co-accused escaped. ***ii)*** Six months from then until the recapture of the co-accused and ***iii)*** four months after the

recapture during which the PI, did not proceed as the DPP indicated essentially that there was no magistrate to hear the matter. The court found the first two periods reasonable but the third unreasonable. The *second* thing of note is that the reason given by the DPP for the matter not proceeding during the third period was given "short shrift" by the court. It was roundly criticized as alarming, and the indication that the DPP would proceed "as soon as the court is able", labelled "vague" and "indefinite". In fact Crane CJ speaking for the Court of Appeal stated definitively at page 155 that *"… no blame can be properly attached to the administration for the notorious shortage of magistrates…"* But that was 1979. As will be seen in later cases such reasons for delay often termed "institutional delay" have to be legitimately factored into the equation in the assessment of the reasonableness or otherwise of the delay. Critically however beyond a certain time threshold, which each jurisdiction has to determine for itself, where the cause of the delay is not due to the actions of the defendant, delay is no longer excusable or reasonable regardless of the head under which it is categorised. More on that anon.

[186] ***Herbert Bell v Director of Public Prosecutions*** is the case from the Judicial Committee of the Privy Council which directly binds lower courts in Jamaica concerning the interpretation of the former section 20(1) of the Constitution, now reproduced as section 16(1). ***Bell*** the appellant was arrested and convicted of serious firearm offences approximately five months after his arrest. Approximately a year and a half later, his conviction was quashed by the Court of

Appeal and a retrial ordered. Five days after the re-trial order, the registrar of the Court of Appeal sent a written notice of the order to the registrar of the Gun Court and to the Director of Public Prosecutions. It was however not received by the Gun Court until nine months later. The case was mentioned on three occasions for statements of witnesses to be served on the appellant, but the investigating officer could not be located nor the statements traced. Three months after the notice of the re-trial arrived at the Gun Court the appellant was granted bail. More adjournments were subsequently granted by the Gun Court until approximately

eight months after the appellant was granted bail, the prosecution offered no evidence against the appellant, the witnesses being unavailable. He was discharged.

[187] Three months later he was however rearrested and despite the objections of his counsel a trial date was set a further three months away. That prompted the appellant to apply to the Supreme Court for a declaration that his constitutional right under section 20(1) (now section 16(1)), to a fair hearing within a reasonable time had been infringed. The Supreme Court and the Court of Appeal both found against the appellant. On his appeal to the Privy Council it was held, among other things, that in the context of the fact that it was a re-trial the period of 32 months since the re-trial had been ordered to the time the retrial was to commence was a breach of the appellant's right to a fair hearing within a reasonable time and he was entitled to the declaration sought.

[188] The decision is of vast significance not just for the conclusion, but based on the process utilised by the Privy Council concerning the factors to be taken into account in analysing the section to determine whether or not it has been breached.

[189] Lord Templeman writing for the Board laid down a number of important principles:

a) The three elements of section 20, namely a fair hearing within a reasonable time by an independent and impartial court established by law, form part of one embracing form of protection afforded to the individual
(page 590 c);

   By way of comment this principle has to be considered in light of the fact that there is now a separate section of the Constitution S.14(3), the subject of the instant claim, which also guarantees trial within a reasonable time, but which does not include the consideration of the fairness of that trial.

b) While it is the case that the longer the delay in any particular case the less likely it is that the accused can still be afforded a fair trial, the court may nevertheless be satisfied that the rights of the accused provided by section

20(1) have been infringed although he is unable to point to any specific prejudice (page 590c);

c) The four factors discussed in ***Barker v Wingo*** (1972) 407 US 514 to assess the right to a speedy trial, guaranteed by the sixth amendment to the Constitution of the United States, or similar criteria, should be applied to any written or unwritten constitution which protects an accused from oppression by delay in criminal proceedings. The weight to be attached to each factor must however vary from jurisdiction to jurisdiction and from case to case (page 591j); The factors outlined at pages 590-591 are:

i) *Length of delay*

'Until there is some delay which is presumptively prejudicial, there is no necessity for enquiry into the other factors that go into the balance. Nevertheless, because of the imprecision of the right to speedy trial, the length of delay that will provoke such an enquiry is necessarily dependent upon the peculiar circumstances of the case. To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge.' (407 US 514 at page 530) ii) *The reasons given by the prosecution to justify the delay*

'A deliberate attempt to delay the trial in order to hamper the defence should be weighed heavily against the Government. A more neutral reason such as negligence or over-crowded courts should be weighed less heavily but nevertheless should be considered since the ultimate responsibility for such circumstances must rest with the Government rather than with the defendant. Finally, a valid reason, such as a missing witness, should serve to justify appropriate delay.' (407 US 514 at page 531) iii) *The responsibility of the accused for asserting his rights*

'Whether, and how, a defendant asserts his right is closely related to the other factors we have mentioned. The strength of his efforts will be affected by the length of the delay, to some extent by the reason for the delay, and most particularly by the personal prejudice, which is not always readily identifiable, that he experiences. The more serious the deprivation, the more likely a defendant is to complain.'(407 US 514 at page 531) iv) *Prejudice to the accused*

'Prejudice, of course, should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This

> court has identified three such interests: (i) to prevent oppresive pretrial incarceration; (ii) to minimise 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 in the record, because what has been forgotten can rarely be shown.' (407 US 514 at page 532)

[190] Though these principles were adopted and adumbrated in relation to what is now section 16(1) and not section 14(3), their application to this case will become important to the final disposition of the matter, as they concern how the court should treat with the question of avoiding unreasonable delay — an ideal common to both sections 16(1) and 14(3) of the Charter of Rights.

[191] The cases of ***Sandiford*** and ***Bell*** have set the background establishing a) that the preliminary inquiry is a part of the trial process and b) outlining the framework established by the Privy Council to assess and address oppression of a defendant by unreasonable delay in criminal proceedings. It is now time to specifically address the effect of section 14(3), on which resolution of this claim depends.

[192] The major planks of Mr. Wildman's submissions were built on the Canadian case of ***Barrett Richard Jordan v The Queen***. This case is significant as it concerns the right to be tried within a reasonable time guaranteed under section 11(b) of the Canadian Charter of Rights. Section 11b provides, *"Any person charged with an offence has the right to be tried within a reasonable time".* Like section 14(3) of the Jamaican Constitution, the focus is on trial within a reasonable time. There is no link or mention in the text to the fairness of that trial. The issue is *when* or *how soon* the matter comes on for trial. The fair trial right, as has repeatedly been noted, is separately provided for.

[193] In ***Jordan v The Queen,*** a number of charges were laid against J in December 2008 for his role in a dial-a-dope operation. The total time from the charges to the conclusion of the trial was 49.5 months. J brought an application under s. 11(b) of

the **Canadian Charter of Rights and Freedoms**, seeking a stay of proceedings due to the delay. In dismissing the application, the trial judge applied the framework set out in ***R. v. Morin*** [1992] 1 S.C.R. 771. J was convicted of the offences in February 2013. The Court of Appeal dismissed his appeal. On appeal to the Canadian Supreme Court, it was held that J's s. 11 (b) Charter right had been infringed; hence the appeal was allowed, the convictions set aside and a stay of proceedings entered. It was emphasised that timely trials were possible and are constitutionally required. The majority determined that the delay in the completion of the matter was 14 months above the presumptive ceiling for cases tried in the superior court. The minority considered that 17 months counted against the state.

[194] The case emphasized the virtues of timely criminal trials. At paragraphs 1, 19 and 20 the majority judgment stated as follows:

> [1] Timely justice is one of the hallmarks of a free and democratic society. In the criminal law context, it takes on special significance. Section 11 (b) of the Canadian Charter of Rights and Freedoms attests to this, in that it guarantees the right of accused persons "to be tried within a reasonable time."
>
> [19] [T]he right to be tried within a reasonable time is central to the administration of Canada's system of criminal justice. It finds expression in the familiar maxim: "Justice delayed is justice denied." An unreasonable delay denies justice to the accused, victims and their families, and the public as a whole.
>
> [20] Trials within a reasonable time are an essential part of our criminal justice system's commitment to treating presumptively innocent accused persons in a manner that protects their interests in liberty, security of the person, and a fair trial.

[195] The main significance of the case lay in the fact that the majority and the minority while arriving at the same outcome, did so by different methods. The majority took the opportunity to move Canada's jurisprudence away from the ***Morin*** framework for applying s. 11 (b), whereas the minority sought to reaffirm that framework subject to revisions. It is important to examine the different approaches in some detail, as if either is to be adopted as a modified guide for Jamaica, they could lead to very different methods of analysis and vastly different outcomes.

[196] The majority stated in no uncertain terms that the ***Morin*** framework for applying s. 11 (b) was doctrinally too unpredictable, confusing and complex and had itself become an additional burden on already overburdened trial courts. In practical terms they found that the *ex post facto* assessment of delay did not encourage court users to take preventative measures to address inefficient practices and resourcing deficiencies. But what exactly was the ***Morin*** Framework? In 1992 ten years after the Canadian Charter came into force, the appellant, Darlene Morin contended that her right to be tried within a reasonable time was infringed.

[197] On January 9, 1988, the appellant who was observed to be speeding, was pulled over by the Police and showed signs of intoxication. Consequently, she was charged with operating a motor vehicle whilst impaired. Thereafter, she was taken to the police station and given a breathalyzer test following which she was charged with operating a motor vehicle having consumed alcohol in such quantity that her blood alcohol level exceeded the legal limit. The appellant was released

from custody on the day of her arrest on a promise to appear. She next appeared in Oshawa Provincial Court on February 23, 1988 and counsel requested the earliest date. The trial was set for March 28, 1989, as the earliest date

[198] On the said date, the appellant's counsel brought a motion to stay the proceedings, contending that the 14 ½ months delay in bringing the appellant to trial infringed her right to a reasonable trial under s. 11(b) of the Charter. The Crown argued otherwise. The issue was challenged up to the Supreme Court, which by a majority dismissed Morin's appeal, holding that the delay was not unreasonable and the appellants' right under s. 11(b) had not been violated.

[199] As noted in paragraph 30 of the judgment the **Morin** framework required courts to assess four factors to determine whether or not a breach of s. 11(b) had occurred: (1) the length of the delay; (2) defence waiver; (3) the reasons for the delay, including the inherent needs of the case, defence delay, Crown delay, institutional delay, and other reasons for delay; and (4) prejudice to the accused's interests in liberty, security of the person, and a fair trial. Prejudice could be either actual or

inferred from the length of the delay. Institutional delay in particular was assessed against a set of guidelines developed by the Supreme Court in Morin: eight to ten months in the provincial court, and a further six to eight months after committal for trial in the superior court. These guidelines acknowledged the finiteness of resources and the need for some tolerance for institutional delay. Institutional delay within or close to the guidelines generally had been considered reasonable. It was this framework which came in for withering criticism from the majority.

[200] They proposed a new framework which I will reflect in point form for convenience:

a) There would be established a presumptive ceiling beyond which delay (other than defence delay) — from the charge to the actual or anticipated end of the trial — would be presumed to be unreasonable, unless there were exceptional circumstances. This they set at 18 months for provincial courts and 30 months for superior courts and cases tried in the provincial court after a preliminary inquiry;

b) Above the presumptive ceiling the burden is on the Crown to establish exceptional circumstances, in the absence of which, a stay would follow. To qualify as exceptional, circumstances must be beyond the Crown's control because *i)* they are reasonably unforeseen or reasonably unavoidable and *ii)* they cannot reasonably be remedied;

c) While the categories of exceptional circumstances cannot be closed and the determination would be left to trial judges, in general exceptional circumstances fall into two categories: discrete events, such as illness or unexpected event at trial and particularly complex cases;

d) Absent exceptional circumstances neither the seriousness of the offence, chronic institutional delay, nor the lack of prejudice to the defendant can justify delays above the presumptive ceiling;

e) Below the presumptive ceiling the burden is on the defence to show that the delay is unreasonably by establishing *i)* it took meaningful and sustained steps to expedite the proceedings and *ii)* the case took markedly longer than it reasonably should have. If these cannot be shown the s.11 (b) application must fail. Stays below the presumptive ceiling should only be granted in clear cases;

f) To avoid the post–**Askov**[5] situation where tens of thousands of matters were stayed by the immediate application of a new framework, transitional exceptional circumstances were recognized for cases filed before the release of the decision, with different accommodations made for those already above the presumptive ceilings and those below. Given the way I intend to resolve this matter it is unnecessary to here outline the details of those transitional arrangements; save to say that due to what was found to be the extent of the delay in this case the transitional provision did not operate to save the conviction.

[201] The minority on the other hand reasoned as follows:

a) The completely new direction adopted by the majority was unnecessary. A reasonable time for trial under s. 11(b) could not be defined by numerical ceilings. The matter had not been subject to adversarial debate and in any event such ceilings were better left to be established by legislatures. Further for the vast majority of cases, the ceilings are so high that they risk being meaningless and feeding rather than curtailing the culture of delay;

b) The right to be tried in a reasonable time is multifactored, fact-sensitive, and case-specific, with its application to specific cases being necessarily complex. The Morin framework addressed these complexities;

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[5] [1990] 2 S.C.R. 1199

c) It was however appropriate to make minor adjustments and clarifications to the **Morin** framework that would regroup its considerations under four main analytical steps –

i) First, on an application by an accused under s. 11(b) the overall period between the charge and the completion of the trial should be examined, to see if its length merits further inquiry;

ii) Second, it should be determined on an objective basis how long a case of this nature should reasonably take, by looking at institutional delay and inherent time requirements of the case. Acceptable institutional delay is the period that is reasonably required for the court to be ready to hear the case once the parties are ready to proceed. This period is determined by administrative guidelines set in **Morin** — eight to ten months before the provincial court and six to eight months in the superior court. There is a point beyond which inadequacy of state resources will not be accepted as an excuse, but allowance is made for sudden and temporary strains on resources, that cause temporary congestion in the courts.

iii) The inherent time requirements of a case, is the period of time reasonably required for parties to be ready to proceed and to conclude the trial, for a case similar in nature to the one before the court. This should be determined on evidence, judicial experience and submissions of counsel. The liberty interests of the accused should also be factored in the estimate of a reasonable time period.

iv) Third, how much of the actual delay counts against the state must be ascertained by subtracting periods attributable to the defence, including 1) any waived time periods, (which must be clear and unequivocal and not mere acquiescence in the inevitable), and 2) delay resulting from unreasonable actions of the accused such as last minute changes of counsel or lack of diligence, from the overall period of delay. Also not to

be counted against the state are unavoidable delays including due to inclement weather or illness of a trial participant.

v) Fourth, the court must determine whether the delay that counts against the state exceeds the reasonable time by more than can be justified. Where the actual time exceeds what is reasonable for a case of that nature, the result will be a finding of unreasonable delay unless the Crown can justify the delay. Even substantial excess delay may be reasonable where, for example, there is particularly strong societal interest in the prosecution proceeding on its merits, or where the delay results from temporary and extraordinary pressures on counsel or the court system. However, these conditions would not invariable provide justification as the accused may still be able to demonstrate actual prejudice. Though proof of actual prejudice is not necessary to establish an infringement of s. 11(b), its presence would make unreasonable a delay that might otherwise be objectively viewed as reasonable.

[202] For reasons which I will elaborate on later in the judgment, I prefer the approach of the minority and, in agreement with the approach of Sykes J, hold that that approach superimposed on the ***Bell*** framework, can provide a useful mechanism for interpreting the right guaranteed under section 14(3) of our Constitution. What is immediately clear however, is that whatever process or framework is used to interpret and vindicate the right, to ensure a balance between competing individual and societal interests, an evidence based rather than anecdotal approach is commended. This is important for there to be certainty in the interpretation of the rights, subject to the peculiar features of each case, as well as to assist the state to understand the nature of the resources it is required to provide to the judicial system. This is the only way to ensure the right can be meaningfully protected and enjoyed by accused persons for their benefit and the establishment of appropriate societal norms for the delivery of justice. Regrettably it is only in fairly recent times that comprehensive empirical evidence showing the average throughput of cases

in our various courts, is being generated and analysed to facilitate those considerations. This process needs to be broadened and strengthened.

[203] Indeed, the minority view in ***Jordan*** expressed approval for the utilisation of evidence in effectively addressing the content of the right to trial within a reasonable time, where it observed at para. 169 that:

> The *Morin* administrative guidelines, namely eight to ten months for trials in provincial courts and six to eight months for trials before the superior courts, were established on the basis of extensive statistical and expert evidence. There is no basis in the record in this case to revise them and I would therefore confirm these guidelines as appropriate for determining reasonable institutional delay.

[204] On issue of striking a balance, in assessing the right, Cromwell J writing for the the minority adopted the views expressed in **Morin** and noted at paras 211 -212 that:

> [211] In McLachlin J.'s concurring opinion in Morin, she held that the societal interests in bringing the accused to trial should be considered in the determination of s. 11(*b*) claims: the "true issue at stake" in a s. 11(*b*) analysis is the "determination of where the line should be drawn between conflicting interests", i.e. those of the accused and those of society: p. 809. Whether a delay becomes unreasonable, on the spectrum of delays apparent in criminal proceedings, must be determined by an analysis in which the interests of society in bringing those accused of crimes to trial are balanced against the rights of the person accused of a crime: pp. 80910. To this I would add the societal interest in prompt disposition of criminal matters.
>
> [212] I agree with this balancing approach. Under the revised framework I propose, the delay in excess of the reasonable time requirements of the case and any actual prejudice arising from the overall delay must be evaluated in light of societal interests: on one hand, fair treatment *and* prompt trial of accused persons and, on the other, determination of cases on their merits. These interests, however, are in effect factored into the determination of what would be a reasonable time for the disposition of a case like this one. But if there are exceptionally strong societal interests in the prosecution of a case against an accused which substantially outweigh the societal interest and the interest of the accused person in prompt trials, these can serve as an "acceptable basis" upon which exceeding the inherent and institutional requirements of a case can be justified.

[205] Mr. Wildman invited the court to follow ***R v Jordan*** and hold that no actual prejudice need be proven by the applicant. On the facts of this case he submitted the delay

was presumptively prejudicial and so egregious the only appropriate remedy was a stay.

[206] Ms. Ruddock's main answer to ***R v Jordan*** was reliance on the case of ***Attorney General's Reference No. 2 of 2001***. In this case charges against 7 prisoners for violent disorder arising out of a prison riot were set for trial approximately 32 months after the charges were first laid. Having accepted submissions on behalf of the defendants that to proceed with the trial after that delay would be incompatible with their Article 6 rights under the European Convention for the Protection of Fundamental Rights and Freedoms, the trial judge stayed proceedings against them. Approximately a month and a half later the stay was lifted, the prosecution offered no evidence and the defendants were acquitted.

[207] The Attorney General referred to the Court of Appeal, two points of law which went on further appeal to the House of Lords. The points were:

> (1) Whether criminal proceedings may be stayed on the ground that there has been a violation of the reasonable time requirement in Article 6(1) of the European Convention for the Protection of Fundamental Rights and Freedoms ("the Convention") in circumstances where the accused cannot demonstrate any prejudice arising from the delay.
>
> (2) In the determination of whether, for the purposes of Article 6(1) of the Convention, a criminal charge has been heard within a reasonable time, when does the relevant time period commence?

[208] Article 6(1) of the Convention headed "Right to a fair trial" reads as follows:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

[209] Section 6(1) of The Human Rights Act of 1998 UK provides that it is unlawful for a public authority (defined to include a court) to act in a manner incompatible with a convention right. Section 8 of the said Act dealing with Judicial remedies provides that where the court finds that an act or proposed act of a public authority is or would be unlawful, it may grant relief or remedy within its powers as it considers just and appropriate. Subject to certain limitations expressed in section 8, damages are included as a possible remedy.

[210] From the headnote to the case reported at [2004] H.R.L.R. 16, in the House of Lords it was held, affirming the Court of Appeal, that:

a) where, through the action or inaction of a public authority, a criminal charge has not been determined at a hearing within a reasonable time, there would necessarily have been a breach of the defendant's Convention right under Art.6(1) for which a just and appropriate remedy had to be afforded him (Human Rights Act 1998, s.8(1));

b) the appropriate remedy would depend on the nature of the breach and all the circumstances;

c) (Lord Hope of Craighead and Lord Rodger of Earlsferry *diss.*) it would be appropriate to stay the proceedings *only where* (a) a fair hearing was no longer possible, or (b) it was for any compelling reason unfair to try the defendant. The public interest in the final determination of charges required that a charge not be stayed or dismissed where any lesser remedy would be just and proportionate in all the circumstances;

d) (Lord Hope of Craighead and Lord Rodger of Earlsferry *diss.*) where the circumstances of the case did not fall within (a) or (b), neither a prosecutor nor a court would be acting incompatibly with a defendant's Convention right by continuing to prosecute or entertain proceedings after a breach of the "reasonable time" requirement had been established. The breach would

have consisted in the delay which had already accrued and not in continuing with the prospective hearing (HM Advocate v R [2002] UKPC D3; [2003] 2 W.L.R. 317 not followed);

e) (*per* Lord Bingham of Cornhill) the appropriate remedy would particularly depend on the stage of the proceedings at which the breach was established. Where the breach was established before the hearing, the appropriate remedy might be a public acknowledgement of the breach, action to expedite the hearing to the greatest extent practicable, and perhaps, where the defendant was in custody, his release on bail. If the breach was established after the hearing, the appropriate remedy might be a public acknowledgement of the breach, a reduction of the penalty imposed on a convicted defendant, or the payment of compensation to an acquitted defendant;

f) (unanimously) the relevant period for the assessment of whether Art.6(1) had been complied with commenced at the earliest time at which the defendant was officially alerted to the likelihood of criminal proceedings against him, which in England and Wales would ordinarily be when he was charged or served with a summons.

[211] Lord Hope in dissenting indicated that in his view a hearing within a reasonable time is a separate and independent guarantee that does not require an accused to show that a fair hearing is no longer possible for the remedy of a stay to be granted. He held that a stay was possible even where the accused could not demonstrate he would suffer any prejudice arising from the delay. While a stay was not the inevitable remedy he found a hearing may be stayed if, in all the circumstances, the court considers this to be the just and appropriate remedy.

[212] Lord Rodger in his dissent expressed the view that Section 6(1) makes acts which are incompatible with the Convention unlawful simply so that the courts can grant a remedy in terms of s 8(1). In this respect the court is in the same position as a court entertaining an application for judicial review. Accordingly, when a court is

faced with a situation where going on with a prosecution and holding a trial would lead to a hearing after the lapse of a reasonable time, it should not hesitate to say that these steps would violate art 6(1) and, hence, would be unlawful in terms of s 6(1) of the 1998 Act. Then, in terms of s 8(1), the court should go on to consider what relief or remedy would be "just and appropriate" for this unlawful act of violating the reasonable time guarantee. He agreed that it was only in rare cases that the just and appropriate remedy would

be a stay under s 8(1). In other cases the trial can proceed and the defendant will get the appropriate remedy at the proper time.

[213] Ms. Ruddock relied on this case to support her submission that while admittedly the delay was significant, if the court found that a breach of section 14(3) had been established a stay was inappropriate. A declaration to the effect that a breach had occurred and directions as to how the matter should hereafter proceed, as well as favourable consideration of bail terms, she submitted would adequately vindicate the right and remedy any breach.

[214] In considering the effect of this case it must first be recognized that Article 6(1) of the Convention is headed "Right to a fair trial" and contains a bundle of rights. In essence there is a "hierarchy of rights" with the overarching or core right being the right to a fair trial and the other rights being supportive of that. It is in this context that Lord Bingham giving the leading judgment for the majority thought that it would be anomalous if breach of the reasonable time requirement had an effect more far-reaching than breach of the defendant's other art 6(1) rights when (as must be assumed) the breach does not taint the basic fairness of the hearing at all, and even more anomalous that the right to a hearing should be vindicated by ordering that there be no trial at all. This was the basis of the view of the majority that the remedy of a stay could only be obtained where actual prejudice was shown in that a fair hearing could not be guaranteed or it was otherwise unfair to proceed against the accused.

[215] The Article 6(1) omnibus collection of rights in relation to a hearing is unlike the position in section 14(3) of the Jamaican Constitution and s. 11 (b) of the Canadian Charter which are both focused on the hearing within a reasonable time guarantee. In the Jamaican context there is a separate section s 16(1) which deals with the fair trial guarantees.

[216] It should also be highlighted that the Convention right embraces both civil and criminal proceedings which create dynamics that require consideration of how

these bundle of rights would be exercised between parties in civil matters as distinct from their exercise between the citizen and the state in a criminal matter.

[217] Finally also of significance is the fact that given the constitutional arrangements of the United Kingdom the Convention Right has to be vindicated through the mechanism of the Human Rights Act. A significant discussion point in the case was whether a court could be said to be sanctioning an unlawful act under the Human Rights Act if it permitted a trial to proceed after there was a finding that there had been a breach of a reasonable time guarantee. The fact that s 14(3) is within a Constitutional framework that by virtue of section 19 has self-contained remedies for breaches of the rights it guarantees, including the power to fashion an appropriate remedy where none exists, removes some, if not all, of the conceptual difficulty caused by the trigger of "unlawfulness" required under the Human Rights Act, for remedies to be obtained for Convention breaches.

[218] The holding of the minority in this case I consider most useful to the present application, as they more than the majority recognised the fact that the reasonable time guarantee was a separate and distinct right, (as is the case under our Article 14(3), even though it supported other rights. Further that all remedies should be available for its breach depending on the nature of the circumstances though based on the principles of what was just, appropriate and proportionate as between the defendant and the state it would perhaps be in rare cases where a stay would be the appropriate remedy where no actual prejudice was proven and a fair trial was still possible.

[219] I need mention briefly three more cases relied on by counsel for the defendant before moving on to my final analysis. In ***Melanie Tapper v The Director of Public Prosecutions***, the Judicial Committee of the Privy Council upheld the finding of the Jamaican Court of Appeal that while the post-conviction delay of over five years was inordinate, and that "such delay without more, constitutes a breach of the appellants' constitutional right to a hearing within reasonable time", "only in exceptional circumstances, if at all" would it be justified and necessary to

set aside a conviction, on the ground of unreasonable delay between the date of conviction and the hearing of the appeal; a reduction in sentence was an appropriate remedy.

[220] The Privy Council noted that even extreme delay between conviction and appeal, in itself, will not justify the quashing of a conviction which is otherwise sound. Such a remedy should only be considered in a case where the delay might cause substantive prejudice, for example in an appeal involving fresh evidence whose probative value might be affected by the passage of time. (see paras 27 & 28).

[221] In ***Prakash Boolell v The State (Mauritius)***, the appellant was convicted and sentenced for swindling in 2003 and his appeal to the Supreme Court of Mauritius dismissed a year later. He appealed to the Judicial Committee of the Privy Council claiming breach of his constitutional rights to a fair trial within a reasonable time, as guaranteed by section 10(1) of the Constitution.

[222] The appeal was founded on the twelve year delay between when the first statement under caution was taken from the appellant and the finding of guilt by the Intermediate Court. It was conceded by counsel for the prosecution that the lapse of time, would without more give rise to a breach of the constitutional provision, but he submitted that the delay was largely the fault of the appellant and that he could not in the circumstances take advantage of it to claim a breach of his constitutional rights.

[223] The Board held that: (i) If a criminal case is not heard and completed within a reasonable time, that will of itself constitute a breach of section 10(1) of the Constitution, whether or not the defendant has been prejudiced by the delay; and (ii) An appropriate remedy should be afforded for such breach, but the hearing should not be stayed or a conviction quashed on account of delay alone, unless (a) the hearing was unfair or (b) it was unfair to try the defendant at all. (See para 32). The Board adopted Lord Bingham of Cornhill propositions material to determining the reasonableness of the time taken to complete the hearing of a criminal case at paras 52-54 of his judgment in ***Dyer v Watson.***

[224] The Board further determined that even though the reprehensible conduct of the defendant significantly contributed to the lapse of time, much more could have been done to hasten matters between the commencement of the second trial in March 1998 and its completion in March 2003. Accordingly, the trial was not completed within a reasonable time in breach of section 10(1) of the Constitution. (para. 37). However, as they did not find the trial to be unfair the conviction was not set aside but as it was considered inappropriate for a custodial sentence to become operative 15 years after the commission of an offence unless the public interest required it, which in this case it did not, a fine was substituted instead.

[225] In ***R v Herald Webley***, the defendant was charged for murder in 1999. The matter came on for trial the twenty-seventh time in December, 2006, but once again could not be started. The defendant applied for the matter to be stayed on the basis of the continuation of the prosecution being an abuse of the process of the court. The prosecution asserted that none of the defendant's contentions prevented him from receiving a fair trial.

[226] Brooks J as he then was after considering the authorities of ***Flowers v R*** [200] 1 W.L.R. 2396**,** ***Bell v DPP***, ***Attorney General's Reference*** (No.1 of 1990) and the ***R v Dutton*** [1994] Crim L.R. 910 among others refused the application. He opined as follows at pages 8 – 9:

> In the instant case, it may be appropriate for the judge before whom this case comes on for trial, to say that the Crown should have no more adjournments and that it should proceed with whatever evidence it has. It would also be for the judge, in the event that it is a matter for the decision of the jury, to direct the jury appropriately in respect of the delay, and any prejudice, alleged by the defence, to have been caused by that delay.
>
> In all the issues raised by this application, the onus is on Mr. Webley to satisfy the court on a balance of probabilities that, because of the issues complained of, either individually or collectively, he would suffer exceptional prejudice to the extent that he would not receive a fair trial.
>
> The evidence available at this stage does not indicate any deliberate or improper behaviour on the part of the prosecution. The issues raised in this application may all be dealt with by a judge and jury at a trial. The judge can deal with them by insisting on a timely commencement and by giving careful directions to the jury on any aspect which is alleged by the defence, to cause it prejudice. The jury will for its part, in its wisdom, make its decision after hearing all the evidence.
>
> In these circumstances I find that Mr. Webley has not satisfied me on a balance of probabilities that the trial process will not afford him the opportunity of seeking to prevent the cautioned statement from being admitted into evidence, of exposing the deficiencies to the jury, to bore such 'holes' in the prosecution's case as he can, and ultimately to receive a fair trial.

[227] It should of course be noted that these three latter cases were also decided under a dispensation in which the right to trial within a reasonable time was nestled among other due process rights. As has repeatedly been acknowledged throughout this judgment the incorporation of section 14(3) in the Constitution with the sole function of conferring a right to trial within a reasonable time while retaining at section 16(1) the full due process rights means that a new look has to be taken as to the significance of the reasonable time guarantee, independent of delay causing prejudice to the holding of a fair trial.

Analysis

The Nature of the Right Guaranteed by section 14(3)

[228] The cases decided based on constitutional or convention provisions that guarantee a bundle of due process rights, such as the former section 20 now section 16(1) of the Jamaican Constitution and Article 6 of the European Convention on Human Rights, while recognizing that the right to a hearing within a reasonable time is a separate and distinct right, or at least a distinct component of the bundle of rights, tended to view that right as primarily geared towards protecting and supporting the core right to a fair trial. Given that conceptual framework, while the desirability of timely justice from both individual and societal perspectives was always recognized, unless actual prejudice was shown, in terms of the delay having affected or being likely to affect the fairness of the trial, or it being otherwise unfair to try or have tried the accused, the remedy for breaching the reasonable time guarantee was not usually a stay or quashing of a conviction.

[229] The rationale for this approach was clearly outlined by Lord Bingham of Cornhill in ***Attorney General's Reference No. 2 of 2001*** at para 24 as follows:

> If, through the action or inaction of a public authority, a criminal charge is not determined at a hearing within a reasonable time, there is necessarily a breach of the defendant's Convention right under art 6(1). For such breach there must be afforded such remedy as may (s 8(1)) be just and appropriate or (in Convention terms) effective, just and proportionate. The appropriate remedy will depend on the nature of the breach and all the circumstances, including particularly the stage of the proceedings at which the breach is established. If the breach is established before the hearing, the appropriate remedy may be a public acknowledgement of the breach, action to expedite the hearing to the greatest extent practicable and perhaps, if the defendant is in custody, his release on bail. It will not be appropriate to stay or dismiss the proceedings unless (a) there can no longer be a fair hearing or (b) it would otherwise be unfair to try the defendant. The public interest in the final determination of criminal charges requires that such a charge should not be stayed or dismissed if any lesser remedy will be just and proportionate in all the circumstances. The prosecutor and the court do not act incompatibly with the defendant's Convention right in continuing to prosecute or entertain proceedings after a breach is established in a case where neither of conditions (a) or (b) is met, since the breach consists in the delay which has accrued and not in the prospective hearing. If the breach of the reasonable time requirement is established retrospectively, after there has been a hearing, the appropriate remedy may be a public acknowledgement of the breach, a

> reduction in the penalty imposed on a convicted defendant or the payment of compensation to an acquitted defendant. Unless (a) the hearing was unfair or (b) it was unfair to try the defendant at all, it will not be appropriate to quash any conviction. Again, in any case where neither of conditions (a) or (b) applies, the prosecutor and the court do not act incompatibly with the defendant's Convention right in prosecuting or entertaining the proceedings but only in failing to procure a hearing within a reasonable time.

[230] In a similar vein Lord Nicholls of Birkenhead noted at paragraphs 39 – 40 that

> [39]…The object of this guarantee is to provide protection against the adverse consequences of unreasonable pre-trial delay. While proceedings are pending there is bound to be suspense and uncertainty for parties. This cannot be avoided, even though suspense and uncertainty bring with them deleterious consequences for those concerned and their families. The reasonable time guarantee is aimed at protecting citizens against this undesirable, if inevitable, feature of court proceedings by confining the period during which it exists to a reasonable one.
>
> [40] This undesirable feature of court proceedings, relating to the pre-trial period, is distinct from the actual conduct of the trial. I can detect nothing in the language of art 6, or in the Convention jurisprudence, which suggests that a failure to hold a trial within a reasonable time, itself a breach of art 6, is compounded by the commission of a further breach if a trial then takes place. Rather, the breach of the reasonable time guarantee lies in failure to conduct the trial timeously. When a trial takes place thereafter the breach, which calls for remedy, is not the holding of the trial. The outcome of the trial is in no way impugned. The breach which calls for remedy comprises the state's failure to ensure the trial took place with reasonable despatch. Just recompense is needed in respect of the pre-trial delay, which resulted in the defendant being exposed for longer than he should have been to the undesirable consequences of pending proceedings. Recompense is not needed in respect of the holding of the trial itself. Of course if the pre-trial delay became so protracted that a fair trial could no longer be held, then the holding of the trial itself would on that ground be a breach of art 6. But that is a different case.

[231] The effect of this approach has been that even where there has been very long periods of delay, for example up to 12 years in ***Boolell*** from charge to conviction and 5 years in ***Melanie Tapper*** between conviction and appeal, the remedy has not been to quash convictions or stay proceedings but to make declarations, or reduce sentences. The possibility of paying compensation to acquitted defendants was also recognized in ***Attorney General's reference No 2 of 2001***, The

complaint has been that this approach stripped the reasonable time guarantee of its true value by failing to recognize the effect of the inherent or presumed prejudice caused by unreasonable delay, with the concomitant effect that there was no effective sanction for the state failing to pursue timely justice outcomes; all leading to a culture of delay.

[232] It is necessary to acknowledge the powerful point made by Sykes J that in the United States and in Scotland it has long been a part of their jurisprudence that unreasonable delay was a basis for staying proceedings or quashing convictions regardless of whether the delay affected or would affect the fairness of the trial. (See paras 85 and 134 *et seq*. ante). He also made the point that in ***Bell v DPP*** which relied on the American Supreme Court Case of ***Barker v Wingo***, in effect a stay was granted based on the violation of the reasonable time guarantee contained in the provision guaranteeing overall due process (then section 20 of the Jamaican Constitution). Hence in his view, later cases following ***Bell*** have perhaps taken too conservative an approach in providing remedies for breach of the reasonable time guarantee.

[233] On my reading of ***Bell*** however, it appears a significant factor which led to the approach taken by the Board was the unfairness to the defendant caused by him having been re-arrested for retrial, after the prosecution had offered no evidence based on unavailability of witnesses. I will return to this issue in my later discussion of what I consider the appropriate disposition of this matter. The important point to be made at this stage however, is that the English jurisprudence which we have largely followed in Jamaica, has up to this point tended to allow trials to proceed and convictions to stand where a breach of the right to a trial within a reasonable time has been established, but it has not been shown that a fair trial is not possible.

[234] By contrast, the Canadian approach for the better part of the last thirty years has been to place a separate focus on the guarantee of the right to a hearing within a reasonable time, from the question of appropriate due process. Section 11(b) of the Canadian Charter of Human Rights addresses the reasonable time and not the

fair trial guarantee. That jurisprudence led to decisions such as ***R v Askov***, ***R v Morin*** and recently ***R v Jordan*** in which the timely disposal of criminal cases as a primary justice outcome in and of itself has been championed. That approach has not been without its detractors as it has led to many otherwise sound cases being stayed without trial and safe convictions overturned.

[235] In April 2011 by virtue of section 14(3) of the Constitution the Jamaican legislature in its wisdom, incorporated a provision similar to section 11 (b) of the Canadian Charter of Human rights. The legislature also saw it fit to retain in a separate section, now 16(1) the previous section 20 that contains a bundle of due process rights – a right to a fair trial within a reasonable time before an independent and impartial tribunal.

[236] A provision is not included in any law in vain. This is an even more compelling reality when the law in question is the Constitution, the supreme law of the land. Therefore on the face of it, even without the benefit of the detailed analysis that has been conducted, the incorporation of section 14(3) and the retention of section 20 in the form of section 16(1) was clearly intended to ensure that the right to trial within a reasonable time was a "stand alone" right guaranteed under section 14(3). The reasonable time guarantee included in section 16(1) is part of a bundle of rights guaranteed by that section.

[237] Though it is perhaps undesirable to classify constitutional rights according to a hierarchy, the nature of different kinds of constitutional rights means that while all are important, some are qualified while others are absolute. So for example, the right to life which is seen by many as the ultimate right is not absolute. It is qualified in that life may be lawfully extinguished, if that occurs according to a sentence passed after due process of law and also if a killing is done in self defence. Conversely, the right to a fair trial is absolute. It cannot be qualified and an accused person cannot waive his right to a fair trial, other than by a guilty plea in which event no trial is necessary. There are however more than one ways and different methods used to secure a fair trial. While the traditional way criminal cases are

tried is for witnesses to attend in person at a trial to give evidence and be subject to cross-examination, the law has recognised that there are circumstances where witnesses may be unavailable or vulnerable and provisions have to be made to ensure that the trial can proceed in their absence, or with special accommodation made to manage their vulnerability. To ensure that trials conducted using these alternate methods are fair, safeguards have to be employed in terms of conditions precedent being met and appropriate judicial directions being given to the tribunal of fact, concerning how to assess evidence received in these non-traditional ways. (See for example section 31D of the **Evidence Act**, ***R v Steven Grant***, [2006] 68 WIR 354 and the **Evidence (Special Measures) Act, 2012)**.

[238] It should also be acknowledged that whether a right is qualified or absolute the nature of the right may mean that more than one type of remedy could be appropriate to address breaches of the right, depending on the circumstances of the breach and all other relevant factors. While side notes are not the most reliable aid to constitutional interpretation, the side note to section 14(3) speaks to protection of freedom of the person while the side note to section 16 (1) speaks to protection of the right to due process.

[239] Examining the sections themselves, section 14(3) provides that a person who is ***arrested or detained*** is entitled to be tried within a reasonable time and goes on to indicate that the person should be released on bail pending trial or taken before a court where he may be released. By contrast s. 11(b) of the Canadian Charter states that any person who is ***charged*** with an offence is entitled to be tried within a reasonable time. On a strict reading of section 14(3) it could be maintained that it would not apply to someone who was not arrested or detained but who was summoned to answer a charge. That strengthens the argument that one main purpose of section 14(3) is to ensure that persons before the court do not languish for unreasonable periods in custody awaiting trial. Therefore the grant of bail, where an accused is in custody, may well go a far way towards preventing or ameliorating any derogation from the right guaranteed under section 14(3).

[240] On the other hand, the nature of the bundle of rights guaranteed under section 16(1) is such, that much more would be required to ensure that the benefits they seek to secure are preserved. The protection of due process rights is fundamental to the existence of the Rule of Law. If measures cannot be adopted

to ensure a trial will be fair or the lapse of time is such that a fair trial within a reasonable time cannot or has not been guaranteed, there is no other way to vindicate those rights than to stay any pending trial or overturn the conviction in a trial that has been unfair. Breach of this absolute right requires an absolute remedy. There is no room or possibility to consider any question of proportionality. The right secured under section 14(3) is different. Whether or not it is capable of classification as an absolute or qualified right, I find the nature of the right is such that its violation is susceptible to considerations of proportionality in the consideration of the appropriate remedy.

What mechanism should be used to determine if there has been a breach of section 14(3)?

[241] In Canada there has been a large body of evidence and empirical studies done assessing what is a reasonable time for cases to go through the courts. Even against that background, in ***R v Jordan*** the minority of the Canadian Supreme Court including the learned Chief Justice severely criticised the majority for embarking on a major policy shift through judicial action in a context where no evidence had been put before the court specifically relating to the change and it had not been the subject of submissions by the parties.

[242] At para. 254 Cromwell J writing for the minority observed that:

> It will by now be obvious that I fundamentally disagree with the approach proposed by my colleagues. It is, in my respectful view, both unwarranted and unwise. The proposed approach reduces reasonableness to two numerical ceilings. But doing so uncouples the right to be tried within a reasonable time from the Constitution's text and purpose in a way that is difficult to square with our jurisprudence, exceeds the proper role of the Court by creating time periods which appear to have no basis or rationale

> in the evidence before the Court, and risks negative consequences for the administration of justice. Based on the limited evidence in the record, the presumptive time periods proposed by my colleagues are unlikely to improve the pace at which the vast majority of cases move through the system while risking judicial stays for potentially thousands of cases. Moreover, the increased simplicity which is said to flow from this approach is likely illusory. The complexity inherent in determining unreasonable delay has been moved into deciding whether to "rebut" the presumption that a delay is unreasonable if it exceeds the ceiling in particular cases.

[243] In the Jamaican context the concern raised by the minority in ***Jordan*** is even more apposite. Jamaica has no history of jurisprudence where the focus has been a hearing within a reasonable time based on stipulated pre-determined guidelines or time standards. It may be that the time has come for those to be developed. However, it is in my view undesirable for the courts to set rigid time limits (as opposed to guidelines) indicating when it will be presumptively considered that the right to a trial within a reasonable time has been breached. If any such rigid time limit is to be set it should be by the legislature. However, it is difficult for the courts to even set guidelines at this point given the absence of compiled statistics and comprehensive empirical data showing:

a) the average time it currently takes for different types of cases to pass through the courts

b) a realistic indication of the reasonable time frames for those cases to move from commencement to final disposal; and

c) the resources necessary to ensure that those time frames can be met with the application of reasonable diligence

[244] This type of data is important especially as the fast paced changes in the legislative framework in recent years requires new efficiencies to be developed in the courts and a realistic assessment of the further legal reforms, physical and technological infrastructure and human resources required at all levels, to ensure that constitutional rights to timely justice can be properly secured. For example, the passage of The **Law Reform (Fraudulent Transactions) (Special Provisions)**

Act 2013, **The Criminal Justice (Suppression of Criminal Organizations) Act, 2014** and the **Committal Proceedings Act 2013** which came into force on January 1, 2016 have significantly increased the number of cases before the Circuit Courts over a relatively short period.

[245] In relation to the **Committal Proceedings Act** the significantly faster pace of committals from the Parish Courts to the Circuit Courts (within 60 days) compared to the Preliminary Inquiry System that it replaced, has resulted in the rapid increase in matters before the circuit courts. The starkest example is the committal of over 700 cases to the Home Circuit Court in 2017 alone compared to over 200 in 2015 and just under 150 in 2016! This without any appreciable increase in what were already strained resources. This state of affairs has led the learned Director of Public Prosecutions to describe the increased flow of cases to the Circuit Courts as a "tsunami!" **The Criminal Justice (Suppression of Criminal Organizations) Act, 2014,** colloquially referred to as the "Lotto Scam" Act has also significantly increased the case lists particularly in Western parishes.

[246] Happily, the provision of resources to facilitate the compilation of statistics and assessment of trends is bearing fruit. The necessary data is being compiled and interrogated to enable conduct of the necessary analysis. However until that has been done and presented to a court in a case where there is the opportunity for full submissions, it would be inappropriate to seek to lay down guidelines. In any event this would not have been the appropriate case to establish time lines for trials generally as this concerns the preliminary examination stage in a context where preliminary enquiries have now been replaced by Committal proceedings. As Sykes J has noted in his Epilogue different timelines may be required for continuous circuits as opposed to circuits that only sit for a few weeks per term. There will also need to be accommodation made for the different numbers of cases in various circuits as well as sensitivity to the increased preparation time that complex cases or cases involving a large number of accused and/or witnesses may require.

[247] It may be that at the appropriate time care should be taken not to have time limits set that may prove impossible to meet for a significant number of cases. While fiscal constraints can never be an excuse for breaching constitutional rights, rights exist in a socio-legal-economic context which should inform their interpretation and also remedies for their breach. It should however be clearly appreciated that willful neglect of the state to provide reasonable resources to enable constitutional rights to be protected and upheld, may result in increasingly far reaching remedies having to be employed to vindicate those rights. While I have not embraced the framework crafted by the majority approach in ***Jordan***, their reasoning regarding the need for the adequate provision of resources by the state, is a useful and telling statement of principle. At paragraph 117 Moldaver, Karakatsanis and Brown JJ writing for the majority stated:

> By encouraging all justice system participants to be more proactive, some resource issues will naturally be resolved because parties will be encouraged to eliminate or avoid inefficient practices. At the same time, the new framework implicates the sufficiency of resources by reminding legislators and ministers that unreasonable delay in bringing accused persons to trial is not merely contrary to the public interest: it is constitutionally impermissible, and will be treated as such.

[248] These are matters that will no doubt need to be fully considered by a court at the appropriate time, but not now, in the absence of evidence or specific arguments on those points. It is for this reason that I emphasize the limited precedential value of this case, given the absence of evidence and arguments that would have facilitated a system wide analysis and consideration of general standards and guidelines.

[249] However, even where there are guidelines, desirable as they may be to focus submissions and enhance certainty, as noted in several cases including ***Bell*** and ***Jordan***, the question of whether delay is unreasonable in any case is, to a large extent, going to be fact specific to that case.

[250] In ***Jordan*** addressing the fact specific, multi-factorial and interrelated nature of the right, guaranteed by s. 11(b) of the Canadian Charter, the minority noted a paragraphs 149 – 157 that:

> [149] The right to be tried within a reasonable time is by its very nature fact-sensitive and case-specific and determining whether the right has been breached in a specific case, may be far from straightforward. There are several reasons for this.
>
> [150] First, the term "delay" is not entirely apt. While delay has a pejorative connotation, delay, in the sense of the passage of time, is inherent in any legal proceeding. In fact, some delay may be desirable… therefore, delay only becomes problematic when it is unreasonable.
>
> [151] Second, unreasonableness is not conducive to being captured by a set of rules: a reasonable time for the disposition of one case may be entirely unreasonable for another. Reasonableness is an inherently contextual concept, the application of which depends on the particular circumstances of each case. This makes it difficult and in fact unwise to try to establish the reasonable time requirements of a case by a numerical guideline. Inevitably, the ceiling will be too high for some cases and too low for others. More fundamentally, a fixed guideline is inconsistent with the notion of reasonableness in the context of the infinitely varied situations that arise in real cases.
>
> [152] Third, the *Charter* protects only against state action. Even if a case took too long to be dealt with, there will only be a breach of the right if that unreasonable delay counts against the state. And so it follows that the focus is not on unreasonable delay in general, but on unreasonable delay that properly counts against the state. We must therefore attribute responsibility for the delay that has occurred and only factor in the delay which can fairly be counted against the state in deciding whether the *Charter* right has been infringed.
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> [153] Finally, s. 11(*b*) implicates several distinct interests, both individual and societal. Excessive delay implicates the liberty, security, and fair trial interests of persons charged, as well as society's interest in the prompt disposition of criminal matters and in having criminal matters determined on their merits. Historically, the liberty interest was the focus.
>
> [154] More recently, the "overlong subjection to the vexations and vicissitudes of a pending criminal accusation" — the stigmatization, loss of privacy, stress and anxiety of those awaiting trial — has been recognized as implicating the security of the person charged.

> [155] A third interest protected by s. 11(*b*) is the accused's interest in mounting a full and fair defence.
>
> [156] Finally, the right to be tried within a reasonable time has a societal dimension…but societal interests do not all point in the same direction. On one hand, the wider community has an interest in "ensuring that those who transgress the law are brought to trial and dealt with according to the law" and in "preventing an accused from using the [s. 11(*b*)] guarantee as a means of escaping trial". On the other hand, there is a broad societal interest in ensuring that individuals on trial are "treated fairly and justly". The community benefits "by the quick resolution of the case either by reintegrating into society the accused found to be innocent or if found guilty by dealing with the accused according to the law" and witnesses and victims benefit from a prompt resolution of a criminal matter.
>
> [157] While the right to be tried within a reasonable time implicates all of these interests, it is important to recognize that it is a free-standing right.

[251] I agree with Sykes J's consolidation of the questions (outlined at para 148 ante) that should be asked by the court in seeking to determine whether there has been a violation of a defendant's constitutional right to trial within a reasonable time. I have only one reservation. In respect of the remedy of compensation, I would not stipulate that compensation has to be assessed at the conclusion of the trial. The advantage of assessing compensation at the end of the trial is that all factors are then known. Post trial assessment of compensation would be the norm where compensation is seen to be an appropriate remedy. However, there may be rare circumstances where compensation can be properly awarded independent of the eventual outcome of the trial, in recompense for the infringement of the guarantee of trial within a reasonable time.

[252] Applying the framework proposed by Sykes J**,** despite the paucity of information, there is enough material to determine in this case whether the delay is unreasonable and in breach of section 14(3).

Has section 14(3) been breached in this case? The four questions:

1. *Is an unreasonable delay inquiry justified?*

[253] By any measure a preliminary inquiry that is not concluded after over four years and has effectively stalled, must qualify to justify an inquiry.

2. *What is a reasonable time for the disposition of a case like this one?*

[254] While I do not find it appropriate to lay down any timelines given the absence of data as to the throughput of cases over the years and the incomplete nature of the facts concerning the available evidence in this case, it is manifest that whatever the reasonable limit it has been significantly exceeded in this case. The matter is still at the stage of inquiry as to whether or not a trial should be held!

3. *How much of the delay that actually occurred counts against the state?*

[255] Even without the existence of guidelines the delay in this matter must be considered way beyond that reasonably attributable to institutional or inherent delays. Though there is limited evidence that some delay was occasioned by absence of defence counsel from a few hearings, it is not in dispute that the main reason the preliminary inquiry has been delayed is the absence of witnesses, one of whom decamped in the middle of cross-examination and has not been seen since. There was no clear indication before the action was filed of when the preliminary inquiry would be completed and whether or not the directions given by the learned Director of Public Prosecutions had bourne any fruit.

4. *Was the delay that counts against the state unreasonable?*

[256] It is over 4 years since the claimant has been arrested and the preliminary inquiry has not been completed to determine if there should be a trial. The main reason the matter has not been completed is due to absence of witnesses. Perhaps inferentially it is also due to further investigative steps that were being pursued under the guidance of the Director of Public Prosecutions, but that is not clear. In any event that would also count against the state. This case is however clear. Any notion of reasonableness in these circumstances must lead to the conclusion that the claimant's right under section 14(3) has been violated. The question that now remains: what is the appropriate remedy in this case?

What is the appropriate remedy for breach of section 14(3) in this case?

[257] As the cases have shown, depending on the time at which the breach is discovered different remedies are possible based on the jurisprudence accepted.

If the breach is determined before trial, based on the analysis conducted by Sykes J and in this judgment the Canadian, American and Scottish approaches would seem to favour a stay or dismissal of the proceedings. In other jurisdictions such as England, Guyana and in Jamaica, prior to the incorporation of section 14(3) in the Constitution, the appropriate remedy has usually been a declaration acknowledging the breach, action to expedite the hearing as far as practicable and possibly release of the defendant on bail if he was in custody. It is only where the effect of the delay was that the defendant could no longer receive a fair trial that in these latter jurisdictions a stay was considered appropriate.

[258] If the breach is established after the hearing in Canada, America and Scotland the remedy would usually be a quashing of the conviction. In England, Guyana and in Jamaica, prior to the incorporation of section 14(3) in the Constitution, the appropriate remedy has included, a declaration acknowledging the breach, reduction in sentence and as mentioned in the ***Attorney General's reference No 2 of 2001*** the payment of compensation to an acquitted defendant. The conviction would only be quashed if the trial of the defendant or proceedings were rendered unfair.

[259] It is easy to understand why the appropriate remedy where a fair trial cannot be guaranteed must be a stay. Nothing else would be able to vindicate the right to a fair trial. If there cannot be a fair trial there should be no trial. However, in respect of the right to trial within a reasonable time, counsel for the defendant relied on ***Boolell*** in which it was stated at page 432 that, "The right is to trial without undue delay; it is not a right not to be tried after undue delay". This is also in keeping with the position expressed by Lord Bingham in ***Attorney General's Reference No 2 of 2001*** where at para 20 he found it to be anomalous that, *"the right to a hearing should be vindicated by ordering that there be no trial at all."* That position accords

with my own view. While there may be circumstances that a stay may be the appropriate remedy where there has been a violation of the right to trial within a reasonable time, it should not be seen as the automatic remedy. I do not understand that to be the position of Sykes J either (see para 142 ante), though he has found a stay to be the appropriate remedy in the circumstances of this case (see para 167 ante).

[260] A stay is the most extreme remedy. It should be the last resort and only employed if no other is suitable. While it is now clear there is no need to prove actual prejudice to establish the violation of the trial within a reasonable time requirement, the proof of actual as opposed to presumed prejudice should, I find, have an impact on the remedy. Rights exist in balance. The claimant has a right to a trial within a reasonable time. This prevents inordinate pre-trial detention where the accused is not a proper candidate for bail and limits the time the accused, his family and associates are "in suspended animation" awaiting the outcome of the charges against him. There is also societal interest in ensuring accused persons are tried within a reasonable time, as this reduces the trauma victims of crime (where the crime is non-fatal), witnesses and the family members and associates of victims and witnesses have to endure. Trials held in a timely fashion also save both the accused, where he funds his own defence, and the State financial costs, which escalate the longer it takes for the trial to be completed.

[261] The state however also has another overriding interest — the attainment of justice. Wherever possible, a trial should be held and a determination made as to whether or not the charges against the accused can be properly made out. Where the accused has not demonstrated actual prejudice caused by the delay in bringing his matter to trial that would compromise his right to a fair trial, a stay may not usually be the appropriate remedy. If there can still be a fair trial it seems a strong argument can be made that there would be an overbalancing of the interest of the accused against that of the society if an immediate stay as opposed to some other appropriate remedy or remedies were fashioned.

[262] I make it clear however that I am not saying that a stay will never be appropriate if actual prejudice to the right to a fair trial cannot be demonstrated. It has been established that the right under section 14(3) is independent of the right to a fair

trial. The issue concerns the appropriate remedy. There may no doubt be some circumstances where the breach of the section 14(3) right is so egregious that the inherent prejudice from the delay is such that, regardless of the effect of the delay on the fairness of the trial, it would be unconscionable to try someone after that length of time. There are also other factors which may be pivotal to the remedy chosen in a particular case. As indicated earlier in ***Bell***, a contributing factor that should not be overlooked which led to the declaration (effectively a stay), was that no further evidence had previously been offered against the appellant due to the unavailability of witnesses. The appellant had been discharged. He was then subsequently rearrested and a date for retrial set. The Judicial Committee at page 593 stated that, *"If fairness required the appellant to be discharged…fairness required that he should not be rearrested…"* In those circumstances, on top of the undue delay it is unsurprising that the Privy Council held that his right to a fair trial within a reasonable time was infringed. It was unfair and unconscionable to seek to try the appellant after that length of time and after he had already been assured that the charges against him had come to an end.

[263] What is the situation we have here? The period of delay in this matter is admittedly long. Neither the presiding Magistrate (now Parish Judge) nor the prosecution marshalling the evidence have taken the necessary steps to satisfactorily advance the matter over these four years. There is however also the societal interest to consider.

[264] The allegations against the accused claimant are very serious. The court is uncertain of the quality of evidence that is now available against the accused. He has an antecedent history which involves serious criminal blemishes, a factor which would have affected his ability to obtain a bail offer earlier than he did. He has not sought to demonstrate that his defence would be compromised by the

delay if he were now to be tried. In these circumstances, balancing the rights and interests of the claimant and the public interest in the attainment of justice, it is my considered view that an immediate stay is not the appropriate remedy in this situation. If he were to be committed for trial and convicted, any time spent in custody would be credited to his sentence as well as his sentence could be reduced to compensate for the breach, if there was no earlier compensation. If he is acquitted after trial, the claimant would not be able to regain the lost years in custody. It is in this respect that Lord Bingham's observation in ***Attorney General's Reference No. 2 of 2001*** that time lost is irretrievable is most apposite. Lord Bingham appeared to contemplate the payment of damages only to an acquitted defendant, presumably because to a convicted defendant other remedies such as a reduction of sentence or quashing of the conviction, in more egregious circumstances, would likely be seen as more valuable than damages.

[265] This court is however in the position that a breach of the claimant's rights under section 14(3) has been identified before trial, in a context where it has been established that section 14(3) provides a separate and distinct right independent of the fair trial rights under section 16(1). The violation under section 14(3) is also significant given the length of time that has passed without even the preliminary inquiry having been completed, even though standard time guidelines are not yet in place. In this new constitutional landscape and in the peculiar circumstances of this case, something more than a declaration, the reduction in the bail offer and action to expedite the hearing, but short of an immediate stay, is required as a remedy. The remedy should adequately compensate the defendant in a manner that signifies from a societal standpoint the importance of upholding constitutional rights.

[266] Damages though perhaps unusual in this pre-trial context seem to be the most appropriate way to vindicate the claimant's rights, while still maintaining the societal interest that the question of liability or otherwise for serious offences be determined after a trial. It is in my view, in the exceptional circumstances of this case, a just and proportionate way to address the breach of the claimant's rights

under section 14(3). It is appreciated that the process of determining the quantum of damages will require a new conceptual approach, as the eventual outcome of the matter is unknown and no benchmark or rough guidelines have

yet been established as an approximate reasonable time for preliminary inquiries to be completed. It may be that the time lines suggested by Sykes J, (see paras 154 -162 ante), may prove appropriate but in the absence of having the opportunity to examine and analyse available data, which were not put before us, I am not sure.

[267] As far as preliminary enquiries go this will now be purely a historical contemplation as, but for matters such as this which commenced under the old system, the preliminary enquiry process has now been replaced by committal proceedings. It may be that in the submissions that will be required as a part of the disposition of this matter, these matters can be addressed as best as possible in assisting the court to make a suitable award. The fact that the task may be challenging, does not mean the remedy is inappropriate. It should be carefully noted that the violation of the claimant's section 14(3) right is such, that while an immediate stay is not in my view the fitting remedy at this time, if the steps prescribed by the court are not strictly followed, a stay will then be necessary.

[268] In closing, I add that having read my brother Anderson J's judgment in draft, I adopt Sykes J's comments in relation thereto.

Disposition

[269] Accordingly, I would therefore resolve the matter in this fashion:

a) A declaration is granted that the claimant's constitutional right to be tried within a reasonable time under section 14(3) of the Constitution has been violated;

b) In the event the claimant has to date been unable to take up the grant of bail, the bail offer is reduced to $300,000 with one or two sureties. Claimant to report to the nearest police station to his place of abode, every Monday and Saturday between the hours of 6 a.m. and 8 p.m. Any travel document of the claimant to be surrendered to the police. Stop order in respect of the claimant to be placed at all air and sea ports.

c) Pursuant to the powers granted to the Constitutional Court under section 19 of the Constitution, the claimant is awarded constitutional damages to be assessed, as compensation for the breach of his constitutional rights under section 14(3) of the Constitution. Written submissions on the quantum of damages should be filed by counsel for the claimant on or before April 13, 2018 and by counsel for the defendant in reply, on or before April 27, 2018.

d) Unless there is earlier intervention by the Director of Public Prosecutions the preliminary inquiry must be completed and a determination made as to whether the claimant should be committed for trial on or before May 30, 2018, failing which, any trial of the claimant on the charges on which he is currently before the Parish Court shall be stayed.

e) If the claimant is committed for trial or placed before the circuit court on a voluntary bill of indictment, his trial shall commence before the end of the Hilary Term 2019, failing which the trial of the charges shall be stayed unless the trial is delayed due to the fault of the defence. It is recognized that this order may result in the claimant's case "leapfrogging" other matters. However, in the peculiar circumstances of this case this order is necessary to prevent further breach of the rights of the claimant.

f) Costs awarded to the claimant to be agreed or taxed.

ANDERSON J

[270] I agree entirely with the reasoning and conclusion of my brother Judge – Fraser J, but I believe that I can usefully add something to same.

[271] I am of the considered opinion that ordinarily, whenever it is to be contended, while proceedings are before a court in this jurisdiction, that those court proceedings constitute a violation of any of a person's fundamental rights and freedoms, in circumstances wherein that person is a party to those court proceedings, it is absolutely necessary for that contention to first be raised before that court.

[272] That is as equally true when such contentions are to be made while proceedings are ongoing before a Parish Court, as it is, when proceedings are ongoing before this court.

[273] Since the Supreme Court though, has original jurisdiction with respect to all claims for breaches of constitutional rights, it follows that in any case wherein an alleged breach of an accused person's constitutional rights is raised for the first time, in a Parish Court, while either trial or committal proceedings are either ongoing in that court, or are expected to commence there at some future time, then, those proceedings ought to be adjourned for a limited period of time, to permit a claim to be brought before this court, for alleged fundamental rights violation(s).

[274] Once the Parish Court has been notified that such a constitutional claim has been brought before this court, it is then incumbent on the Parish Court to adjourn the matter for specified dates, until that claim is concluded before this nation's higher court. Under no circumstances though, should that matter be adjourned, 'sine die,' as that course is not appropriate for criminal proceedings.

[275] By taking that approach it will then enable the Parish Court to provide to this court, a complete record of that lower court's proceedings, pertaining to that matter. It is incumbent on any applicant who is seeking constitutional redress in

that type of scenario, to enable that such record is made available to this court, as also, it is incumbent on the Parish Court to provide same to him. This is necessary, so as to ensure that justice can be properly effected.

[276] It is incumbent on the applicant to provide that record to this court, because, it is the applicant who has the burden of proof in any claim for constitutional redress. If though, the applicant fails to make same available to this court, either at all, or in a timely way, then it will be incumbent on the Office of the Director of Public Prosecutions to obtain same from the Parish Court and to provide same to this court, by means of affidavit evidence, exhibiting same.

[277] If such a procedure had been utilized by the parties to this claim and if the defendant had properly, as ought to have been done, collaborated with the Office of the Director of Public Prosecutions, for the purposes of this claim, then the record of proceedings before the Parish Court would now have been available to this court. That record is of particular value to this court, in a case wherein a permanent stay of criminal proceedings is sought by a claimant.

[278] That is so because the cause of the delay is always a relevant factor for this court, in determining what relief, if any, ought to be granted to a claimant, in circumstances wherein the length of the delay in bringing a criminal case to trial, has been unduly long. That is a relevant factor for this court to carefully consider, in deciding as to what relief ought to be granted to the claimant, in such a case. The grant of a permanent stay of criminal proceedings, is only one option in such a circumstance.

[279] As things presently are, in this court, in respect of this claim, regrettably, this court is not though, now possessed with such record from the court below. This though,

is to my mind, an exceptional case, in terms of the length of the delay in concluding the preliminary inquiry proceedings.

[280] As such, it would be pointless and undoubtedly lead to even greater delay and greater injustice to the claimant, if the Parish Court's record of proceedings as

are pertinent to this claim, were to be sought by this court, prior to this court rendering its judgment in respect of this claim.

[281] In the circumstances, I am of the view that due to the exceptional circumstances of this claim, the absence of the Parish Court's record of proceedings should not preclude the claimant from obtaining the reliefs as my brother Judge – Fraser J has suggested. For the reasons which he has provided, I am of the view that those reliefs are the appropriate ones to be granted in the claimant's favour.

SYKES J

ORDER

a) It is hereby declared that the claimant's constitutional right to be tried within a reasonable time under section 14(3) of the Constitution has been violated;

b) By a majority (Sykes J dissenting):

   i) In the event the claimant has to date been unable to take up the grant of bail, the bail offer is reduced to $300,000 with one or two sureties. Claimant to report to the nearest police station to his place of abode, every Monday and Saturday between the hours of 6 a.m. and 8 p.m. Any travel document of the claimant to be surrendered to the police. Stop order in respect of the claimant to be placed at all air and sea ports;

   ii) Pursuant to the powers granted to the Constitutional Court under section 19 of the Constitution, the claimant is awarded constitutional damages to be assessed, as compensation for the breach of his constitutional rights under section 14(3) of the Constitution. Written submissions on the quantum of

damages should be filed by counsel for the claimant on or before April 13, 2018 and by counsel for the defendant in reply, on or before April 27, 2018;

iii) Unless there is earlier intervention by the Director of Public Prosecutions the Preliminary Inquiry must be completed and a determination made whether the claimant should be committed for trial on or before May 30, 2018, failing which, any trial of the claimant on the charges on which he is currently before the Parish Court shall be stayed;

iv) If the claimant is committed for trial or placed before the circuit court on a voluntary bill of indictment, his trial shall commence before the end of the Hilary Term 2019, failing which the trial of the charges shall be stayed unless the trial is delayed due to the fault of the defence. It is recognized that this order may result in the claimant's case "leapfrogging" other matters. However, in the peculiar circumstances of this case, this order is necessary to prevent further breach of the rights of the claimant.

c) Costs awarded to the claimant to be agreed or taxed.