IN THE SUPREME COURT

THE TURKS AND CAICOS ISLANDS

CR 52 / 2020

BETWEEN:

Willengince Noel

and

Rex

BEFORE: **The Honourable Mr. Justice Davidson Kelvin Baptiste (Ag)**

APPEARANCES: **Sheena Mair for the applicant.**

Nayasha Hatmin for the respondent.

HEARD: **April 21st2023**

DELIVERED: **May 12th 2023**

DECISION

1. **BAPTISTE J (Ag.):** This application for a stay on the ground of abuse of process, has its genesis in criminal proceedings instituted against Willengince Noel ("the applicant") on 4th December 2020. The applicant has been in custody since. The proceedings related to various offences including robbery and possession of an imitation firearm with intent to commit a serious offence. The application, filed on 23rd March 2023, is founded primarily on the issues of unreasonable delay and non-disclosure.

2. Before delving into the matters relied on in support of the application, and the Crown's opposition thereto, it would be useful to set out the principles applicable to a stay of criminal proceedings on the ground of abuse of process. The court seised of the question whether proceedings should be stayed as an abuse of process has a very broad discretion: paragraph [80] of **Warren v Attorney General of Jersey** [2011] UKPC 10. The burden is on an accused to show, on a balance of probabilities, that he is entitled to a stay of proceedings on grounds of abuse of process. A stay of criminal proceedings is always an exceptional remedy, because "the majority of improprieties in connection with bringing proceedings can be satisfactorily dealt with by the court exercising its powers of control over the proceedings": per Lord Holroyde in **Hamilton and ors. v Post Office Limited** [2021] EWCA Crim 577 at paragraph [64]. As stated in **D Limited v A and others** [2017] EWCA Crim 1172 at paragraph [50] "… [i]t remains the case that it is an exceptional step to stay a prosecution; and if a stay is to be granted it must be by a proper application of settled principles to the facts."

3. The law recognises two categories of cases empowering the court to stay criminal proceedings on the ground of abuse of process. They were summarised by Lord Dyson in **R v Maxwell** [2010] UKSC 48 at paragraph [13]:

> "It is well established that the court has the power to stay proceedings in two categories of case, 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 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 **R v Horseferry Road Magistrates' Court, Ex p Bennett** [1994] 1 AC 42, 74G) or will 'undermine public confidence in the criminal justice system and bring it into disrepute' (per Lord Steyn in **R v Latif** [1996] 1 WLR 104, 112F)."

4. Referring to the second category case, in **Warren v Attorney General** (supra), Lord Dyson stated at paragraph [35] :

> "…It is unhelpful and confusing to say that this category is founded on the imperative of avoiding unfairness to the accused. It is unhelpful because it focuses attention on what is fair to the accused, rather than on whether the court's sense of justice and propriety is offended or public confidence in the criminal justice system would be undermined by the trial. It is confusing because fairness to the accused should be the focus of the first category of case. The two categories are distinct and should be considered separately."

5. Although the two categories for the grant of a stay are legally distinct, notwithstanding the category invoked, the grant of a stay is an exceptional remedy; a remedy of last resort. This underlies the nature of the remedy. Thus, in **D Limited and Others** (supra), after noting the two well-established limbs or bases applicable to staying an indictment on the grounds of abuse, Davis LJ stated at paragraph [34]:

> "On either approach, it is established that it would be an exceptional course for a stay to be granted. As it has been put, a stay is a remedy of last resort."

6. As Gross LJ stated in **DPP v Fell** [2013] EWHC 562 (Admin) at paragraph [15], the grant of a stay "… is, effectively, a measure of last resort. It caters for and only for those cases which cannot be accommodated with all their imperfections within the trial process".

7. Lord Dyson explained in **Warren v Attorney General of Jersey** [2011] UKPC 10 at paragraph [26]:

> "… the balance must always be struck between the public interest in ensuring that those who are accused of serious crimes should be tried and the competing public interest in ensuring that executive misconduct does not undermine public confidence in the criminal justice system."

In **R v Norman** [2016] EWCA Crim 1564, the court explained at paragraph [23] that a category two abuse involves:

> "… a two stage approach. First it must be determined whether and in what respects the prosecutorial authorities have been guilty of misconduct. Secondly it must be determined whether such misconduct justifies staying the proceedings as an abuse. The second stage requires an evaluation which weighs in the balance the public interest in ensuring that those charged with crimes should be tried against the competing public interest in maintaining confidence in the criminal justice system and not giving the impression that the end will always be treated as justifying any means. How the discretion will be exercised will depend upon the particular circumstances of each case, including such factors as the seriousness of the violation of the accused's rights; whether the police have acted in bad faith or maliciously; whether the misconduct was committed in circumstances of urgency, emergency or necessity; the availability of a sanction against the person (s) responsible for the misconduct; and the seriousness of the offence with which the person is charged. These are merely examples of factors which may be relevant. Each case is fact specific. These principles were reaffirmed by the Privy Council in **Warren v Attorney General for Jersey** [2012] 1 AC 22, in which the Board upheld a refusal to stay a prosecution for serious drugs offences where the police had acted unlawfully in foreign jurisdictions and deliberately lied to the

foreign authorities, the Attorney General and Chief of Police, in order to obtain incriminating recordings of conversations in a car without which no prosecution would have been possible."

8. In **Warren v The Attorney General** (supra), at paragraph [83], Lord Kerr extracted a number of principles regarding the second category of cases in which an abuse of process application may be made. In summary they are:

    (i) The principal purpose of the examination, in the second category of cases, of the question whether proceedings should be stayed is to determine whether this is necessary in order to protect the integrity of the criminal justice system – see **R v Maxwell** at paragraph 13. It should now be recognised that the best way to describe this basis for a stay is that chosen by Lord Dyson in **R v Maxwell** – that it should be granted where necessary to protect the integrity of the criminal justice system.

    (ii) A balancing of interests should be conducted in deciding whether a stay is required to fulfil this primary purpose. It is unwise to (1) attempt to list the various factors which might arise in the range of cases in which this issue may be considered as they are potentially extensive or (2) rigidly categorise those cases in which a stay will be granted. But where a stay is being considered in order to protect the integrity of the criminal justice system, "the public interest in ensuring that those that are charged with grave crimes should be tried" will always weigh in the balance.

    (iii) The "but for" factor (i e) where it can be shown that the defendant would not have stood trial but for the executive abuse of power) is merely one of the various matters that would influence the outcome of the inquiry as to whether a stay should be granted. It is not necessarily determinative of that issue.

    (iv) A stay should not be ordered for the purpose of punishing or disciplining prosecutorial or police misconduct. The focus should always be on whether the stay is required in order to safeguard the integrity of the criminal justice system.

9. Lord Kerr said at paragraph [84]:

    "…For my part, I think there is much to be said for discarding the notion of fairness when considering the second category of stay cases. Fairness to the accused, although not irrelevant in the assessment of whether it is fair to allow the trial to continue, is subsumed in the decision whether to grant

a stay in second category cases based on the primary consideration of whether the stay is necessary to protect the integrity of the criminal justice system."

10. Examples of category 2 abuse were given in **The King (City of York Council) v AUH & Ors** [2023] EWCA Crim 6, where Lord Burnett CJ stated at paragraph [104]:

> "Examples of limb 2 abuse arise in connection with bad faith on the part of the prosecution, unlawfulness or executive misconduct. Well - known examples include **R v Horseferry Road Magistrates Court ex p Bennett** [1994] 1 AC 42 where the defendant was brought back to the United Kingdom in breach of extradition arrangements and **R v Mullen** [2000] QB 520 where the United Kingdom law enforcement agencies procured the unlawful deportation of the defendant from Zimbabwe to the United Kingdom; **R v Bloomfield** [1997] 1 CR App R 135 where going back on an assurance that no evidence will be offered where there was no material change of circumstance would bring the administration of justice into disrepute; **AG's Ref (No 3 of 2000) (Loosely)** [2001] 1 WLR 2060, an example where entrapment by the police was so seriously improper as to bring the administration of justice into disrepute."

11. In **Panday v Virgil (Senior Superintendent of Police)** [2008] AC 1386, the Board looked at *the Bennet principle* and one or two cases which applied it. Bennett was unlawfully brought to England as a result of collusion between the South African and British police and on arrival was arrested and brought before magistrates to be committed for trial. The House held that in those circumstances the English court should refuse to try him. In **Bennet** Lord Griffiths stated at paragraphs [61] to [62]:

> "In the present case there is no suggestion that the appellant cannot have a fair trial, nor could it be suggested that it would have been unfair to try him if he had been returned to this country through extradition procedures. If the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accepts a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law."

12. In giving the judgment of the Board in **Panday v Virgil**, Lord Brown stated at paragraph [26]:

> "The Bennett principle was directly applied by the Court of Appeal (Criminal Appeal) in **R v Mullen** [2004] 2 Cr App R 290 where it was held that the British authorities, in securing Mullen's deportation from Zimbabwe, had been guilty of

> "a blatant and extremely serious failure to adhere to the rule of law with regard to the production of a defendant for prosecution in the English courts " so that when, many years later, this came to light, his conviction fell to be quashed."

13. At paragraph 27 Lord Brown stated that the Bennett principle was also applied in the context of entrapment in **R v Latiff** [1996] 1 WLR 104 and **R v Loosely** [2001] 1WLR 260. He stated that in **R v Loosely**, the House of Lords "laid down the principle that it would be unfair and an abuse of process if the defendant had been lured, incited or pressurized into committing a crime which he would not have otherwise committed but not if the law enforcement officer, behaving as an ordinary member of the public would behave, merely gave a person an unexceptional opportunity to commit a crime and that person freely took advantage of the opportunity."

14. Lord Brown stated at paragraph 28:

> "It will readily be seen that the factor common to all these cases and the central consideration underlying the entire principle is that the various situations in question all involved the defendant standing trial when, but for an abuse of executive power, he would never have been before the court at all. In the wrongful extradition cases, the defendant ought properly not to have been within the jurisdiction; only a violation of the rule of law brought him here. Similarly, in the entrapment cases, the defendant only committed the offence because the enforcement officer wrongly incited him to do so. True, in both situations, a fair trial could take place. But given that there should have been no trial at all, the imperative consideration became the vindication of the rule of law.

The Submissions

15. I now turn to Ms. Mair's submissions. In her written and oral submissions, Ms. Mair chronicled the history of the matter. Learned counsel relied on the following circumstances as justifying a stay of proceedings on the basis that cumulatively they offend the Court's sense of justice and propriety:

    (i) unreasonable delay in starting the trial of October 2022;
    (ii) lack of full disclosure by the crown prior to the trial in October, and that disclosure requested before, during and after the trial is still outstanding;
    (iii) no reasons given for the refusal of the previous stay application (on 23rd November 2022);
    (iv) delay in receiving (written) reasons for refusal of previous stay application;
    (v) date fixed of 27th January never called in court;
    (vi) no fixing of a retrial date;
    (vii) delay in dealing with fixing of a retrial date;
    (viii) applicant remanded in custody with no valid remand warrant;

(ix) no compliance with section 34 of the Criminal Procedure Rules;
(x) applicant being refused bail and remanded to inhumane and degrading conditions;
(xi) denial of right to liberty and protection of the law; and
(xii) denial of protection from arbitrary detention.

16. In expounding on the issue of unreasonable delay in starting the trial, Ms. Mair pointed out that the applicant was remanded in custody for 1 year and 10 months before his first trial commenced on 4th October 2022. During that time there were two dates the trial could not commence as the court was engaged in another matter. Two bail applications were also refused in the interregnum; the latter because the court was of the view that there was no material change of circumstances since the last bail application to allow the court to entertain the application. There was no reasonable explanation for the two trial dates being adjourned.

17. Ms. Mair stated that bail was refused in the Supreme Court on 18th December 2020. The matter came up for Sufficiency Hearing on 7th February 2021 and various dates thereafter. A warned trial date of 29th November 2021 was vacated and a Pretrial review fixed for 10th December 2021; thereafter a fixed trial for 28th February 2022. The trial could not commence on that date as the court was engaged in another matter. A trial date was subsequently fixed for 16th May 2022. That trial could not proceed as the court was engaged in another trial. A pretrial review/mention was fixed for 24th June 2022 and thereafter on 7th July 2022, when a warned trial was fixed for 3rd October 2022 and a fixed trial date for 14th November 2022. On 4th October 2022 the trial commenced. The jury was discharged on 7th October 2022 and the matter was due to be called again for trial on 14th November 2022.

18. After several mention dates, on 21 November 2022, Hatmin J (Ag.) recused himself from dealing with the matter. The court thereafter refused an application to stay the proceedings, promising written reasons by 26thJanuary 2023. The applicant was to be arraigned by a different judge on 27th January 2023 but the matter was not called that day. Written reasons for the refusal of the stay in November 2022 have not been received. Ms. Mair also contended that several disclosure issues remain unresolved.

19. The applicant continues to be remanded in custody and has been in custody for 2 years and 4 months with no future court date or trial date fixed. Ms. Mair further asserted that there is no lawful remand warrant since 27th January 2023. The applicant has never been advised of any compliance with rule 34 of the Criminal Procedure Rules 2021 in relation to Bail Review except on the 10th January 2023. On that date bail was not considered. Ms. Mair argued that no positive steps have been taken by the state to ensure the applicant's trial and retrial are being dealt with swiftly and within a reasonable time. The applicant, who is presumed innocent, has been treated unfairly and unjustly.

20. In sum, Ms. Mair submitted that the cumulative effect of the circumstance complained of, coupled with the clear and continued breach of the applicant's rights, compel the conclusion that it is in the interest of justice that proceedings are stayed.

21. The stay application is strongly opposed by the Crown. Ms. Hatmin argued that a court is not empowered to stay proceedings on the basis of delay simpliciter; the delay must be inordinate and unjustifiable. In support thereof, Ms. Hatmin relied on **The Attorney General's Reference (No 1 of 1990)** (1992) 95 Cr. App. R. 296 where Lord Lane stated:

> "Stays imposed on the grounds of delay or for any other reason should only be employed in exceptional circumstances … even where the delay can be said to be unjustifiable, the imposition of a permanent stay should be the exception rather than the rule. Still more rare should be cases where a stay can be properly imposed in the absence of any fault on the part of the complainant or prosecution."

Further, no stay should be imposed unless the defendant shows on the balance of probabilities that owing to the delay, he will suffer serious prejudice to the extent that no fair trial can be held, in other words that the continuation of the prosecution amounts to a misuse of the court.

22. Ms. Hatmin contended that a heavy burden rests on an applicant who seeks a stay on the ground of delay. The essential question to be determined is whether in all the circumstances, the delay was such as to make the prosecution unfair. Where there is delay, even if unjustifiable, a stay should be the exception rather than the rule.

23. Ms. Hatmin submitted that the Crown has made full disclosure of all material to which the defence was entitled but the defence continue to request material unrelated to the matter before the court. There is no statement from David Wilson purporting to identify any person who participated in the robbery. Ms. Hatmin submitted that the court's failure to provide reasons for the decision not to stay the proceedings does not prejudice the applicant or render it impossible for him to have a fair trial. There was no substantial unjustifiable delay in the circumstances of the case. A breach of constitutional rights does not automatically lead to a stay. Staying of an indictment for abuse should only be done in exceptional cases. Further, whether taken cumulatively or individually, the matters relied on to ground the stay do not offend the court's sense of justice and propriety. In the circumstances, the applicant has failed to satisfy this court that he is entitled to a stay on the ground of abuse of process.

Analysis

24. I have considered the respective submissions of the parties on the issue of a stay on the ground of abuse of process. The two categories for the grant of a stay are legally distinct. The applicant relied on a category two abuse and has set out the factors in support thereof. As the cases emphasise, a stay of criminal proceedings is an exceptional remedy and a category two abuse is by its nature rarely found. The burden rests on the applicant to show on the balance

of probabilities that he is entitled to a stay on the ground that in all the circumstances, the continuation of the trial will offend the court's sense of justice and propriety. The issues of delay and disclosure essentially form the centre piece of the application.

25. Noting the emphasis placed on the issues of delay and non-disclosure by the applicant, it is necessary to consider the principles pertinent thereto. Several cases have addressed the issue of delay. In **CPS v F** [2011] EWCA Crim 1844, the Lord Chief Justice dealt with the issue of delay and abuse of process. He stated at paragraph [49 (ii)]:

> "An application to stay for abuse of process on the grounds of delay must be determined in accordance with **Attorney General's Reference (No 1 of 1990)** [1990] [1 QB 630]. It cannot succeed unless, exceptionally, a fair trial is no longer possible owing to prejudice to the defendant occasioned by the delay which cannot fairly be addressed in the normal trial process. The presence or absence of explanation or justification for the delay is relevant only insofar as it bears on that question."

26. In **R v Hewitt** [2020] EWCA Crim 1247, the legal framework regarding an application for a stay for abuse of process arising from delay was set out at paragraph [98]:

> "The principles governing an application for a stay of proceedings for abuse of process arising from delay are well - established and uncontroversial. They were set out by this court by Lord Lane CJ in **Attorney General's Reference (No 1 of 1990)** (1992) 95 Cr. App. R. 296. No stay should be imposed unless the defendant showed on the balance of probabilities, that due to the delay he would suffer serious prejudice to the extent that no fair trial could be held. The principles were confirmed in **R v S (SP)** [2006] EWCA Crim 756; [2006] 2 Cr App 23, where it was said by Rose LJ (Vice President), giving the judgment of the court at [21]:
>
> > "In the light of the authorities, the correct approach for a judge to whom an application for a stay for abuse of process on the ground of delay is made, is to bear in mind the following principles:
> >
> > (i) Even where delay is unjustifiable, a permanent stay should be the exception rather than the rule;
> > (ii) Where there is no fault on the part of complainant or prosecution, it will be very rare for a stay to be granted;
> > (iii) no stay should be granted in the absence of serious prejudice to the defence so that no fair trial can be held;
> > (iv) when assessing possible serious prejudice, the judge should bear in mind his or her power to regulate the admissibility of evidence and the trial process itself should ensure that all relevant factual issues arising from delay

will be placed before the jury for their consideration in accordance with appropriate direction from the judge;

(v) if, having considered all these factors, a judge's assessment is that a fair trial will be possible, a stay should not be granted."

27. At paragraph [99] the court stated that the principles governing an application for a stay of proceedings for abuse of process "…were reinforced in **R v F (S)** [2011] EWCA Crim 1844; [2011] 2 Cr App R 28." In giving the judgment of the court in **R v F (S)** Lord Judge CJ said, at paragraph [45]:

> "… most important of all, as all the authorities underline, it is only in the exceptional cases where a fair trial is not possible that these applications are justified on the grounds of delay, even when the pre-condition to a successful application, serious prejudice, may have occurred . The best safeguard against unfairness to either side in such cases is the trial process itself, and an evaluation by the jury of the evidence."

In **ex parte Bennett** at page 74H Lord Lowry said:

> "…The discretion to stay is not a disciplinary jurisdiction and ought not to be exercised in order to express the court's disapproval of official conduct. Accordingly, if the prosecuting authorities have been guilty of culpable delay but the prospect of a fair trial has not been prejudiced, the court ought not to stay the proceedings, merely "pour encourager les autres".

28. Having examined the principles regarding delay and abuse of process, and the matters complained of in respect of delay, I am satisfied that the trial process provides ample protection for the applicant, it has not been established that there is serious prejudice to the applicant by reason of the delay, the case is not an exceptional one to justify a stay on the ground of delay. Importantly, being a category two reliant application for a stay, on the ground of abuse of process, the delay complained of, is not of a nature such as to offend the court's sense of justice or propriety, if asked to try the applicant in the circumstances.

29. With respect to disclosure, as Lord Hughes said in **R (on the application of Nunn) v Chief Constable of Suffolk Constabulary and another** [2014] UKSC 37 at paragraph [22]: "The principled origin of the duty of disclosure is fairness." Lord Bingham put it this way in **R v H** [2004] UKHL 3; [2004] 2 AC 134 at paragraph [14]:

> "Fairness ordinarily requires that any material held by the prosecution which weakens its case or strengthens that of the defendant, if not relied on as part of its formal case against the defendant, should be disclosed to the defence. Bitter

> experience has shown that miscarriages of justice may occur where such material is withheld from disclosure."

30. In **The Crown v Richards and ors.** [2015] EWCA Crim 1941, Sir Brian Leveson P said at paragraph 18:

> "The prosecution has long been under a duty to disclose to the defence any unused material in its possession, that is to say, material that is not part of its formal case against the defendant, which either weakens its case or strengthens that of the defendant."

'There must be a proportionate approach to disclosure tailored to the issues in the case applying the test for disclosure rather than a general request for anything that might conceivably have a bearing on the case.' In **The Queen v Boardman** [2015] EWCA Crim 175 at paragraph 42, Sir Brian Leveson P warned against "the over- zealous pursuit of inconsequential material which does not go to the issue all in the hope that the CPS will fall down and that an application can be made which has the effect of bringing the prosecution to an end."

31. In **Hamilton and ors. v Post Office Limited** [2021] EWCA Crim 577, the issues of disclosure and abuse of process were addressed. Forty-two persons who were employed by the Post Office were prosecuted by their employer and convicted of crimes of dishonesty. Many years later their cases were referred to the court by the Criminal Cases Review Commission. The court had to decide whether their prosecutions were an abuse of process of the court and whether their convictions were unsafe. In particular, the court considered issues as to the reliability of the computer accounting system Horizon, which was in use in branch post offices during the relevant period.

32. In each of the appeals the appellant relied on failures of investigation and disclosure, which, they argued, would have founded a successful application for a stay for abuse of process if the relevant facts had been known at the time. As it was, prosecutions were pursued on the basis that the data produced by Horizon was accurate and reliable and the appellants were advised by their legal representatives and made a decision as to pleas, in that context: (paragraph [68]).

33. The Post Office accepted that in cases where the reliability of the Horizon data was essential to the prosecution and conviction of the appellants and where the judge's findings showed that there was inadequate investigation and /or that full and accurate disclosure was not made, the conviction may be held to be unsafe on grounds amounting to category one abuse: (paragraph [71]).

34. The Post Office conceded that there were material failures of investigation and disclosure in all but three of the forty two cases, which meant that 39 of the appellants could not have had and did not have a fair trial. The Post Office accepted that in those 39 cases it was open to the court to find the prosecutions unsafe on the grounds of abuse of process of the first category: (paragraph [77]).

35. At paragraph [120], Lord Justice Holroyde expressed the court's conclusions about the general issues which affected every appellant in whose case the reliability of the Horizon data was essential to the prosecution ("the Horizon cases"). At paragraph [121] he noted that the concessions made by the Post Office relating to failures of investigation and disclosure in all the Horizon cases across a period of twelve years. In each case there was no independent evidence of an actual shortfall and it was essential to the prosecution's case that the Horizon data was reliable.

36. The court accepted that throughout the relevant period there were significant problems and issues with the reliability of Horizon which gave rise to a material risk that an apparent shortfall in the branch accounts did not in fact reflect missing cash or stock, but was caused by one of the bugs, errors or defects in Horizon. The Post Office knew there were problems with the reliability of Horizon. The court held that it was the Post Office's:

> "clear duty to investigate all reasonable lines of inquiry, to consider disclosure and to make disclosure to the appellants of anything which might be reasonably be considered to undermine its case. Yet it does not appear that POL [the Post Office] adequately considered or made relevant disclosure of problems with or concerns about Horizon in any of the cases at any point during that period. On the contrary, it consistently asserted that Horizon was robust and reliable."

37. The court found at paragraph [123] that:

> "These pervasive failures of investigation and disclosure went in each case to the very heart of the prosecution. Whatever charges were brought against an individual appellant, and whatever pleas may ultimately have been accepted, the whole basis of each prosecution was that money was missing from the branch account: there was an actual shortfall, which had been caused by theft or covered up by false accounting or fraud. But in the "Horizon cases", there was no evidence of a shortfall other than the Horizon data. If the Horizon data was not reliable there was no basis for the prosecution. The failures of investigation and disclosure prevented the appellants from challenging, or challenging effectively, the reliability of the data."

38. The court stated that these failures justified a finding of category 1 abuse. The court went on to consider whether these failures of investigation and disclosure justified a category two abuse. In considering that question, the court found, among other things, that the Post Office

deliberately chose not to comply with its obligations in circumstances in which its prosecutions depended on the reliability of the Horizon data: (paragraph [129]).

39. At paragraph 133 the court stated:

> "Most importantly, in the context of a category two abuse, POL's [The Post Office] failings of investigation and disclosure "directly implicate the courts". If the full picture had been disclosed, as it should have been, none of the prosecutions would have taken the course it did before the Crown Court."

At paragraph [137] the court opined that "the failures of investigation and disclosure were so egregious as to make the prosecution of any of the Horizon cases an affront to the conscious of the court." Further they were denied any disclosure of material capable of undermining the prosecution case. They were prosecuted, convicted and sentenced on the basis that the Horizon data must be correct, and cash must therefore be missing, when in fact there could have been no confidence as to that foundation.

40. In **R v R** [2015] EWCA Crim 1941, a stay was sought in the context of a massive complex fraud case, on the footing of inadequate disclosure where the proceedings had been extant for five years. The court held that no stay should be ordered, on either limb. The resolution of such matters lay in the court's case management powers and its ability to make specific disclosure and other orders.

41. I have paid regard to the relevant principles regarding non–disclosure and the nature of the matters complained of in that regard and also noted Ms. Mair's contention that the defendant would not get a fair trial due to the delay resulting from the prosecution's failure to provide compliant primary disclosure. I have also considered the response of the Crown; and the burden which rests on the applicant. I am not of the view that the applicant has established that he would suffer serious prejudice. The applicant has failed to discharge the burden cast on him to show that a stay should be granted on the grounds of delay or non - disclosure. In my judgment, continuation of the proceedings would not offend the court's sense of justice and propriety.

42. An appropriate remedy should be afforded for a breach of the reasonable time guarantee if a breach is established; but the hearing should not be stayed or a conviction quashed on account of delay alone, unless (a) the hearing was unfair, or (b) it was unfair to try the defendant at all: see **Boolell v The State** [2006] UKPC 46, paragraph [30].

43. Like Ms. Hatmin, I am of the view that the court's failure to provide reasons for the decision not to stay the proceedings does not render it impossible for the applicant to have a fair trial, nor does it offend the court's sense of justice and propriety if the trial were to proceed. There was no substantial unjustifiable delay in the circumstances of the case. A breach of constitutional rights does not automatically lead to a stay.

44. Staying of a criminal proceeding for abuse should only be done in exceptional cases. The matters referred to by the applicant in support of the stay do not outweigh the very strong public interest in the trial of the serious offences the applicant stands charged with. Further, whether taken individually or cumulatively, the matters relied on to ground the stay do not offend the court's sense of justice and propriety in proceeding with the trial. In my judgment, the applicant has failed to satisfy this court that he is entitled to a stay on the ground of abuse of process. In all the circumstances I cannot conclude that the trial of the applicant will offend the court's sense of justice and propriety. The application to stay the proceedings on the ground of abuse of process is accordingly refused.

The Hon. Mr. Justice Davidson Kelvin Baptiste

Judge (Ag) of The Supreme Court.