In The Supreme Court of Bermuda

CRIMINAL JURISDICTION

2023 No: 22

BETWEEN:

THE KING

v

LARRY BENJAMIN

Mr. Adley Duncan, for the Director of Public Prosecutions

Mr. Philip Perinchief for the Defendant

Date of Hearing 3rd February 2025

Date of Ruling: 3rd March 2025

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APPROVED RULING

INTRODUCTION

1. This matter comes before the court on an application to stay proceeding based on an abuse of process together with testing the sufficiency of evidence against the charge of impaired driving causing grievous bodily harm

Counsel submissions

The Abuse of Process

2. The crux of the Applicant's submissions is that upon being arrested on 19th October 2018 in relation to this matter he was then interviewed, breath analyzed and bailed ('the prior period'). It was only circa August 2023 that the file was then passed from the Bermuda Police Service ("BPS") to the Department of Public Prosecutions ("DPP") office; which Mr. Perinchief submits amounts to an inordinate delay. Submissions were that during the prior period; there being no further investigation or interviews other than the October 2018 activity immediately following the incident. The prior period relates to the time from the incident to the Applicant being charged.

3. Mr. Perinchief helpfully set out the timeline as:

Date of Accident 19 October 2018

Date of Arrest 19 October 2018

Date of Caution Statement, breathalyser/interviews 20 October 2018

Date of bail 20 October 2018

Date file passed to DPP from police 1 August 2023

Date Information sworn 23 August 2023

Date Accused formally charged 29 August 2023

Date of first appearance in Magistrates' Court 29 September 2023

Date of first Supreme Court appearance 1 November 2023

Date of Quashing/Dismissal Hearing 30 January 2025

4. Mr. Perinchief furthered his submissions, that the approach which has been applied by the court where there has been delay in proceedings can be taken from *Robinson and Wallington v Director of Public Prosecution and anor [2019] Bda LR 73;* which highlights the constitution right

to a fair hearing within a reasonable time pursuant to s.6(1) of the Constitution. Mr. Perinchief says that the triggering event is where there is a lengthy lapse of time from when the defendant is arrested until the time that he faces trial (i.e. to charge); therefore, the court should be concerned so much so that it makes an inquiry of the Department of Public Prosecution's ("DPP") office to the administrative and prosecutorial activity which caused this delay.

5. The Applicant has had the proceedings hanging over his head for five (5) years and this is not the method in which matters should occur. With a lapse of time of this magnitude, the court must have concern. The DPP's office should have provided information explaining such delay and they have not. There is an acceptable delay which he says is potentially two (2) years between incident and charge; however a five (5) year delay is unacceptable and must be explained. A delay of this nature sets a dangerous precedent.

6. Where there is inordinate delay, there is a presumption of prejudice. The case of *Boolell v The State [2006] UKPC 46* he says indicates, regardless whether or not prejudice exists, an inordinate delay gives a presumption of prejudice; however, this is not an issue that will deny an Applicant. Drawing from the Robinson matter, he referred to paragraph 65:

> *In the Privy Council case, Boolell v Mauritius [2006] UKPC 46, the Court considered the right under the Constitution of Mauritius section 10(1) to a fair trial within a reasonable time regardless of whether the defendant had been prejudiced by the delay. A right for all purposes identical to the right enjoyed by an accused person under section 6(1) of the Constitution. Lord Carswell delivered the judgment of the court, and at paragraph 32 said: 33 "Their Lordships accordingly consider that the following propositions should be regarded as correct in the law of Mauritius:*

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. *(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."*

The Prejudice

7. The Applicant is a bus operator driver who has suffered as a result of this delay. The material prejudice suffered is related to the Applicant's age, mental and physical health. He did not drive at work for two years, following the incident, as he did not feel that he was able to do so. It is only recently that he resumed his driving responsibilities.

8. When addressing the court in relation to the calculation of delay Mr. Perinchief refers again to *Robinson* at para 19:

> *19. In the case of the First Plaintiff, the parties did not agree on the commencement date for the calculation of delay. As a result, I will address more thoroughly, what ordinarily is a relatively uncontroversial legal proposition.*
>
> *20. The opposing legal positions taken by both parties are set out in the A-G' Reference (No 2 of 2001) [2001] EWCA Crim 1568. In this case, the Attorney General applied under section 36 of the Criminal Justice Act 1972, to refer the following two points of law for the opinion of the UK Court of Appeal. "(i) 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."*
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> *21. In paragraph 10 of the judgment, Lord Woolf CJ explained the traditional starting point for calculation of the commencement of delay: "in the great majority of situations the date that a defendant is charged (in the sense we use that term in our domestic jurisprudence) will provide the answer. Ordinarily therefore the commencement of the computation in determining whether a reasonable time has elapsed will start with either a defendant being charged or being served with a summons as a result of an information being laid before the magistrates."* He says that this is the Crown's position but not that of the Applicant.

9. However, he goes on to highlight at paragraph 22….

> *relying upon European Court decisions ……., Lord Woolf sought to align the Convention Article 6(1) test for the commencement of calculating delay with the test under the common law: "There will, however, be situations where a broader approach is required to be adopted in order to give full effect to the rights preserved by Article 6(1) of the Convention. Mr. Perry put the matter as follows. For the purposes of that Article there could be a period prior to a person formally being charged under English law if the situation was one where the accused has been substantially affected by the actions of a state so as a matter of substance to be in no different position from a person who has been charged.*

This is the section Counsel referred to support considerations of the timeline prior to charge.

10. He continued

> "*The importance of the approach that Mr Perry concedes the court has to adopt is that it takes account of the fact that there may be some stage prior to an accused being formally charged in accordance with our domestic law where, as a result of the actions of a state linked to an investigation, when he has been materially prejudiced in his position".*

This is the background of his earlier address.

11. The case of *Robinson* sets out the steps on prejudice, delay and remedies. On the issue of uncertainty of the case, Mr. Perinchief quoted from Robinson at paragraph 11:

> In *Dyer* at paras 156 and 157, Lord Bingham explained the purpose of the right contained in Article 6(1) of the ECHR: 12
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> "*156. In the case of article 6(1), its principal purpose at least is to prevent an accused being left too long in a state of uncertainty about his fate. Such a protection is, of course, of very real interest to an innocent person who has been charged with an offence or even to a person who has in fact committed an offence but whose guilt the prosecution cannot establish. The accused's whole life, both private and*

professional, may be thrown into turmoil, doubt and confusion until he is acquitted." This is the Applicant's position. *"Especially for the innocent and for their families the time spent awaiting trial must indeed be "exquisite agony" (R v Askov [1990] 2 SCR 1199, 1219 per Cory J).* This is the Applicant's position; there may be a difference in degree rather than kind.

"….*In a case in which it is said that the reasonable time requirement has been violated under section 6(1) of the Constitution, the first step is to consider the period of time which has elapsed. Does the period of time give grounds for real concern? The starting point is that there is no period of time, which is determinative on an application to stay a prosecution on the grounds of delay*."

Mr. Perinchief urges that this is a question that the court must ask itself.

Complexity of the Case

12. Mr. Perinchief submits that this matter is not complex; therefore there is no need for any major delay on whether to charge or not. It is a straightforward case. Once the Applicant left the police station, within a short period, the matter should have moved to the DPP's office. Taking again from the *Robinson* case he cited at para 30:

> *In my view, this case did not on its face appear complex. Neither party asserted the trial of allegations of possession nor possession with intent to supply cannabis was complex further, neither party submitted the case was complex in the management or calling of oral and documentary evidence. No case is straightforward; however, I find that the nature of the charges, in this case, did not justify a delay of over two years.*

Conduct of the Authorities

12. The court was also referred to page 5 of *Robinson*

> *"The authorities were reviewed by the Judicial Committee of the Privy Council, Lord Bingham of Cornhill presiding, in Dyer (Procurator Fiscal, Linlithgow) v.*

Watson and Another [2002] UKPC D1 [2002] 4 LRC 577 ("Dyer"). In Paragraph 52 of his judgment, with which Lord Hutton, Lord Millett and Lord Rodgers agreed, Lord Bingham stated the Court's approach as follows: "[52] In any case in which it is said that the reasonable time requirement (to which I will henceforward confine myself) has been or will be violated, the first step is to consider the period of time which has elapsed. Unless that period is one which, on its face and without more, gives grounds for real concern."

And at para 37:

37. Assessing conduct of the judicial and administrative authorities necessitates further consideration of the law set out in Dyer together with the law on recall of persons released on parole. In paragraph 55 of Dyer, the court addressed the impact of administrative authorities on the question of delay as follows: "55. The third matter routinely and carefully considered by the court is the manner in which the case has been dealt with by the administrative and judicial authorities. It is plain that contracting states cannot blame unacceptable delays on a general want of prosecutors or judges or courthouses or on chronic under-funding of the legal system. It is, generally speaking, incumbent on contracting states so to organise their legal systems as to ensure that the reasonable time requirement is honoured. But nothing in the convention jurisprudence requires courts to shut their eyes to the practical realities of litigious life even in a reasonably well-organised legal system.

13. Certain indulgences can be given with the DPP's office and the investigative arm; however, when taking into account the delay of this, the time frame is unreasonable, unacceptable and should warrant a stay of proceedings.

Prejudice

14. Mr. Perinchief referred to para 79 of the case that the court, "…where significant prejudice due to a period of delay can be demonstrated, it can be taken into account when making the assessment. It may, for example, have a bearing on the conduct to be expected of the prosecuting

authorities where they failed to give the proceedings the priority which they plainly ought to have been given in the circumstances".

15. The burden is not on the Applicant. Additionally, the availability of the Complainant in this matter is unknown. *Robinson* laid out various steps where there is an inordinate delay it triggers into motion certain processes and procedures, the final step being the remedies.

Remedies for Delay

16. Having concluded that there has been an unreasonable delay in the prosecution of the charges, on must turn to the appropriate remedy. In the case of *Dyer*, Lord Hope said the following at paragraph 129:

> *"The European Court has repeatedly held that unreasonable delay does not automatically render the trial or sentence liable to be set aside because of the delay (assuming that there is no other breach of the accused's Convention rights), provided that the breach is acknowledged and the accused is provided with an adequate remedy for the delay in bringing him to trial (though not for the fact that he was brought to trial), for example by a reduction in the sentence."*

There are traditional remedies as set out at paragraph 68 that:

> *The traditional remedies consequent upon a Defendant establishing unreasonable delay are expedition, compensation and reduction of sentence.*

17. However, he says the traditional remedies are not available to the Applicant. When they are not available, the court must look at the non-traditional remedies wherein he seeks a declaration to quash the indictment. Continuing at paragraph 71:

> *"21.There is a certain amount of authority on this subject. However, there is no authority which supports the conclusion that a stay is the appropriate remedy, except in limited circumstances where it is no longer possible for a defendant to have a fair trial, bearing in mind the ability of the court to exclude evidence or to take other action to achieve a fair trial. If a fair trial is not possible, then a stay would have to be imposed. Equally, it would be appropriate to stay proceedings if*

the situation is one where it could be said that to try the accused would in itself be unfair."

72. In my view, in light of the prejudice suffered by the First Plaintiff and the expedition and reduction of sentence remedies failing to adequately address that prejudice, I find the appropriate remedy is to stay the prosecution against the First Plaintiff because of the breach of his right to a fair hearing within a reasonable time. Further, when I take into account all the circumstances surrounding his incarceration and the conduct of the prosecution of the charge the First Plaintiff faces, it would be unfair to retry him.

18. The court must look at each case individually. Taking the facts of this case into account together with the breach of his right to a fair trial because of the conduct of the authorities, having considered all circumstances, it would be unfair to try the Applicant. The authorities give the court the discretion to stay proceedings.

Section 31 Application

19. Mr. Perinchief states that guidance was given to counsel in a practice direction in respect of s.31 applications, which requires the DPP to determine that there is sufficient evidence to proceed with a case. Although statements have been received, there have been certain indications given.

20. Mr. Perinchief briefly addressed the court submitting that the absence and/or unavailability and requests to read in four (4) prosecution witnesses will deny the Applicant the opportunity of cross-examination; particularly PC Paul Watson who has retired from the service, Dr. Rahjini Patton in relation to the medical evidence, PC Simon Joseph who examined the scene, as well as the uncertainty in relation to the complainant; these are sufficient to deprive the Applicant of a fair trial.

21. The court was then taken through portions of the Practice Direction Form 1 which gave indications of the potential residue of evidence which has not been provided. What is gleaned from the form, is that the issue of delay will continue; as it appears that there is outstanding and potentially further disclosure.

22. It is not the quantity of evidence that is front and center, it is the quality; as the defence would like these witnesses to be produced. It is for the Crown to give some assurances as to the availability of witnesses. Additionally, from the disclosure, the defence gathered that there was a 'courtesy car' and there is no statement taken from that person. The absence of this information would be unfortunate.

Response submissions from the Crown

23. Mr. Duncan on behalf of the Crown addressed the court by setting out the principles of law, the Applicant's argument as he understood it, how the principles do not support the argument; and therefore, the applicant's application.

24. The Crown commenced its submissions by indicating what is accepted by the Crown; those things being (i) that there has been delay as he accepted the timeline set out by the Applicant, (ii) that the delay has not been attributable to the Applicant, (iii) the court has a jurisdiction to stay the proceeding on the basis of abuse of process, delay or remedying a constitutional breach of the Applicant's right to a fair trial within a reasonable time on either of these basis.

25. Whether there has been a delay, Mr. Duncan advanced that in criminal justice proceedings, as a whole, it is accepted that delay is inevitable, the question in law is 'At what point does the delay become unreasonable?' and 'Has there been an unreasonable delay that should cause the court to stay the Indictment?' We must look at the circumstances of this case and calculate the point at which the delay becomes unreasonable.

26. Turning to the matter of *Boolell* which was provided by the Applicant, it is an important case, as it is a Privy Council authority that is persuasive if not binding. He referred to paragraphs 21 which outlines that various authorities had conflicting positions on when the delay is calculated from:

> *21. Section 10(1) of the Constitution of Mauritius contains a guarantee in familiar terms, that where a person is charged with a criminal offence "the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law". As Lord Steyn pointed out in Darmalingum v*

> *The State [2000] 1 WLR 2303, 2307, section 10(1) contains three separate guarantees, namely (1) a right to a fair hearing (2) within a reasonable time (3) by an independent and impartial court established by law. The application of these requirements in the decided cases has not been entirely consistent. Lord Bingham of Cornhill observed in Dyer v Watson [2002] UKPC D1, [2004] 1 AC 379, 394, para 29, that it may be questioned whether the reasoning of the preceding decisions can be fully reconciled. The academic commentators have been more forthright in pointing to an inconsistency between the decisions: see, eg, Ashworth, [2001] Crim LR 855, 860.*

27. Paragraphs 22 - 28 set out what the conflicting positions were. Paragraph 29 resolves these issues conclusively and we must look at *AG's reference (No. 2 of 2001) [2001 EWCA Crim 1568* when calculating delay. Paragraph 31 summarized the findings of *A-G's Reference*, whereas Paragraph 32 sets out the propositions of law:

> *Their Lordships accordingly consider that the following propositions should be regarded as correct in the law of Mauritius:*
>
> *(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. The *Robinson* case is good law; although not binding. The Crown states that a criminal case if not completed in a reasonable time; even if a delay is found, that a stay is not an automatic remedy.

29. Paragraph 26 of *Robinson* incorporates *AG's ref No.2* in the usual course of things the starting point for a timeline is charge. The Applicant was charged in August 2023, the matter

moved with reasonable expedition, following charge; it cannot be said that there was delay at this stage. Heavy reliance is placed, by the Applicant, on the five (5) years prior to charge.

30. There may be circumstances where the period prior to charge is relevant for the purpose of this calculation; however either the substantially effected test or the materially prejudiced test is what is to be applied. The Applicant must satisfy this element, if relying on the pre-charge period. The specific wording is found at paragraph 10 of *AG's Ref* case:

> *The jurisprudence does not confine a charge for the purpose of Article 6 to precisely the circumstances which we would regard in this jurisdiction as amounting to a charge. However, in the great majority of situations the date that a defendant is charged (in the sense we use that term in our domestic jurisprudence) will provide the answer. Ordinarily therefore the commencement of the computation in determining whether a reasonable time has elapsed will start with either a defendant being charged or being served with a summons as a result of an information being laid before the magistrates.*

31. The starting point was taken to be the time of charge, it was advanced that there were circumstances prior to charge that could be relevant, as set out at:

> Para 11 *There will, however, be situations where a broader approach is required to be adopted in order to give full effect to the rights preserved by Article 6(1) of the Convention. Mr. Perry put the matter as follows. For the purposes of that Article there could be a period prior to a person formally being charged under English law if the situation was one where the accused has been substantially affected by the actions of a state so as a matter of substance to be in no different position from a person who has been charged*.

32. The finding of the court was that:

> *The approach that we have indicated to the question of when a person is charged is important in relation to what was contended before the judge in this case. It was contended before the judge that there had taken place an interrogation of the defendant and it was said that this constituted the charge. We disagree with that view. In the ordinary way an interrogation or an interview of a suspect by itself does not amount to a charging of that suspect for the purpose of the reasonable time requirement in Article 6(1). We do not*

consider it would be helpful to seek to try and identify all the circumstances where it would be possible to say that a charging has taken place for the purpose of Article 6(1), although there has been no formal charge. We feel that the approach indicated by the authority that we have cited clearly expresses the position and we are content to leave the matter in that way.

33. It is for the Applicant to show that there was something within the preceding five year period that changed his life as though he was charged. The Crown accepted that there had been prejudice per se.

34. The Crown does not accept that there has been delay in the constitutional sense, applying the *Robinson* authority as advanced by the Applicant. However, if the court disagrees with that proposition, *Robinson* is authority for the further proposition that a finding of delay does not automatically lead to a stay. There has been some delay and some prejudice, however, this does not rise to the threshold that the Court should exercise its discretion.

35. The Court then looks at the remedies. The Crown submits there are sufficient remedies by way of (i) case management powers that can limit the way in which the case is presented (ii) legal direction to the jury for the jury to consider concerning the passage of time, the fading of memory, lack of memory allowing delay becomes a defence at trial, (iii) if there is a conviction the sentence can reflect the delay and (iv) the court can make a declaration. Where an alternative remedy is available the court should decline from exercising its jurisdiction.

36. In the Crown's section 31 response, Counsel directed the court to the Record; specifically the Indictment charging the Applicant with the offences, the defendant's interview wherein admissions were made, the Complainant's evidence concerning the actual collision and the injuries together with the medical evidence. These relevant pieces of evidence, he submits, support the Crown's case. The standard, upon which the Court is to be satisfied, is the *Galbraith* standard and submits there is sufficient evidence to establish a *prima facie* case.

37. Proposed read-ins are merely proposals. The Crown has a duty to produce witnesses for cross-examination; those are case management issues which are not for consideration at this stage.

The Law

38. For what is meant by the expression "*trial on indictment*", we must look to the Criminal Code Act 1907, (**the Code**) section 503, which is in the following terms (including the heading):

Commencement of trial; arraignment

> 503 *(1) At the time appointed for the trial of an accused person, he shall be informed in open court of the offence with which he is charged, as set forth in the indictment, and shall be called upon to plead to the indictment, and shall say whether he is guilty or not guilty of the charge.*
>
> *(2) The trial is deemed to begin when he is so called upon.*

Motion to quash indictment

> 504 *(1) The accused person may before pleading apply to the Supreme Court to quash the indictment on the ground that it is calculated to prejudice or embarrass him in his defence to the charge, or that it is formally defective.*
>
> *(2) Upon such motion the Supreme Court may quash the indictment, or may order it to be amended in such manner as the Court thinks just, or may refuse the motion.*

The Criminal Jurisdiction and Procedure Act 2015

Section 31 of the CJPA 2015 provides:

> ***31 Application for dismissal***
>
> *(1) A person who is sent for trial under section 23 or 24 on any charge or charges may, at any time—*
> *(a) after he is served with copies of the documents containing the evidence on which the charge or charges are based; and*

(b) before he is arraigned (and whether or not an indictment has been preferred against him),apply orally or in writing to the Supreme Court for the charge, or any of the charges, in the case to be dismissed.

(2) The judge shall dismiss a charge (and accordingly quash any count relating to it in any indictment preferred against the applicant) which is the subject of any such application if it appears to him that the evidence against the applicant would not be sufficient for a jury properly to convict him.

(3) No oral application may be made under subsection (1) unless the applicant has given to the Supreme Court written notice of his intention to make the application.
(4) Oral evidence may be given on such an application only with the leave of the judge or by his order; and the judge shall give leave or make an order only if it appears to him, having regard to any matters stated in the application for leave, that the interests of justice require him to do so.
(5) If the judge gives leave permitting, or makes an order requiring, a person to give oral evidence, but that person does not do so, the judge may disregard any document indicating the evidence that he might have given.
(6) If the charge, or any of the charges, against the applicant is dismissed—
(a) no further proceedings may be brought on the dismissed charge or charges except by means of the preferment of a voluntary bill of indictment; and
(b) unless the applicant is in custody otherwise than on the dismissed charge or charges, he shall be discharged.
(7) Rules may be made under section 540 of the Criminal Code Act 1907 ("the Criminal Code") which make provision for the purposes of this section and, without prejudice to the generality of the forgoing, may make provision—
(c) as to the time or stage in the proceedings at which anything required to be done is to be done (unless the court grants leave to do it at some other time or stage);
(d) as to the contents and form of notices or other documents;
(e) as to the manner in which evidence is to be submitted; and
(f) as to persons to be served with notices or other material."

Abuse of Process

39. The principle is that there is a general and inherent power of the court to protect its process from abuse ***Connelly v DPP [1964] A.C. 1254 HL*** and ***DPP v Humphrys [1977] A.C. 1 HL***

40. These powers arise (i) where there is an impossibility to give the defendant a fair trial, and (ii) where a stay is necessary to protect the integrity of the criminal justice system. The power of justices to stay criminal proceedings for abuse of process is to be most sparingly exercised, and should be strictly confined to matters directly affecting the fairness of the trial of the particular accused with whom it is dealing, as in this case the issue of delay and quality of evidence. [emphasis added]

41. The issues are firstly (i) the delay in the investigation and process together with the impossibility of a fair trial due to the absence/loss of evidential matters. Guidance as to the approach to be followed where the complaint relates to the non-availability evidence was provided in ***R v (Ebrahim) v Felham Magistrates' Court; Mouat v DPP [2001] EWHC Admin 130; [2001] 2 Cr App R 23.***

42. The first consideration is the nature and extent of the duty of the investigating authority, the Bermuda Police Service ("BPS") to obtain and/or retain material - the information and potentially the witness statement of the driver of the 'courtesy car'.

43. The absence of information in relation to the courtesy car can be put to the relevant witness during the trial proper, ultimately it will be a matter for the jury whether they accept or reject this notion. I do not find that any delay in the process results in the loss to the Applicant of a fair trial.

44. The evidence listed/categorized as read in by the Prosecution is subject to agreement. If an alternative view is taken this is likely to affect the strength of the evidence against the defendant/applicant. This too, I find is not sufficient to alter the fairness of the trial.

45. While I am satisfied that there has been significant delay as the five (5) years preceding charge is relevant; I do not find that a prejudice has been established when applying the substantially affected and materially prejudiced tests.

Test of Sufficiency

46. The implementation of section 31 of the CJPA, has changed the process, nevertheless, it maintained the test of sufficiency. The matter of *R v Tonae Perinchief-Leader [2020] CA (Bda) Crim 10* confirmed that the test is not whether the Crown has proved its case but whether the evidence against the accused would not be sufficient for a jury properly to convict.

47. Following the well-established criteria set out in *Galbraith [1981] 1 WLR 1039*, the Judge must be satisfied that (i) there is evidence that the defendant committed the offence charged, and (ii) that he evidence is sufficient enough for a jury to properly convict him of the offence charged.

Conclusion

Questions for the Court on Abuse

Has there been a delay?

48. With the incident and start of investigation dating back as far as 2018 and charges only being laid in 2023, I find there was a significant delay in the handling of this matter. A nature of delay that the court finds alarming and; a delay in which the investigative arm and prosecutorial office should have great concern.

49. Even with the global impact of Covid 19 which fell squarely within the delay period, it is remarkable that a simplistic traffic matter would take five (5) years to make its way from investigation to consideration of charge. Such recurrence, the Commission of Police should make every effort to, in the future to prevent. I, therefore, find that there has been an extraordinary delay.

Is such a delay unreasonable?

50. It is noted that a major portion of the delay is attributed to the time frame prior to charge; as it can be seen that post charge, this matter has moved with usual progression. However, from 2018 - 2025 some seven (7) years elapsing without the commencement of trial, I find, too, to be unreasonable in the ordinary sense.

51. Applying the legal guidance, it is for me to make a calculation of delay starting with the time from which the accused person was called upon to plead unless, I find that the Applicant has been substantially affected as a result of the delay. It is for the Applicant to show that a material or substantial prejudice from which he was affected resulted, for the court to consider exercising its discretion to stay the proceeding.

52. It may be for the court to look back to the prior period, if it finds that the accused had been substantially affected by the action of the state. I do not find that the Applicant had been materially prejudiced or substantially affected, therefore, the starting point of calculation is 2023. Additionally, I do not find that this passage of time rose to a level of prejudice to affect the fairness of trial.

53. The Privy Council recent authority of *Boolell*, which was relied on by the Applicant can be distinguished; as much, if not all of the delay in that matter was caused by the Applicant. In the matter before the court, the Applicant cannot be faulted for any of the delay caused.

Can there be a fair trial/Would it be unfair to try?

54. Taking the guided proposition from *Boolell*, following a breach of the accused convention right to a fair trial within a reasonable time, it will be appropriate to stay proceedings where there can no longer be a fair trial or it would be unfair to try him

55. Section 6(1) of the Bermuda Constitution Order 1968 allows the secure protection of law, in that any person charged with a criminal offence shall be afforded a fair trial within a reasonable time. Despite this, the authorities suggest that the court's discretion to stay proceedings for an abuse of process should be exercised sparingly.

56. The delay in this matter thus far, has caused the unreasonable delay as the Applicant has been deprived of his right to be tried within a reasonable time and I make a declaration that his right has been infringed.

57. However, there is nothing before me that persuades me that there has been any substantial effect or material prejudice to exercise my discretion to stay the proceedings as a result of this

delay. On the balance of probability, I find that the Applicant is capable of receiving a fair trial and I find that it will not be unfair for him to be tried.

58. For the reasons stated, I have determined that the trial must proceed in the interest of justice and if convicted, there is sufficient remedy to address such declaration. Therefore, the application to stay proceedings for abuse of process must fail.

Section 31 Application

59. Upon review of the evidence contained in the Record, having heard submissions from Counsel, applying the test of *Galbraith* - limb 1 being there is no evidence upon which the jury could convict or limb 2, that there is some evidence but it is so poor that it would be unsafe, I find that the section 31 application must fail as there is sufficient evidence upon which a jury properly directed could convict.

60. The Record contains sections of the accused's interview with police wherein he admits being the driver of the motor car. Also included in the record is his admission to drinking prior to the incident; there is evidence of police officers observing the common law signs of impairment; as well as evidence of the complainant concerning the actual collision and his injuries together with medical evidence.

61. The issues raised by Counsel in his submissions can be cured by case management and are ultimately matters for the prosecution and the jury at trial. This application, too, must fail.

The Hon. Mrs. Kenlyn Swan Taylor
Assistant Puisne Judge of the Supreme Court of Bermuda