IN THE SUPREME COURT OF
THE TURKS AND CAICOS ISLANDS

Action No: CR 35/12
CR 36/12
CR 18/14

IN THE MATTER OF THE TURKS AND CAICOS ISLANDS

IN THE MATTER OF THE CRIMINAL PROCEEDINGS NO. CR 35/12, 36/12, 18/14

BETWEEN

(1) THE KING

PLAINTIFF

AND

(1) MICHAEL MISICK
(2) MC ALLISTER HANCHELL
(3) THOMAS CHALMERS MISICK

DEFENDANTS

AND IN THE MATTER OF THE TURKS AND CAICOS ISLANDS CONSTITUTION ORDER 2011

ACTION NO. CR 63/2024

BETWEEN

(1) MC ALLISTER EUGENE HANCHELL

PLAINTIFF

AND

(1) THE ATTORNEY GENERAL OF THE TURKS AND CAICOS ISLANDS
(2) THE DIRECTOR OF PUBLIC PROSECUTIONS

DEFENDANTS

CORAM: NARINE J

APPEARANCES:

MR. ANDREW MITCHELL KC AND MR. QUINN HAWKINS FOR THE CROWN, THE ATTORNEY GENERAL AND THE DIRECTOR OF PUBLIC PROSECUTIONS

MR. GILBERT PETERSON SC AND ADRIAN KAYNE INSTRUCTED BY JAHMAL MISICK FOR MICHAEL MISICK

MR. JEROME LYNCH KC AND JAMES SHEPPARD FOR MC ALLISTER HANCHELL

MR. HUW EVANS AND MR KAYODE SMITH INSTRUCTED BY JAHMAL MISICK FOR THOMAS CHALMERS MISICK

WRITTEN DECISION DELIVERED ON 2ND DECEMBER 2024 IN REPECT OF THE ORDER MADE ON 6TH NOVEMBER 2024

JUDGMENT

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1. There are several applications before this Court. These are:

   - An application by McAllister Hanchell (MAH) to stay the criminal proceedings against him on the ground of abuse of process, filed on 12th December 2023.
   - An originating summons filed by MAH on 22nd May 2024, claiming a declaration that the continuation of the criminal proceedings against him contravenes or is likely to contravene his right to the protection of the law under Section 1(a) of the Constitution and his right to a fair

hearing within a reasonable time under Section 6(1) of the Constitution and an order permanently staying the criminal proceedings;

- An application by Michael Eugene Misick (MM) filed on 28th August 2024, seeking a permanent stay of the criminal proceedings against him on the ground that their continuation constitutes an abuse of process of the court and a further violation of his right to a fair trial within a reasonable time;
- An application filed on 30th August 2024 by Thomas Chalmers Misick (TCM) for a permanent stay of the criminal proceedings against him on the ground that the continuation of the criminal proceedings against him constitutes an abuse of process of the court and a further violation of his right to a fair trial within a reasonable time, and
- An application filed by the Crown on 2nd March 2021, for the trial of the defendants to be without a jury pursuant to Section 58 of the Criminal Procedure Ordinance 1968.

Background

2. This matter has a protracted and somewhat unfortunate history. In July 2008, a Commission of Inquiry was appointed by then Governor Richard Tauwhare, chaired by Sir Robert Auld to look into allegations of corruption committed by members of the House of Assembly between 2003 to 2009. In August 2009 a Special Prosecutor was appointed to

investigate and prosecute any persons suspected of having committed criminal offences.

3. In February 2012 a warrant was issued for the arrest of MM on a charge of conspiracy to receive bribes. Proceedings were instituted to extradite MM from Brazil in December 2012. He was eventually returned to Turks and Caicos on the 7th January 2014 and charged on the same day.

4. MAH was charged on 7th February 2012 with acts of corruption. TCM was charged the same year. A retired Jamaican Judge Harrison J. was appointed in June 2012 to preside over the trial of 9 defendants (including the defendants herein) on an indictment containing 17 counts charging acts of bribery, conspiracy to defraud and money laundering.

5. There were several pre-trial applications including an application by the Crown for a trial without a jury, which found its way to the Privy Council, after a Constitutional motion was filed challenging the Trial without a Jury Ordinance, and a motion involving the issue of the judge's tenure. On 1st May 2015 the Privy Council disposed of these motions in favour of the Crown. There were further applications filed by the defendants, including a Constitutional motion filed in August 2015 challenging the Constitutionality of the court and an application for the judge to recuse himself on the ground of bias.

6. The trial eventually started on 7th December 2015. On 18th January 2016 the Crown opened its case, and closed its case on or about 20th September 2018, subject to the calling of a witness at the request of MM. The trial was adjourned to facilitate defence counsel to prepare no case submissions, which were filed in the first week of November 2018. The Crown replied on 7th January 2019. There followed an application by one defence counsel for a stay of proceedings on the ground that the trial was unmanageable, which was dismissed by the judge on 24th January 2019. The presentation of oral submissions of no case submissions to answer were directed to begin on 29th January 2019, but was adjourned at the request of one defence counsel on medical grounds. The oral submissions were heard from 27th February 2019 to June 2019. The judge dismissed the submissions of no case to answer on 29th July 2019.

7. The trial resumed on 9th September 2019. The trial was adjourned on several occasions on applications by defence counsel, resuming on 15th November 2019, when MM opened his defence. On 25th November the trial was adjourned to 9th December 2019 after a defence counsel collapsed in court. A Christmas break was taken from 18th December 2018 to 13th January 2020.

8. From March 2020 to June 2020 there were several adjournments due to the outbreak of Covid-19. Between May 2020 to November 2020, the

defendants challenged the legality of regulations which allowed for remote sittings of the court, all the way to the Privy Council.

9. Hearings resumed in January 2021, with the defendant Lillian Boyce requesting a Goodyear indication and eventually being sentenced on 20th January 2021. The last day of trial was 28th January 2021. The matter was adjourned to 8th February 2021. Unfortunately, the trial judge passed away on 7th February 2021.

10. There followed applications by the defence for a stay of proceedings for abuse of process and a Constitutional motion seeking a declaration that the continuation of the proceedings contravenes or is likely to contravene the defendants right to the protection of the law under Section 1(a), and their right to a fair trial within a reasonable time under Section 6(1) of the Constitution, and an order dismissing the proceedings.

11. Both applications were heard by Chief Justice Agyemang, who delivered separate rulings on 7th May 2021. The Chief Justice conducted a detailed examination of the history of the proceedings. She noted in particular that there were 1879 possible sitting days between the start of the trial on the 7th December 2015 and 28th January 2021, the last day of the trial. Of these 1879 days, the Chief Justice found that only 512 days were actually used. She surmised that if the time had been fully utilized, the trial would

have been concluded in 26 months instead of the 5 years which had elapsed without arriving at a conclusion.

12. The Chief Justice found the delay in the proceedings before Harrison J to be unreasonable and inexcusable. She noted the reasons put forward by the Crown and the defence for the delay. The Crown pointed to the many spurious applications made by the defendants which made their way to the Privy Council, and the refusal of the defence to agree uncontroverted facts, thereby increasing the length of the trial. The Crown further submitted that the court did not engage its coercive powers to get the defendants to agree undisputed facts and the granting of unmeritorious applications for adjournments to defence counsel.

13. The Chief Justice further outlined the defendants' assertions that the trial was so complex that it was unmanageable, and the voluminous evidentiary material offloaded by the Crown from time to time, which ran into thousands of pages.

14. Both sides further pointed to the sometimes extended and unnecessary court breaks ordered by the judge and situations that arose that could not be helped including ill health, bereavement, change of counsel, a global pandemic and death.

15. The Chief Justice further considered in the context of delay, the undoubted complexity of the case, the conduct of the defendants, and the manner in which the case was handled by the administrative and judicial authorities.

16. The Chief Justice went on to find that the applicants had an adequate alternative remedy available to them in the form of their application to stay the proceedings. She expressed the view that the Constitutional motion was lacking in bona fides, and was vexatious and dismissed it.

17. On the applications filed by the defendants for a stay of proceedings, the court found that although there was excessive delay, it was still possible for the defendants to receive a fair trial, provided that the Crown severed the information so as to provide less complex and speedy trials.

18. A temporary stay of the proceedings was granted until 31st May 2021. The Crown was ordered to produce severed informations on or before that date to make possible expedited trials. Failure of the Crown to comply would result in the temporary stay being made permanent. The court further expressed its intention to take into account in sentencing (in the event of conviction of any of the defendants), the prejudice suffered by the defendants by reason of the failure of the court to try the defendants within a reasonable time.

19. On 2nd June 2021 the court indicated that the Crown had complied with its ruling, despite arguments to the contrary by defence counsel. The information was severed to allow for two separate trials which became known as Trial A and Trial B. The defendants MM, MAH, and TCM were to be tried in Trial A. Trial B involved Floyd Hall, Jeffery Hall, Melbourne Wilson and Clayton Greene. Trial B was to follow Trial A, both to be presided over by the Chief Justice. However, the order for the retrials were reversed due to the withdrawal of Mr. Reginald Amour SC, counsel for MM. His replacement, Mr. Gilbert Peterson SC, needed time to read into the case, and the Chief Justice accommodated him by reversing the order of the retrials. Were it not for this accommodation, the retrials of the defendants MM, MAH, and TCM would have long been retried, thus rendering the applications before this court otiose.

20. Trial B was set to commence on 25th June 2021. It was adjourned to 9th July 2021 to accommodate counsel for Jeffery Hall. The Chief Justice had estimated that the trial would take six months to complete and set a "not before" date of 1st March 2022 to start Trial A.

21. On 18th July 2022, the court dismissed no-case submissions made by the defendants in Trial B. In August 2022, the defendants renewed their applications to stay the proceedings on the ground of delay. These applications were dismissed on 5th September 2022.

22. Trial A was eventually listed for a plea and directions hearing on 20th June 2023, at which the Chief Justice indicated that she intended to recuse herself from sitting in Trial A, due to findings of fact that she made in Trial B which involved allegations against MM in Trial A.

23. The Chief Justice eventually returned verdicts in Trial B on 25th September 2023, 26 months after the trial began. On 10th October 2023, she sentenced Floyd Hall to one year, and Clayton Greene to 6 months imprisonment and made confiscation orders against both of them.

24. There followed correspondence from November 2023 to May 2024 between the defence attorneys, Crown counsel and the Registrar of the Supreme Court and the Secretary of the Judicial Services Commission concerning the progress being made towards appointing a judge to preside over Trial A, and a possible timetable to be set for the trial.

25. On 7th May 2024 the Registrar circulated a notice to all counsel in Trial A, informing them that despite considerable difficulty in securing the appointment of a judge to hear Trial A, the JSC were actively pursuing the matter. Despite their best efforts the JSC encountered serious challenges in finding a jurist of sufficient experience and expertise to conduct a complex fraud trial, which would require the absence of the selected jurist from his place of residence for an anticipated period of possibly two years

or more. The search for a suitable candidate encompassed jurists and experienced senior counsel throughout the Caribbean and through the assistance of the Governor, the bench and bar of the United Kingdom. These efforts not having borne fruit an advertisement for an ad hoc judge was eventually posted on the CaribbeanJobs.com platform in May 2024, which attracted 17 applicants, 4 of whom were shortlisted for interviews, which were conducted in June 2024. Eventually, a judge was appointed on 8th July 2024, and a directions hearing was fixed on 19th July 2024, at which directions were given for the filing of submissions, and the hearing of pre-trial applications on 21st and 22nd October 2024. The trial was fixed to begin on 2nd December 2024. At the directions hearing Crown counsel indicated that the Crown would be ready to start the trial in September 2024. However, defence counsel indicated that they would not be ready to start the trial until January 2025, inter alia, due to commitments they had undertaken while they were awaiting the appointment of a judge. Eventually the court fixed the trial to begin on 2nd December 2024.

26. I propose to deal with the pre-trial applications in the following order – first the Constitutional motion (CM), then the abuse of process applications (AOP), followed by the trial without a jury (TWAJ) application.

The Constitutional Motion (CM)

27. The CM filed on 22nd May 2024 by MAH, seeks a declaration that the continuation of the criminal proceedings against MAH contravenes his right to the protection of the law under Section 1(a) of the Constitution and his right to a fair hearing within a reasonable time under Section 6(1). As a consequence of the breaches, MAH seeks an order permanently staying the criminal proceedings.

28. The jurisdiction of the Supreme Court of Turks and Caicos Islands (TCI) is conferred by Section 21 of the Constitution which provides:

> **21(1) If any person alleges that any of the foregoing provisions of this Part has been, is being or is likely to be contravened in relation to him or her, then without prejudice to any action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.**
>
> **21(2) The Supreme Court shall have original jurisdiction**
>
> **(a) To hear and determine any application made by any person in pursuance of sub-section (1); and … may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of entering or securing the enforcement of any of the foregoing provisions of this Part to the**

protection of which the person concerned is entitled; <u>but the Supreme Court shall not exercise its powers under the sub-section if it is satisfied that adequate means of redress are or have been available to the person concerned under any written law.</u> (emphasis added)

29. On a plain and literal interpretation of sub-section 21(2), the Supreme Court is mandated not to exercise its powers to grant relief for a breach of the rights granted by the Constitution as long as there exists an adequate means of redress available to the applicant.

30. It is the contention of the Attorney General and the Director of Public Prosecutions (DPP) that there is adequate means of redress available to MAH in his application for a permanent stay of the criminal proceedings filed since 12th December 2023, which this Court has directed to be heard on the same day as the CM. When the CM came on for hearing on 21st October 2024, Mr. Lynch KC indicated that he was no longer pursuing the AOP application.

31. MAH argues that the AOP application does not provide adequate means of redress for the following reasons:

(i) There is no right of appeal against an unsuccessful application for a stay unless the applicant is convicted. If the applicant is not convicted he has no means of redress having been put through an unnecessary trial, after his right to a trial within a reasonable time has been breached. In addition, if convicted following a retrial, and successful on appeal in relation to the refusal of a stay, the breach of his Constitutional right would have subsisted for an even longer period of time;

(ii) MAH filed his AOP application since 12th December 2023. He was informed that the application would be placed before the trial judge when appointed. No indication of such an appointment was communicated until July 2024. At the time of the filing of submissions of the plaintiff on 15th July 2024, no date had been set for the hearing of the AOP application.

(iii) MAH should not have to prepare for a retrial which will take place after an unreasonable delay.

32. The argument stated at paragraph 32(i) does not bear scrutiny. The fact that there is no right of appeal where the AOP application for a stay of proceedings is refused, until the trial is completed, does not render the alternative means of redress inadequate. MAH already has the benefit of a finding by the Chief Justice in her ruling of 7th May 2021, that there has been a breach of his right to a fair trial within a reasonable time. In his

CM, MAH does not ask for damages for the breach. What he seeks is an order permanently staying the criminal proceedings against him. The remedy of an AOP application has always been available to MAH. The fact that he has filed such an application, but has elected not to pursue it makes no difference. The alternative remedy provides an adequate means of redress to MAH.

33. The fact that there is a right of appeal available to MAH immediately upon refusal of his CM, does not render his alternative means of redress inadequate. In fact, there appears to be a policy consideration underpinning the Section 21(2) withdrawal of jurisdiction. In **Brandt v Comissioner of Police (Montserrat)** [2021] UKPC 12, the Privy Council relied on the Board's decision in **Attorney General of Trinidad and Tobago v Ramanoop** [2006] 1 AC 328. At paragraph 35 of **Brandt** Lord Stephens stated:

> **"35. First, to seek constitutional relief where there is a parallel legal remedy will be an abuse of the courts process in the absence of some feature "which, at least arguably, indicates that the means of legal redress otherwise available will not be adequate". The correct approach to determining whether a claim for constitutional relief is an abuse of process because the applicant has an alternative means of legal redress was explained by Lord Nicholls, delivering the judgment of the**

Board in Attorney General of Trinidad and Tobago v Ramanoop [2006] 1 AC 328 at para 25, as follows:

> **"…where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made includes some feature which makes it appropriate to take that course. As a general rule there must be some feature which, at least arguably, indicates that the means of legal redress otherwise available will not be adequate. To seek constitutional relief in the absence of such a feature will be a misuse, or abuse, of the courts process. A typical, but by no means exclusive, example of a special feature will be a case where there has been an arbitrary use of state power."**

34. In **Brandt**, the Privy Council considered the submission that the appellant's remedy of a challenge to the admissibility of evidence in the criminal proceedings would only be tested on appeal after conviction, and this rendered the alternative means of redress inadequate, and rejected it in no uncertain terms at paragraph 43:

> **"The Board does not consider that the difference in status of the appellant during the appeal process leads to the means of challenge in the criminal proceedings being inadequate.**

Rather, that is the ordinary means of challenge available to all persons accused of criminal offences."

35. The second reason advanced by MAH as to the inadequacy of the alternative means of redress, was the indication of the Registrar of the Supreme Court that the AOP application was to be listed before the trial judge when appointed. As of 23rd May 2024, no trial judge had been appointed, and so MAH filed his CM which was placed before Justice Gruchot, sitting in the civil jurisdiction.

36. Shortly after the trial judge was appointed on 8th July 2024, a directions hearing was held on 19th July 2024, at which directions were given for the filing of submissions for the AOP filed by MAH, and the other defendants should they decide to file their own AOP applications. The hearing of the CM and all AOP applications was fixed for 21st and 22nd October 2024.

37. In **Jaroo v A.G.** [2002] 1 AC 871, an appeal from the Court of Appeal of Trinidad and Tobago, the Privy Council expressed the view that where the procedure by way of Constitutional motion is engaged, once the applicant becomes aware that another procedure is available, and the use of the CM procedure is no longer appropriate, steps should be taken without delay to withdraw the motion, since its continued use will constitute an abuse of process.

38. MAH seeks to distinguish **Jaroo** on the basis that the case involved the retention of a motor vehicle by the authorities, to which the appellant resorted to his Constitutional right to property while there was available to him a common-law remedy in an action for detinue. While it is true that the right being pursued in this case is a right to a trial within a reasonable time and not a right to property, the principle espoused in **Jaroo** remains applicable. The availability of an alternative and adequate remedy at common law, renders the continuation of the procedure by way of CM an abuse of process.

39. The further submission of MAH is that the alternative procedure by way of AOP application is not an adequate remedy because it required MAH to prepare for a retrial which is to take place after an inordinate delay. If he succeeds in obtaining a permanent stay of proceedings in his CM, he will be spared the stress of having to prepare for and attend a complex and lengthy trial.

40. The obvious flaw in this submission arises from the fact that the court has directed the AOP application and the CM to be heard at the same time. If the AOP application finds favor with the court, a permanent stay may be granted, thus relieving MAH of the burden of having to prepare for and undergo an arduous trial.

41. In support of this submission MAH has relied heavily on the Privy Council decision in **Herbert Bell v Director of Public Prosecutions** [1985] AC 937, **Gibson v Attorney General of Barbados** [2010] Chief Justice 3 a decision of the Caribbean Court of Justice (Chief Justice), and **Urban St Brice v The Attorney general of St. Lucia** [2020] SLUHCVAP 2018/0036, a decision of the Court of Appeal of the Eastern Caribbean Supreme Court.

42. The facts of **Bell** are quite starkly distinguishable from this case. The applicant was arrested and charged with firearm offences in May 1977. He was convicted in the Gun Court in October 1977. His appeal against conviction was allowed by the Court of Appeal, and a retrial was ordered, but notice of this order was not received by the Registrar of the Gun Court until December 1979. The original statements of witnesses could not be found, and the investigating officer was not available. The case came up for mention in the Gun Court on three occasions before the applicant was released on bail in March 1980. Subsequently the case was mentioned on numerous occasions and the Crown was not ready to proceed. The applicant was discharged in November 1981 after the Crown offered no evidence. He was re-arrested in February 1982 for the same offences and ordered to be retried in May 1982. He applied by way of originating motion for redress under Section 25 of the Constitution of Jamaica for a

declaration under Section 20(1) that his right to a fair hearing within a reasonable by an independent and impartial court, had been infringed. The Full Court refused the application, and his appeal to the Court of Appeal was dismissed.

43. The Privy Council allowed the appeal and granted a declaration that the applicant's right to a fair hearing within a reasonable time had been infringed but declined to accede to the request that the applicant be discharged, and not tried again on the original or any other indictment based on the same facts. In effect the court refused to order a permanent stay of the indictment. However, Lord Templeman did remark in the final paragraph of the judgment that their Lordships were reminded by counsel for the Director of Public Prosecutions and the Solicitor General of "the traditional and invariable adherence by the authorities of Jamaica to the spirit and letter of the advice tendered by the Board", perhaps hinting that The Board expected the prosecution to be discontinued.

44. MAH relies on a dictum of Templeman LJ at page 947 F-H:

> **"It was argued on behalf of the respondents, the Director of Public Prosecutions and the Attorney General that the applicant was able to obtain redress by waiting on his retrial, ordered for 11 May 1982, and then submitting to the Gun Court at the commencement of the retrial that the proceedings should be dismissed on the grounds that in the events which**

had happened a retrial would be an abuse of the process of the court. Their Lordships cannot accept this submission. If the Constitutional rights of the applicant had been infringed by failing to try him within a reasonable time, he should not be obliged to prepare for a retrial which must necessarily be convened to take place after an unreasonable time."

45. As indicated earlier, MAH is not required to wait for the trial in order to make an application that the proceedings against him should be dismissed or stayed. He has already filed that application, and the court has directed that it be heard and determined in advance of the retrial.

46. A close reading of the Judgment of the Board in **Bell** reveals that the Board appears not to have considered the issue of jurisdiction of the Supreme Court where there exists an adequate alternative remedy. The issue of jurisdiction does not appear to have been identified as an issue in the case. The issue was raised briefly by the Deputy Director of Prosecutions, F Algernon Smith in his submissions before the Board. It does not appear to have been developed in argument. Perhaps this accounts for the absence of analysis on the issue of jurisdiction in the judgment.

47. **Gibson** was a case which was also decided on its own peculiar facts. Gibson was charged with the murder of a woman in January 2002. He was taken into custody 2 days after the body was found. The police observed scratches and bruises about his body which he claimed to have sustained as a result of a fall from a tree. One wound in particular attracted the attention of the police – a wound to his right bicep. A dentist who was called in, took impressions of this injury, and later compared them with impressions that he took of the upper and lower jaw of the deceased. He concluded that the injury was a human bite-mark which was inflicted by the deceased. This was the only evidence that connected Gibson to the murder.

48. Gibson was committed to stand trial in March 2005, and a trial date was set for July 2005, and was adjourned to October 2005, and then to February 2006. Defence counsel sought an adjournment on the ground that his client was indigent and could not afford to pay for the services of a forensic odontologist, which he required to consider and challenge the evidence of the dentist on which the prosecution relied. Eventually, in October 2006, the Attorney-General offered to pay the sum of $2000.00 (Bds.) towards the fees, on condition that any reports produced by the expert were to be made available to the Crown. The offer was found to be clearly inadequate, and the condition attached unacceptable.

49. Gibson filed a Constitutional motion against the Attorney-General alleging that his rights under Section 18(2)(e), and Section 18(1) of the Constitution had been breached. Section 18(1) provides for a fair hearing within a reasonable time by an independent and impartial court established by law; Section 18(2)(e) mandates that a person charged with a criminal offence shall be offered facilities to examine in person or by his legal representative witnesses called by the prosecution and to obtain the attendance and carry on the examination of witnesses to testify on his behalf. The motion eventually found its way to the Chief Justice.

50. The Chief Justice was not persuaded that Section 18(2) gives the accused person the right to the services of an expert funded by the state. The court found that the provision of "facilities" does not imply that an indigent accused must be placed on perfect parity with the prosecution. It is sufficient that the facilities afforded to the accused must be adequate. (see paragraphs 31-33 of the judgment).

51. However, the Chief Justice went on to find that where the inequality of arms between the accused and the State is so serious, and the accused is so handicapped that the inequality is likely to have an impact on the outcome of the trial, the accused is entitled to claim that his fundamental right to a fair trial as guaranteed by Section 18(1) is being infringed. (see paragraph 34).

52. The Chief Justice went on to state at paragraph 40"

> **"40 When one considers the sum total of the specific circumstances of this case, it was our view that there could not be a fair trial in this case if the defence, through lack of means, were deprived of access to the services of a forensic odontologist and this Court could not sanction Gibson's trial under those conditions. Furthermore there was no reason either in law or in logic to wait until an unfair trial was about to begin before taking steps to forestall it."**

53. It is clear that the decision in **Gibson** was driven by the peculiar circumstances of the case. The decision was undoubtedly the correct one in the circumstances of the case, since, in the absence of the services of the expert witness, Gibson would not be able to receive a fair trial. In fact, after the odontologist's report became available, the prosecution was discontinued by the D.P.P.

54. MAH also placed heavy reliance on the case of **St. Brice**, a decision of the Court of Appeal of the Eastern Caribbean Supreme Court. The facts of this case are clearly distinguishable from the case at hand. St. Brice was charged with murder in November 2002. He was committed for trial in May 2005. The trial was aborted. The appellant was later convicted, but his conviction was successfully appealed in 2007. There followed a series

of aborted trials, Constitutional applications, applications for a stay of execution, judicial review applications, and several appeals. Eventually St. Brice succeeded in obtaining a permanent stay of proceedings from the Court of Appeal in July 2020. He had been in custody awaiting the final determination of his matter for 17 years and three months.

55. In considering the issue of delay the Court opined at paragraph 27:

> **"27 Further a finding that a defendant is largely responsible for the delay in the completion of the trial is not decisive of the question as to whether the reasonable time guaranteed has been breached. Accordingly, the learned judge erred in law in not recognizing that it is no answer to a Constitutional challenge founded on a breach of the reasonable time requirement that the conduct of the appellant largely contributed to the delay."**

56. In considering the issue of delay the court applied the decision of the Privy Council in **Prakash Boolell v The State** [2006] UKPC 46, an appeal from Mauritius, in which there was a delay of 12 years between the date on which the appellant gave his first statement under caution and the eventual disposition of his case.

57. In **Boolell**, although the Board considered that the appellant's conduct was reprehensible in that he exploited the legal system with a view to prolonging the proceedings, it was incumbent on the court to take steps to expedite the matter so as to bring it to a conclusion within a reasonable time. The conduct of the appellant, though a relevant factor in assessing the breach was not decisive. The issue of delay had to be looked at in the round and included an examination of the readiness of the prosecution and the conduct of the trial.

58. **St. Brice** was undoubtedly a case which was decided on its particular facts. A factor which must have weighed heavily with the court was the fact that St. Brice had been in custody for more than 17 years without the case against him being brought to a final conclusion.

59. Accordingly, this court is not persuaded by MAH's submissions that an AOP application does not provide an alternative and adequate means of redress. In fact, the court holds that an AOP application, if successful, will provide the effective relief that MAH is pursuing, which is a permanent stay of the proceedings against him. It follows that the jurisdiction of this court to grant relief is barred by Section 21(2) of the Constitution.

60. My findings are by no means unique, and I am sure, will not be unexpected by the parties to the CM. By originating summons filed in March 2021, MAH, MM, TCM (and other defendants then before the Court) sought essentially the same relief as that sought in the CM before this court. The CM was argued on the same day as AOP applications filed by the defendants, before the Chief Justice.

61. Essentially the same arguments were advanced before the Chief Justice, as to why the AOP applications did not provide an adequate form of redress for the alleged breach of the defendants' rights. The same authorities notably, **Bell, Gibson** and **St Brice** were provided as support for the defendants' submissions.

62. The CM was dismissed by the Chied Justice in a judgment handed down on 7th May 2021. The Chief Justice found that the AOP applications filed by the defendants and heard at the same time as the CM, provided an adequate means of redress. In addition, the court found that the CM was lacking in bona fides, and was vexatious, but stopped short of finding that it was an abuse of process.

63. The issue of jurisdiction that was before the Chief Justice in March 2021, and is now before this court, is essentially an issue of law. It was decided by the Chief Justice at first instance and no appeal was lodged against the

decision. In spite of this, an essentially identical application was filed by MAH before this court, some months after he had filed an AOP application. On 19th July 2024 both the CM and the AOP applications were fixed for hearing on 21st and 22nd October 2024. The CM could have been withdrawn on 19th July 2024, or at any date before the hearing. It was not. Instead, at the start of his oral submissions on 21st October 2024, Mr. Lynch KC withdrew the AOP application filed on 12th December 2023.

64. MAH submits that he filed the CM after he was not able to obtain a date for the hearing of his AOP application. That was no longer the case after 19th July 2024. In my view, the continuation of the CM proceedings after 19th July 2024, was an abuse of process. Accordingly, it is dismissed.

Abuse of Process Applications

65. There are two AOP applications now before the court:

    (i) An application of MM filed on 28th August 2024, and

    (ii) An application of TCM filed on 30th August 2024.

66. MM states as his grounds that the continuation of the criminal proceedings constitutes an abuse of the process of the court and a further violation of his right to a fair trial within a reasonable time. The notice filed by TCM is in almost identical terms.

67. Similar applications have previously been filed on behalf of the defendants – 5 of them before Harrison J, and before the Chief Justice. Rulings were given by the Chief Justice on 7th May 2021, 2nd June 2021 and 5th September 2022. All of these applications have been refused.

68. To recap the history of this matter briefly, after the death of Harrison J, on 7th February 2021, on 1st March 2021 the court was informed by the lead prosecutor that the DPP had decided to continue with the prosecution of the defendants. In March 2021, the CM and 2 AOP applications were filed – one a joint application by 6 defendants, and one filed by MM. The CM and AOP applications were directed to be heard by the Chief justice on 25th March 2021.

69. On 7th May 2021, the Chief Justice gave a separate ruling on the CM application, and on the AOP applications. After a careful review of the submissions of the prosecution and the defence, and the leading authorities, the court concluded, inter alia, that it was still possible for the defendants to receive a fair trial provided that the information was severed to allow for multiple trials which the Chief Justice hoped will reduce complexity, and reduce the time that each defendant would have to spend in the retrial. The Court further expressed the hope that the trials would be completed with expedition so as not to compromise the ability of the defendants to defend themselves. (see paragraph 219). Towards this end, the Court granted a temporary stay of the proceedings until 31st May 2021

to permit the prosecution to formulate the required amendments to the information.

70. On 2nd June 2021, the court expressed its satisfaction with the prosecution's amendments. The information was severed so as to permit 2 separate trials which came to be referred as Trial A and Trial B. MM, MAH, and TCM, were in Trial A, which was to proceed first. Despite the renewed entreaties of defence counsel to make the temporary stay permanent, the court was not persuaded to do so.

71. As it turned out Trial B preceded Trial A due to the withdrawal of lead counsel for MM, and the need to allow time for new head counsel to prepare for the case. The first retrial started on 12th July 2021. The trial involved 4 defendants, and 5 counts, three for conspiracy to defraud, one for bribery and one for money laundering. The trial was expected to take one year at most. However, by August 2022, it was still in progress. The defendants filed an AOP seeking a permanent stay of the proceedings on the ground of delay. The application was rejected by the court on 5th September 2022, and the trial continued. The closing submissions were completed on 16th June 2023, and verdicts were delivered on 25th September 2023.

72. MM has submitted that the proceedings should be stayed for the following reasons:

(i) MM can no longer have a fair trial;

(ii) It is no longer fair that MM should be tried;

(iii) MM was promised an expedited retrial to start in or around March 2022;

(iv) There has been a new breach of MM's right to a fair trial within a reasonable time.

73. TCM, in his submissions, reviewed the history of the proceedings and submitted that had the Chief Justice known that Trial B would take 2 years, she would not have allowed it to proceed, and would have granted a permanent stay. He conceded that it is rare for the courts to rule that the effect of a delay cannot be mitigated within the trial process by appropriate directions and reductions in sentence. He maintained however, that the delay between the Commission of Inquiry and the start of the trial before Harrison J, followed by a 5 year trial, was unacceptable. He noted that the Chief Justice had recognized the breach of the right to a trial within a reasonable time but asserted that the breach has continued unabated. He complained that despite the assurances of a speedy retrial, 2 years had elapsed and the possible hearing days were not fully utilized. He further expressed his dissatisfaction with the delay in securing the appointment of a trial judge resulting in the proposed retrial not starting until 2nd December 2024.

74. TCM further submitted that the breach of the reasonable time requirement was to be attributed to the failure of the judge and the prosecution to take reasonable steps to expedite and arrange both the trial and the re-trial, irrespective of whether the defendants contributed to the delay, to which TCM does not concede that he contributed.

75. TCM further contended that the offences involve allegations of misappropriation of money by public officials, not murder, rape or armed robbery. In fact the conduct involved brought benefits in the territory. There is no evidence that the population will be outraged by a premature end to the trial. In fact the average citizen may experience relief, in view of the resources already expended.

76. In addition, according to TCM, the remaining defendants have already suffered substantial punishment. TCM had spent 13 years under investigation and on bail. He has spent 5 years attending the first trial, thus unable to effectively practise his profession. He was unable to travel without repeated applications for variation of his bail. His assets have been frozen. He has had the prospect of a prison sentence hanging over him since his arrest in 2011. He has watched the distress of his family members. His loss of income is conservatively estimated to run into several million dollars.

77. TCM further outlines difficulties he may have in challenging the allegations against him. Prosecution witnesses are now aware of

challenges they must face in cross-examination, and can prepare for them. Between 15-22 years have passed since the occurrence of the impugned transactions. It is difficult for a defendant to recall the details of each transaction among the thousands carried out at the request of professional clients since then. It is unrealistic to expect TCM to respond to cross-examination about financial charts prepared from banking material 20 years ago, and when some are internal documents which he saw for the first time when the documents in the case were served.

78. TCM concedes, however, that stays for delays in criminal cases are rare, and the bar is set high. He contends however that this case is unique, and is an extreme example of cases involving delay. TCM argues that the need to show fault by the prosecution and significant prejudice to the defendants is easily satisfied.

79. In response the Crown submits in summary:

(i) The relevant time period to be considered for the purposes of this application starts in May 2021, and arguably from September 2022 when another AOP application was dismissed, or in June 2023, after the Chief Justice recused herself from sitting in Trial A.

(ii) Trial A could not have been conducted simultaneously with Trial B, since there was only one courtroom equipped with the necessary electronic equipment and the prosecution team could

not be present in two courtrooms at the same time. At any rate none of the parties suggested the possibility of simultaneous trials.

(iii) In the AOP ruling of 5th September 2022, the court found that the retrial was prolonged, inter alia, due to additional witnesses requested by the defence, lengthy cross-examination by the defence, reduced court sittings due to ill health of defence counsel, the introduction of half day sittings on Fridays to permit the Chief Justice to deal with administrative duties, cumulative breaks of two weeks, a Christmas break, and days lost due to ill health. The Chief Justice found that these circumstances could not have been foreseen by the prosecution when they gave their time estimate of 6-9 months.

(iv) The Crown further submitted, in essence that it was possible for the defendants to receive a fair trial, and it would not be unfair to try the defendants.

80. The principles which should guide the court in deciding whether to grant a stay were articulated by Lord Lane CJ in **Attorney-General's Reference (No 1 of 1990)** [1992] 3 WLR 9 at page 18 H to page 19 D. They may be summarized as follows:

(i) A stay on the ground of delay or for any other reason should be employed only in exceptional circumstances;

(ii) even where the delay can be said to be unjustifiable, the imposition of a permanent stay should be the exception rather than the rule;

(iii) it would only be in rare cases that a stay can properly be imposed in the absence of any fault on the part of the prosecution;

(iv) delay due merely to the complexity of the case or contributed to by the actions of the defendant should never be the foundation of a stay;

(v) a stay should not be imposed unless the defendant shows on a balance of possibilities that owing to the delay he will suffer serious prejudice to the extent that no fair trial can be held. Put another way, the continuation of the prosecution amounts to a misuse of the process of the court;

(vi) in assessing the likelihood of prejudice the court will take into account, the power of the court to regulate the admissibility of evidence, and the trial process itself, which should ensure that all relevant issues arising from the delay are placed before the jury with appropriate directions as to how the jury would consider these issues in coming to their verdict.

81. Further guidance may be gathered from the UK Supreme Court in **R v Maxwell (Appellant)** [2010] UKSC 48, at paragraph 13, per Lord Dyson:

> **"13. It is well established that the court has the power to stay proceedings in two categories of cases namely (i) where it will**

be impossible to give the accused a fair trial and (ii) where it offends the court's sense of justice and propriety to be asked to try the accused in the particular circumstances of the case. In the first category of case, if the court concludes that an accused cannot receive a fair trial, it will stay the proceedings without more.. No question of the balancing of competing interests arises. In the second category of case, the court is concerned to protect the integrity of the criminal justice system. Here a stay will be granted where the court concludes that in all the circumstances a trial will "offend the court's sense of justice and propriety" (per Lord Lowry in <u>R. v Horseferry Road Magistrate's Court, Ex p. Bennett</u> [1994] 1 A.C. 42, 74 G) or will "undermine public confidence in the criminal justice system and bring it into dispute" (per Lord Steyn in R v Latif and Shahzad [1996] 1 WLR 104, 112 F)

82. In paragraph 14 of the judgment, Lord Dyson set out a paragraph of the judgment of Lord Steyn in **Latif** which is particularly lucid:

"The law is settled. Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed: <u>Reg. v</u>

Horseferry Road Magistrates' Court, Ex parte Bennett [1994] 1 AC 42. Ex parte Bennett was a case where a stay was appropriate because a defendant had been forcibly abducted and brought to this country to face trial in disregard of extradition laws. The speeches in Ex parte Bennett conclusively establish that proceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place. An infinite variety of cases could arise. General guidance as to how the discretion should be exercised in particular circumstances will not be useful. But it is possible to say that in a case such as the present the judge must weigh in the balance the public interest in ensuring that those that are charged with grave crimes should be tried and the competing public interest in not conveying the impression that the court will adopt the approach that the end justifies any means"

83. **Charles v Trinidad and Tobago** [2000] 1 WLR 384, was a case in which the appellant was to be retried for murder a third time, 9 years after his second trial in which the jury had failed to agree. The Privy Council granted a permanent stay, holding that it was a misuse of the criminal process for the prosecution to continue the proceedings. In delivering the

judgement of the Board Lord Slynn, while paying due deference to local conditions and the public interest, commented at page 390 E:

> **"Even so, there may come a time when the delay is so great that even having regard to the public interest in convicting the guilty it becomes an abuse of process and unacceptable for a prosecution to continue."**

84. Similar sentiments were expressed by Kennedy LJ in **R v Henworth** [2001] 2 Cr. App. R 4, where the defendant sought to challenge a second retrial for murder. At paragraphs 25 and 26, Kennedy LJ noted:

> **"[25] Where a serious crime has been committed and it is shown that there is a case to answer as far as the defendant is concerned, there is a clear public interest in having a jury decide positively one way or the other, whether that case is established.**
>
> **[26] Having said that, we recognize the possibility that in any given case a time may come when it would be an abuse of process for the prosecution to try again. Whether that situation arises must depend on the facts of the case which include first, the overall period of delay and the reasons for the delay; second, the results of previous trials; thirdly, the seriousness of the offence or offences under consideration; and**

fourthly, possibly, the extent to which the case now to be met has changed from what was considered in previous trials."

85. The case of **Dyer v Watson** [2004] 1 AC 379 sets out the matters to which the court should have regard in considering the issue of delay, which is the ground on which both applicants base their AOP applications. At page 402 Lord Bingham sets out the matters the court should consider at paragraphs 53-55:

> **"53. The court has identified three areas as calling for particular inquiry. The first of these is the complexity of the case. It is recognized realistically enough, that the more complex a case, the greater the number of witnesses, the heavier the burden of documentation, the longer the time which must necessarily be taken to prepare it adequately for trial and for an appellate hearing. But with any case, however complex, there comes a time when the passage of time becomes excessive and unacceptable.**
>
> **54. The second matter to which the court has routinely paid regard is the conduct of the defendant. In almost any fair and developed legal system it is possible for a recalcitrant defendant to cause delay by making spurious applications and challenges, changing legal**

advisers, absenting himself, exploiting legal technicalities, and so on. A defendant cannot properly complain of delay of which he is the author. But procedural time wasting on his part does not entitle the prosecuting authorities themselves to waste time unnecessarily and excessively.

55. The third matter routinely and carefully considered by the court is the manner in which the case has been dealt with by the administrative and judicial authorities. It is plain that contracting states cannot blame unacceptable delays on a general want of prosecutors or judges or courthouses or on chronic under-funding of the legal system. It is, generally speaking, incumbent on contracting states so to organize their legal systems as to ensure that the reasonable time requirement is honoured."

The Issue of Delay

86. The protracted history of these proceedings has already been outlined at the beginning of this judgment. It is important however to briefly recap the history in order to provide context in examining the delay. In 2008 a Commission of Inquiry was appointed to look into allegations of corruption by members of the House of Assembly during the period 2003 – 2009. A Special Prosecutor was appointed in 2009 to investigate and

prosecute persons suspected of criminal offences. In 2012, 5 persons were arrested for various offences including MAH and TCM. MM was extradited from Brazil and charged on 7th January 2014 upon his return. Harrison J was appointed in June 2012 to preside over a trial involving 9 defendants on an information containing 17 counts. Due to several legal challenges by the defendants, the trial did not start until December 2015, and dragged on for more than 5 years, until the untimely death of Harrison J. in February 2021.

87. The Chief Justice subsequently took control of the proceedings in March 2021, after the DPP decided to continue the proceedings, the Chief Justice heard a CM and AOP applications for a stay of proceedings on the ground of delay. These were dismissed on 7th May 2021.

88. In her ruling on the AOP application, the Chief Justice agreed that the delay in prosecuting the matter was unacceptable and expressed her view quite forcefully that there had been a breach of the defendant's right to a trial within a reasonable time. However, the Chief Justice found that it was still possible for the defendants to receive a fair trial, provided that the Crown severed the indictment so as to reduce complexity and conduce to speedier and more manageable trials. On 2nd June 2021, the Chief Justice ruled that the amendments made to the indictment met with her approval, and ordered that the matter proceed by way of two separate trials, which

came to be known as Trial A and Trial B. Trial A involved the three defendants now before this court.

89. On 2nd June 2021, the Chief Justice also indicated that lead counsel for M had sought leave to withdraw. New counsel required time to read into the case. It was decided, in the circumstances that Trial B will be heard first to be followed by Trial A. There was no objection by MAH or TCM to this course, nor was it suggested by anyone that the trials should be heard simultaneously.

90. The re-trial of the defendants in Trial B began on 9th July 2021. It was suggested, perhaps optimistically that the trial would take 3-4 months and certainly not more than a year. On 18th July 2022 the court dismissed submissions of no case to answer. Another AOP made by the defence was dismissed on 5th September 2022. On the 16th June 2023, closing submissions were completed. Verdicts were handed down on 25th September 2023.

91. In her ruling of 7th May 2021 the Chief Justice found that the excessive delay in completing the trial before Harrison J was contributed to by the court, the prosecution and the defence. She found that the court had utilized only 44.5% of the possible sitting days, had taken too many breaks, and had not exercised sufficient control in the management of the trial.

92. In her ruling of 5th September 2022, the Chief Justice noted that the calling of certain witnesses requested by the defence and lengthy cross-examination of certain witnesses by defence counsel, had increased the length of the trial. While acknowledging the original time estimate for the trial, the Chief Justice noted that time was lost due to half day sittings on Fridays to allow her to perform her administrative duties, and breaks taken for ill health of counsel. The Chief Justice commented that these events were not foreseeable by the Crown, and did not support the view that the Crown deliberately misled the court in its estimate of the length of the trial.

93. The ruling of the Chief Justice on 7th May 2021 clearly adjudicated on the period that had run from the initiation of proceedings up to that date. The further ruling handed down on 5th September 2022 adjudicated on the proceedings up to that date. As far as this court is aware these rulings have not been disturbed by any decision of a superior court. This Court finds itself in agreement with the findings of the Chief Justice in these rulings, and in any event, the Court lacks the jurisdiction to set aside findings of a court of coordinate jurisdiction.

94. If the time that has run pre - 5th September 2022 is at all relevant to the AOP applications before this court it will be in the context of the effect of the post – September 2022 delay, viewed cumulatively, having regard to the previous history of the proceedings.

95. The question remains, however, when should the further delay in the proceedings be deemed to have started for the purpose of these AOP applications? One must consider that after the ruling of 2nd June 2021, Trial A would have began as early as July 2021, had it not been for the withdrawal of lead counsel for MM and the indulgence granted to the new lead counsel to read into the matter. It is difficult to comprehend how the Crown, or the judicial arm of the State could be held responsible for the subsequent delay in proceeding with Trial A, which in the normal course of events would have been concluded long before these applications arose.

96. MM appears to suggest that the further delay in starting Trial A should be assessed from March 2022, which he submits is the earliest date that Trial A was expected to begin. Even so, he suggests that Trial A could conceivably have been ordered to start in the autumn of 2021. It appears that the March 2022 date is based on the order of the Chief Justice made on 2nd June 2021, of a "not before date" of 1st March 2022 for the start of Trial A.

97. In his AOP motion filed on 12th December 2023, MAH refers to 20th June 2023, the date on which the Chief Justice recused herself from hearing Trial A at a Plea and Directions hearing. His complaint appears to be based on the lack of progress in appointing a judge to preside over Trial A.

98. In his submissions filed on 30th August 2024, TCM complains about the delay in prosecuting this matter from its inception, but does not appear to identify a date from which the further delay should be calculated for the purposes of his AOP application.

99. The prosecution suggested that the period of delay for the purposes of this application should begin either from 7th May 2021 or 5th September 2022.

100. As noted earlier, Trial B came to an end when verdicts were handed down on 25th September 2023. The closing addresses had been completed on 16th June 2023. The trial had lasted 26 months. To say that the transcripts of evidence and the documentary evidence were voluminous, is an understatement. For the court to take three months to consider its verdict in order to examine the evidence carefully, and consider the law, is not unreasonable. No one has suggested that it was. In my judgment, it is reasonable to conclude in the circumstances of this case that the period of delay that is relevant for the purposes of the AOP applications is the time that elapsed from 25th September 2023 to the 19th July 2024, when directions were given for the hearing of the pre-trial applications, and the start of Trial A.

101. I will now consider the factors identified in **Dyer v Watson** in relation to the analysis of the delay.

Complexity

102. There can be little doubt that these proceedings are extraordinarily complex involving scores of witnesses and hundreds of documents. It is to be expected that cases such as this one require a great deal of preparation and will take a long time to be completed, especially if there is extensive cross-examination. It will be unfair to subject this prosecution to condemnation for the protracted length of the trial caused by the complexity of the case. Of course, unnecessary time wasting is to be deplored.

Conduct

103. **Dyer v Watson** isolates the conduct of the defendant in assessing the delay. My own view is that the conduct of the prosecution is also relevant. Since the inception of these proceedings, there have been a multiplicity of defence applications, some being pursued up to the Privy Council. The applications now filed before me have resulted in a delay of at least two months in starting the trial. The prosecution indicated its readiness to start the trial in September 2024. Defence counsel were pressing for a start in January 2024.

104. The main reason put forward for the January 2025 start was that counsel had taken on commitments because of the lateness in appointing a judge to do the trial. As one counsel put it, the attorneys should not have to "starve" while awaiting the start of the trial.

105. In their submissions in support of the CM and the AOP applications, the defence attorneys were quite strident in their condemnation of the delay in prosecuting this matter and in appointing a judge to preside over Trial A. Yet at the directions hearing on 19th July 2024, the court had the distinct impression that attorneys were not enthusiastic about hastening the process. There was no urgency displayed in fixing an early date to hear the pre-trial applications, and even less in fixing a start date for the trial. Defence attorneys appeared to be content to wait out the rest of the year. The lack of urgency shown engendered a measure of skepticism about the sincerity of the complaints of delay and prejudice caused to the defendants by the delay and the bone fides of these applications.

106. Defence counsel for TCM further complained about the management of the proceedings by the prosecution, which he criticized for "overzealousness" and misguided optimism in setting unrealistic time estimates for both the original trial and Trial B. The complaints hardly rise to the level of prosecutorial misconduct, as exemplified in the case law and illustrated by such cases as **Maxwell., Ex p. Bennett, and Latif**. Having regard to the complexity of this matter, the obvious right of the defendants to cross-examine witnesses and the unforeseeable factors such as illness and bereavement it may be a little unreasonable to hold the prosecution to their original time estimates.

Adequate Resources

107. The third consideration as prescribed in **Dyer** is the manner in which the case has been dealt with by the administrative and judicial authorities. There is no doubt a duty on the State to provide sufficient judicial officers, administrative staff, court facilities, and financial resources so as to comply with its Constitutional obligation to provide a trial within a reasonable time.

108. The prosecution submits that in considering the performance of the State in fulfilling its duty, the following matters should be taken into account:

(i) The limited resources available due to the size of the jurisdiction;

(ii) The resources of the court would only permit one courtroom being outfitted with the electronic equipment required for the presentation of evidence, and

(iii) In any event, the prosecution team could not have been in two courtrooms at the same time.

109. As noted earlier, at the time the Chief Justice made the order for separate trials, one to follow the other, it was envisaged that the first trial would take 6-9 months, and certainly not more than a year. In these circumstances, the attorneys for MAH and TCM had no objection. Attorney for MM, who was granted the indulgence of the reversal of the start of Trial A and Trial B, never suggested until his submissions filed on 28 August 2024 that Trial A could have started before the end of Trial B.

110. The State is under a duty to provide sufficient resources to the administration of the criminal justice system in order to make good on its guarantee to provide a trial within a reasonable time. However, the availability of financial resources is a relevant factor. In **Sieuraj Sookermany v Director of Public Prosecutions** [1996] 48 WIR 346, de la Bastide CJ recognized the relevance of this consideration at page 357a:

> **"(i) The right of an accused to be tried within a reasonable time must in every case be balanced against the interest of the public in having him tried (see Bell v Director of Public Prosecutions 1985) 32 WIR 317 at pages 327, 328)**
>
> **(ii) In performing this balancing exercise, the court is entitled to take into account the prevailing system of legal administration and the prevailing economic, social, and cultural conditions that are found in the particular country. This point was made by Lord Templeman in Bell and reiterated by him in Mungroo v R [1991] 1 WLR 1351. The Board also recognized that the problem of institutional delays is a complex one to which there may be no simple or ready-made solutions, and that the scarcity of financial resources is clearly a**

factor to be taken into account in countries like Jamaica…"

111. It has been estimated that the prosecution of this matter has already cost the state in excess of $100 m. Having regard to the small size of the jurisdiction and the considerable resources already expended, it is difficult to conclude that the delay in bringing these proceedings to a final conclusion, had been caused or contributed to, by the failure of the State to deploy sufficient resources.

112. The length of time that it has taken for the state to appoint a judge to hear this matter has come in for severe criticism by defence counsel. It is submitted that the State should have commenced the process of selection since 20th June 2023, the date on which the Chief Justice indicated her intention to recuse herself from hearing Trial A. An ad hoc judge was eventually appointed on 8th July 2024.

113. In an affidavit sworn on 24th June 2024 in the CM proceedings, Khalila Astwood-Tatem, Deputy Attorney General provided a detailed account of the attempts made by the Chief Justice and the Judicial Services Commission (JSC) to secure the services of a suitable judicial officer. It appears that the JSC became engaged in the search from as early as July 2023, after the Chief Justice informed the JSC immediately after her recusal and requested them to find an ad hoc judge to hear Trial A.

114. Meanwhile the Chief Justice approached two of the three sitting criminal court judges, who declined the undertaking for various reasons.

115. The JSC encountered difficulty in identifying a candidate with specialized knowledge and experience to undertake a complex fraud trial. There was a limited pool of potential candidates who were suitably qualified and willing to serve on an ad hoc basis. Many suitable candidates were unavailable due to current judicial duties. In July 2023, the JSC approached Chief Justices, retired and sitting in their efforts to find a suitable candidate. The Chairperson of the JSC made similar approaches to eminent jurists, who cited pressing commitments they already had. Some requested remuneration which was nearly twice that being paid to sitting judges in TCI. The JSC also approached sitting judges in the region. Some were unable to be out of their jurisdiction for the required time, others had health challenges. Some had other commitments.

116. The JSC also sought to recruit two very senior, experienced criminal counsel, who both declined. One had been approached to represent one of the defendants.

117. Eventually, the JSC advertised the position, conducted interviews, and shortlisted candidates towards the end of 2023. However the few candidates who accepted the challenge of embarking on a two year trial, were found to be unsuitable after further enquires were made. Other

jurists who were about to retire were contacted, but were unwilling to embark on a challenging trial due to personal obligations.

118. Efforts were also made through the office of the Governor to the Judicial Office in the UK. A virtual interview was conducted by the JSC with an experienced jurist identified by the Foreign, Commonwealth and Development Office. In the end, the jurist did not accept the position due to professional commitments.

119. Eventually, another advertisement was placed on the CaribbeanJobs.com platform, which attracted 17 applications of which 4 were shortlisted for interview. One candidate was selected and he was eventually appointed on 8th July 2024.

120. Having regard to the detailed account of efforts made by the Chief Justice, the JSC and the Office of the Governor to identify and appoint a suitable judicial officer to conduct the trial, it would seem unfair to accuse the State of dragging its feet in the matter.

121. If the period of delay is assessed from 20th June 2023, then the delay is approximately a year from which it is reasonable to allow a period of at least 3 months to identify, interview, and select a judge. The successful candidate would still need the time to read into the case, give directions for pre-trial hearings, and read submissions and authorities. Realistically

then, the earliest start time would be in or about September 2023, when Trial B was actually completed.

Prejudice

122. The case law establishes that there will come a time when the delay is so prolonged that prejudice to the defendant will be presumed. In this case however TCM has submitted that he has suffered actual prejudice. TCM complains that his assets have been frozen, he cannot travel without applications to the court, he has suffered damage to his reputation, he and his family have suffered distress, and he has incurred financial losses in his legal practice. In addition he has had this case, with a possible term of imprisonment, hanging over him since 2012.

123. In addition, TCM complains that he will be prejudiced in defending the case against him because of the passage of 15-22 years since the alleged offences were committed. It would be difficult for him to recall basic details of the events and the individual financial transactions, among the thousands carried out on behalf of his clients. It would also be challenging for him to respond to cross-examination on financial charts prepared from banking material from so long ago.

124. MM, in his submissions, makes a similar complaint. In the event that he chooses to give evidence, he will be required to deal with "a wealth of detailed complex material dating back 20 years." There is an inherent risk

that a defendant may not be able to give the best account of himself and do justice to his own case.

125. All criminal charges carry with them a certain amount of inherent prejudice in the form of loss of reputation, possible restriction to one's freedom of movement, anxiety, personal distress and distress to close family members, and as in this case, possible financial loss. Of course the longer the delay in bringing the proceedings to an end, the more intense these negative consequences may become. In cases of delay, these factors may be taken into account by the judicial officer in mitigation when considering an appropriate sentence after a conviction.

126. The kind of prejudice that the court is required to assess, is the likely prejudice that the defendants may experience in making their defence. The longer the delay the more likely that memories fade, witnesses may die or become unavailable, and documentary evidence may be lost or destroyed. In this case, TCM and MM point to the possibility that they may not be able to recall fine details of complex financial transactions which happened as long as 22 years ago. This may affect their ability to present an effective defence to the serious charges they face.

127. On closer examination, the submissions that the defendants are now required to recall details of financial transactions from as long as 22 years ago, appears to be somewhat artificial. While the start of the original trial before Harrison J was delayed for about 3 years by pre-trial applications,

the defendants had to prepare for a trial as early as December 2015. The prosecution closed its case on 15th January 2019. No case submissions followed and were dismissed on 29th July 2019. Certainly, by that time if not before, the defendants would have decided whether or not they elected to give evidence and would have familiarized themselves with the evidence.

128. After the death of Harrison J on 7th February 2021 the Chief Justice moved swiftly to get the matter back on track following the decision of the DPP to ask for a re-trial on 1st March 2021. A CM and AOP applications were heard by the Chief Justice on 25th March 2021 and dismissed on 7th May 2021. By 2nd June 2021 a date was set for Trial B to begin, after lead counsel for MM withdrew from the case. Trial A was supposed to be called first. MM, MAH, and TCM should have been prepared to proceed by June/July 2021. The expectation was that Trial B would be completed in months, certainly less than a year. It is not unreasonable that they should have been preparing themselves for a trial to take place within months. In fact they have complained bitterly about the length of time Trial B took, and the subsequent delay in finding a judge to hear Trial A.

129. In addition to this, the prosecution case is based on documentary evidence of financial transactions supported by contemporaneous documents which should have been disclosed to the defendants since the original trial. They would have had ample time to study these documents

and prepare themselves for cross-examination, if they chose to give evidence. In fact, they have had the advantage of having seen prosecution witnesses give their evidence, and being cross-examined. Having had a dress rehearsal of their trial, they may have been able to identify weaknesses in the prosecution case, an advantage that the State did not have, since MM elected not to give evidence and another defendant (not in this case) had started his defence, and was under cross-examination.

Conclusion

130. To return to the principles laid down in **Maxwell and Attorney-General's Reference No 1 of 1990**, I come to the following findings:

    1. I am not satisfied on a balance of probabilities that the defendants have demonstrated such serious prejudice that no fair trial can be held, or that the continuation of the prosecution amounts to an abuse of the process of the court.
    2. Whatever prejudice the defendants may suffer as a result of the passage of time can be remedied within the trial process.
    3. I am not persuaded on a balance of probabilities that it would be unfair to try the defendants, or that a stay is necessary to protect the integrity of the criminal justice system. There is simply no evidence of prosecutorial misconduct, executive misconduct or unlawfulness, so as to justify the exceptional remedy of a permanent stay of proceedings in this case.

131. For the sake of completeness and in deference to counsel, I will deal briefly with a Constitutional argument put forward by counsel for MM. He submits that the DPP, in continuing these proceedings against MM, in breach of Section 6(1) of the Constitution is acting ultra vires the Constitution, and his act in so doing should be regarded as a nullity. In these circumstances the court should grant a permanent stay of the proceedings.

132. MM submits that the Constitution imposes a "vires control" upon the DPP, in a similar though not identical way to that imposed on the Lord Advocate in Scotland by Section 57(2) of the Scotland Act 1998.

133. MM further submits that if the Supreme Court permits the prosecution to proceed, the act of the Court in so doing will also be a nullity. The only adequate means of redress is a permanent stay of proceedings.

134. The fatal flaw in MM's submission is that there is no statutory provision enacted in TCI that provides a "vires control" on the DPP or the Court from acting incompatibly with the Constitution, similar to section 57(2) of the Scotland Act 1998, which expressly provides a vires control from acting incompatibly with convention rights. That effectively disposes of this submission.

The Trial without a Jury (TWAJO) Application

135. The Crown has made an application for this trial to be conducted without a jury pursuant to Section 58 of the Criminal Procedure Ordinance (CPO), which provides that a judge may grant such an order if he is satisfied that the interests of justice so require. On determining this issue, the judge is mandated to consider the following matters:

- the nature of the changes;
- the complexity of the issues, and any steps that might be taken to reduce the complexity of the trial;
- the length of the trial, and any steps that might be taken to reduce the length of the trial;
- the likelihood of pre-trial publicity influencing potential jurors and
- any information tending to suggest the possibility of jury tampering.

136. Trial by jury is regarded as a cornerstone of the criminal justice system. Adjudication of the guilt or innocence of the subject by a jury of his peers is regarded as a highly prized possession, which must not be lightly denied to an accused person. It has been described by Lord Devlin as “the lamp which shows that freedom lives.” Trial by jury is the norm, which must not be departed from unless there is strict and careful compliance with the statutory requirements.

137. The legislation requires that the judge must be "satisfied that the interests of justice" requires that the trial should proceed without a jury. The legislation prescribes that a number of specified matters must be considered. However, the list is not exhaustive. The court must consider all relevant circumstances. Each factor must be evaluated and weighed by the judge, and placed in the balance. At the end of this exercise the judge must be satisfied that the interests of justice require that the trial should proceed without a jury.

The Nature of the Charges

138. The defendants are charged with bribery, conspiracy to defraud and money laundering. These offences are alleged to have been committed by a former Premier, a former Minister, and a prominent Attorney and brother of the Prime Minister. The offences were allegedly committed against the State of TCI, and involve serious breaches of trust reposed in persons entrusted with public duties. They are extremely serious offences.

139. The defendants submit that they are offences that are routinely adjudicated upon by juries and are not abhorrent in nature, such as sexual offences against children.

140. The court agrees that the offences in themselves do not disclose any particular features that make them unsuitable for trial by jury. The

concern of the court arises in relation to the complexity of the evidence to be adduced in proof of the charges.

Complexity

141. The defendants submit that the complexity of this case has been substantially reduced since the original trial and Trial B. In these trials Harrison J and the Chief Justice had granted TWAJO applications by the Crown, adverting inter alia to the complexity of the issues and the evidence.

142. It is true that this trial involves fewer defendants and counts than the original trial and Trial B, assuming that count 4 is severed. The Crown is expected to call some 46 witnesses, possibly more, and the defendants may decide to give evidence and call witnesses. The charges of bribery and money laundering involve an examination of numerous financial transactions across international borders in which several financial institutions were used. The Crown's case is expected to take some 4-5 months at best, probably considerably longer, depending on the length of cross-examination and unforeseen circumstances. The case requires a close examination of financial records and charts showing the movement of money across borders and financial institutions. The jury will be required to examine, analyze, and retain a huge volume of material over a period of several months. While the court appreciates the confidence

reposed in jurors as finders of fact based on the evidence, it is perhaps a little unrealistic to expect the average juror to carry out this task having regard to the voluminous evidential material to be canvassed in this case.

143. The issue of complexity weighs heavily in favor of a trial without a jury.

Length of the Trial

144. Trial B involved 4 defendants and 5 counts including 3 counts of conspiracy to defraud, one count of bribery and one count of money laundering. It was estimated to last 6-9 months. It took 26 months.

145. Trial A is also estimated to take 6-9 months. The court is optimistic that this target can be achieved, provided that the available hearing days are used efficiently, issues and facts are agreed, and there is economy in cross-examination. Even with the best of intentions, unforeseen circumstances may arise pushing the completion date to a year or beyond. Of course any trial estimate is considerably lengthened if a trial by jury is ordered, since issues of law are generally ventilated in their absence.

146. Apart from the issue of the average juror being able to assimilate and retain a vast volume of evidence over such a protracted period, there is the question of financial hardship on jurors, particularly those who are self-employed or engaged in small businesses. It is by no means unforeseeable that many jurors may have families to maintain, and may be the sole

breadwinner in the family. It seems unrealistic to expect that such a juror will be able to carry out his financial responsibilities on the wholly inadequate stipend of $15.00 a day.

147. In the court's view, the issue of the length of the trial carries significant weight in favor of a trial without a jury.

Pre-trial Publicity

148. While it is recognized that pre-trial publicity may affect a jury's ability to render an unbiased verdict, there appears to be a divergence of judicial perception on the issue. The Chief Justice in her ruling on the TWAJO application firmly rejected the view that pre-trial publicity affected the jury's ability to render a true verdict. She considered that the sensational media reports before and during the aborted trial did not seriously endanger a fair trial by a jury, having regard to the fact that "the passage of time does have an effect on the public memory, and tends not to affect the outcome of trials." (see paragraph 60 of Ruling dated 18th June 2021.)

149. In his ruling on the TWAJO application before him, Harrison J, at paragraph 44 expressed a different view. He noted that in England which had a large pool, "the memory of events diminishing in the minds of Jurors, with the passage of time is easily understandable." However, the

same does not apply in a small island community, where some members of the jury will probably know or know of the accused and the witnesses.

150. In his conclusion, Harrison J referred to the adverse pre-trial publicity which "could not have failed to influence adversely the minds of the potential jurors in the small jurisdiction of TCI."

151. It is important to bear in mind the impact of the pre-trial publicity in the context of a very small jurisdiction, divided along political lines between two major parties. From a very small jury pool, a panel of seven jurors must be selected. Unfortunately, the legislation does not provide for alternates, in the event that any juror is excused, or removed from the panel for other reasons.

152. The defendants argue that the impact of the pre-trial publicity since 2015 has been blunted by the passage of time. The court disagrees. The defendants are prominent citizens, a former Premier, a former Minister, and a prominent lawyer. There is little reason to believe that public interest in the case does not remain high.

153. In the Court's view, the observations of the Privy Council expressed by Lord Hughes at paragraph 55 of the report in **Misick and Others (Appellants) v The Queen (Respondent) Turks and Caicos** [2015] UKPC 31, remain particularly apposite:

> **"…Our systems demand of jurors that they are free from being influenced by anything other than the evidence addressed in court. Another common feature, also directed to this end is that they should be essentially anonymous, whereas in the islands the usual practice is that the names are circulated to the parties in advance of the trial. In the present case, the transactions which are to be in question have involved very large sums, and the judge found there to be counter-claims of pervasive benefit or disadvantage to large numbers of belongers. There has already been relentless publicity, both in favor of and against the defendants, and there seems no sign of it stopping, whether or not the proceedings are pending. This case is so unusual, and the background to it so controversial, that it can readily be seen that it would probably be impracticable to find a jury composed of these with no prior knowledge of, or opinion upon, the issues at stake, and that even if such were possible, the identity of jurors would inevitably become known, thus exposing them to inevitable extra-evidential opinions and/or information, whether innocently communicated or not."**

154. Accordingly, the court attaches significant weight to the issue of pre-trial publicity, in favor of trial without a jury.

Jury Tampering

155. There has been no evidence of jury tampering.

Reasoned Judgment

156. The Crown submits that the importance of the case and the public interest in the outcome requires a determination of the case by the delivery of reasoned verdicts by a judge, in preference to verdicts rendered by a jury, in which the basis for the jury's decision remains unclear giving rise to speculation and doubt by the public.

157. MM contends that the public will know precisely the basis on which the verdicts are reached, by virtue of fair and accurate reports in the media, counsel's closing arguments, and submissions on the totality of the evidence.

158. MAH argues that having regard to the protracted delay, and all the public funds expended in trying the defendants, there is "a greater imperative" for the verdicts to be delivered by a jury, which is still the preferred tribunal, whose verdict is most likely to be trusted and respected by the public.

159. TCM submits, in similar vein, that in matters of national importance, verdicts reached by a judge coming from outside of TCI society are less likely to be accepted as fair by the local community than verdicts reached by a jury randomly selected from their own society. Public perception that the system is fair, is crucial to public confidence in the judicial process.

160. Respectfully, the Court emphatically rejects this view. A judicial officer from a foreign jurisdiction is far more likely to be objective, balanced, unbiased, and fair in examining the evidence, and making findings of fact, in a matter such as this one, where perceptions are likely to be influenced by extraneous factors outside of the courtroom, particularly in a very small jurisdiction, where potential jurors may know, or know of, the defendants and witnesses. While no doubt there are many persons who possess a robust, and perhaps romanticized view of trial by jury, this court is firmly of the view that having regard to the peculiar features of this case, a judicial officer, untainted by local influences and experiences, is more likely to render a true verdict in accordance with the evidence. In my view, no issue arises as to any likely negative impact on public confidence in the criminal justice system. Indeed, no evidence has been put before this court of any loss in public confidence following the verdicts delivered by the Chief Justice (also a non-national) in Trial B.

161. This court considers that reasoned verdicts delivered by an impartial and independent judicial officer is more likely to be accepted and respected by the public, and is likely to enhance, rather than negatively impact, public confidence in the criminal justice system.

162. Having so decided, this court does not attach as much weight to this factor as compared to the issues of complexity, length of trial and pre-trial publicity.

163. I have placed the relevant factors, as I have weighed them, unto the scale. The balance is overwhelmingly in favour of a trial without a jury. Accordingly, this court concludes that the interests of justice require that this trial should proceed without a jury.

Disposition

1. The originating summons filed on 22nd May 2024 is dismissed.
2. The AOP applications filed on 12th December 2023, 28th August 2024, and 30th August 2024 are dismissed.
3. The TWAJO application is granted.

RAJENDRA NARINE
Judge