**JAMAICA**

**IN THE COURT OF APPEAL**

**BEFORE: THE HON MR JUSTICE F WILLIAMS JA**
**THE HON MISS JUSTICE SIMMONS JA**
**THE HON MR JUSICE BROWN JA (AG)**

**SUPREME COURT CRIMINAL APPEAL NO 10/2014**

**MAITLAND RECKFORD v R**

**Mrs Caroline P Hay QC and Zurie O Johnson for the appellant**

**Miss Paula Llewellyn QC, Director of Public Prosecutions and Miss Shanique Farquharson for the Crown**

**7 February 2022 and 3 February 2023**

**BROWN JA (AG)**

## Introduction

[1] The appellant was twice tried, and as many times convicted for the murder of Conroy Llewellyn ('the deceased'), committed on 23 February 2003. Arising from his first conviction (27 July 2007) he was sentenced to life imprisonment, with the stipulation that he should serve 25 years before becoming eligible for parole. His first conviction was quashed on appeal and a retrial ordered on 9 July 2010 (see **Maitland Reckford v R** JMCA Crim 40). The appellant remained in custody at the date of his second trial.

[2] His second trial commenced on 7 October 2013 in the Home Circuit Court and culminated in his conviction on 11 October 2013. The appellant was subsequently sentenced, but neither the sentence nor the date on which it was imposed, is ascertainable from the transcript of the proceedings, as those parts, along with others, are missing. Additionally, the indictment upon which he was tried does not form part of the record. Following his October 2013 conviction, the appellant applied for leave to appeal his conviction and sentence. His Criminal Form B1, on which the application was

made, is dated 18 November 2013, and records that he was, on 15 November 2013, sentenced to life imprisonment, with the stipulation that he serves 21 years' imprisonment before becoming eligible for parole.

[3] A single judge of appeal considered the appellant's application for leave to appeal and, on 28 April 2021, granted him leave to appeal both his conviction and sentence. In granting the appellant leave to appeal, the single judge made observations which impugn the fairness of his trial. Firstly, in a case dependent on the correctness of the visual identification of a sole eyewitness, whose evidence was riddled with inconsistencies, evidence was led which suggested that statements were taken from other persons who identified the appellant, but who did not testify. This, the single judge of appeal considered to be prejudicial, left as it was, without a careful direction from the learned trial judge ('the learned judge'). Secondly, evidence which was led to explain why no identification parade was held, included material showing that the appellant had been before the court for other offences. This too was left before the jury without a warning from the learned judge. The single judge of appeal also noted that sections of the transcript of the proceedings were missing.

[4] On 7 February 2022, at the conclusion of the hearing of this appeal, we agreed with the submissions made by his counsel, on supplementary grounds one, two and three; these grounds concerned the failure to provide a full record of the proceedings and to have the matter heard within a reasonable time. While all four grounds were fully argued, only grounds one, two and three were frankly conceded by the learned Director of Public Prosecutions ('DPP'). In essence the argument which elicited the learned DPP's concession was that it was wholly impossible to review the appellant's conviction and sentence. Accordingly, we made the following orders:

> "1. It is declared that the right of the appellant under section 16(7) of the Constitution of Jamaica, to be given a copy of the record of proceedings made by or on behalf of the court, has been breached.
>
> 2. It is declared that the right of the appellant under section 16(8) of the Constitution of Jamaica, to have his conviction and sentence

reviewed by a superior court within a reasonable time has been breached by the excessive delay between his conviction and the hearing of the appeal.

3. The appeal is allowed.

4. As redress for those breaches of his constitutional rights in these circumstances, his conviction is quashed, the sentence is set aside and a judgment and verdict of acquittal is entered."

[5] What follows are our promised reasons for making the above pronouncements, preceded by a brief background.

**Background**

[6] The following background facts have been extracted from the learned judge's summation, as the evidence-in-chief and a section of the cross-examination of the sole eyewitness, Miss Anita Morrison ('Miss Morrison'), are part of the missing transcript. Miss Morrison gave her statement to the police on 25 March 2003. Miss Morrison asserted that she knew the appellant before the date of the incident as she used to cornrow his hair. Miss Morrison testified that on the night in question, at about 8:25, she, along with her son, went to visit her sister. They entered the yard and had reached the front of the house, about five feet from the gate. While there, the gate was kicked off its hinges and two armed men entered. She recognized both men. One was the appellant, who was known to her as "Shuka". The other man she knew as "Sugar".

[7] Miss Morrison said the yard was well-lit. Sitting in the yard, under a cherry tree, were the deceased and Carlton, the father of Miss Morrison's child. The appellant ran towards the deceased, who was trying to run towards the gate, put the gun to his head and fired twice. The location, number and nature of wounds, as described by Miss Morrison, were discrepant with the evidence of the pathologist. Firstly, whereas Miss Morrison testified that the deceased was shot in his head, the pathologist's evidence was that the deceased was shot in the back. Secondly, Miss Morrison's evidence was that the deceased was shot twice. On the other hand, the pathologist testified that there was but one entry gunshot wound on the body of the deceased. Thirdly, the evidence of Miss

Morrison was that the deceased was shot at close range (she demonstrated a distance of "inches"). However, the evidence of the pathologist, was that there was no gunpowder deposit on the body; this, the expert said, indicated the weapon from which the bullet was fired was at a distance greater than 2 feet from the deceased.

[8] In addition to the above discrepancies, there were notable inconsistencies in Miss Morrison's evidence. Three sections of her deposition or statement were tendered into evidence as exhibits one, two and three. Exhibit one concerned the portion of her evidence at the preliminary enquiry in which she had been recorded as saying "[t]he kitchen prevented me from seeing his face". In her testimony at the trial, Miss Morrison insisted that nothing blocked her view and the evidence at the preliminary inquiry would have been a mistake. The other two exhibits were not discussed in the summation.

[9] There was also some difficulty with Miss Morrison's evidence about her opportunity to see the appellant. Miss Morrison said the incident lasted for about 55 seconds and she saw the men for about 30 seconds. Miss Morrison, however, admitted that the incident happened quickly, which undermined her estimate of the duration of the incident.

[10] The appellant testified in his defence. The learned judge characterized the appellant's defence as an alibi. However, the evidence for the defence does not form part of the available transcript. More particularly, the appellant's evidence was neither rehearsed at length nor summarised in the learned judge's summation.

## The appeal

[11] The appellant filed four grounds of appeal in his application for leave to appeal his conviction and sentence. Those original grounds were neither argued nor abandoned. Mrs Hay QC asked that the grounds be allowed to stand. Therefore, we include them for the sake of completeness. As filed in the Criminal Form B1, they are:

> "1. **Misidentity by the Witness**: That the prosecution witness wrongfully identified me as the person or among the persons who committed the alleged crime.

2. **Lack of Evidence:** That during the Trial [sic], the prosecution failed to put forward any piece of material and forensic, scientific DNA evidence to link me to the alleged crime.

3. **Unfair Trial**: That the evidence and testimonies upon which the Learned Trial Judge relied on [sic] for the purpose to convict me lacks facts and credibility thus rendering the verdict unsafe in the circumstances.

4. **Miscarriage of Justice**: That the court erred in lack [sic] in not upholding the no case submission. Thus my innocence would not in question [sic] resulting in my innocence." (Emphasis as in the original)

[12] The appellant also filed four supplementary grounds of appeal. Leave was sought, and granted, to argue these grounds. The four supplementary grounds of appeal are quoted below:

"1. The right of the Appellant under section 16(7) of the Charter of Fundamental Rights and Freedoms, 2011 to a copy of the full record of the proceedings made at his trial for murder by or on behalf of the Court has been breached occasioning a fundamental miscarriage of justice. For that reason and by way of constitutional redress, the conviction for murder ought to be quashed, verdict of acquittal entered and the sentence set aside.

2. The Appellant's right of [sic] due process of law [under] section 16(1) of the Charter of Fundamental Rights and Freedoms, 2011 to a fair hearing within a reasonable time by an independent and impartial court established by law has been breached. For that reason and by way of constitutional redress, the conviction for murder ought to be quashed, verdict of acquittal entered and sentence set aside.

3. The right of the Appellant under section 16(8) of the Charter of Fundamental Rights and Freedoms, 2011 to have his conviction and sentence reviewed within a reasonable time [sic] by a Court of superior jurisdiction to the one at which he was convicted has been breached occasioning a fundamental miscarriage of justice. For that reason and by way of constitutional redress, the conviction for murder ought to be quashed, verdict of acquittal entered and sentence set aside.

> 4. The learned trial judge failed to exclude, carefully treat with or warn the jury as to how to treat with prejudicial evidence to include inadmissible hearsay tending to support identification and evidence of the Appellant's past possible criminal conduct. This failure occasioned a substantial miscarriage of justice. The conviction is thereby unsafe and by that miscarriage of justice it ought to be quashed, verdict of acquittal entered and the sentence set aside."

The submissions on supplementary grounds one, two and three

[13] Mrs Hay argued these grounds together as, she submitted, they flowed from the same complaint. The submissions in reply by the learned Director of Public Prosecutions were similarly tailored. Since there was a considerable meeting of the minds of both learned Queen's Counsel in the arguments under these grounds, in the interest of brevity, we will condense and combine their submissions and, hopefully, do no violence to the clarity and elegance of their individual presentations.

[14] As was telegraphed by the single judge of appeal, both sides agreed that significant portions of the transcript of the proceedings are missing. These sections are itemised below:

1. The entire examination-in-chief and part of the cross-examination of Miss Anita Morrison (sole eyewitness).

2. The case for the defence; that is, the examination-in-chief and cross-examination of the appellant (perhaps recorded on the missing pages 87 and 88).

3. Aspects of the learned judge's summation; that is, pages 115 and 116.

4. The taking of the verdict.

5. The sentence hearing.

[15] There was also a convergence in the submissions that almost nine years have elapsed between the date of the appellant's second conviction and the production of the

partial transcript of the proceedings. Both counsel spoke to the exhausting efforts to obtain the full transcript. This submission dovetailed with their further submission that it is fair to say that the full transcript of the proceedings will never become available.

[16] The consequence of these irremediable defects in the transcript of the proceedings is the neutralising of this court's ability to review the appellant's conviction and sentence. Therefore, the cumulative impact of the delay in producing a complete transcript of the proceedings and the neutering of appellate review, is a miscarriage of justice, warranting the quashing of the conviction and the setting aside of the sentence. Both sides relied on **Evon Jack v R** [2021] JMCA Crim 31. Mrs Hay also cited **R v Dalton Reynolds** (unreported), Court of Appeal, Jamaica, Supreme Court Criminal Appeal No 41/1997, judgment delivered 25 January 2007.

The submissions on supplementary ground four

[17] As was intimated above (see paragraph [4]), the submissions for the appellant on this ground diverged from those of the Crown. Therefore, the submissions on ground four will be treated with separately, beginning with the submissions advanced by Mrs Hay. Mrs Hay's submissions struck, firstly, at the learned judge's management of the trial and, secondly, his duty to jealously guard the fairness of the trial. In respect of the first complaint, Mrs Hay charged that the learned judge improperly allowed inadmissible hearsay evidence to be led by the prosecution that (a) the appellant had also been identified by persons who did not testify, and (b) the appellant did not face an identification parade owing to his incarceration or detention for other offences not contained in the indictment.

[18] In relation to his gatekeeper role to ensure the fairness of the trial, Mrs Hay submitted that the learned judge failed to warn the jury concerning the inadmissible hearsay evidence. Learned Queen's Counsel argued that the admission of evidence that the appellant had been also identified by persons not called to testify had the effect of shoring up, in the eyes of the jury, the weak evidence of the sole eyewitness who testified.

Consequently, the learned judge had a duty to warn the jury that that evidence was incapable of fortifying the eyewitness' evidence.

[19] As it concerned the explanation for not placing the appellant on an identification parade, Mrs Hay made, in essence, two points. In the first place the explanation was unnecessary. Secondly, if the prosecution considered it necessary to proffer an explanation, it was sufficient to indicate that there was a reason without going into details. This evidence, Mrs Hay contended, without a warning to the jury to disregard it, left the jury with the view that they could rely on it as evidence of bad character.

[20] In Mrs Hay's submissions, the learned judge's failure to exclude this "prejudicial evidence" or to warn the jury as to its limitations led to irreversible prejudice, either singularly or, together with grounds one, two and three. The ultimate impact was to deprive the appellant of a fair trial and cause a grave miscarriage of justice.

[21] The learned Director of Public Prosecutions, with characteristic candour, accepted that the learned judge did not direct the jury as to how to treat with the inadmissible hearsay evidence. However, in contradistinction to the position of Mrs Hay, the Director of Public Prosecutions argued that the learned judge's omission could not render the jury's verdict unsafe and thereby undermine the appellant's conviction as the case for the prosecution was founded upon identification, not the hearsay evidence. In this regard, the learned judge's directions on the issue of identification were beyond reproach. So, although it would have been desirable for the learned judge to direct the jury on the hearsay evidence, once the jury accepted the sole eyewitness as reliable and credible, the conviction was sufficiently grounded. The learned Director of Public Prosecutions therefore concluded that this ground was not a basis upon which the conviction should be quashed.

Discussion

[22] The complaints in grounds one, two and three, together alleged breaches of the appellant's rights under Chapter III, the Charter of Fundamental Rights and Freedoms,

of the Jamaican Constitution ('the Charter'). Specifically, the appellant asserts that his right to due process under sections 16(1), (7) and (8) of the Charter have been breached. It is therefore expedient to set out the relevant provisions which the appellant alleges have been engaged by the actions, or inactions of the State:

> "16. (1) 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.
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> (2) ….
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> (3) …
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> (4) …
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> (5) …
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> (6) …
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> (7) An accused person who is tried for a criminal offence or any person authorized by him in that behalf shall be entitled, if he so requires and subject to payment of such reasonable fee as may be prescribed by law, to be given for his own use, within a reasonable time after judgment, a copy of any record of the proceedings made by or on behalf of the court.
>
> (8) Any person convicted of a criminal offence shall have the right to have his conviction and sentence reviewed by a court the jurisdiction of which is superior to the court in which he was convicted and sentenced ..."

[23] The essence of section 16(1) of the Charter is the guarantee of the reasonable time standard. It is now well-established that "fair hearing within a reasonable time" includes the hearing on appeal: **Melanie Tapper v R** [2012] UKPC 26; **R v Dalton Reynolds**. A fair hearing within a reasonable time, as a concept, is not susceptible to precise definition, on account of its symmetry or organic relationship with disparate circumstances and points in time. Their Lordships at the United Kingdom Privy Council ('UKPC') in **Herbert Bell v Director of Public Prosecutions** (1985) 32 WIR 317; (1985) 22 JLR 268 ('**Bell v DPP'**), recognized as much.

[24] In **Bell v DPP**, at page 322, the UKPC accepted that a consideration of whether a reasonable time had elapsed could not be divorced from "past and current problems which affect the administration of justice in Jamaica". In short, there is no universally accepted standard of a 'reasonable time' within the which hearing of a criminal trial should take place. In **Curtis Charles, Steve Carter and Leroy Carter v The State** (1999) 54 WIR 455 ('**Charles and Carter v The State**'), Lord Slynn of Hadley in discussing the propriety of a re-trial, spoke to the differing circumstances and, by extension, the reasonable time standard, which obtained in England and Trinidad and Tobago, and unequivocally regarded any comparison between the two as wrong. He referred to Lord Widgery CJ's remarks in **R v Saunders** (1973) 58 Cr App Rep 248, at page 255, that it was outside the court's knowledge for a re-trial to take place three and a half years after the commission of the offence, and added this comment, at page 461:

> "However, it would be wrong to apply conditions and practices in England in this matter to cases in Trinidad and Tobago ..."

[25] Brooks JA, (as he then was) in **Lescene Edwards v R** [2018] JMCA Crim 4 (reversed on appeal to the UKPC on other grounds), at para. [47], made two observations on their Lordships' judgment in **Bell v DPP**. Firstly, **Bell v DPP** did not go so far as to say how long is too long. Secondly, their Lordships accepted that in considering whether the right guaranteed under section 16(1) of the Charter had been breached, the court is engaged in balancing two competing principles; namely, prejudice to the appellant and the public interest that the guilty should be punished.

[26] Therefore, in order to determine whether the appellant's right under section 16(1) of the Charter has been breached, the court must take into its consideration three factors: (a) the length of the delay, (b) the reasons advanced in justification of the delay, and (c) the appellant's responsibility to assert his right (see **Bell v DPP**, at page 324; **Lescene Edwards v R**, at para [48]).

[27] I will take first the length of the delay. It appears the transcript of the proceedings was not produced until seven years after the appellant was convicted and sentenced.

There are three declarations certifying the accuracy of the transcript, in accordance with rule 3.8(3) of the Court of Appeal Rules 2002. The last of those certificates is dated 25 November 2020. Following that, the transcript of proceedings was received in the registry of this court on 16 December 2020. Therefore, between the conclusion of the trial and the hearing of the appeal, a full eight years had elapsed. Even if the delay is reckoned from the date on the appellant's Criminal Form B1 (15 November 2013), the appeal was not heard until the interregnum had entered its ninth year.

[28] The length of the delay in **Bell v DPP** (between the date of arrest and retrial) was five years. Lord Templeman described that period as "presumptively prejudicial" (see page 324 of the judgment). In **Charles and Carter v R**, a delay of nine years was politely described as "considerable and disturbing", per Lord Slynn at page 461. Brooks JA, exercising considerable restraint, found the 10 years it took for **Lescene Edwards v R** to come on for trial to be "unacceptable" (see para. [49] of this court's judgment).

[29] If, as was suggested in **Bell v DPP**, in the face of delay which is "presumptively prejudicial", there is no necessity for further inquiry into the factors which must be placed in the scale, then this is a case which meets that threshold. However, the learned Director of Public Prosecutions described the delay as "inordinate". The Crown offered very little, by way of explanation for this deplorable state of affairs. Although the tone of the submissions made on behalf of the Crown was one of resignation and humility, having regard to the date the last certificate from the court reporter was signed (25 November 2020), we think it less than sufficient to lean on the futility of exhaustive searches to locate the transcript, as the ultimate explanation. Whatever the explanation for the delay in the production of the transcript, there can be no doubt that the appellant's right to have his appeal heard within a reasonable time has been breached.

[30] Turning to the right to be given a copy of the record of the proceedings made by, or on behalf of, the court, within a reasonable time after judgment, upon payment of the reasonably prescribed fees, the breach is palpable. In **Evon Jack v R**, the delay between conviction and the production of the transcript was six years. Brooks P regarded that

delay, together with the failure to provide the transcript as ample evidence of a breach of section 16(7). After quoting section 16(7) of the Charter, at para. [20], Brooks P said:

> "There is … no doubt that Mr Jack's entitlement to this constitutional right has … been breached. The six-year delay in the production of the record of the summation, as well as the failure to provide the transcript of the evidence, are ample testimony of that breach."

In this case, there was not only an inordinate delay, to borrow the learned Director of Public Prosecutions' characterization, but, as in **Evon Jack v R**, this was compounded by the production of an incomplete transcript. This provides a convenient segue to the alleged breach of section 16(8) of the Charter.

[31] By virtue of section 16(8) of the Charter, the appellant has a right to have his conviction and sentence, occurring as they did in the Supreme Court, reviewed by this court, a court of superior jurisdiction to the Supreme Court. The issue which arises here is whether the appellant's conviction and sentence can be fairly reviewed by this court, having regard to the state of the transcript that has been produced. This, therefore, requires an examination of the central issue in the case.

[32] The main issue at the trial was the correctness of the visual identification of the appellant. The sole eyewitness was Miss Morrison. Having perused the transcript of the evidence, we agree with the learned Director of Public Prosecutions that the learned judge gave adequate directions in keeping with **R v Turnbull and others** [1976] 3 All ER 549 ('**Turnbull Guidelines**'). However, as was also conceded by her, there is a dearth of material to suggest that the jury was directed on how to relate the several material inconsistencies to the case for the defence. Indeed, as Mrs Hay submitted, the available transcript does not reveal whether the case for the defence was clearly put to the jury, notwithstanding the learned judge's several references to the appellant's testimony. The appellant's defence appears to have been alibi. However, the references in the learned judge's summation appear to fall short of giving the jury full assistance in this critical area.

[33] Since the case against the appellant depended on the correctness of the visual identification of a much-contradicted witness, the court, like the Crown, is handicapped in properly assessing the evidence of the sole eyewitness due to the missing portions of the transcript. At the risk of repetition, without the missing sections of the transcript, this court is unable to say if the issues raised at the trial were sufficiently, squarely and fairly placed before the jury. In short, this court is not in a position either to review the appellant's conviction or his sentence. The breach of the appellant's right under section 16(8) of the Charter is therefore clearly established.

**Redress for breaches of the appellant's constitutional rights**

[34] And so we come to the appropriate redress for these constitutional breaches. In **Evon Jack v R** it was acknowledged that this court is empowered to issue a public acknowledgment of the breach, grant a reduction in sentence, or quash the conviction of an appellant, without him or her having to resort to the Supreme Court under section 19 of the Constitution (the Supreme Court has original jurisdiction to hear and determine applications for constitutional redress - see para. [44] of the judgment).

[35] The last of the three options is to be reserved for cases in which either the fairness of the trial or the continuation of proceedings against the appellant has been compromised. Lord Carnwath, at para. 26 of **Tapper v DPP**, affirmed a number of principles outlined by Lord Bingham in the **Attorney General's Reference (No 2 of 2001)** [2004] 2 AC 72, which included the following:

> "*… 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 …*" (Emphasis as in the original)

Lord Carnwath went on to reserve the quashing of the conviction, as a form of redress for delay, for exceptional cases. At para. 28 he said:

> "… 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."

Therefore, resort to the remedy of quashing the conviction will only be appropriate where the delay has spawned substantial prejudice to the appellant; that is, prejudice which is more than presumptive, such as that arising from the length of the delay itself, as was said in **Bell v DPP**.

[36] In this case, there has been extreme delay between the date the appellant was convicted and when the appeal was set down for hearing, approximately nine years. Beyond that delay, the deficiencies in the transcript that was eventually produced make it impossible to conduct a fair review of his conviction and sentence. Furthermore, the incomplete transcript gives such a truncated view of the evidence against the appellant that it cannot be determined, on any reasonable standard, that it would be fair to order a re-trial. More compellingly, in the circumstances of this case, it would be grossly unfair to order the appellant to undergo a third trial for three main reasons. Firstly, the appellant was taken into custody no more than one month after the deceased was killed. In **Charles and Carter v The State,** at page 459, one of the three reasons given for the desirability of a speedy trial is, "to minimise the anxiety and concern of the accused". To have had a charge, like the sword of Damocles, hanging over his head for the better part of 19 years, borders on being inhumane. Secondly, and collateral to the preceding point, any re-trial ordered would not take place before the twentieth anniversary of the appellant's arrest and charge for the offence. That, we believe, could not be demonstrably justified in any free and democratic society. Thirdly, it appears, from the chronology provided by his counsel, that the appellant has remained in custody, at least from the date (23 March 2003) he was taken into custody as a suspect in this case, to the date of the hearing of his appeal. Consequently, assuming a similar outcome of a third trial, in both verdict and sentence, the appellant would have served already a substantial portion of any pre-parole period imposed. It was against this background that we considered the appropriate redress to be the quashing of the appellant's conviction.

**Conclusion**

[37] In this case, the prosecution's case was based primarily on the correctness of the visual identification of the appellant by a sole eyewitness. The quality of that evidence, and the appellant's evidence in rebuttal (alibi), were therefore pivotal to a fair review of the conviction, even allowing for the learned judge's adequate directions along the contours of the **Turnbull Guidelines**. Without those sections of the transcript, this court was not able to properly review the appellant's conviction. That fact, together with the failure to provide the appellant with a complete transcript and the extreme delay, post-conviction as well as the delay between the appellant's date of arrest and the date of any ordered re-trial, made quashing his conviction the only appropriate remedy in the circumstances.

[38] It was for the reasons articulated above that we made the orders set out at para. [4]. Having regard to our decision in respect of grounds one, two and three, we did not find it necessary to render a decision in relation to ground four.