[2019] JMFC FULL 3

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CONSTITUTIONAL DIVISION

CLAIM NO. 2018 HCV 01788

THE HONOURABLE MR JUSTICE GLENWORTH BROWN
THE HONOURABLE MR JUSTICE DAVID BATTS
THE HONOURABLE MRS JUSTICE VIVENE HARRIS

BETWEEN	**PATRICK CHUNG**	**CLAIMANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**1ST DEFENDANT**
AND	**DIRECTOR OF PUBLIC PROSECUTIONS**	**2ND DEFENDANT**

Constitutional law – Right to fair trial within a reasonable time – Period before charge 27 years – Period after charge 7 years – Incest – Indecent Assault – Whether delay breached right to hearing within a reasonable time – Whether right to fair hearing breached or is likely to be breached – Whether stay of proceedings the appropriate relief – Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act – section 16

Jacqueline Samuels-Brown QC, Marsha Gay Samuels and Lorenzo Eccleston for Claimant

Tamara Dickens instructed by the Director of State Proceedings for 1st Defendant

Maxine Jackson and Cheryl Lee Bolton for the 2nd Defendant

HEARD: 25th, 26th, 27th, 28th June 2018, 25th January, 14th, 15th March, and 12th April 2019

G. Brown J

[1] I have had the benefit of reading the judgments of Batts and Harris JJ and I agree entirely with the reasoning and conclusion at which Harris J has arrived.

[2] However, it was observed that there was no order made for the trial to be stayed pending the outcome of this application. To prevent any further delay, I hereby direct that the matter be mentioned at the opening of the St. James Circuit Court on the 24th day of April, 2019 and the trial shall commence before the end of the Michaelmas Term 2019, failing which the trial of the charges shall be stayed unless the trial is delayed due to the fault of the defence (the claimant in these proceedings).

Batts J

[3] On the 27th day of April 2012 the Claimant was arrested. He was ultimately charged with very serious offences, being indecent assault and incest. The indictment, proffered on the 7th January 2013, contains 11 counts. It is alleged that the offences were committed in the period 1st January 1976 to 31st December 1985. The Claimant, who is now seventy-eight years old, has come to this Court for constitutional relief. He says that due to the passage of time, and all that has happened in the interim, he is no longer able to properly prepare or present his defence. He complains that his constitutional right, to a fair trial within a reasonable time, has been, is being and/ or is likely to be breached if the trial is allowed to proceed. He seeks certain declarations and an order to permanently stay proceedings.

[4] The detailed allegations against the Claimant are as repulsive as they are troubling. They may be gleaned from witness statements given to the police by the virtual complainant whose name, in order to protect her privacy, I will not reveal. I accept and adopt the reasoning, in **R v Geoffrey Davis** [1995] FCA 1321 (at paragraph 7), which demonstrates that similar concerns and protections are not

necessarily afforded to an accused person. It is in the public interest that save in exceptional circumstances hearings generally, and matters concerning constitutional relief in particular, should be heard in public. It is for this reason that we refused the Claimant's application for an in camera hearing of this matter. The Claimant elected to adopt this forum to litigate these issues. He had, as an alternative, the right to urge these points before the trial judge. Trials of offences of this nature are held in camera. Not having done so he ought not to complain if we decide that the public interest in knowing trumps his desire for privacy.

[5] The virtual complainant is the Claimant's daughter. She was born on the 27th day of August 1963 and initially lived, with her mother and other siblings, in Browns Town St. Ann. At the age of 11 or 12 she was sent to live in Montego Bay St. James with her grandmother (the Claimant's mother). The Claimant lived in Kingston but visited his mother in Montego Bay most weekends. The virtual complainant states,

> *"He was very affectionate towards me and was always hugging me, so I followed him around all the time and adored the ground he walked on. Whatever I wanted I got and if my cousins wanted to go to the beach they would use me to ask dad because whatever I asked I got.*
>
> *All this was new to me as I wasn't used to getting things I asked for but life with the Chung's was better than with my mother as they were well off. Based on how my dad treated me I grew to love him very much and looked forward to the times when he would come to visit."*

[6] The virtual complainant recounts that on some of these weekend visits there would be a family night. It entailed herself her siblings and her cousins lining out their mattresses on the roof and sleeping under the stars. She used to sleep in her father's arms. When she was about thirteen (in about the year 1976) he fondled her breast during one of these family nights. She was shocked and turned and looked at him and he said "sorry I thought it was Bev." Beverly was the Claimant's wife at that time. Later that night she felt him fondling and caressing her breast again. He kept on fondling her private parts. She was shocked and froze. She

looked at him and he looked right back at her. He continued to fondle her breast and vagina that night.

[7] She states that she didn't tell anyone what happened that night because she was scared. She described her grandmother as a stern businesswoman who smoked, used curse words like a man, never smiled and punched members of staff in the face. She says her grandmother often threatened to send her back to her mother if she did something wrong. She was also afraid that if she did not do her father's bidding he would be displeased, would not love her anymore and would send her back to live with her mother.

[8] She states that after the first night he would fondle her on every opportunity he got. This continued for a few years. It occurred whenever they were alone. He ensured they were alone. So that most times when there were family outings he would not go, telling the others he was taking her to her mother. Instead of going to her mother he would stay with her and continue to touch her.

[9] Eventually fondling lead to intercourse. It was about 1978 that he took her virginity by inserting his penis into her vagina. She recalls it was in the summer just before her fifteenth birthday. It was very painful and so he stopped that night. She says that it had become the norm for her to sleep in his bed so the family thought nothing of it when she did so. A few nights after that first night of intercourse he did it again and pushed it all the way in. She recalls her "period" coming for the first time shortly after that night. Thereafter she says they regularly had sexual intercourse.

[10] After she finished high school in the 1980s her cousins and herself went to school in Canada. She stayed with her uncle Michael Chung and his family. While there her father came to visit and they had sexual intercourse. After school in Canada she returned to live with her grandmother in St. James. She got her first job in 1982 at the telephone company when she was 19 years old. Even then she says her father was still having sexual intercourse with her. She now had a room to herself at her grandmother's house. She said if she locked the door her

grandmother would complain. So her father came and went from her room as he pleased. It was much easier for them to be alone. She said he would come to her room, and sometimes she would go to his room, for sex. It was she said,

> *"as if he was my boyfriend because he was the only man I was having sexual intercourse with."*

[11] In about 1983-1984 the virtual complainant says her father moved to Ironshore in St. James. He lived in a 3-bedroom house. She shared, in that house, a room with her sister Stacy Ann. Her two brothers were in another room and her father and mother in the third room. He kept having sexual intercourse with her there.

[12] She stated that most of the intercourse occurred in an apartment which she at some time occupied above the Westron Supermarket. This was a business operated by her father. He had given her the apartment. He would close the supermarket and then before going home come up to her apartment and have sex. She stated that she once got pregnant and had to have an abortion. She says they even engaged in oral sex with each other.

[13] In her early twenties she had a discussion with co-workers about a newspaper article concerning incest. The co-workers were very critical of it. That same night sexual intercourse with her father came to an end. She describes the event thus:

> *"That night when I went home, my father came to my bed and hugged me from behind like he normally does, started to caress me and I just started crying. At this point he just said to me,*
>
> *"baby if you don't want to do this anymore I will stop" I didn't answer I just kept crying.*
>
> *That was the last time my father had sex with me but he started to treat me bad after that. He told me that I have to move out of the apartment as he wanted to renovate the building. I had nowhere to go so I asked him if I could stay at his house as by then he had built a house at Patterson Avenue in Ironshore and he allowed me."*

[14] In completing this narrative, it is, I think, relevant to note that in 1993 the virtual complainant met the person who would later become her husband. She recalls that she told him of the incestuous relationship she had had with her father. In consequence a confrontation occurred in which the Claimant admitted his illegal conduct:

> *"When Peter [that is her future husband] came into the office he said to my father,*
>
> *Mr Chung this is not about me staying at your house this is about you abusing your daughter!*
>
> *My father said he wasn't abusing me Peter in turn said to him, when a man had sex with his daughter that's abuse! Peter was talking very loud.*
>
> *My father just went silent for awhile and he appeared shocked, like scared shock. After a few seconds he said, in a low voice, "I thought it was Beverly."*
>
> *Peter then said to him, "maybe the first time but all the other times you thought it was Beverly." I was (sic.) just stood there crying and he looked at Peter and said, "I don't know what came over me I am sorry."*

[15] The virtual complainant explained that she decided not to report the matter to the police because the Claimant was an influential businessman in Montego Bay. Furthermore, she was scared and embarrassed. She married Peter and they moved to the United States. They were together for 15 years but the marriage did not work because sometimes Peter's "touch" reminded her of her father. She says that herself and Peter are still the best of friends. The virtual complainant states that she received counselling from "several psychiatrists" but she does not think she has been "cured".

[16] The virtual complainant also explains the circumstances which led her to make a report to the police. In 2007 she returned to Jamaica, at her father's request, to work as a Manager in his business. He was by then separated from his wife Beverly and was living with his girlfriend Simone. They had two daughters. Her father sometimes visited with his two young daughters and sometimes a friend.

She says that when she saw her father with them she got scared for the children. She revealed her suspicions to Peter and he encouraged her to report her own abuse to the police. Her father's daughters were seventeen and eleven years old in April 2011 when the first statement was given to the Police. Further statements were taken on the 5th October 2011 by the police.

[17] The Claimant denies the allegations of incest and sexual abuse. He suggests that the virtual complainant was removed from his employ for dishonesty and that that motivated these allegations. The factual aspects of his claim in these proceedings are supported by affidavits from himself and two children, a son and a daughter. That daughter shared a room with the virtual complainant for a while. Affidavits from three medical practitioners complete the evidence filed in support of the claim.

[18] It is no part of the duty of this court to determine the guilt or innocence of the Claimant. It is however relevant to state that, if true, the conduct represents not only reprehensible illegal sexual conduct but also constitutes an egregious abuse of authority and a betrayal of trust. The consequential damage must be extraordinary. In fact, a clinical psychologist, Gina M Del Gordon (PhD), in a report dated 3rd August 2012 diagnosed the virtual complainant as having Post Traumatic Stress Disorder "consequent to childhood sexual abuse."

[19] The Claimant seeks relief pursuant to section 16 of the Constitution of Jamaica. His claim, as amended on the 21st January 2016, references in particular sections 16 (1) and 16 (6) (b) and (d) of the Constitution.

Those sections read,

"Section 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"
"Section 16 (6) every person charged with a criminal offence shall-

(a) …

(b) Have adequate time and facilitates for the preparation of his defence

(c) ...

(d) Be entitled to examine or have examined at his trial, witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."

[20] The complaint is that due to the time that has elapsed since the date of the alleged offences the Claimant will be unable to have a fair trial. Each party provided written submissions and authorities on this issue. Each counsel was afforded the better part of a day to make oral submissions. I have considered them all. Counsel is to pardon me if I do not deem it necessary to repeat those submissions in this judgment. They have been of inestimable value but I will extract and use only such material as is necessary to explain my conclusions.

[21] Queen's Counsel asserts that all delay has an inherent prejudicial effect. A delay of 27 years, (1985, being the year of the last alleged incident and 2012, the year he was charged), is particularly prejudicial. Indeed, if the 7 years, since he was charged, is added the delay comes to 34 years. Queens Counsel also points to the following particular prejudices:

a) An inability to call potentially relevant witnesses.

(i) His mother, the virtual complainant's grandmother and primary care giver for much of the relevant period, is now deceased.

(ii) His ex-wife Beverly, who also features in the virtual complainant's

(iii) narrative, now lives abroad. She remarried and has moved on with her life.

(iv) His mother –in-law, also mentioned, is also now deceased.

b) His inability to access certain documents. In particular, the psychologist's notes of the visits by the virtual complainant. These were destroyed, in the usual course, 7 years after she was treated.

c) His inability to take the court to visit certain loci as the buildings have been remodelled or destroyed. In particular, the apartment above the supermarket. The Claimant asserts, which the virtual complainant denies, that there was direct access to the apartment via a staircase within the supermarket.

d) His failing health. Affidavits from medical practitioners reveal that the Claimant suffers from many maladies. None, it is fair to say, significantly affects cognition or his ability to give instructions.

[22] In this jurisdiction there is no statute of limitation for crime. The policymakers have not seen it necessary to create a time by which criminal charges ought to be pursued. It bears noting also that they have not seen it fit to modify repeal or replace the Limitation of Actions Act with respect to civil matters, which Act, was passed in 1881. That statute has been judicially criticized but the legislature has seemingly paid no heed, see for example **Melbourne v Wan (1985)** 22 JLR 131. The failure, to address time bars in criminal proceedings, may not therefore be indicative of a decided policy position. It may have more to do with a general malaise which besets our law making entity.

[23] The absence of a criminal statute of limitation means therefore that it is for this court to consider, on a case by case basis, the matter of delay and its impact on criminal prosecutions. In doing so we should be able to give guidance on the question when, or whether, the passage of time is likely to result in such unfairness that proceeding to trial is ill-advised. It means too that the question whether delay per se is a basis to stay proceedings arises for our determination.

[24] There are at least two competing public interests to be considered. On the one hand is the noble and desirable objective of upholding the law. Criminal conduct

is, after all, to be punished. Those accused of crime are to face their trial. On the other hand, is the imperative that persons accused receive a fair hearing. It is, I think, part and parcel of this concept of fairness that criminal conduct should be reported promptly and persons accused should be tried within a reasonable time.

Our Constitution has clearly articulated the right to a fair trial and the right to have that trial within a reasonable time. In doing so the Constitution has signalled that the rights, to fairness and reasonable despatch in the resolution of trials, are to be accorded equal, if not greater, weight than the expectation that accused persons should be brought to justice. I can put this in no better way than was articulated by His Hon Judge Nicholson in **R v Liddy** [2016] SADC 80, a case decided by the district court of South Australia:

> *"Para 95. The balancing exercise referred to in the authorities must be given work to do. If the potential or likely unfairness from the applicant's perspective is sufficient on its own to call for a stay there would be little, if any, need to consider the other side of the ledger, that is, the public interest in the disposition of charges of serious offences, in the conviction of those guilty of crime and in the need to maintain public confidence in the administration of justice. However, in the event that there is a level of perceived unfairness falling short of that which, on its own, would suggest an abuse of process and demand a stay, the nature and extent of that perceived unfairness is to be weighed against the public interest in an effort to determine whether or not a continuation of the prosecution as Bleby J has put it, 'will lead to oppression and injustice and is thus inconsistent with the recognised purposes of the administration of criminal justice."*

[25] The Federal Court of Australia pointed to how and where the relevant balance was to be struck in **R v Geoffrey David Davis** [1995] FCA 1321 (23 June 1995) per Wilcox, Burchett and Hill JJ, at paragraphs 32, 33 and 36:

> *"32. In determining whether or not there ought to be a stay of proceedings Gallop J had to consider more than the prejudice that would be suffered by Dr. Davis because of destruction of his records. He had also to take into account the public interest in the enforcement of the criminal law. This interest requires that ordinarily allegations of serious*

> *criminal conduct (as these are) should be brought to trial. We accept the test enunciated by Mason CJ in Jago, to justify a permanent stay of criminal proceedings there must be a fundamental defect which goes to the root of the trial of such a nature that nothing that a trial judge can do in the conduct of the trial can relieve against its unfair consequences.*
>
> *33. We also note that in **Williams v Spautz [1992] HCA 34, (1992) 174 CLR 509 at 519**, Mason CJ, Dawson J Toohey J and McHugh J said that 'the court should refrain from granting a stay unless it is satisfied that an unfair trial will ensue unless the prosecution is stayed.' The point, no doubt is that although there is a public interest in bringing allegations of serious criminal conduct to trial, there is no public interest in doing so under circumstances of irreparable unfairness. It is more important to retain the integrity of our justice system than to ensure the punishment of even the vilest offender. We do not say this because the justice system is some precious preserve of the judges, it is not. We say this because the integrity of the justice system is a fundamental and essential element in the maintenance of a free society. Our society should not buy the conviction of its guilty at the cost of allowing trials which would inevitably risk convicting also the innocent. …"*
>
> *36. It is important that guilty people are convicted. It is even more important that innocent people are not. There can be no guarantee about achievement of either objective. The Courts can only strive to attain them. The best contribution that judges can make is to insist that trials be fair. Because a fair trial is not now possible in this case, it is necessary to uphold the stay order. The appeal should be dismissed."*

[26] These extensive quotations clearly articulate the rational for section 16 (1) of the Constitution of Jamaica. It is important to recognise however that, unlike the provisions considered in those Australian cases (or in **R v Jacobi** [2012] SASCFC 115) and, unlike the provisions considered in the Irish case of **PO'C, Applicant v The Director of Public Prosecutions, Respondent** [2008] 4 IR 76 or, in the Canadian case of **R v LCWK** [1991] ISCR 1091 (cases all relied on by the Defendants), section 16 (1) creates three distinctive rights. These are: the right to a fair trial, the right to trial within a reasonable time and, the right to trial before an independent and impartial court. The tripartite nature of this rights provision has

been judicially recognised, see **Mervin Cameron v Attorney General of Jamaica** [2018] JMSC FULL 1 and **Darmalingum v The State** [2000] 1 WLR 2303 [P.C.] at 2307. There is no doubt that some overlap can occur. Delay can, for example, impact not only the reasonable time right but also the right to fairness. However, each right is separate, so that, a fair trial does not cure a breach of the right to a trial within a reasonable time. [27] In Jamaica we, to say the least, are quite familiar with delay in our system of justice. It is therefore not surprising that the Full Court has considered the constitutional implications of delay, see **Mervin Cameron v Attorney General of Jamaica** (supra)**.** In that case the court recognised that there was a constitutional right to trial within a reasonable time and that this was independent of the right to a fair trial. The court, after reviewing the authorities, decided that the remedy for a breach of this right was discretionary, and need not be a stay of proceedings. Damages, a reduced sentence and/or a declaration are all alternative remedies. The court was divided on the appropriate remedy on the facts before them. Sykes J (now the Chief Justice) found himself in the minority when he decided a stay ought to be ordered. I found the reasoning of the majority less than compelling given that, although it had been four and a half years since the applicant's arrest, his preliminary enquiry had not yet come to an end. I prefer, and apply, the reasoning of Sykes J:

> *"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 for imposing that standard under the new Charter."* (para 169 of his judgment)

[28] Justice Sykes appears to have found common cause on this issue with the minority opinion in **The Attorney Generals Reference** (**No 2 of 2001**) [2004] 2 AC 72. In that case a majority in the English House of Lords departed from the position adopted by the Judicial Committee of the Privy Council, on an appeal from

Scotland, in **HM Advocate v R** [2004] 1 AC 462. Lords Rodger and Hope, who wrote separate dissenting judgments, effectively demonstrated that there was no warrant for importing into the reasonable time right a requirement for demonstrable prejudice. Per Lord Roger:

> *"I would therefore hold that, when a court is faced with a situation where going on with a prosecution and holding a trial would lead to a hearing after a lapse of a reasonable time, it should not hesitate to say that these steps would violate article 6(1) and, hence, would be unlawful in terms of section 6(1) of the Human Rights Act 1998. Then, in terms of section 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".*
>
> [Note that the sections there considered are similar to section 16(1) of Jamaica's Constitution]

The learned Judge went on to indicate that in most cases damages or a reduction in sentence or a declaration would constitute a just and appropriate remedy. It will only be in rare cases that a stay would be just and appropriate. Although both state the right in similar terms the Constitution of Jamaica, unlike the English Human Rights Act, is silent as to the available remedies. In Jamaica, therefore, it is a matter for the court to determine the appropriate remedy.

[29] Common law courts have long considered the question of delay. Time has been computed using as the relevant date, the date of committal **R v Telford JJ Exp Badhan** [1991] 2 QB 78 at 91; or upon the first report to the police **R v Gray** 70 SASR 62**, R v B** [2003] 2 Cr App R 197; or the date of trial **R v Jacobi** [2012] SASCFC 115 at paragraph 44. I accept, as stated in **The Attorney General's Reference (No 2 of 2001)** [2004] 2 AC 72, per Lord Bingham at page 91, that as a general rule the relevant period begins at the earliest time at which someone is officially alerted to the likelihood of criminal proceedings against him. It seems generally to be assumed that the victim's delay in making a report is not contributory to delay or relevant to its computation. This is so particularly in relation

to sexual offences **R v L (WK)** [1991] 1 SCR 1091 and **H v DPP** (unreported) 31st July 2006**,** per Murray CJ, and **K v DPP** [2006] IESC 56.

[30] Section 16(1), of the Constitution begins with the words "whenever a person is charged". I do not think this means that time, for the purpose of assessing what is a reasonable time, commences after charge. If it did a person could be kept in a state of "terrorem" by state agencies indefinitely, or for an extended period, threatening but not actually arresting or charging that person. In this regard see the analysis, of Lords Hope and Rodgers, at pages 108 and 121 respectively, in **The Attorney General's Reference (No 2 of 2001)** cited above. Section 14 (3) of the Constitution, it should be noted, gives a similar right to persons arrested or detained. As I stated in paragraph [29], time, for the purpose of computing reasonable time, commences at the earliest time someone is officially alerted to the prospect of criminal prosecutions.

[31] Another question considered is what time has to pass in order to make delay actionable or, to use the lingua of Jamaica's Constitution, what is an unreasonable time. Courts seem to have given various answers: 4 .5 years **Cameron v Attorney General** (cited above); 10 years **R v Gray** 70 SASR 62 ;15 years **Darmalingum v The State** [2000] 1 WLR 2303; and, 30 years R v B [2003] 2 CR AppR 13. Each case it seems will depend on its peculiar facts, and local circumstances.

[32] In the case at bar a report was first made to the police on or about the 17th August 2011. The Claimant was arrested on the 27th April 2012. The matter remained in the Resident Magistrates court until the 7th January 2014 when, by virtue of a Voluntary Bill laid by the Director of Public Prosecutions, it was remitted to the Circuit Court. Neither a preliminary enquiry nor committal proceedings were ever held. He has since then appeared in the Circuit Court nine times according to the agreed chronology handed to us in the course of submissions. His trial is yet to commence. One would have hoped that, given the history of the matter and the Claimant's age and frailties, the case would have been dealt with expeditiously. When considering the reasonableness of delay, it must be relevant that the offence

is alleged to have occurred over 30 years ago. The prosecuting authorities ought to be aware that with each passing month the automatic prejudice that accompanies delay would worsen. In this regard delay is as harmful to the accused person's case as it is to the virtual complainant's. It seems to me that, in all the circumstances of this case, the Claimant's constitutional right to a trial within a reasonable time has been breached by the failure to commence his trial since 2011, when the matter was first reported to the police, and /or since 2012 when he was charged.

[33] In this court much time was, in my view unwisely, spent debating "prosecutorial delay" and whether it was an issue. The matter arose in this way. Upon the completion of the hearing on the 28th June 2018 my colleagues and I were divided as to whether the delay subsequent to charge was an issue in the case. The Registrar of the Supreme Court was therefore directed to enquire of the parties whether prosecutorial delay was in issue. Not surprisingly the responses differed. The Crown said it was not while the Claimant's Counsel said it was (see emails and letters dated :25th July 2018, 19th July 2018, 27th July 2018, 26th September 2018, and documents entitled "the Second Defendant's Response to Questions asked by the Court "and "Further Claimant's Submissions with respect to Prosecutorial delay" filed 27th July 2018). The court decided to reconvene for further submissions as to whether "prosecutorial delay" was an issue. This proved impracticable until the 25th January 2019. On that date submissions were heard and we decided to allow further evidence and argument on the question of prosecutorial delay. On the 14th and 15th March 2019, therefore, written submissions were considered and further oral submissions made. The irony of course is that all this has added a further period of delay and, to my mind, compounded the constitutional conundrum.

[34] The point of departure in this discussion of "prosecutorial delay" has been the idea that because section 16(1) commences with the words "whenever any person is charged," there is a distinction to be drawn between "pre charge" and "post charge"

delay. The latter being only relevant if the prosecuting authorities are proved to be culpable. Much time and effort has therefore been spent analysing court sheets, judge's notations and other evidence. The purpose being to establish fault for each adjournment. For the reasons outlined, in paragraphs [29] to [31] above and 35 below. I do not think all this really matters. Furthermore, there has been no suggestion, or evidence, that the Claimant was complicit. He did not abscond or otherwise attempt to frustrate the judicial process. On occasions he was ill and

these were supported by medical reports, in one case he had to undergo surgery, see paragraph 15 of the affidavit of Egbert England dated 12th March 2019. The records reveal that for the period, 27th April 2012 to 7th January 2014, the matter remained in the parish court (then called the Resident Magistrates Court) without the preliminary enquiry being held or commenced. On the latter date a Voluntary Bill of Indictment was laid and a trial date fixed in the Circuit Court for the 22nd September 2014. He, on or about the 27th November 2015, exercised his right to approach this court for constitutional redress. The Claimant obtained no stay of proceedings. However, the trial court has, it seems, adjourned his trial to facilitate the Full Court hearing this matter.

[35] The entire chronology betrays a woeful systemic failure. In the first place the Parish Judge (Resident Magistrate) ought to have proceeded with the preliminary enquiry forthwith. Once arrested, it must be presumed that, there was sufficient material on file to establish a prima facie case. If there was not the accused was to be released. That is the law. Instead the case languished. File notes suggest that further evidence was being collated and/or a Bill of Indictment was being awaited. These cannot be considered good reasons for postponing proceedings given the circumstances of the matter. In the second place once the Voluntary Bill was laid, and the matter placed before the Circuit Court, the trial judge had the responsibility to commence trial. The fact of an application for constitutional relief was, without more, no basis to adjourn. The trial judge, and almost all cases say this, is in the best position to assess whether or not a fair trial was still possible. Issues as to unfairness, delay and any other constitutional remedy, would and could be raised

before the Circuit Court which is a division of this Supreme Court. In the event of an adverse ruling, and an adverse decision by the jury, recourse could be had to the Court of Appeal.

[36] The Claimant is entitled to a fair trial within a reasonable time. In assessing both, fairness of trial and the reasonableness of time which has elapsed since charge, all the circumstances must be considered. This includes the age of the accused, his circumstances, the time that has passed since the offence was committed, the

time since a report of the offence might reasonably have been expected, the time since the report was actually made as well as, the time since the charge was laid. In this case, as I stated in paragraph [32] above, the matter was clearly not handled with the level of dispatch to be expected given the circumstances of the Claimant. His age and the antiquity of the offence, one would have thought, ought to have propelled some urgency in the prosecuting authorities and the courts. In the result there can be no doubt that there cannot now be a trial within a reasonable time. In my view, given the history and circumstances of this matter, it was unreasonable not to have commenced the preliminary enquiry within 6 months of charge and not to have commenced his trial within 6 months thereafter.

[37] Claimant's counsel has urged a rather novel point, at any rate, I have not seen it specifically addressed in the authorities cited. Queens' Counsel correctly indicated that the Charter of Rights has now made persons, and not just the state, responsible for the protection of the rights of others. Section 13 (5) states:

> *"A provision of this chapter binds natural or juristic persons if, and to the extent that, it is applicable, taking account of the nature of the right and the nature of any duty imposed by the right."*

Therefore, submits counsel, a virtual complainant who delays unreasonably in making a report of crime is acting in breach of the accused person's constitutional rights. Furthermore, even if not liable or culpable, the fact of the duty means that time for purposes of computing delay should run from the date the report to the

authorities ought reasonably to have been made. I agree. Citizens have a duty to report crime and in particular felonies. There is no conceptual difficulty in taking into account the virtual complainant's delay when considering the accused person's right to a trial within a reasonable time. Of course to the extent that such delay was motivated by fear of the accused or, because of a loco parentis relationship, it ought not to be considered. This is because a person cannot get the benefit of his own wrong, see the discussion in **R v William Wilkinson** [1996] 1 Crim App R 81. Also relevant is the discussion of delayed reporting by virtual complainants in child sex abuse cases where delay is considered virtually irrelevant, **H v Director of Public Prosecutions** (Unreported Judgment, 31st July 2006) and, **K v DPP** [2006] IESC 56. Those were not however cases in which a constitutional right to trial within a reasonable time was under consideration.

[38] This approach to the interpretation of Section 13 (5) is supported by Section 13 (1) (c) of the Charter of Fundamental Rights and Freedoms, which states:

> *"all persons are under a responsibility to respect and uphold the rights of others recognized in this Chapter,"*

The Honourable Justice Paulette Williams (as she then was) in **Tomlinson, Maurice Arnold v Television Jamaica Ltd, CVM Television Ltd and the Public Broadcasting Corporation of Jamaica,** [2013] JMFC Full 5 at paragraph [42] stated:

> *"It was formerly the position that constitutional remedies are available for infringement of the fundamental rights and freedoms provisions by the State. This had been aptly described as the vertical application. The Charter has introduced sections which have given rise to the debate as to whether these remedies are now available for infringements by a natural or juristic persons – the horizontal approach.* ***Section 13 (1), as already outlined above, along with Section 13 (5) are the sections which Lord Gifford QC opines that their inclusion 'undoubtedly expresses Parliament's intention for constitutional remedies to be available against private entities who infringe the fundamental rights and freedoms of others****."* [Emphasis added]

[39] Further support for Queens Counsel's submission is found in the report of the Joint Select Committee of Parliament on its deliberations on the Bill entitled an "Act to amend the Constitution of Jamaica to provide for a charter of rights and connected matter" (see https://jis.gov.jm/media/charter-of-rights1.pdf,). At page 15 the report states:

> *"The Committee is committed to the principle of ensuring that the constitution encompasses the widest possible deposit of rights with the most open and liberal form of justiciability for those rights. The Committee agrees that, in order to have respect for human rights, a culture of respect for human rights has to be created, and that can only take place when all persons are treated as being obliged to respect the constitutional provisions. The Committee does not agree that an individual's right to question an action against his interest whether by another individual or by the state, should be curtailed on the ground that it would result in too much litigation or uncertainty…**The Committee is, therefore, of the view that the constitutional protection of fundamental rights and freedoms afforded in the proposed new Chapter III should be extended to case of infringement by private persons."*** [Emphasis added]

[40] In the **Tomlinson case** (cited above) the Committee's report was also referenced and the Court said, at paragraph [48]:

> *"The objective of the Committee, to my mind, was achieved. Section 13 (5) is clear that it is to be applied between persons natural or juristic. This flows from 13 (4) which provides for the other categories that it binds."*

[41] It is manifest that section 13 (5) imposes on one private citizen a duty to respect and uphold the rights of another private citizen. In the case at bar the virtual complainant attained adulthood, left her father's house and, eventually got married. On her account the decision not to make a report to the police was jointly taken with her future husband. This decision was taken sometime in 1995. The explanations, that her father knew lots of policemen, she thought the case would go nowhere and that she was scared and embarrassed, even if a true reflection of her state of mind, are not to be thrown at the Claimant's feet. The decision to delay

reporting was hers and there is no suggestion that the Claimant in any way influenced that decision. She had a constitutional duty to respect the Claimant's right to a fair trial within a reasonable time. In this regard therefore time should be counted from 1995 the year in which the virtual complainant ought reasonably to have made a report.

[42] The Constitution does not offer recourse in every case in which a horizontal breach occurs. Section 13 (5) provides "to *the extent that it is applicable, taking account of the nature of the right and the nature of any duty imposed.*" In applying that section certain policy imperatives arise. In the context of criminal proceedings one would not wish potential complainants to be discouraged from making reports for fear that they will be held liable for breaching another's constitutional rights by, for example, making a late report. The horizontal application of Section 16 (1) would not therefore be countenanced and no remedy against a virtual complaint made available. The law on malicious prosecution is a sufficient safeguard. Nevertheless, the analysis, at paragraphs [38] and [41] above, is useful and relevant when considering the issue of "trial within, a reasonable time" and how reasonableness of time is to be assessed.

[43] I turn now to consider the other right which it is alleged, has been, is being or is likely to be, breached. That is the right to a fair hearing. The time elapsed since the offences were committed is relied upon as evidence that a fair hearing is no longer possible. This is because with time memories fade, people's features change and so on. These factors equally affect the prosecution as well as the defence. Common law courts while not denying that delay can without more lead to presumed prejudice, have routinely decided it would only be so in extreme cases. In **R v Telford Justices ex parte Badhan** [1991] 2 QB 78, a delay of 15 years was held, without more, to justify a permanent stay. It was considered extreme. In this case the time elapsed, since the alleged offences, is almost twice as long.

[44] On the other hand, the defendants rely on authorities, some of recent vintage, which adopt a rather ungenerous approach to the question of delay and its relevance to unfairness. My sister Harris J, the draft of whose judgment I was privileged to see, is also enamoured of this line of cases, exemplified by the decision of the English Court of Appeal in **RD v DPP** [2013] EWCA Crim 1592 (also referenced elsewhere as **R v Davies** [2013] EWCA Crim 1592), which she has cited. That line of authority reflects a point of view which says that delay does not become actionable unless it results or is likely to result in an unfair trial. Unfairness, these judges go on to say, occurs only if the judge's directions at trial will not or did not protect the person on trial. One analysis of this line of cases demonstrates

> that unfairness seems only to occur when evidence, lost in consequence of delay, was relevant to an alibi. In cases involving allegations of repeated sexual assaults over a period of time an alibi defence is usually irrelevant, see **Choo A LT "Abuse of Process and Delayed Prosecutions" City Research** Online http//openaccess.city.ac.uk. The English Court of Appeal is not binding on this court although its decisions are highly persuasive. **RD v DPP,** and that line of authority have erroneously made proof of unfairness necessary if breach of the reasonable time right is to be established, as to which, see the discussion at paragraph [28] above. To be fair the judges in those cases were considering abuse of process, and differently worded provisions, which arguably do not have the clear demarcation seen in our section 16(1). It is also true that in **RD v DPP**, and many of those cases, the question was being examined after conviction. The court was therefore preoccupied with whether the trial had in fact been a fair one.

[45] It seems to me that a court, considering whether the constitutional guarantee of a fair trial is likely to be breached, should lean in favour not against the protection of the right. In this case given the time which has elapsed, and a trial not having been commenced let alone completed, I hold that a fair trial is now all but impossible presumptively. That presumption has not been rebutted by evidence or otherwise.

[46] The Claimant does not however rest on the presumption. As I indicated in paragraph [21] above specific consequential prejudices were identified by his counsel. The Crown tried to negative them and asserted that actual prejudice had to be shown. With regard to the doctor's notes it was submitted that since no one knows what was in the notes no one can say they would have assisted the defence. Therefore, relying on **RD v DPP** and that genre of cases, as actual prejudice was not shown the claim must fail. Crown Counsel fails to appreciate that actual prejudice is not required where one is considering an assertion that a right "is likely to be" breached. Furthermore, and in any event, the prejudice alleged is the inability to inspect the destroyed documents. The documents were destroyed by reason of the very passage of time of which complaint is made. Indeed, and as the majority in **R v Carosella** [1997] ISCR 80 pointed out,

> *"To require the accused to show that the conduct of his or her defence was prejudiced would foredoom any application for even the most modest remedy where the material has not been produced. It would require the accused to show how the defence would be affected by the absence of material the accused has not seen."*

The same rationale goes for the potential witnesses now deceased or effectively unavailable. These, on the allegations, were the only adults at the time who may have been able to confirm or deny the alleged opportunities for the illegal conduct. In this regard it was of crucial import in **RD v DPP** that, "the appellant was able to call his wife as a witness to the activities in the matrimonial home at the time of the offences alleged by S," (see paragraph 28 of the court's judgment). It was for that reason that prejudice by reason of the absence of his late mother was negatived. The unchallenged evidence before this court is that the Claimant's ex-wife has moved on with her life, migrated and is effectively unavailable. As regards the buildings destroyed or remodelled, the virtual complainant described certain structures, for example a staircase, as facilitating the conduct. The Claimant denies the existence of that staircase. The ability to prove, by visit to the locus, that the staircase was not there has been lost. These are not matters *de minimis*. Indeed, in the context of sexual crimes which by their nature are secretive, an accused

sometimes can only challenge the virtual complainant's credibility by reference to tangential matters. It seems to me that the Claimant's right to a fair trial is likely to be infringed, because of the over thirty-year delay since the alleged offences and, because of the actual prejudice due to lost items, opportunities and evidence, in consequence of said passage of time. This is not a case where the accused person's conduct, by for example avoiding detection, in any way contributed to the time lost. In such circumstances different considerations obviously apply.

[47] Having found that the Claimant's rights, to trial within reasonable time and to a fair trial, have been breached the question of the appropriate remedy arises. The inability to guarantee a fair trial will automatically give rise to a stay. On the other hand, the appropriate remedy for breach of the reasonable time right requires

some reflection. Although the accused is an old ailing man, who is wheel chair bound, sympathy plays no role in these matters. There is no suggestion that he cannot give or take instructions so his physical condition will not impact the possibility of a fair trial and hence played no role in my consideration of that constitutional issue. His physical condition, as attested to by medical practitioners, is however relevant when the question of the appropriate remedy arises. When regard is had to the accused's age and medical condition I would have ordered a stay even had I found only a breach of the reasonable time stipulation. The alternative remedies, for breach of his constitutional right to trial within a reasonable time, are a declaration damages or a reduced sentence. These will be of no moment to the Claimant given his age and physical condition. Those remedies, in the circumstances of this case, are therefore neither effective just nor proportionate, see the test adumbrated by Lord Bingham in **Attorney General's Reference** N**o**. **2 of 2001** (cited at paragraph 29 above) and relied upon by my learned sister Harris J. It is therefore only just and humane that a stay, a permanent one, should be ordered. Anything less, in all the circumstances of this case, would suggest that we are more concerned with vengeance than with justice.

[48] I recognise that the virtual complainant may feel hard done by because of this decision. It is no part of my remit to comment on the merits of the case and, with restraint, I will not do so. I, however, offer to her the thought that the Claimant, so long as he is alive, will have not only his physical ailments to ponder but any wrongs he may have perpetrated. He will also have to bear the public odium that attaches to anyone so accused. He will never get his day in court and, perhaps, that is as it should be.

V. HARRIS J

Introduction

[49] This is a Historical Childhood Sexual Abuse case ('HCSA'). It is the second case of its kind to be prosecuted in Jamaica. The first matter went to trial without the defendant making any assertion that the proceedings were to be stayed on grounds of delay whether in the form of a constitutional claim or as an abuse of the process of the court.[1] The delay in making the complaint in that case was just over 45 years.[2]

[50] Professor Penney Lewis[3] in her publication **Delayed Prosecution for Childhood Sexual Abuse**[3] states:

> ***"****We do not yet know the causes of delay in disclosure and report. Much speculation exists as to the reason why children and adults often do not disclose or report CSA ('Childhood Sexual Abuse') timeously. While studies have shed some light on possible causal factors for delay, the interaction between these factors is complex and not yet well-understood. The majority of delayed CSA cases involve complainants who, while always aware of the abusive*

[1] **R v Rhenwiuck Green** which was tried in the St. Mary Circuit Court

[2] See the Second Respondent's (sic) Skeleton Arguments filed on September 29, 2017 at paragraph 10 [3] Reader in Law at the Centre of Medical Law and Ethics and the School of Law, King's College, London, UK

[3] Oxford University Press 2006

event(s), failed to disclose at the time …"[4]

[51] She went on to give some examples of the "causal factors" of delay. These include the psychological inability to complain as a result of threats and fear, self-blame and shame, the immediate and long term psychological effects of CSA of which Post-Traumatic Stress Disorder ('PTSD') is classified as a "significant disclosure inhibitor."[5]

[52] Delay by complainants in reporting cases of sexual abuse has been judicially recognised both in other jurisdictions and Jamaica. In **Peter Campbell v Regina**[6] at paragraph 30 (ix) the Court of Appeal extracted the following principle from **R v Valentine**[7]:

> *"30. (ix) account should be taken of the fact that victims both male and female often need time before they can bring themselves to tell what has been done to them. Whereas some victims find it impossible to complain to anyone other than a parent or member of their family, others may feel it quite impossible to tell their parents or family members…"*

[53] Panton P (as he then was) applying **Peter Campbell** and **Valentine** in **Robert Rowe v R**[8] enunciated at paragraph [12] of that decision:

> *"[12] We have taken due note of* [counsel for the appellant's] *concern as regards the delay by the victim in the instant case to make her plight known to a third party... It is a matter of current history in the western world that many victims of sexual crimes have kept silent for many years before revealing the story of their pain. In many instances, notwithstanding the lapse of time, the perpetrators have acknowledged the truth of the allegations made against them."*

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[4] **Delayed Prosecution for Childhood Sexual Abuse**, page 5
[5] *Ibid* pages 6 to 8
[6] (unreported), Court of Appeal, Jamaica, [Supreme Court] Criminal Appeal No 17/2006, judgment delivered 16 May 2008
[7] [1996] 2 Cr App R 213, 224
[8] [2014] JMCA Crim 3

Background

[54] The claimant, Mr. Patrick Chung, is charged on an indictment containing eleven (11) counts. It is alleged that between 1976 and 1985 he indecently and sexually assaulted his daughter MC ('the complainant'). The details of the allegations have been set out in the judgment of my learned brother Batts J and therefore there is no need for me to repeat them. However, I wish to make the following observations.

[55] Based on the allegations, the offences occurred at three locations in the parish of St. James. Firstly, at Union Street which was the premises where the complainant resided with her paternal grandmother, who is now deceased. Persons who also lived in that residence included her grandmother's husband (who is also deceased), male cousins WP and DC. She shared a room with her female cousins WP, CW and KC. She remained at Union Street until 1980 when she and her cousins were sent to school in Canada. The complainant also stated that although

the claimant's siblings did not live at the premises, they visited quite often. The indecent and sexual assaults occurred whenever the claimant visited and she slept in bed with him or on holidays or some weekends whenever the other family members went on outings and they were left alone. The sexual abuse continued until she left for college abroad, while she was in college and when she returned home.[9]

[56] Secondly, at the claimant's house located at Ironshore when the complainant went to live there in 1983 to 1984. She said that while she resided there she shared a room with her sister Stacey-Ann. Her brothers Warren and Edward shared another room. The claimant and his then wife Beverley also resided there. She alleges that the claimant would have sexual intercourse with her in the room that she shared with her sister whenever the other members of the family were absent.[10]

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[9] Statement and further statement of MC dated October 05, 2011 and February 24, 2012 respectively
[10] *Ibid*

[57] Thirdly, at an apartment that was located above a supermarket that the claimant owned and operated on Union Street. The claimant permitted the complainant to live there. There is no evidence that anyone else resided there with her at the time that the offences were said to have been committed. It is in this apartment, the complainant said, that most of the sexual intercourse took place.[11]

[58] The complainant said she did not report the alleged incidents of indecent assault and incest because she was afraid of her grandmother and also of not being believed. She was concerned that if she reported the matter she would have caused trouble in the household and she did not wish to do so. She was fearful of losing her father's love and being returned to her mother, who resided in another parish. She also said that she felt ashamed about what had happened to her.[12]

[59] The first time she made a complaint to anyone was sometime after June 12, 1993 when she told her then boyfriend PN (they later got married and subsequently divorced) about the incidents. In July 1993 PN confronted the claimant in the complainant's presence. According to PN and the complainant, the claimant admitted his unlawful conduct and apologised to both of them.[13]

[60] The complainant stated that although at that point in time PN encouraged her to make a report to the police she did not do so because she felt scared and embarrassed. She also said that one of the reasons she chose not to report the matter was because of the position the claimant occupied, and the influence he exerted, in the community.[14]

[61] What compelled her to report this matter to the police, the complainant stated, was her observations of the relationship that the claimant had with her younger sisters. She became alarmed that her sisters, especially AC, were being or were about to be molested by their father. She voiced her concerns to her former husband PN

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[11] *Ibid*
[12] *Ibid*
[13] Statements of MC and PN both dated October 05, 2011
[14] Statement of MC dated October 05, 2011

who encouraged her to report the sexual abuse she allegedly endured to the police.[15]

[62] The complainant reported the matter to the police on August 17, 2011. She was interviewed by the police on August 22 and 24, 2011. She gave her first written statement to the police on October 05, 2011.[17] The second written statement was given on February 24, 2012.

[63] The claimant was arrested and charged by the police with the offences contained in the indictment on April 27, 2012.[16] This means that there has been a period of

delay (the pre-charge period) in bringing this matter to trial, ranging between twenty-seven (27) and thirty-six (36) years.

The Claim

[64] The claimant, by an amended Fixed Date Claim Form that was filed on January 21, 2016, is alleging that as a result of the extensive delay in making the complaint which has led to the institution of criminal charges against him, his constitutional rights are being and/or are likely to be breached if the trial proceeds. He is seeking the following reliefs from the court:

(1) A Declaration that the Claimant having been charged with criminal offences is entitled to a fair trial in accordance with The Charter of Fundamental Rights and Freedoms of the Constitution of Jamaica and in particular section 16 thereof.

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[15] *Ibid* [17]

Ibid

[16] Affidavit of Patrick Chung filed on June 27, 2016 paragraph 3. However the affidavit of Detective Sergeant Ulette Lewis-Green filed on March 13, 2019 states that the claimant was arrested on April 24, 2012 by. (See paragraph 4 of her affidavit)

(2) A Declaration that a fair trial on a criminal charge includes adequate facilities for the preparation of one's defence and the right to obtain and/or secure the attendance and examination of witnesses.

(3) A Declaration that the Claimant is entitled to adequate facilities for the preparation of his defence in accordance with The Charter of Fundamental Rights and Freedoms of the Constitution of Jamaica and in particular section 16 thereof.

(4) A Declaration that the Claimant is entitled to obtain and/or secure the attendance and examination of witnesses against him and on his own behalf under the same conditions as witnesses against him in accordance with The Charter of Fundamental Rights and Freedoms of the Constitution of Jamaica and in particular section 16(6)(d) thereof.

(5) A Declaration that having regard to the extensive delay of between 39 and 35 years in the complaint leading to the institution of criminal charges against him being laid the Claimant is not likely to and/or cannot receive a

fair trial on the said charges as guaranteed by The Charter of Fundamental Rights and Freedoms of the Constitution of Jamaica and in particular section 16 thereof.

(6) A Declaration that having regard to the extensive delay of between 39 and 35 years in the complaint leading to the institution of criminal charges against him the Claimant will not or will likely not be able to secure the attendance of witnesses on his own behalf and for the purposes of mounting his own defence.

(7) A Declaration that having regard to the extensive delay of between 39 and 35 years in the complaint leading to the institution of criminal charges against him the Claimant will be or is likely to be disenabled and/or constrained in the examination of witnesses against him contrary to the

guarantees under The Charter of Fundamental Rights and Freedoms of the Constitution of Jamaica.

(8) A Declaration that having regard to the extensive delay of between 39 and 35 years in the complaint leading to the institution of criminal charges against him the Claimant has been and/or is likely to be denied facilities for the preparation and presentation of his defence contrary to that which is guaranteed by The Charter of Fundamental Rights and Freedoms of the Constitution of Jamaica.

(9) An Order that the trial of the Claimant for the offences listed in the Voluntary Bill of Indictment be permanently stayed.

[65] The grounds on which the claimant relies are:

i) The Claimant is charged with criminal offences which are currently pending in the St. James Circuit Court.

ii) The charges arise out of a complaint alleging incidents which occurred as far back as 39 years prior to the complaint being made.

iii) As a consequence of the delay the Claimant has been put at a disadvantage and will be prevented and/or impaired in the preparation and presentation of his case.

iv) As a consequence of the delay the Claimant has been or is likely to be denied adequate facilities for the presentation and preparation of his defence.

v) Evidence which would otherwise be available to the defendant is no longer in existence due to the delay in prosecuting the charges against him.

vi) As a consequence of the delay the Claimant's physical and mental health has deteriorated and he will not or is not likely to be able to put forward his defence.

vii) The common law concept of equality of arms which forms part of the Constitutional right to fairness cannot or is not likely to be achieved in any trial of the Claimant on the indictment proffered at this time.

viii) Such other grounds as are detailed in the affidavits filed in this claim.

[66] Before examining the issues in this matter, I wish to indicate that all the evidence given in this claim was by way of affidavits. The affiants were not cross-examined. Learned counsel for the claimant and defendants then made their respective submissions (written and oral). I would have them know that their detailed submissions and the numerous authorities that have been cited, which is quite understandable in the circumstances, have been carefully considered whether they have been referred to or not. Finally, I wish to thank counsel for their industry and assistance to the court.

The evidence for the Claimant

[67] The thrust of the claimant's case is that he is innocent of the charges. He deposes that although he has attended court on a number of occasions he is unable to say what took place as he suffers from a hearing deficiency and extremely poor eyesight. This resulted in him being confused by what was taking place in court and although his attorney has tried to explain the process to him, he still does not understand. He is also afflicted by the chronic and common lifestyle diseases of hypertension, high cholesterol and diabetes. He states that his health, both mental and physical, is deteriorating.[17]

[68] The claimant is also saying that all the adults who were close to the complainant and himself who would be able to give evidence on his behalf have died or are otherwise unavailable. He names three persons as the witnesses he would have called to give evidence at his trial.

[17] Affidavit of Patrick Chung filed on June 27, 2016 paragraphs 6 to 8

[69] These witnesses are firstly, his mother Olive Chung with whom the complainant resided and who was her primary care-giver. She died on July 01, 2003; secondly his mother-in-law Ethlyn Kong who lived with him when the complainant resided in his household and who used to accompany him on his visits to see the complainant when she lived with his mother. She is also deceased. She died on August 28, 1998; and thirdly his former wife Beverley who has, since the dissolution of their marriage, remarried and now lives overseas.[18] This is the witness that he is saying is no longer available.

[70] Through learned counsel Mrs. Jacqueline Samuels-Brown QC, the claimant has also advanced that due to the passage of time one of the *loci in quo* (the supermarket with the apartment above it) has been sold and renovated. It is, therefore, no longer in the same condition as it was at the time of the alleged offences. He has also lost the opportunity to view the notes of the psychologist who treated the complainant in 2003 or 2004 and diagnosed her with PTSD as a result of the impact of childhood sexual abuse. These notes were destroyed seven (7) years after she was treated in accordance with the laws of the state of Florida in the United States of America (USA).[19]

[71] The claimant's children Everard and Stacey-Ann Chung, as well as, several of his doctors have also given evidence in this matter.[20] The affidavits of Everard and Stacey-Ann Chung speak mainly to the relationship that existed between the complainant and the claimant after she returned from college abroad and after her marriage to PN when she returned to Jamaica to assist with the family business.

[72] There are also affidavits from Dr. June Francis, Dr. Patrick Lloyd, and Dr. Lennox Reid. The doctors have all given evidence of the several chronic illnesses that affect the claimant and the treatment that he is receiving for them. Dr. Francis states that the claimant is suffering from hearing loss, while Dr. Lloyd indicates that

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[18] *Ibid* paragraph 10

[19] Letter dated August 03, 2013 from Gina M Del Gardo, Ph.D. paragraph 1

[20] Affidavit of Everard Chung filed November 27, 2015; affidavits of Stacey-Ann Chung filed December 09, 2015 and April 19, 2018

he has exhibited memory loss.[21] Dr. Francis specialises in Family Medicine and Dr. Lloyd is a consultant general surgeon.

[73] Exhibited to the first affidavit of Stacey-Ann Chung are several medical reports. These reports mainly concern the claimant's physical, as distinct from, his mental condition. There are no reports or affidavits from a psychiatrist or psychologist that provide details of any mental defects/deficiencies affecting the claimant.

Submissions on behalf of the Claimant

[74] Mrs. Samuels-Brown QC has submitted that the claimant is unable to receive a fair trial in breach of sections 16 (1), 16 (6) (b) and (d) of the **Constitution of Jamaica** because of the prejudice that has been caused to him by the delay in making the complaint and the subsequent prosecution that has been instituted. She further advances that if the court finds that there has been a breach, in light of all the circumstances of the case, the appropriate remedy is a stay of the criminal proceedings.

[75] The prejudice, counsel continues, arises because:

i) witnesses that would have been relevant to his defence are either deceased or unavailable. According to counsel, the significance of the inability to call these witnesses is heightened in light of the manner in which the indictment has been framed, that is, a lack of specificity as to the time that the alleged offences were committed;

ii) he has lost the opportunity to have access to the notes of the psychologist who treated the complainant and these notes could be vital to the preparation and presentation of his defence;

[21] Affidavit of June Francis filed July 31, 2017, affidavit of Patrick Lloyd filed August 02, 2017 and affidavit of Lennox Reid also filed on August 02, 2017

iii) given the passage of time, one of the *loci in quo*, an apartment above the supermarket at Union Street has been changed, and the court could no longer view these premises. This, counsel asserts, would be vital to challenging the credibility of the complainant; and iv) the claimant's declining health.

[76] She has relied on a number of authorities. As it concerns how various courts approached breaches of the constitution and the remedies that were applied, this court was referred to **Tapper v Director of Public Prosecutions**,[22] **Herbert Bell v Director of Public Prosecutions and Another**,[23] **Mervin Cameron v Attorney General of Jamaica**,[24] **Sooriamurthy Darmalingum v The State**,[25] **Allie Mohammed v The State**[26] and **Attorney-General's Reference (No. 2 of 2001)**.[27]

[77] Counsel for the claimant also relied on a number of cases that addressed abuse of the due process of the court as a result of delay and the resultant prejudice

where this was shown/proved. These included **Curtis Charles and Others v The State**,[28] **R v Byron Johnson, Solomon Johnson, Devon Hackett and Carlos Williams**,[29] **R v Liddy**,[30] **R v Telford Justices, Ex parte Badhan**[31] and **R v Gray**[32].

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[22] [2012] UKPC 26
[23] [1985] A.C. 937
[24] [2018] JMSC FULL 1
[25] [2000] 1 W.L.R. 2303
[26] [1999] 2 A.C. 1
[27] [2004] 2 A.C. 72
[28] [2001] 1 W.L.R. 384
[29] (unreported), Supreme Court, Jamaica, Claim No 2004HCC20, judgment delivered 30 November 2011
[30] [2010] SADC 80
[31] [1991] 2 Q.B. 78
[32] (1997) 70 SASR 62

[78] As it concerns lost documents the claimant relied principally on the case of **R v Carosella**[33]. However, the court was also referred to the cases of **R v Ward**,[34] **R v Gray**,[35] **R v Flook**[36] and **R v Geoffrey David Davis**[37].

[79] I will borrow the words of my learned brother Batts J to set out the final submission made by counsel for the claimant. "Counsel also submitted that the Charter of Rights has now made persons, and not just the state, responsible for the protection of the rights of the others". The argument advanced is that if a complainant "unreasonably delays in reporting a crime", he/she may be "acting in breach" of a defendant's section 16 (1) Charter rights.

[80] The upshot of this submission, in my view, is that the claimant is advancing that the right to a fair trial within a reasonable time has horizontal application. The court was referred to section 13 (5) of the **Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act** ('**Charter of Rights**') and the case of **Mervin Cameron v The Attorney General of Jamaica**,[38] in support of this submission.

Submissions on behalf of the 1st Defendant

[81] Learned counsel Ms Tamara Dickens amplified her oral submissions. Her position is that the claimant is entitled to the first four (4) declarations that he seeks.

[82] She posited that the germane issues before the court are:

(1) whether the claimant's rights to a fair trial guaranteed under section 16 of the **Charter of Rights** have been or are being infringed; and

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[33] [1997] 1 S.C.R. 80
[34] [1993] 1 W.L.R. 619
[35] *Supra* paragraph [76]
[36] [2010] 1 Cr. App. R. 30
[37] [1995] FCA 1321
[38] *Supra* at paragraph [76]

(2) whether there should be a permanent stay of the criminal proceedings in the circumstances.

[83] Counsel initially submitted that there is an absence of evidence that is required to prove a breach under section 16 (1) of the **Constitution**. This section, she contends, is delay that occurs after a person has been charged with a criminal offence (commonly termed 'prosecutorial delay'). Prosecutorial delay, counsel continued, has not been raised by the claimant. The delay that has been argued to have resulted in an alleged breach of the claimant's constitutional right to a fair trial is the delay between the commission of the alleged offences and when the report was made to the police (which is often referred to as 'complainant or precharge delay'). After this submission was made, the parties were invited by the court to provide evidence and make submissions on prosecutorial delay and this issue will be addressed later in the judgment. (See paragraphs [138] to [162] below).

[84] She reminded the court that Parliament in its wisdom has not imposed statutory limitations for serious crimes in Jamaica (which includes the offences that the claimant is charged with) and therefore it is left to the court to decide whether a delay in making a complaint of a criminal offence to the authorities causes "irreparable prejudice" which results in a breach of the **Charter Rights** of a defendant to a fair trial.

[85] The posture of the 1st defendant is that the law is clear that the circumstances of this case must be carefully considered. This is because the loss of opportunity to call witnesses, view the notes of the psychologist, visit a *locus in quo* and the failing health of the claimant do not necessarily mean that this will automatically result in a breach of his constitutional rights to a fair trial.

[86] It was submitted (both by the 1st and 2nd defendants) that the threshold to be met is that, *"the delay must be shown to result in actual prejudice to an accused so as to give rise to a real or serious risk of an unfair trial save in only exceptional*

circumstances where it would be unfair or unjust to put an accused on trial."[39] In other words, a bare assertion and/or presumptive prejudice would not suffice.

[87] Additionally, the onus rested on the claimant "*to establish a real risk of unfair trial such as could not be avoided by appropriate rulings and directions on the part of the trial judge. The risk must not only be a real one but the unfairness of the trial must be unavoidable*."[40] According to counsel, based on the evidence presented to the court, the claimant has failed to do so. Therefore, the extraordinary and exceptional remedy of a stay, as requested, ought not to be granted. She also relied on the authority of **R v Reginald John Pike**.[41]

[88] As to the approach to be taken by the court on the issue of the lost notes of the psychologist, two submissions were made. Firstly, it was stated that the prejudice this would cause to the claimant was not pleaded and raised only in submissions. Secondly, the facts in the case at bar are distinguishable from those in **Carosella**[42]. She also urged the court that the dissenting judgment is to be preferred and applied.

[89] Addressing the issues of the lost opportunity to call witnesses and visit the *locus in quo*, counsel submitted that it was not sufficient to say that these, without more, have resulted in prejudice to the extent that the claimant could not receive a fair trial. The purpose of the witnesses and visit to the *locus* must be stated and importantly it must be shown that their absence would prevent the claimant from receiving a fair trial. She cited the case of **DD v Director of Public Prosecutions**[43] in support of her submissions.

[90] Counsel put forward that the provisions of section 16 of the **Constitution** are similar in terms to the provisions of Article 6 of the **European Convention on**

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[39] **PO'C v Director of Public Prosecutions** [2008] IESC 5 paragraphs [9] – [11]
[40] *Ibid* at paragraph [86]
[41] [2000] NSWCCA 347
[42] *Supra* at paragraph [78]
[43] [2008] IESC 47

Human Rights ('**ECHR**') and she referred the court to **The Guide on Article 6 of the ECHR** ('**The Guide**') as one of the means of interpreting those provisions.

[91] Concerning the right to secure the attendance and examination of witnesses, counsel relied on the authority of **Perna v Italy**[44] and **Director of Public Prosecutions v C.Ce**.[47] She submitted that it was held in those cases that it was not sufficient for a litigant/defendant to merely assert that his right to a fair trial is or may be infringed because of an inability to call witnesses. The court is to determine whether in fact this is so by assessing the relevance and importance of the evidence of the proposed witnesses. She further stated that it is the defendant in the criminal proceedings (the claimant in these) who must establish and prove that the intended witnesses would have been necessary to establish the truth of his defence.

[92] As regards the facilities for the preparation and presentation of the claimant's defence, counsel for the 1st defendant referred the court to pages forty-three (43) and forty-four (44) of **The Guide**. She submitted that the breach of a person's rights to a fair trial on account of not having adequate time and facilities for the preparation of his or her defence (section 16 (6) (b) of the **Constitution**) does not arise in the circumstances of this case. This is so because this provision contemplates the denial of the opportunity to a person charged with a criminal offence to acquaint him or herself with the results of the investigations carried out throughout the proceedings for the purposes of preparing his or her defence. Counsel further submitted that the claimant is not alleging that he is being denied access to any statements, material evidence or documents that are in the possession of the prosecution.

[93] Submitting on equality of arms, counsel pointed the court to pages twenty-one (21) to twenty-two (22) of **The Guide** and stated that in the circumstances of the case, due to the delay, the claimant has not established that he is placed at a significant

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[44] Application No 48898/98, Judgment Strasbourg 6 May 2003 [47]
[2017] IECA 326, (Transcript)

disadvantage when compared to the prosecution. Adopting the submissions made by learned counsel for the 2nd defendant Ms Maxine Jackson, counsel Ms Dickens contended that due to delay the prosecution has also lost the opportunity to call any person who could give evidence of a recent complaint and present medical and/or forensic evidence. The case, therefore, rests on the view to be taken of the credibility of the complainant and the claimant. As such, both the prosecution and the defence are on equal footing.

The evidence on behalf of the 2nd Defendant

[94] Mrs. Larona Montague Williams, an attorney-at-law employed to the 2nd defendant[45] deposes that there is no legislation or case law which prevents a complainant from making a report alleging sexual abuse years after it has occurred.[46]

[95] She indicates that the prosecution has always been "*ready, willing and able to commence the trial against the claimant.*" She asserts that since the matter has

been transferred to the Circuit Court for the parish of St. James, all the adjournments have been applied for by the claimant. There were three (3) trial dates and four (4) mention dates.[47] The mention dates were all set after the trial had been adjourned three (3) times. The reasons for the adjournments were the ill-health of the claimant and his wife, the need for the claimant to do surgery and receive medical treatment, and absence of counsel for the claimant (on a mention date).

[96] Initially, I made the observation that no explanation had been provided as to why the matter was before the Resident Magistrate's Court (now Parish Court) for almost twenty-one (21) months before it was placed before the Circuit Court on a

[45] Affidavit filed on June 23, 2016
[46] *Ibid* at paragraph 11
[47] *Ibid* at paragraph 12

Voluntary Bill of Indictment ('VBI'); and that there was no evidence as to reasons for the adjournments since September 23, 2016. However, I note that on February 05, 2016 when the case was mentioned, the claimant indicated to the court that he had filed a constitutional claim and that he needed to travel overseas for treatment.[48] However, the parties have, on March 14 and 15, 2019 provided evidence and submissions on these matters which I will address later at paragraphs [138] to [162].

The 2nd Defendant's submissions

[97] Learned counsel for the 2nd defendant, Ms Maxine Jackson, commenced her submissions by reminding the court that cases of HCSA, such as this one, are relatively new phenomena in the criminal justice system of common law jurisdictions, and particularly in Jamaica.

[98] She submitted that courts are generally reluctant to stay HCSA prosecutions and that in any event the case law clearly illustrates that a stay of criminal proceedings is only to be granted in exceptional circumstances. She relied on the authorities of **Attorney-General's Reference (No 1 of 1990)**,[49] **Attorney-General's Reference (No. 2 of 2001)**,[50] **R v L (WK)**,[51] **R v Mark Paul Smolinski**,[52] **R v Alan Edward Austin**[53] and **R v B**[54] in support of her submissions.

[99] It was further submitted that delay in itself is not sufficient to invoke a stay of proceedings. What is required, the submission continued, was a demonstration by the claimant of actual prejudice beyond the realm of mere speculation which would tend to show that his constitutional rights to a fair trial has been breached. In other words, as a result of the prejudice caused by the delay, a fair hearing was no longer

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[48] *Ibid* at paragraph 12 (vii)
[49] [1992] 1 Q.B.630
[50] *Supra* at paragraph [76]
[51] [1991] 1 SCR 1091
[52] [2004] EWCA Crim 1270
[53] (unreported) Supreme Court of Western Australia, No. 293 of 1995, judgment delivered 14 December 1995
[54] [2003] EWCA Crim 319

possible or it would be otherwise unfair to try him. She referred the court to the cases of **Attorney-General's Reference (No. 2 of 2001)**,[55] **SH v Director of Public Prosecutions**[56]and **Maxwell Crosby Halahan v R**.[57]

[100] Counsel submitted that the unavailability of witnesses is a common feature in most trials even when the issue of delay does not arise. She conceded that the situation can be exacerbated in HCSA cases because of the inordinate delay in reporting the matters and a defendant may be confronted with allegations in respect of which he has no available witnesses to contradict the complainant's version of the events or corroborate his own.

[101] However, she urged the court to consider the circumstances and nature of the allegations of the case at bar and determine whether or not any of the proposed witnesses could have refuted the evidence of the complainant in light of the Crown's case that the alleged incidents occurred in private. She reiterated that the

main issue in this case is that of credibility and in the circumstances the inability of the claimant to call the witnesses he named has not breached his constitutional rights to a fair trial.

[102] It was also submitted that the courts have stayed proceedings on the basis of unavailability of witnesses mainly in circumstances where the incidents alleged are isolated events rather than a series of events over a period of time (as is the circumstances in the case at bar). The court was referred to **DD v Director of**

[55] *Supra* at paragraph [76]
[56] [2006] IESC 55
[57] [2014] EWCA Crim 2079

Public Prosecutions,[58] **R v Ivan Polyukhovich**,[59] **R v David A.**,[60] **R v Pike**,[61] **R v O**[62] and **William Wilkinson**.[63] The case of **Badhan**[64] was distinguished.

[103] Counsel Ms Jackson in addressing the issue of the lost notes of the psychologist adopted the submissions of the 1st defendant that the prejudice that this has caused to the claimant was not pleaded and raised in submissions only. She further submitted that to say that they could be vital to the preparation and presentation of the claimant's defence was highly speculative. She referred the court to **PO'C v The Director of Public Prosecutions**[65] and the dissenting judgment in **Carosella**[66]

[104] She urged that in considering prejudice to the claimant, the court was to distinguish between "*mere speculation about what missing documents might show and missing evidence which represents a significant and demonstrable chance of amounting to decisive or strongly supporting evidence emerging on a specific issue in the case*."[67] She contended that the claimant failed to show that his inability to access these notes would prejudice his defence and would prevent him from obtaining a fair trial. She distinguished the cases of **Carosella**[68] and **Geoffrey David Davis**.[69]

[105] In her submissions on the claimant's health, Ms Jackson submitted the courts will only grant a stay where he shows that as a result of his illness he is unable to participate in the preparation and presentation of his defence; and as a result there would be a serious risk to the claimant having a fair trial. No evidence of this has

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[58] *Supra* at paragraph [89]
[59] (unreported), Supreme Court of South Australia, SCCRM-92-477, judgment delivered 22 December 1992
[60] [1992] 11 C.R.R. (2D) 381
[61] *Supra* at paragraph [87]
[62] [1999] 1 NZLR 347
[63] [1996] 1 Cr. App. R. 81
[64] *Supra* at paragraph [77]
[65] [2008] IESC 5
[66] *Supra* at paragraph [78]
[67] **R v RD** [2013] EWCA Crim 1592 at paragraph 15
[68] *Supra* at paragraph [78]
[69] *Supra* at paragraph [78]

been provided unlike in a number of cases on which the claimant relied. She further submitted that where there were a series of abuse, as opposed to an isolated incident, the courts are reluctant to grant a stay. She relied on **R v Austin**[70] and **R v Jacobi**.[71]

[106] Finally, addressing what Batts J described as "a rather novel point" that by delaying to report the alleged abuse to the authorities, the complainant may have acted in breach of the **Charter Rights** of the claimant. Ms Jackson has submitted that there is no statute of limitation for serious crimes in Jamaica. The court, she urged, is to balance the public interest in having persons charged with serious crimes prosecuted, even where there is significant delay, against any prejudice caused to a defendant that may give rise to a serious risk of an unfair trial. She has further submitted that in the context of this submission, the reasons for the delay in making the complaint are to be examined. However, it is my conclusion, having perused the authorities, that the law has long evolved to the position that where an application for a stay of proceedings is being considered, it is no longer necessary to enquire into the reason for the delay in making the complaint. That enquiry is no longer relevant to the balancing exercise that is required to determine whether it is fair to try a defendant.[72]

The relevant provisions of the Constitution

[107] Section 16 (in part) states:

> *"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.*
>
> *(6) Every person charged with a criminal offence shall –*

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[70] *Supra* at paragraph [98]
[71] [2012] SASCFC 115
[72] See the cases of **H. v Director of Public Prosecutions** [2006] IESC 55 and **J.K. v The Director of Public Prosecutions** [2006] IESC 56

(a) ...

(b) have adequate time and facilities for the preparation of his defence;

(c) ...

(d) be entitled to examine or have examined, at his trial, witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) ...

(f) ...

(g) ..."

[108] Section 13 (5) provides:

> *"A provision of this Chapter binds natural or juristic persons if, and to the extent that, it is applicable, taking account of the nature of the right and the nature of any duty imposed by the right."*

Principles applicable to section 16 (1) of the Charter of Rights

[109] I will now look at some principles gleaned from relevant case law that are applicable to Section 16 (1) of the **Charter of Rights**, which is the reproduction of the previous section 20 (1) of the **Jamaican Constitution**. I start by noting that it has been long settled that the interpretation of the fundamental rights provisions of constitutions are to be generous and purposive.[73]

[110] I recognise that the rights given in section 16 (1) are three separate guarantees, that is, they are independent rights. Lord Bingham in the **AG Reference (No 2 of 2001)**[74] **case** referring to Art. 6 of the **ECHR** made the following observations (which in my view are equally applicable to our section 16 (1)):

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[73] See the UKPC decision in **Minister of Home Affairs v Fisher** (1979) 44 WIR 107

[74] *Supra* at paragraph [76]

"[10] ...the core right guaranteed by the article is to a fair trial. Most of the specific aspects singled out for mention...relate to the fairness and perceived fairness of the trial process. The article takes a broad view of what fairness requires...But the focus of the article is on achieving a result which is, and seen to be, fair.[75]

[12] Fourthly, it is clearly established that Art. 6(1), in its application to the determination of civil rights and obligations and of criminal charges, creates rights which although related are separate and distinct: see ***Porter v Magill*** *[2002] 2 A.C. 357, 489, 496, paras 87,108;* ***Dyer v Watson*** *[2002] 3 W.L.R. 1488, 1513,1526,1528, paras 73, 125, 138;* ***Mills v HM Advocate*** *[2002] UKPC D2; [2002] 3 W.L.R. 1597, 1603, paras 12-13;* ***HM Advocate v R*** *[2003] 2 W.L.R. 317, 321, para. 8. Thus there is a right to a fair and public hearing; a right to a hearing within a reasonable time; a right to a hearing by an independent and impartial tribunal established by law; and (less often referred to) a right to the public pronouncement of judgment. It does not follow that the consequences of a breach, or a threatened or prospective breach, of each of these rights is necessarily the same.*[76]

[75] Paragraph 10 of judgment
[76] Paragraph 12

[13] It is accepted as "axiomatic":

> *"that a person charged with having committed a criminal offence should receive a fair trial and that, if he cannot be tried fairly for that offence, he should not be tried for it at all":* ***R v Horseferry Magistrates' Court, Ex p. Bennett*** *(1994) 98 Cr. App. R. 114, 131-132, [1994] 1 A.C. 42, 68.*
>
> *In such a case the court must stay proceedings. But this will not be the appropriate course if the apprehended unfairness can be cured by exercise of the trial judge's discretion within the trial process:* ***Attorney-General's Reference (No 1 of 1990)*** *[1992] 1 QB 630 ..." "*[77]

[111] In **Mervin Cameron**[78] D. Fraser J (writing for the majority) puts it this way:

> *"[214] ...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* [which was the issue being considered by the court] *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*

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[77] Paragraph 13
[78] *Supra*

> *a separate section s 16 (1) which deals with the fair trial guarantees."*

[112] I agree with Batts J that, *"section 16 (1) creates three distinctive rights. These are the right to a fair trial, the right to trial within a reasonable time and, the right to trial before an independent and impartial court.*" What this means is that the right to a trial within a reasonable time is independent of the right to a fair trial.[79] I will now go on to consider some authorities on the reasonable time guarantee.

Trial within a reasonable time

[113] In **Tapper v DPP**[80] the issue before the UKPC was whether the appellant's constitutional right to a hearing within a reasonable time, as provided in section 20 (1) of the Jamaican Constitution, had been breached; and if so what was the appropriate remedy for the breach.

[114] Lord Carnwath who delivered the judgment of the Board, after examining a number of authorities stated that *"... the significance of* ***Darmalingum***[81] *as authority has been reduced to almost vanishing point*." He went on further to say:

> *"[28] ... 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 in Jamaica..."*

[115] What, therefore, is the law in the **AG's Reference No 2 case**[82] as summarised in **Boolell v The State**[83] as it relates to the interpretation of the then section 20 (1) of the Jamaican Constitution (now section 16 (1) of the **Charter of Rights**) which binds this court?

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[79] See **Tapper v DPP** *supra* at paragraph [76]
[80] *Ibid*
[81] *Supra* at paragraph [76]
[82] *Ibid*
[83] [2006] UKPC 46

at paragraph [76]

[116] Lord Bingham of Cornhill who delivered the judgment of the court in **AG's Reference No 2**[84] at paragraphs 24 and 25, which I believe is worth setting out in full, stated:

> *"24. 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)* [similar to section 16 (1) of Jamaica's **Charter of Rights**]*. 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 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 rights in prosecuting or entertaining the proceedings but only in failing to procure a hearing within a reasonable time.*

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[84] *Supra*

> *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) 98 Cr. App. R. 114,* (none of which has been alleged in the case at bar) *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] 2 Cr. App. R. 445 [2000] 1 W.L.R. 2302 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 N.Z.L.R. 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..."*

[117] Lord Bingham at paragraph 26 of the judgment went on to address the second point of law that was being considered by the court. He puts it in this way:

> *"26. The requirement that a criminal charge be heard within a reasonable time poses the inevitable question: when for the purposes of Art.6(1), does a person become subject to a criminal charge? When, in other words, does the reasonable time begin?"*

[118] He answers the question at paragraphs 27 and 29:

> *"27. As a general rule, the relevant period will begin at the earliest time at which a person is officially alerted to the likelihood of criminal proceedings against him...*
>
> 29. ***… (2) In the determination of whether for the purposes of Art.6(1) of the Convention, a criminal charge has been heard within a reasonable time, the relevant period commences at the earliest time at which a defendant is officially alerted to the likelihood of criminal proceedings against him, which in England and Wales will ordinarily be when he is charged or served with a summons."*** *(emphasis added)*

[119] At paragraph [32] in **Boolell**[85] Lord Carswell declared what the law is in Mauritius (and by extension in Jamaica based on what the Board said in **Tapper**[86]):

> *"[32] 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."* [120] Article 6(1) of the **ECHR** states:
>
> "*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 the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."*

[121] Section 10 (1) of the Constitution of Mauritius provides:

> *"Article 10. Provisions to secure protection of law*
>
> *(1) Where any person is charged with a criminal offence, then unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.*
>
> *(2) ..."*

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[85] *Supra* at paragraph [115]

[86] *Supra*

[122] As can be seen, although the two cases cited above[87] addressed Article 6 (1) of the **ECHR** and section 10 (1) of the Constitution of Mauritius, these provisions are similar in terms to section 16 (1) of the **Charter of Rights**. Therefore, the applicable law in Jamaica, as I understand it, is as follows:

(a) if a criminal case is not heard and completed within a reasonable time, that will of itself constitute a breach of section 16 (1) of the **Charter of Rights**, whether or not the defendant has been prejudiced by the delay;

(b) 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;

(c) in determining whether for the purposes of section 16 (1) of the Charter, a criminal charge has been heard within a reasonable time, the relevant period commences at the earliest time at which a defendant is officially alerted to the likelihood of criminal proceedings against him, which will ordinarily be when he is charged or served with a summons.

[123] Section 16 of the **Charter of Rights** protects the rights of persons to due process. It is irrefutable, in light of the case law, that unreasonable delay in the prosecution of matters with or without prejudice may give rise to a breach of a person's right to a trial within a reasonable time.[88] Lord Templeman who delivered the judgment of the Board in **Bell v DPP**[89] also observed, at page 951, that:

[87] **AG Reference No. 2 of 2001** and **Boolell v The State**
[88] As held in **Boolell** *supra* at paragraph [115]
[89] *Supra* at paragraph [76]

at paragraph [76]

> *"In 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."*

[124] Consequently, depending on the circumstances of the case, the reasonable time requirement may be breached without actual prejudice being proved (termed 'presumptive prejudice'). It is my view, therefore, that it is always crucial to bear in mind when the due process right of a trial within a reasonable time guaranteed by section 16 (1) of the Charter becomes engaged. From as way back as 1979 in the case of **Michael Feurtado v Director of Public Prosecutions**[90] the Full Court of this court held that the "reasonable time" contemplated by the provision of section 20 (1) of the now repealed Chapter III of the Jamaican Constitution, which as stated before is identical to section 16 (1) of the Charter, is the date of the arrest (postcharge period) and not the date of the commission of the offence.

[125] While there has been much development of the law since then, it seems to me that this principle has remained constant. Lord Bingham said so in the **AG's Reference case**[91] in 2004 and as recently as March 22, 2018, Sykes J (as he then was) reiterated in **Mervin Cameron**[92] that "section 16 (1) is only engaged when the person is charged with a criminal offence."[93] It appears to me that a pre-charge delay does not trigger the guaranteed right of a trial within a reasonable time as provided in section 16 (1) of the **Charter of Rights**. To determine if a trial has been unreasonably delayed, time begins to run from the date of **charge**, which in this case would be from the April 24, 2012 or April 27, 2012. So in order to trigger this particular **Charter** right, it is the date of charge or when a defendant is summoned that starts the constitutional clock.

[126] Therefore, by parity of reasoning, it would be improper to compute time in the manner that counsel for the claimant has done. Counsel has alleged that there has

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[90] (1979) 16 JLR 405
[91] *Supra* at paragraph [76]
[92] *Ibid*
[93] Paragraph [19] of judgment

been “an extensive delay of between 39 and 35 years” in the complaint leading to the institution of criminal charges against the claimant. It is unclear how this range was arrived at. Since the prosecution commenced on either April 24, 2017 or April 27, 2012[94], based on the complaint that was made in October 2011 alleging criminal conduct by the claimant on unspecified dates between 1976 and 1985 there would have been delays of 36 and 27 years in making the complaint.[98]

Principles relevant to permanent stay of proceedings

[127] However, it is evident from the authorities that even if a breach of the reasonable time guarantee is found to have occurred, this does not automatically lead to proceedings being stayed. This is so because a stay of proceedings is considered to be an exceptional remedy which is to be granted only in circumstances where a fair hearing can no longer be guaranteed.

[128] One of the main reasons for this stance is due to the two competing and significant public interests that are at stake. The first is the right of the public to expect that persons who are charged with criminal offences face their trials; while the second is that at the same time the public also expects that trials are fair and should take place within a reasonable time after a person has been charged. Consequently, in determining whether a stay is the appropriate course for the court to employ will by necessity require the balancing of these two very important public interests.

[129] In **SH v DPP**[95] the court being cognisant of this very important principle observed at paragraph [42] of the judgment:

> *“…the prosecution of serious crimes is vital to the public interest. The State can only initiate a prosecution when it is aware that a crime has been committed and there is sufficient evidence available to charge somebody on it. Once that happens the State has, in principle, a duty to*

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[94] The claimant said he was arrested on April 27, 2012 (see paragraph 3 of his affidavit filed on June 27, 2016). However, in the affidavit of Detective Sergeant Ulette Lewis-Green filed on March 13, 2019 (see paragraph 4) she deposes that she arrested him on April 24, 2012. Nothing much turns on the differences in date in terms of time. [98] See paragraph [63] above

[95] *Supra* at paragraph [99]

> *prosecute. Although the bringing of a prosecution may undoubtedly be central to vindicating the rights or interests of a victim of a crime, the interest of the People in bringing a prosecution is, in the interests of society as a whole, of wider importance. The fact that a person who was the victim of a serious crime had delayed in bringing the commission of that crime to the notice of the State authorities is not of itself a ground upon which the State should refuse to bring a prosecution or the courts to entertain one…"*

[130] I find the reasoning of Mason CJ, on this issue, in **Jago v The District Court of New South Wales**[96] quite instructive. In that case the court was considering two questions. Firstly, whether the common law of Australia recognizes a right to a speedy trial separate from and additional to the right to a fair trial (which was held that it did not); and secondly whether the appellant's right to a fair trial has been prejudiced by virtue of undue delay (pre-charge) amounting to an abuse of process. The court was urged that if it gave an affirmative answer to each question then there should be permanent stay of the proceedings. The learned Chief Justice stated:

> *"20. The test of fairness which must be applied involves a balancing process, for the interests of the accused cannot be considered in isolation without regard to the community's right to expect that persons charged with criminal offences are brought to trial: see* ***Barton****, at pp 102, 106;* ***Sang****, at p 437;* ***Carver v. Attorney-General*** *(NSW)* (1987) 29 A Crim R 24*, at pp* 31, 32*. At the same time, it should not be overlooked that the community expects trials to be fair and to take place within a reasonable time after a person has been charged. The factors which need to be taken into account in deciding whether a permanent stay is needed in order to vindicate the accused's right to be protected against unfairness in the course of criminal proceedings cannot be precisely defined in a way which will cover every case. But they will generally include such matters as the length of the delay, the reasons for the delay, the accused's responsibility for asserting his rights and, of course, the prejudice suffered by the accused:* ***Barker v. Wingo*** (1972) 407 US 514*;* ***Bell v. D.P.P.*** (1985) AC 937*, as explained in* ***Watson****, and* ***Gorman v. Fitzpatrick*** (1987) 32 A Crim R 330*.* ***In any event, a permanent stay should be ordered only in an***

[96] (1989) 168 CLR 23

> ***extreme case and the making of such an order on the basis of delay alone will accordingly be very rare...***
>
> *21.* ***To justify a permanent stay of criminal proceedings, there must be a fundamental defect which goes to the root of the trial "of such a nature that nothing that a trial judge can do in the conduct of the trial can relieve against its unfair consequences****..."* (emphasis added)

[131] All the circumstances of a case must be taken into account in resolving whether a stay of proceedings is appropriate. Deane J in **Jago**[97] said:

> *"...It is not practicable to seek to precisely identify in advance the various factors which may be relevant in determining whether, in the circumstances of a particular case, unreasonable delay has produced the extreme situation in which any further proceedings should be permanently stayed. The starting point will be the consideration of the question whether the delay is so prolonged that it is unreasonable in the context of the particular case. An affirmative answer to that question will, at least where the accused does not share responsibility for the delay, prima facie indicate that the accused is entitled to some relief (e.g. an order fixing a date for trial). It will not, however, of itself and viewed in isolation, suffice to found an order that the proceedings be stayed... An order that proceedings be permanently stayed will only be justified in the exceptional cases which I have indicated, namely, where it appears that the effect of the unreasonable delay is, in all the circumstances, that any subsequent trial will necessarily be an unfair one or that the continuation of the proceedings would be so unfairly oppressive that it would constitute an abuse of process."* [98]

[132] The learned judge went on to identify five (5) factors to which a court should have regard in deciding whether or not to stay proceedings on the ground that the effect of delay is that the trial will be necessarily unfair. These are:

(1) the length of the delay;

(2) reasons given by the prosecution to explain or justify the delay;

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[97] *Supra* at paragraph [130]

[98] Paragraph 60 of the judgment

(3) the accused's responsibility for and past attitude to the delay;

(4) proven or likely prejudice to the accused; and

(5) the public interest in the disposition of serious offences and in the conviction of those guilty of crime.

[133] However, he warned that "*they should not be treated as a code or permitted to divert attention from the fact that what will ordinarily be involved in answering the question is the formation of a value judgment in the context of the nature and seriousness of the alleged offence and having regard to other relevant circumstances.*" [99]

[134] The golden thread that runs through most of the authorities that have been placed before the court is that these tenets have been reiterated not only in those cases where applications were made to stay proceedings on the basis of an abuse of process, or on application for judicial review, but also in matters dealing with breaches of the fair trial guarantee.[100]

[135] In **Mervin Cameron**[101] D. Fraser J referred to the case of **R v Herald Webley**[102] a decision of Brooks J (as he then was). The defendant had been charged for murder in 1999. In December 2006 the matter came on for trial for the twentyseventh (27th) time but again could not be started. The defendant applied for a stay on the basis that to continue the prosecution would be an abuse of the process of the court. The application was opposed by the prosecution on the ground that the defendant had failed in his contentions to show that he would not receive a fair trial. The learned judge commented:

> *"[226] Brooks J, as he then was after considering the authorities of **Flowers v R** [200] [sic] 1 W.L.R. 2396, **Bell v DPP**, **Attorney General's Reference** (No. 1 of 1990) and*

[99] Paragraph 61 of the judgment
[100] See also **W.K.L. v R** *supra* at paragraph [98]; **J.K. v DPP** [2006] IESC 56
[101] *Supra* at paragraph [76]
[102] (unreported), Supreme Court, Jamaica, HCC89/04(1), judgment delivered 07 December 2006

the [sic] ***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 caused that delay.*
>
> *In all the issues raised by the 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 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..."*

[136] After referring to a number of authorities on this issue, D. Fraser J continued:

> *"[233] ...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 in a reasonable time has been established, but it has not been shown that a fair trial is not possible...*
>
> *[260] A stay is the most extreme remedy. It should be the last resort and only employed if no other is suitable...*

> *[261] Where the accused has not demonstrated actual prejudice caused by the delay in bringing the matter to trial that would compromise his right to a fair trial, a stay may not usually be the appropriate remedy."*

[137] I agree with and adopt the learned judge's conclusions. I would also add that an examination of the Australian and Irish authorities on this point (whether or not a stay of proceedings is to be granted) reveals commonality that this is only to be done in rare cases where a fair trial can no longer take place.[103]

Prosecutorial Delay

[138] The parties were invited to provide further evidence and submissions on prosecutorial delay on March 14 and 15, 2019. I do not think that the time spent on this issue was unwise. The claimant asserted that he was also relying on prosecutorial delay while the defendants disputed this on the basis of how they said the case was pleaded and argued. It was therefore necessary, in my view, to have the parties return to address the court on this matter in order to allow all the relevant information to be made available so that the court could be assisted in coming to a properly informed conclusion.

[139] The evidence which came from affidavits and exhibits (the endorsements on the Information by the Clerks of Courts, the court sheets by the Parish Court Judges, the back of the VBI by the various Supreme Court Judges and minute sheets on the ODPP's files (which were cross-checked with the endorsements made by the judges of the Supreme Court and the affidavit evidence of the Registrar of the Circuit Court for the parish of St. James)) reveals that:

a) The claimant was arrested on April 24, 2012.

b) The matter was first before the Resident Magistrate's Court (now Parish Court) for the parish of St. James on April 27, 2012. Bail was granted to the claimant and

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[103] See the cases of **R v Austin**, *supra* at paragraph [98]; **Wagner v R** (1993) 66 A. Crim R 583; **DD v DPP**, *supra* at paragraph [89]; **PO'C v DPP**, *supra* at paragraph [103]; **R v Jacobi** *supra* at paragraph [105] see paragraph 13 of the judgment

then the case was set for mention on June 08, 2012. The reason for the matter being mentioned was stated as "for the investigating officer to speak with the Director of Public Prosecutions (DPP) re DNA and the possibility of laying new charges." The issue of DNA arose because when the claimant first appeared before the court he denied being the complainant's father and investigations against him involving alleged abuse of other persons were also on going.[104]

c) On June 08, 2012 the matter was set for mention on July 19, 2012 for "DPP to enter *nolle prosequi*."

d) On July 19, 2012 the matter was again set for mention on November 01, 2012 and the investigating officer was bound over for statements. No mention is made of the *nolle prosequi* which was to entered by the DPP and none in fact was entered.

e) On November 01, 2012 the case was set for mention on January 16, 2013. The endorsement in the court sheet was that this was for the DPP to enter *nolle prosequi.* However, the endorsement of the Clerk of Courts on the Information was that the matter was being mentioned for a psychiatric report to be served.[105] This report was served on Mr. Dalton Reid, attorney-at-law, who was also representing the claimant at that time, on November 16, 2012.[106]

f) On January 16, 2013 the case was set for mention on March 23, 2013. It is not entirely clear what was the reason for this mention date based on the endorsements in the court sheet and on the Information.

g) On March 23, 2013 the matter was set down for mention on June 14, 2013 for the DPP to be contacted by the Case Progression Officer (CPO).

h) On June 14, 2013 the matter was set down for July 19, 2013. The endorsement reveals that this date was agreed by counsel for the prosecution (Ms Jackson) and

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[104] See paragraphs 6 - 11 of the affidavit of Detective Sergeant Ulette Lewis-Green filed on March 13, 2019.
[105] See also paragraphs 12 -15 of the affidavit of Detective Sergeant Ulette Lewis-Green
[106] See paragraph 11g of the affidavit of Egbert England filed on March 13, 2019

defence (Mrs. Samuels-Brown Q.C.) and on that date the claimant's bail was varied to allow him to accompany his wife overseas for medical treatment. The matter was then set down for mention on December 13, 2013.[107]

i) On December 13, 2013 the matter was set for mention on January 07, 2014 for trial date to be agreed and for contact to be made with the Office of the Director of Public Prosecutions (ODPP).

j) On January 07, 2014 (which would have been the first day of the sitting of the Circuit Court for the parish of St. James for the Hilary Term) a *nolle prosequi* was entered and the matter was sent to the Circuit Court. The case was then set for trial on September 22, 2014 for four (4) days.

k) On September 22, 2014, the prosecution was ready for trial. However, the claimant applied for an adjournment and this was granted on grounds of ill-health. The endorsement of the learned judge was that the claimant submitted a medical certificate in which it was stated that he was "chronically ill, unable to face trial at this time. Crown ready." The matter was traversed to the next sitting of the Circuit Court and set down for trial on January 12, 2015.

l) On January 12, 2015, the prosecution again was ready for trial. The claimant again applied for and was successful in obtaining an adjournment because he was unwell. The case was then set for trial on July 20, 2015.

m) On July 20, 2015 the claimant applied for an adjournment to undergo surgery and requested a further two months for recovery. The complainant did not attend court as she was overseas also to do surgery. This was a joint application by both parties. The matter was then set down for mention on September 25, 2015.

n) On September 25, 2015 it was revealed to the court that the claimant's surgery had been postponed (no reason for the postponement of his surgery is available

[107] See paragraphs 11 i - k of the affidavit of Egbert England filed on March 13, 2019

from the records). A mention date of the December 01, 2015 was requested by counsel for the claimant so that a trial date could be agreed.

o) On December 01, 2015 the claimant was not present at court due to ill-health and a bench warrant was issued and stayed until December 10, 2015.

p) On December 10, 2015 the bench warrant ordered for the claimant on December 01, 2015 was vacated and the court was advised that the claimant had filed the current constitutional claim in November 2015. The matter has remained on the mention list since then.

q) The hearing of the current claim commenced in June 2018 (a little over two and one half (2 ½) years after it was filed). No evidence has been presented as to what has caused this delay. However, while not speculating, the matter would have gone through case management, pre-trial review and would have been subjected to the usual inherent delays. I also have no doubt that issues such as availability of dates, judges and courtrooms (institutional delay) would have impacted the hearing of the matter.

[140] The matter has been before the court for almost seven (7) years. However, in light of how this case has traversed the court, it is important that the periods be broken down. It spent twenty (20) months in the Resident Magistrate's Court and has been before the Circuit Court for over five (5) years. From the date of arrest to the first time the matter was set for trial is two (2) years and five (5) months. From that time until the constitutional claim was filed is one year and approximately two months. There were three (3) trial dates and four (4) mention dates (not including the first date that the matter was before the court) between the time when the matter was first set for trial in September 2014 to December 2015 when the court was informed

that the claimant had filed the present claim. The trial of the case has been "informally stayed" pending the outcome of the constitutional claim since December 2015 although there was no formal stay of those proceedings.

[141] The case was never set for preliminary enquiry in the Resident Magistrate's Court. During this period, not counting the date of the first appearance of the claimant and the date when the *nolle prosequi* was entered the case was mentioned eight (8) times. From June 2012 the endorsement reflects that the DPP was to enter *nolle prosequi* but this was not done until January 2014. It is also noted that disclosure by the prosecution continued until January 2013. There were also adjournments for the DPP and Ms Jackson to be contacted.

[142] When the matter came before the Circuit Court the matter was set for trial on three occasions, the first being in September 2014. The case was given priority on all the trial dates. From then on, until the constitutional claim was filed, the matter was adjourned due to illness of the claimant or to facilitate him having surgery. On one trial date, the complainant did not attend, as she too was scheduled for surgery and was overseas. As indicated no evidence or submissions were made about the period the constitutional claim has been pending.

The Law

[143] To decide whether the delay has breached the defendant's right to trial within a reasonable time and if a stay would be the appropriate remedy, I will be guided by the approach taken by the court in **Mervin Cameron**.[108] However, I remind myself that the court in that case was considering an application under section 14(3) of the **Constitution**. In the case at bar section 14 (3) was not prayed in aid of the application. The claimant has relied on section 16. In this regard I agree with the following observations made by D. Fraser J which is worth repeating and setting out in full:

> *"[214] In considering the effect of this case* **[AG Reference No. 2]** *it must first be recognized that Article 6 (1) of the Convention* **[ECHR]** *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*

[108] *Supra* at paragraph [76]

> *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 the 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 for 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 focussed 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…*
>
> *[228] The cases decided based on the 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 are always recognized, unless actual prejudice was shown, in terms of 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."* [This was the rationale for the decision in **AG Reference No**. **2**]

[144] The court in **Mervin Cameron**[109] applied the principles that were enunciated by Cromwell J (writing for the minority) in **Barrett Jordan v Her Majesty the Queen and the Attorney General of Alberta, British Colombia Civil Liberties**

[109] *Supra* at paragraph [76]

Association and Criminal Lawyers' Association (Ontario) (Interveners).[110] It is my view, based on my reading of this authority that it was concerned with section 11 (b) of the Canadian Charter which addresses the reasonable time and not the fair trial guarantee.

[145] However, I do agree with the reasoning of D. Fraser J that:

> *"[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 if 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 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."*

[146] The learned judge went on to distinguish between sections 14 (3) and 16 (1) of the **Charter of Rights** at several areas in his judgment.[111] In the round, he concluded that it has "*been established that the right under section 14(3) is independent of the right to a fair trial.*"[112] What resonated with me, however, given that I share the same view, was his reasoning at paragraph [260] part of which is set out below:

> *"[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*

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[110] [2016] 1 SCR 631; 398 DLR (4th) 381
[111] See paragraphs [238], [239], [240] and [241] of the judgment
[112] See paragraph [262] of the judgment

requirement, the proof of actual as opposed to presumed prejudice should, I find, have an impact on the remedy…"

Analysis

[147] I will now turn to the analysis of the evidence presented on delay. I will adopt the approach taken by the court in **Mervin Cameron**[113] at paragraph [148] which was summarised at paragraph [201] by D. Fraser J and is set out below:

> *"[201] …c) …*
>
> *(i) First on an application by an accused under s. 11 (b)* [equivalent to s14 (3) of the **Charter of Rights**] *the overall period between charge and the completion of 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 the 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.*

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[113] *Supra* at paragraph [76]

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 for 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 proceedings on its merits, or where the delay results from temporary and extraordinary pressures on counsel or the court system. However, these conditions would not invariably 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."* [148] The learned judge went on to say:

"[202] …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 an 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 context 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 the provincial courts and six to eight months in 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."*

[149] I agree. In the case at bar no empirical studies, statistical or other body of evidence have been presented from which the court could set time limits or lay down guidelines on whether the reasonable time guarantee is breached in a case of this nature. It would not only be difficult, but also inappropriate to do so in all the circumstances. There has not been, as an example, any data and/or evidence provided on the average time that it would take for a case of this kind to be disposed of.

[150] Nonetheless, the learning in **Jordan**[114] shows that where statistical or some other objective measure is unavailable then the court is to rely on its "experience and sense of reasonableness." I am also guided by D. Fraser J that the "*question of whether delay is unreasonable in any case, is to a large extent, going to be fact specific to that case*."[115]

[151] I have also accepted the definitions of inherent and institutional delays that have been helpfully simplified by Sykes J (as he then was) at paragraph [33] of the **Mervin Cameron**[120] judgment. The learned judge stated:

> *"[33] … inherent delays – that's* [sic] *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…institutional delay – that is delay attributable to a lack of resources such as court rooms, judges and other things necessary for the court to function…"*

[152] To determine if the reasonable time guarantee has been breached in this case there are four questions to be resolved:

(1) Is the reasonable delay inquiry justified?

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[114] *Supra* at paragraph [144]
[115] Paragraph [249] of **Mervin Cameron**, supra at paragraph [76]
[120] *Supra* at paragraph [76]

[153] The matter has been before the court since April 27, 2012 and has not yet been tried. This is a period of almost seven (7) years and would qualify to justify an enquiry.

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

[154] It is not appropriate, in my view, to lay down any timelines given the absence of data on the average time it would take for a case of this nature to be disposed of, and also to avoid setting any unrealistic or arbitrary time limits. However, the fact that the matter has been before the court for almost seven (7) years and the trial has not been completed, it would appear, *prima facie*, that the reasonable time limit, whatever it may be, has been exceeded in this case.

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

[155] For clarity I will itemized each period of delay.

i) the delay of seven (7) weeks (from April 27 to June 08, 2012) was to facilitate the investigating officer to make contact with the DPP concerning DNA (the claimant having denied paternity of the complainant) and to possibly lay additional charges against the defendant – this delay is viewed as an inherent delay and does not count against the state.

ii) the delay of six (6) weeks (from June 08 to July 19, 2012) the court was told that this was for the DPP to enter *nolle prosequi* – this delay is also viewed as an inherent delay and does not count against the state

iii) the delay of a little over three (3) months (from July 19 to November 01, 2012) was to allow the investigating officer to complete the file (bound over for statements) – this delay would count against the state.

iv) the delay of two and one half (2½) months (from November 01, 2012 to January 16, 2013 was to allow the prosecution to obtain a psychiatric report and for *nolle prosequi* to be entered by the DPP – this delay counts against the state.

v) there is no reason given for the delay of two (2) months and one (1) week (from January 16 to March 23, 2013) – being unexplained, this delay counts against the state.

vi) the delay of almost three (3) months (from March 23 to June 14, 2013) was to allow for the CPO to contact the DPP – this delay counts against the state.

vii) the delay of a little over a month (from June 14 to July 19, 2013) was a date that was agreed between the attorneys for the claimant and the prosecution to attend court so that the defendant's bail could be varied so that he could travel overseas with his wife for medical treatment – this delay does not count against the state.

viii) the delay of almost five (5) months (from July 19 to December 13, 2013) was to allow the claimant to travel overseas with his wife who was unwell for medical treatment – this delay does not count against the state.

ix) the delay of almost a month (from December 13. 2013 to January 07, 2014) was for trial date to be agreed between the attorneys (presumably in the Circuit Court) – this I view as an inherent delay (since it was a matter that was required for the progression of the case to trial) and does not count against the state.

x) the delay of over eight (8) months (from January 07, 2014 to September 22, 2014) – does not count against the state. This period would be reasonable in my view to allow the parties to be ready to proceed and conclude the trial. Additionally, I take into account that the St. James Circuit Court does not sit continuously like the Home Circuit Court (it sits for seven to eight (7 – 8) weeks per term and institutional delay has to be factored into this period as well.

xi) all the delays that came after September 22, 2014 do not count against the state because on the trial dates, the prosecution was ready to proceed and the matter was adjourned due to the illness of the claimant. On one of the trial dates (July 20, 2015) the complainant was also overseas to undergo surgery.

However, any delay that might have been caused as a result of her absence (had the claimant been in a position to face his trial) would not count against the state as this would be regarded as unavoidable due to the illness of a trial participant.

xii) The claimant also filed the constitutional claim in November 2015. While there was no formal stay of proceedings, the court was advised on December 10, 2015 of these proceedings and the trial has not yet taken place. It is understandable, in my view, why this has happened given the peculiarities of this case which involves a historical complaint and the claimant who is not in the best of health. The delay of over three (3) years (from December 10, 2015 to now) in my view does not count against the state.

[156] Therefore, of the twenty (20) months that the matter spent before the Resident Magistrate's Court, ten (10) months and three (3) weeks of the actual delay counts against the state.

[157] However, I wish to observe that the delay which took place from July 19, 2012 to January 16, 2013 (which is under just under 7 months) and which I have found to count against the state, was for the completion of the file and to allow the prosecution to obtain a report from a psychologist and have it served on the defence. This report had to be obtained from overseas. The complainant's evidence is that she was contacted by the investigating officer sometime in July 2012 to locate the psychologist who had counselled her in relation to her years of alleged abuse by the claimant. This process took about two months (from July to September 2012). The reasons for the delay are that the psychologist in question

had relocated her practice from Florida to Texas. The complainant's file had to be located. It was subsequently discovered that the records of her treatment had been destroyed in keeping with the laws of Florida. A report or "statement" was then

penned by the psychologist and mailed to the complainant's Florida address. The complainant then had to travel overseas to retrieve the document.[116]

[158] The point is, while the period of this delay has been counted against the state, and it may be said that a period of almost seven (7) month would exceed the time that was required for completion of the file and disclosure to be made, it is my view that some part of this period must be accounted for as reasonably necessary for the case to progress to trial (inherent delay). Additionally, the case would be affected by institutional delay bearing in mind that there would be other matters scheduled for preliminary examination long before this matter came before the court.

[159] What this means, therefore, is that the period of delay attributable to the state would be further reduced. In the circumstances, I do not consider the two months that it took the complainant to retrieve the document from the psychologist as inordinate. In my opinion and experience, an allowance of three months for institutional delay would be reasonable. This would mean that the total period of delay attributable to the state would be approximately six (6) months.

(4) Was the delay that counts against the state unreasonable?

[160] The court must now determine whether the delay of six (6) months that counts against the state exceeds the reasonable time by more than can be justified. It is my view that it has not. This matter is not the usual incest and indecent assault case. There are some complexities involved such as delayed complaints, witnesses who reside abroad, an aged defendant and no doubt there will a number of factual and legal issues that will arise. Certainly, allowance should be made for any inherent delays associated with the complexities of this case.

[116] See paragraphs 14 – 21 of the affidavit of MC filed on March 13, 2019

[161] However, even if I am wrong, given the circumstances of this case, for the reasons stated below, it is my considered view that in any event a stay would not be the appropriate remedy.

[162] Regrettably, I am unable to agree with my learned brother Batts J that the claimant's constitutional right to a trial within a reasonable time has been breached. Consequently, such a declaration is denied.

Fair Trial

[163] Nonetheless, it is my belief that the matter cannot end there. Pre-charge or complainant delay is relevant in determining whether the claimant can receive a fair trial. It is opined that while presumptive or inferred prejudice may be applicable in the context of post-charge or prosecutorial delay[117], the same cannot be said of pre-charge or complainant delay. If, as the claimant is posturing, that as a result of the pre-charge delay he cannot receive a fair trial, he is required to demonstrate actual prejudice.

[164] It is to be noted that all the cases cited and relied upon by the claimant that touched and concerned the **Constitution of Jamaica**, addressed post-charge delay. This is not surprising since those cases raised issues that fell under the former section 20 (1) of the Constitution. As maintained earlier, the reasonable time requirement in that section and the current section 16 (1) is specifically concerned with the postcharge period. It is therefore no wonder that many of the authorities to which the court has been referred considered the issue of pre-charge delay in HCSA cases in the context of an abuse of the due process of the court. However, counsel for the 2nd defendant assisted the court with the case of **PO'C v DPP**[118], a decision of

[117] See paragraphs [122] to [124] above
[118] *Supra* at paragraph [103]

the Supreme Court of Ireland, which focussed on pre-charge delay in a HCSA case in the framework of the constitutional provisions of the rights to a fair and expeditious trial. This authority will be discussed later.

[165] It is a fact that in Jamaica there is no statute of limitation for serious crimes, such as those which the claimant faces. I quite agree with Batts J that, "*the absence of a criminal statute of limitation means that it is for this court to consider on a case by case basis the matter of delay and its impact on criminal prosecutions. In doing so we should be able to give guidance on the question when, or whether, the passage of time is likely to result in such unfairness that proceeding to trial is illadvised. It means too that whether delay per se is a basis to stay proceedings arises for our determination.*"

[166] I can say that guided by the many authorities I have read in this matter I am not persuaded that delay *per se* is a basis to stay proceedings. I believe that the authorities, whether dealing with a breach of the section 16 (1) **Charter Rights** or abuse of the due process of the court, clearly illustrate, that for a stay to be granted, it must be shown that the delay had resulted in actual prejudice to a defendant to the extent that there could no longer be a fair trial or it would be otherwise unfair to try him/her.

[167] Finnegan J in **PO'C v DPP**[119] puts it in this way:

> *"...In an application to prohibit a criminal trial on a ground of complainant delay, it must be shown that the delay had resulted in actual prejudice to an accused so as to give rise to a real or serious risk of an unfair trial. Presumptive prejudice would not suffice."*

[168] In **PO'C v DPP** [120] the applicant was charged with indecently assaulting a complainant on a date unknown in 1982. The complainant made a formal complaint on June 12, 1998 (a delay of sixteen (16) years). She would have been

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[119] *Supra* at paragraph [103]
[120] *Ibid*

12 years and 10 months old at the time of the alleged offence. The applicant brought judicial review proceedings in which he sought to prevent the further prosecution of the charge on grounds of complainant delay and actual prejudice which can be summarised as follows:

(a) two witnesses that he could call had died who could assist with the establishment of an alibi for the time of the offence;

(b) the unavailability of witnesses and/or their inability to recall the events after such a long period of time; and

(c) the destruction of training diaries of the applicant and other persons which would assist with his defence.

[169] As it concerns complainant delay, the court, applying **SH v Director of Public Prosecutions**[121] held at paragraph [9] of the judgment:

> *"[9] ...there is no necessity to hold an inquiry into, or to establish the reasons for, delay in making of a complaint. The issue for the court is whether the delay has resulted in prejudice to an accused so as to give rise to a real or serious risk of an unfair trial save in only exceptional circumstances where it would be unfair or unjust to put an accused on trial."*

[170] In **SH v DPP**[122] the court was also faced with the issue of a HCSA case in the context of the rights to a fair and expeditious trial as provided for by the Constitution of Ireland. The judgment was delivered by Murray CJ. The court overruled previous decisions that called for an examination of the reasons given for the delay in making the complaint and set the test that is to be applied when considering if complainant delay has breached a defendant's rights to a fair and expeditious trial. The learned Chief Justice said:

> *"[37] Over the last decade the courts have had extensive experience of cases where complaints are made of alleged sexual abuse which is stated to have taken place many,*

[121] *Supra* at paragraph [99]
[122] Supra at paragraph [99]

> *many years ago. It is an unfortunate truth that such cases are routinely part of the list in criminal courts today.*
>
> *[38]* ***At issue in each case is the constitutional right to a fair trial. The court has found that in reality the core inquiry is not so much the reason for the delay in making a complaint by a complainant but rather whether the accused will receive a fair trial or whether there is a real or serious risk of an unfair trial. In practice this has invariably been the essential and ultimate question for the court. In other words, it is the consequence of delay rather than the delay itself which has concerned the court.*** *" (emphasis added)*

[171] In **DD v DPP**[123] Finnegan J also stated the relevant threshold that is required to be met before a stay of proceedings would be granted. He opined that, "*The relevant test is whether the delay or events happening during the period of delay has caused irreparable prejudice to* [the defendant's] *ability to defend himself so that there is a real and serious risk of an unfair trial.*"[124]

[172] The learned judge provided guidance on how this risk may be demonstrated by applying **McFarlane v Director of Public Prosecutions**[125] an earlier decision of the court:

> *"In order to demonstrate that risk there is obviously a need for an Applicant to engage in a specific way with the evidence actually available so as to make the risk apparent. A failure to do this was the basis of the failure of the Applicant in* ***Scully*** *[2005]. This is not a burdensome onus of proof: what is in question, after all is a demonstration of a real risk, as opposed to an established certainty, or even probability of an unfair trial. The Applicant has not so much failed to meet the requisite standard of proof as failed to address the issue in any meaningful way. To say this is not to criticise the Applicant's advisors: it may be that the point has been put as far as it can be."*

[173] At issue in the case before me is the claimant's constitutional right to a fair trial. I respectively agree with the approaches taken by the learned judges in these three

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[123] *Supra* at paragraph [102]
[124] See page 5 of judgment
[125] [2006] IESC 11

(3) cases and am prepared to apply them to the case at bar. I will now go on to determine whether the prejudice, as particularised by the claimant, gives rise to a real or serious risk of an unfair trial. In making this determination, I bear in mind that the onus rests on the claimant on a balance of probabilities "*to establish a real or serious risk of an unfair trial which cannot be avoided by appropriate rulings and directions on the part of the trial judge. The risk must not only be a real one but the unfairness of the trial must be unavoidable.*"[126]

Prejudice

[174] As previously set out at paragraph [75] *supra*, it is being contended that if the matter proceeds to trial, the claimant will be prejudiced because (1) witnesses are no longer available; (2) the notes of the complainant's psychologist have been destroyed; (3) *loci in quo* no longer exist; and (4) the claimant's physical and mental health is declining. I will consider each in turn.

(1) Unavailability of witnesses

[175] In relation to the unavailability of witnesses, the claimant is asking this court to declare that having regard to the delay in the complaint leading to the institution of criminal charges against him, he will not or will not likely be able to secure the attendance of witnesses on his own behalf and for the purposes of mounting his own defence. I have already set out his evidence in support of this contention at paragraphs [68] and [69] herein.

[176] I have considered that two of his potential witnesses are now deceased, namely his mother, Olive Chung, and mother-in-law, Ethlyn Kong; and the third potential witness, his ex-wife Beverley Chung resides overseas.

[177] By way of explanation, the claimant has stated that Olive Chung was the complainant's caregiver and that the complainant was living with her for a number of years including the period when the alleged sexual abuse took place. In relation

[126] **PO'C v DPP** *supra* at paragraph [103] see paragraph 4 of the judgment

to Ethlyn Kong, the claimant has stated that she would accompany him when he went to visit the complainant at Olive Chung's home and that she also resided with the claimant when the complainant came to live with him.

[178] Save for the fact that Beverley Chung has remarried and now lives overseas, there is no evidence that her attendance cannot be secured. The claimant has not stated that her whereabouts are unknown to him or that she is otherwise unable to give evidence in person or by video-link. As the court held in **R v L**[127] the claimant has not presented any evidence that the his ex-wife is untraceable. There is no evidence from the claimant that his former wife has indicated to him that she will not give evidence. All the court was told is that she has relocated, has moved on with her life and is not available.

[179] It is noted also that the complainant alleges that the claimant would engage in sexual intercourse with her in the home that he shared with his former wife whenever members of the family were not around.[128] If true, this would tend to cast doubt on whether calling this witness would assist in the claimant's defence.

[180] In any event, the claimant has not in my view clearly demonstrated how any of the witnesses named would have assisted in his defence. Counsel, in her submissions, has referred to them as 'obvious potential alibi witnesses', however I bear in mind that the allegations are not of an isolated incident but that the claimant had sexual intercourse with the complainant on numerous occasions over a nine-year period. She also alleges that the alleged sexual abuse would take place when family members were not around and that most of the sexual abuse took place when she occupied an apartment above the supermarket that the claimant operated. There is no evidence that she resided with anyone at this apartment. I have had regard to the case cited by counsel for the 2nd defendant, **R**

[127] [1991] 1 S.C.R.1091
[128] *Supra* at paragraph [56]

v William Wilkinson[129] which bears some amount of factual similarity. It was opined by Lord Taylor CJ, at page 86:

> *"This is not a case … of a single named day upon which something happened; it was a continuing course of conduct of weeks and weeks in relation to each of the two girls. Accordingly, it is not a case in which inability, after many years to establish a particular alibi for a particular day could have been an important factor."*

[181] In **Regina v R.D.**[130] the delay in prosecuting several sexual offences ranged between 39 and 63 years. The learned trial judge rejected the defendant's arguments that the delay had prejudiced his rights to a fair trial on grounds of missing evidence (documents and deceased witnesses). I respectfully agree with and adopt the following dicta of Lord Justice Treacy who delivered the judgment of the court:

> *"20. It seems to us that some of these submissions were overstated. This case, although unusual in relation to the length of time that has elapsed, presents difficulties of a sort which frequently occur in cases involving lesser delay. There also underlay the submissions made on behalf of the appellant the assumption that missing evidence would necessarily have supported the appellant's case, which we are unable to accept. Moreover, the complaints of J, G and S were not date specific but were couched in general terms of sexual abuse occurring on very many occasions during visits during school holidays within wide periods identified in the indictment.* ***Accordingly, an alibi in its true sense was not an issue before the jury. The issue was in reality whether or not the jury could be sure that the abuse had taken place…****" (emphasis added)*

[182] I also agree with counsel for the 2nd defendant's submission that less significance ought to be given to the unavailability of witnesses where the alleged incident took place in a setting where the opportunity was very likely (such as the family home), or where the alleged incident took place in private. In either circumstance, it would be doubtful as to the value of such evidence, particularly since the claimant has

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[129] *Supra* at paragraph [102]
[130] [2013] EWCA Crim 1592

not said what evidence these witnesses would be likely to give and how this would assist him in mounting his defence.[131]

[183] Additionally, the claimant has not established that the evidence that his mother. mother-in-law and former wife would give is unavailable from any other person or source. It is the complainant's evidence that there were a number of persons who lived at the residence of her paternal grandmother during the times that these incidents were said to have occurred there. One of her cousins with whom she shared a room at this house bears the same surname as the claimant. There is also her evidence that the claimant's siblings would also visit on a regular basis. At the house he shared with his ex-wife, the unrefuted evidence is that three other of the claimant's children resided there at the time of the alleged sexual encounters. Two of those children have provided affidavits in this matter. Once again, the claimant has not given any indication of the evidence that his former wife would give and has not averred that this evidence would not be available from any other source.

[184] In **DD v DPP**[137] the delay in prosecuting the charges of sexual offences ranged between 13 and 22 years. The defendant's application for an order of prohibition was refused. On appeal, he alleged that he had suffered actual prejudice on the grounds that (1) his recollection of the events was no longer clear; (2) several potential witnesses were now deceased; (3) lost records; and (4) several parts of the old buildings of the school where the offences were alleged to have been committed had been demolished.

[185] Finnegan J observed that in relation to the evidence which each of the missing witnesses might have been in a position to give, that the Appellant "*has not gone as far as he can go*". He continued:

> *"The nature of the offences in issue here is that they occur in private and in secret. Any evidence which the deceased*

[131] **R v Jacobi**, *supra* at paragraph [105], paragraph 113 of the judgment
[137] *Supra* at paragraph [89]

> *witnesses could have given would at best have been peripheral…*
>
> *The Applicant has not engaged with the circumstances of the case in that he has not indicated whether any of the evidence which the three deceased witnesses would give is unavailable from some other source…"*

[186] I adopt and apply this principle to the case at bar. The claimant has merely named and stated that the witnesses are unavailable without presenting compelling evidence to show how those witnesses would have assisted his defence. He has also not stated that this evidence could not come from another source. In my view, he has failed "to engage with circumstances of the case" and "has not gone as far as he could go". As such, I would not be minded to grant the declaration as sought by the claimant on this limb.

(2) Destruction of psychologist's notes

[187] It is contended that evidence which would otherwise be available to the defendant is no longer in existence due to the delay in prosecuting the charges against him. Although not pleaded, it is submitted that the claimant is prejudiced by not having access to the notes of the psychologist that treated the complainant and that these notes could have been vital to the preparation and presentation of his defence.

[188] The evidence before this court is that in or about 2002 the complainant sought medical treatment in Florida, USA from a clinical psychologist. During treatment, she disclosed that she was being sexually abused by the claimant and was diagnosed as having PTSD resulting from CSA. However, the records/notes of the complainant's sessions were destroyed seven years after she was treated. It is

noted that this is the retention period required by the laws of the state of Florida[132] and that the destruction was not done maliciously or in an attempt to prevent the records from coming to court (as in the **Carosella**[139] case).

[189] Again, the claimant has not demonstrated how the psychologist's notes would be central to his defence, his contention is that they could have been vital to the preparation of his defence. In fairness to him, it would be difficult to show the evidentiary value of something which he has not been able to see. However, I am inclined to agree with counsel for the 2nd defendant that the claimant's contention is an invitation to enter the realm of speculation. This is an invitation that this court must decline given that the claimant has not established a real likelihood of prejudice due to the destruction of the records. I would adopt the reasoning from the minority judgment (4-5) of L'Heureux-Dubé J at paragraphs [74] - [76] of **Carosella**:

> *"[74] …Where evidence is unavailable, the accused must demonstrate that a fair trial, and not a perfect one, cannot be had as a result of the loss.*
>
> *[75] …for the appellant to suggest that he is unable to receive a fair trial because of destroyed notes, he must be able to demonstrate that there was actually some harm to his position. It is not enough to speculate, as my colleague proposes, that there is the potential for harm, as the notes might somehow have proved useful…such a standard is completely inappropriate." (emphasis added)*
>
> *[76] A long line of jurisprudence has affirmed that an accused has a responsibility to establish a real likelihood of*

[132] Letter dated August 03, 2013 from Gina M Del Gardo, Ph.D. paragraph 1
[139] *Supra* at paragraph [78]

> *prejudice to his defence as a result of an absence of relevant material…"*

[190] In **RD v DPP**[133] the court also considered the issue of prejudice and unfairness caused by lost records. At paragraph 15 of his judgment given on behalf of the court Treacy LJ said:

> *"15. In considering the question of prejudice… it seems to us that it is necessary to distinguish between mere speculation about what missing documents or witnesses might show, and missing evidence which represents a significant and demonstrable chance of amounting to decisive or strongly supportive evidence emerging on a specific issue in the case. The court will need to consider what evidence directly relevant to the appellant's case has been lost by reason of the passage of time. The court will then need to go on to consider the importance of missing evidence in the context of the case as a whole and the issues before the jury. Having considered those matters, the court will have to identify what prejudice, if any, has been caused to the appellant by the delay and whether judicial directions will be sufficient to compensate for such prejudice as may have been caused or whether in truth a fair trial could not be properly afforded to a defendant."*

[191] I agree with and adopt the court's reasoning. There is no doubt that the psychologist's notes have been destroyed. However, I do not accept counsel for the claimant's argument that those notes could necessarily have been used to challenge the credibility of the complainant. What we do know is that the complainant was diagnosed as having PTSD as a result of CSA. I have no way of knowing (especially in light of the time which was long after the alleged abuse that the complainant sought therapy) what, if any details, might have been included to allow for any serious challenge to the complainant's reliability by use of those notes. It would be speculative, at best, to make any such assumption.

[192] An additional distinction between the case at bar and **Carosella** is that the destruction in that case was deliberately done by an agency that was financed by

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[133] [2013] EWCA Crim 1592

the public and scrutinised by the government. This agency made a decision which was not one for it to make, that is, to obstruct the course of justice by systematically destroying evidence which the practices of the court might require to be produce.[134] Sopinka J, on behalf of the majority (5-4), opined that this particular feature distinguished **Carosella** from lost evidence cases generally.[135] This does not feature in the case at bar. To my mind, the decision taken on lost notes in **Carosella** is specific to the facts in that case.

[193] In the case before the court, the destruction of the complainant's records was lawfully done by the private entity where she sought therapy. The entity acted in accordance with the relevant retention laws and its actions were not done to obstruct justice by destroying evidence. In fact, at the time that the notes were destroyed, the complainant had not yet reported the matter to the police. Further, based on the complainant's evidence, this therapy was funded by her at great expense. The psychologist in her letter even mentioned that the claimant did not complete the payment of her fees. Of note, the claimant deposed that the claimant never contributed to the payment of the sessions despite her ex-husband insisting that he should and the claimant agreeing.[136]

[194] Finally, I would add that I agree with counsel for the 2nd defendant that there is also a distinction between the present situation and what obtained in the **Geoffrey David Davis**[137] case, where a stay was upheld. In that case it was determined that a fair trial was not possible and that *inter alia* special prejudice was caused by the loss of medical records. The respondent was a medical doctor charged with assaulting a number of his patients over a 14-year period (1960 to 1974). Although most of the complainants admitted that they presented with a gynaecological problem which may have warranted vaginal examination, in some of the cases the

[134] Per Sopinka J at pages 41 and 42
[135] *Ibid* at page 42
[136] Affidavit of MC in response to Stacy-Ann Chung filed on July 25, 2017 paragraph 12
[137] at paragraph [78]

need for such an examination was not so apparent. The respondent left the medical practice and in 1993 the medical records for all but one complainant, were culled and destroyed. Without these records, the respondent was unable to speak to what happened on subsequent visits by the complainants (when, how often and for what reason) or to give instructions to his counsel. The court was of the view that having regard to the nature of the allegations and the surrounding circumstances, there was nothing a trial judge could do to overcome the unfairness caused to the respondent by the delay and consequently the loss of the medical records. On the facts of that case, I am in agreement with the decision that the court arrived at. That particular authority is unhelpful to the claimant in this case. I also find that the other authorities cited by the claimant on this issue[138], similarly do not assist him.

(3) Loci in quo no longer exist

[195] The claimant contends that given the passage of time, one of the *loci in quo*, an apartment above the supermarket at Union Street has been changed, and the court could no longer view these premises. This, counsel asserts, would be vital to challenging the credibility of the complainant.

[196] Since a pre-condition to a visit is that there is evidence that the locality has remained unchanged since the commission of the alleged offence[139], counsel for the claimant would be correct that changes to the apartment would render a visit to that particular *locus* futile. However, it is useful to remind myself that –

(1) "the object of a view or visit to the locus in quo should be for the purpose of enabling the jury to understand the questions being raised, to follow

[138] *Ibid*

[139] **Allan Cole v R** [2010] JMCA Crim 67 at paragraph [34]

the evidence and to apply the evidence, and **(is) not a substitution for such evidence**."[140] ; (emphasis added)

(2) a decision whether or not the *locus in quo* should be visited is entirely a matter within the discretion of the trial judge[141]; and

(3) the considerations which guide the discretion in making such a decision are not circumscribed by the rules which regulate the reception of evidence.[142]

[197] Their Lordships in **R v William Wilkinson**[143] treated with a similar consideration. At page 85, Lord Taylor CJ stated: "*It is said that the lorry alleged to have been the venue of some of the assaults was no longer in existence. However, it would not have been impossible, in our judgment, for discovery to have been obtained as to what the nature of the lorry was*."

[198] Similarly, in **DD v DPP**[144] with regard to the buildings which had been demolished, the court noted:

> *"…the Applicant submits that it is no longer possible to ascertain whether the layout of these buildings would have permitted of the types of abuse alleged. The Applicant himself can describe the layout of the buildings. No evidence is before the court as to attempts to obtain other witnesses who could give that evidence. Again the Applicant has failed to engage with the evidence actually available to make any risk apparent."*

[199] The main issue that has arisen with the particular *locus*, in my view, relates to the credibility of the complainant on an issue not related to the alleged sexual abuse.

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[140] Per Waddington, P (Ag) in **R v Warwar** (1969) 11 JLR 370, 383
[141] **R v Herman Williams** (1971) 12 JLR 541
[142] *Ibid*
[143] *Supra* at paragraph [102]
[144] at paragraph [89]

This concerns whether or not there was an internal staircase connecting the upstairs apartment (where she resided) to the supermarket at a time when the supermarket was broken into via a hole in the roof. It would seem to me that it was somehow being alleged that the complainant had broken into the supermarket. The complainant on the other hand gave evidence that she would have no need to place a hole in the roof to break into the supermarket as there was an internal staircase connecting her apartment to the supermarket.[145] Stacey-Ann Chung has averred that at the time of the break-in, there was a spiral staircase on the outside of the building leading from the supermarket to the apartment; and that the construction of an internal staircase was in process but that it was incomplete at the time.

[200] While it may be that that particular *locus* has changed, the claimant can describe the layout of the building. Additionally, his witness Stacey-Ann Chung has also given a detailed description about this building and the construction that was ongoing.[146] Therefore, evidence about the *locus* is available and can be presented at the trial to mount a challenge to the complainant's credibility on this aspect of the matter.

[201] Given that a visit to the *locus in quo* is not a substitution for evidence, there is nothing to suggest that the claimant is incapable of challenging the complainant or testing her credibility on this particular issue or matters relating to where the abuse allegedly took place. Therefore, I am unable to say that the claimant has been so prejudiced by the inability of the court to visit the *locus* that his right to a fair trial has been breached.

(4) Decline of the claimant's health

[202] Counsel for the claimant submitted that he is now seventy-seven years of age and suffers from ill health which will impair his ability to participate in the trial and put

[145] Affidavit of MC in response to Affidavit of Stacey-Ann Chung filed on July 25, 2017 at paragraph 10
[146] See Further Affidavit of Stacey-Ann Chung filed on April 19, 2018 paragraphs 6 and 8

forward his defence. A number of medical practitioners have given evidence in this matter. As noted at paragraphs [67] and [72] herein, the claimant has been diagnosed with a number of diseases. These include diabetes, malignant hypertension, hypercholesterolemia, severe diabetic retinopathy (with bleeding), cataract, and heart disease. He also suffers from impaired vision, diminished hearing, stress syndrome and memory lapses.

[203] In August 2017, one of the claimant's doctors, Dr Patrick Lloyd, has expressed the view that "*based on his rapidly deteriorating medical status both mental and physical, inclusive of the more frequent memory lapses, (the claimant) should retire from his business and seek to engage in more relaxing occupations and pastimes as stress has played a major factor in his present ill health*."

[204] It is acknowledged by counsel for the 2nd defendant that the passage of time in cases up to 40-years delay presents a major challenge to an accused, particularly one who might have fallen to ill-health or bad memory. However, it is contended that the ailments that the claimant suffers from are common and can be controlled with proper monitoring and treatment. It is further contended that the evidence of Dr Patrick Lloyd which relates to memory lapses is not sufficient to justify a stay of proceedings, particularly since the substance of the claimant's defence appears to be a straight denial.

[205] Reliance was placed on the Australian case of **R v Jacobi**[147], wherein the court considered an application for a stay of proceedings on the basis that the continuation would constitute an abuse of process having regard to the 85-yearold applicant's ill health and the loss of evidence due to the delay between the charged act and the complaints to the authorities. The applicant suffered from a number of health related issues, including difficulty concentrating, cardiac failure, incontinence, depression, anxiety and osteoarthritis. The court held that the

[147] at paragraph [105]

medical conditions of the applicant were not so serious as to render a trial unfair, by reason of a lack of common humanity.

[206] I am of a similar view that the claimant's medical conditions are not so serious as to render a trial unfair, by reason of a lack of common humanity. It is noted that in their detailed reports, none of the claimant's medical doctors have expressly stated concerns about his ability to cope with the rigors of trial or as Batts J puts it, "*Affidavits from medical practitioners reveal that the Claimant suffers from many maladies. None, it is fair to say, significantly affects cognition or his ability to give instructions.*"

[207] I see no reason that the exceptional remedy of a stay should be granted due to the decline in the claimant's health. Should there be an issue of the claimant's fitness to plea, that can be dealt with by the trial judge. Bearing in mind that the test of unfitness to plead is whether the accused will be able to comprehend the course of the proceedings so as to make a proper defence.[148] Should this be raised, the trial judge will consider whether the accused would be able to exercise his right to challenge jurors, understand details of the evidence as it is given, instruct his legal advisers and give evidence himself, if he so desires.

[208] Before leaving this point, I wish to make a general observation. In a number of cases cited, a key consideration is whether anything can be done by the trial judge to 'cure the prejudice'[149] or 'overcome the unfairness caused to the accused.'[150] I am of the view that appropriate directions by the trial judge on delay is one such

[148] Pritchard (1836) 7 C&P 303
[149] **Carosella** *supra* at paragraph [78]
[150] **R v Jacobi** *supra* at paragraph [105]

action. To this end, I would adopt the dicta of Gray and Sulan JJ from **R v Jacobi**[151]:

> *"… A power to ensure a fair trial is not a power to stop a trial before it starts. It is a power to mould the procedures of trial to avoid or minimize prejudice to either party.*
>
> *Complications are often encountered during the course of trial. Theses may arise from, for example, the death or unavailability of witnesses, or the destruction of key documents. Nevertheless, these can often be remedied by adapting procedures of the trial, by ruling on evidence, or by appropriate directions to the jury designed to minimise any prejudice which might otherwise result. It is not uncommon for these types of obstacles to arise.*
>
> *The power to order a stay is extraordinary. This is so because a granting of a stay amounts to a refusal to exercise jurisdiction. A court which grants a stay without sufficient reason abuses itself by declining to exercise its constitutional function of determining disputes."*

[209] It is my conclusion that all the factual issues arising from delay can be placed before the jury, together with the appropriate directions from the judge in summing up. Once these issues are raised, it will be the duty of the trial judge to place them squarely before the jury and to adequately direct the jurors on how to treat with the issue of delay.[152][153] The claimant, I have found, "*has failed to engage with the evidence so as to make the risk of an unfair trial apparent.*" As a result, I am not convinced, on the evidence presented that the prejudice alleged by him is "*of such a nature that nothing that a trial judge can do in the conduct of the trial can relieve against its unfair consequences*"[154]. Accordingly, the threshold required to justify the grant of the exceptional remedy of a permanent stay of proceedings has not been met.

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[151] *Supra*, paragraph [105] at paragraphs 52 – 54 of the judgment
[152] See The Supreme Court of Judicature of Jamaica Criminal Bench Book 2017, pages 131 to 136; pages
[153] to 308 and pages 314 to 315
[154] Mason CJ in **Jago**, *supra* at paragraph [130]

Horizontal application of section 16(1)

[210] In the case at bar there are two impediments to invoking section 13 (5) of the **Charter**, now commonly referred to as a horizontal application.

[211] Firstly, it cannot be contended with any seriousness that the claimant has pursued such an argument, as it is quite apparent that the complainant has not been made a party to these proceedings.

[212] Secondly, I am entirely unconvinced, on the paucity of arguments and authorities presented, that tripartite rights guaranteed by section 16 (1) are even capable of horizontal application.

[213] It must be borne in mind that the wording of section 13 (5) makes it abundantly clear that not all rights, by virtue of their nature, are binding on natural persons (private citizens). Even where they are binding or applicable to a natural person then it may not apply to the extent that it would to the state (see: dicta of Sykes J (as he then was) at paragraph [203] in **Maurice Arnold Tomlinson v Television Jamaica Ltd et al**[155]).

[214] Section 13 (5) provides:

> *"A provision of this Chapter binds natural or juristic persons* ***if, and to the extent that, it is applicable, taking into account the nature of the right*** *and the nature of any duty imposed by the right." (emphasis added)*

[215] In the case at bar, it was submitted by counsel for the claimant that a virtual complainant who delays unreasonably in making a report of a crime acts in breach of the accused's constitutional rights.

[216] Respectfully, it is doubtful as to whether the right to due process is capable of horizontal application. The duty to observe the reasonable time guarantee is on

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[155] [2013] JMFC Full 5

the state.[156] This is reflected in the fact that prosecutions under the criminal law are brought on behalf of the state in the name of the Crown and the alleged victims/injured parties are typically referred to as virtual complainants. Where crimes are committed, liability is owed to the state (not the injured party) and it is the state which supervises any punishment.[157]

[217] This distinction is important as it demonstrates that it is the state which must afford accused persons with a fair hearing within a reasonable time. The duty falls squarely and solely on the state. It is doubtful whether the right to due process could be invaded by any person other than the state or its organs. This being the test, which was accepted by the Full Court in **Brendan Courtney Bain v The University of the West Indies**[158] at paragraph [98]. Again bearing in mind when the section 16 (1) right is engaged (that is, after charge) then it bears no resonance to one's mind how the virtual complainant would have infringed the claimant's right by failing to make a report earlier.

[218] It is to be noted that the cases make a point of determining what delay may be attributable to the state. This is because delay for which the state is not responsible cannot be prayed in aid of the applicant (per Lord Steyn in **Taito v R**[159], adopted in **Tapper**[160]). There is a clear recognition that there are certain events which result in unavoidable delays which are not counted against the state. Examples cited include inclement weather and illness of a trial participant.[161] Therefore, it seems that psychological trauma or fear which prevents the victim of alleged sexual abuse from coming forward at an earlier date could fall within the category of a delay which ought not to count against the state.

[219] There seems to be some support for this position from Iain Currie and John de

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[156] **Mervin Cameron** at paragraph [161] of judgment
[157] Adopted from Criminal Law, Jonathan Herring, 5th edn, paragraphs 1.3 and 2.1
[158] [2017] JMFC FULL 3
[159] [2002] UKPC 15
[160] *Supra* at paragraph [76]
[161] **Jordan** guidelines – paragraph 4 (set out at paragraph [201] of **Mervin Cameron**)

Waal in their text **The Bill of Rights Handbook**, which focusses on the Constitution of the Republic of South Africa (SA). In this publication, the learned authors had this to say about section 35 of the Bill of Rights ('BOR') which addresses the rights of arrested, detained and accused persons:

> *"The rights of detained, arrested and accused persons generally precludes them from being directly applied to private conduct..."*[162]

[220] It is perhaps instructive to point out that section 35(3) of the BOR provides for the right of every accused person to a fair trial, while subsection (d) of the said section makes provision for the right of an accused person "to have their trial begin and conclude without unreasonable delay."

[221] The issue of horizontal application of the BOR of SA was also considered in the case of **Du Plessis v De Klerk**[163], a decision of the Constitutional Court of SA. The majority of the court concluded that the Bill of Rights was not in general capable of a direct horizontal application. However, the very same Constitutional Court in the case of **In Re: Certification of the Constitution of the Republic of South Africa**[170] held that that Section 8 (2) of Chapter 3 unequivocally provided for the horizontal application of the BOR. This is the same provision as section 13 (5) of our **Charter of Rights**. Nonetheless, I bear in mind that it is the responsibility of the court to determine the suitability or non-suitability of an impugned right to horizontal application.

[222] I agree entirely with the opinion expressed by Karun D. Chetty in his research paper entitled **The Horizontal Application of the South African Bill of Rights**[164] where he states:

> *"…Before a right binds a natural or juristic person it must be applicable with reference to the nature of the right and the nature of the duty that has been imposed by that right… The*

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[162] See pages 48 to 50 of the 5th edition of the text

[163] 1996 (5) BCLR 658, 1996 SACLR LEXIS 1 at 34 (May 15, 1996), 1996 (3) SA 850 [170] 1996 (10) BCLR 1253

[164] Published in 1998 as the author's LLM thesis at pages 20 to 23

> *court must decide that the particular right is capable of application with reference to its suitability taking into account the nature of the right and the correlative duty it imposes… Even if it found that such a right is applicable, this does not in itself satisfy the requirement that the parties are bound if it emerges also that the nature of the duty is such that it cannot be suitably imposed on a private person."*

[223] I am of the view that given the nature of the rights and duties that have been imposed by section 16 (1) of the **Charter of Rights** it cannot be "suitably imposed on a private person" (the complainant) in the circumstances of this case for all the reasons stated in paragraphs [213] *et seq*.

[224] Finally, I would adopt the reasoning of Sykes J (as he then was) at paragraph [74] of **Mervin Cameron**[165]:

> *"…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 (which has not been pleaded in this matter).* ***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 cases, 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****." (emphasis added)*

Adequate time and facilities for the preparation of defence

[225] The claimant is seeking a declaration that having regard to the extensive delay of between 39 and 35 years in the complaint leading to the institution of criminal charges against him he has been and/or is likely to be denied facilities for the preparation and presentation of his defence contrary to section 16 (6) (b) of **Charter of Rights**.

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[165] *Supra* at paragraph [76]

[226] There have been a number of judicial pronouncements which provide guidance on the interpretation of this provision. In light of my conclusion that not much, by way of evidence and submissions, was made of this issue I will simply refer to two authorities.

[227] In **Attorney General v Gibson**[166], the Caribbean Court of Justice provided an interpretation of this provision in the Constitution of Barbados (section 18(2)(c)). The judgment was delivered by Saunders J (as he was then) and Wit J. The learned judges stated that this provision has been interpreted to include tangible objects such as pen, paper, computer and books that would assist a defendant in the preparation of his defence; a right to disclosure of the prosecutor's file (except where this is not allowed by statute or in the public's interest); the opportunity to acquaint himself with the results of investigations carried out throughout the proceedings; access to all relevant elements that have been or could be collected by the competent authorities; to communicate with counsel of his choice; and if the defendant is in custody, conditions of detention that would allow him adequately to prepare for trial.

[228] In **R v Bidwell**[167] a decision of the Court of Appeal, Forte JA (as he then was) in discussing the expression 'facilities' highlighted the things that a defendant would require in order to prepare himself to answer the charge laid against him and the opportunities that must be afforded him adequately to engage in such preparation.

[229] Having considered the authorities cited above I am prepared to agree with counsel for the 1st defendant that the claimant has not presented any evidence that would

tend to show that he is being denied adequate time and facilities for the preparation and presentation of his defence. A declaration to this effect is therefore denied.

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[166] [2010] 5 LRC 486

[167] (unreported) Court of Appeal, Jamaica, SCCA No 50/1990, judgment delivered 26 June 1991

Equality of Arms

[230] Without reference to any authority, the claimant contends that the common law concept of equality of arms which forms part of the Constitutional right to fairness cannot or is not likely to be achieved in any trial of the claimant on the indictment proffered at this time.

[231] The learned editors of **Archbold, Criminal Pleading, Evidence and Practice**, 2014[168] put it as follows:

> *"The right to a fair trial involves observance of the principle of "equality of arms" under which the defendant in criminal proceedings must have "a reasonable opportunity of presenting his case to the court under conditions which do not place him at a substantial disadvantage vis-à-vis his opponent": Kaufman v Belgium, 50 D.R. 98 at 115; Neumeister v Austria, 1 E.H.R.R. 91; Delcourt v Belgium, 1 E.H.R.R. 355; Borgers v Belgium, 15 E.H.R.R. 92; Jespers v Belgium, 27 D.R. 61; Bendenoun v France, ante; and see generally R v H [2004] 2 A.C. 134, HL.*

[232] In **AG v Gibson**[169] at paragraphs [33] and [34] of the judgment, Saunders and Wit JJ made the following observation, with which I fully concur, as it relates to the principle of equality of arms:

> *"[33] The principle of 'equality of arms' did not require that an indigent accused (or any accused) be placed on perfect parity with the prosecution, since it was not unreasonable to expect that often there would be a marked inequality between the facilities at the disposal of the prosecution, with its access to the resources of the state, and those available to the accused...*
>
> *[34] … However, if the inequality was so serious and the accused so handicapped that it was likely to have a significant impact on the outcome of the trial, that would amount to an infringement of the accused's fundamental right to a fair trial guaranteed by s 18(1) of the Constitution."*

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[168] Paragraph 16-63

[169] *Supra* at paragraph [227]

[233] I find that there is merit in counsel for the 1st defendant's submissions on this point. I agree that the claimant has not established that he is placed at a significant disadvantage when compared to the prosecution. I also agree with counsel for the 2nd defendant that, due to delay the prosecution has also lost the opportunity to call any person who could give evidence of a recent complaint and present medical and/or forensic evidence.

[234] Additionally, in my view, the claimant has not established on the evidence presented, that the "*inequality is so serious*" and that he is "*so handicapped that it was likely to have a significant impact on the outcome of the trial*" that this would amount to a breach of his fundamental rights to a fair trial. Of course, there is no evidence before this court that the claimant is an "indigent accused".

[235] Ultimately, it appears that the case will rest on the view to be taken of the credibility of the complainant and the claimant. As such, it can be said that both the prosecution and the defence are "equally armed".

Relief

[236] I find it unnecessary to grant the relief sought at paragraphs 1, 2, 3 and 4 of the claimant's Amended Fixed Date Claim Form. These rights are clearly provided by the **Charter** at sections 16 (1), 16 (6) (b) and (d) which are applicable to any and every person charged with a criminal offence. The claimant, having been so charged is certainly entitled to the protection of these rights.

[237] Further, I would also decline the declarations sought at paragraphs 5, 6, 7 and 8, for the reasons which have been set out above. Finally, I am unable to grant an order that the trial of the claimant for the offences listed in the voluntary bill of indictment be permanently stayed, as sought at paragraph 9.

[238] Finally, given the length of time this matter has been before the court, it is my own view that it be accorded some priority. I would recommend the case be set for

mention at the next sitting of the Circuit Court for the parish of St. James and that the trial commences before the end of the Michaelmas Term 2019.

G. BROWN J

ORDER

By a majority (Batts J dissenting):

1. The claim for constitutional relief is dismissed.

2. It is ordered that the matter be set for mention at the opening of the St. James Circuit Court on the 24th day of April, 2019, and the trial shall commence before the end of the Michaelmas Term 2019, failing which the trial of the charges shall be stayed unless the trial is delayed due to the fault of the defence.

……..
Glenworth Brown
Puisne Judge

……..
David Batts
Puisne Judge

……..
Vivene Harris
Puisne Judge