IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CRIMINAL DIVISION)

COMMONWEALTH OF DOMINICA

CASE NO's DOMHCR: 2023/0006
2024/0021
2024/0011

BETWEEN:

THE STATE
V
THOMSON FONTAINE
LENNOX LINTON
EDISON JAMES

BEFORE: The Honourable Mr Justice Colin Williams

APPEARANCES:

Mr Israel B. Khan, SC, with Mr Daniel Ishmael Khan and Ms Ula Nathai-Lutchman for the State
Mr Geoffrey Letang and Ms Gabrielle St Hilaire for the First Defendant
Mr Gildon Richards for the Second Defendant
Mr David Bruney for the Third Defendant

2025: February 6th, 27th, 28th

RULING

1. **WILLIAMS J**: Counsel, Mr Geoffrey Letang, Mr Gildon Richards, and Mr David Bruney, respectively represent the three Defendants, Mr Thomson Fontaine, Mr Lennox Linton, and Mr Edison James. On the 6th of February 2025 the three counsel indicated that they objected to the indictment and to the arraignment of their client.

2. After hearing brief oral submissions from the Counsel for the Defendants and Mr Israel Khan, SC, on behalf of the State in response to those submissions, an Order was made:

    1) Giving the Defendants leave to file an application with submissions by 3:00 p.m. on Monday the 17th of February, 2025.

    2) The State to respond with their submissions by 3:00 p.m. on Monday the 24th of February, 2025.

3) Adjourning the matter to Thursday the 27th of February 2025 at 9:00 a.m.

3. This decision therefore is the ruling on the Defendants' application.

The indictment

4. On the 29th of January 2025, the learned Director of Public Prosecutions, Ms Sherma Dalrymple, filed an indictment which bore three separate and distinct numbers[1] on the face of the indictment, charging the three defendants with the offence of "Incitement: Contrary to Common Law."

5. The 'Particulars of Offence' stated that:

> "Thomson Fontaine, Lennox Linton and Edison James, on the 7th day of February 2017 at Kennedy Avenue, Roseau, in the Parish of St George, in the District aforesaid did unlawfully incite by encouraging and/or persuading and/or instigating by words and/or deeds caused person(s) to come out, gather in groups or act in such a manner as would (i) jeopardize public safety and order and/or (ii) endanger the public peace and/or (iii) cause a tumultuous disturbance of the peace in Roseau on 7th February, 2017 following a meeting organized by opposition parties on Upper Kennedy Avenue calling for the resignation of Prime Minister, Roosevelt Skerrit."

6. Based on the particulars, the substance of the charge is somewhat similar to a summary offence provided for in the **Public Order Act**.[2] The side note to section 8 indicates that it addresses the 'prohibition of offensive conduct conducive to breaches of the peace'. Subsection 8(1) of the **Public Order Act** states that:

> "Any person who at any public meeting or in any public procession uses threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned is guilty of an offence."

7. Under that provision of the Statute, an offender is liable to a fine of ten thousand dollars or to imprisonment for six months.

8. The indictment, which stated the offence to be contrary to the common law, in part of the 'particulars of the offence', used a form of words that are present in the **Riot Act**.[3] Section 4 of the **Riot Act** was amended in 1974.[4] The side note indicates that it deals with 'Unlawful assembly after proclamation'. The body of the section states:

[1] 2023/0006; 2024/0021; and 2024/0011
[2] Chapter 15.01 of the Laws of Dominica
[3] Chapter 10:02 of the Laws of Dominica
[4] Act No 6 of 1974

> "Where any persons to the number of twelve or more, being unlawfully, riotously and tumultuously assembled together to the disturbance of the public peace and being required or commanded… by proclamation… to disperse themselves and peaceably to depart… notwithstanding the proclamation so made, unlawfully, riotously and tumultuously remain… is liable to imprisonment for five years."[5]

Defendant's submissions

9. The three Counsel for the Defendants were *ad idem* that the indictment ought not to be read to their respective client, neither should their client be asked to enter a plea to the indictment.

10. Each counsel for the three Defendants outlined the particular issues that they considered to be impacting on their client. They variously submitted that the charge should be quashed,[6] or dismissed,[7] or permanently stayed,[8] and that the Defendants be discharged.[9]

11. Mr Letang on behalf of the First Defendant submitted that:

    1) The indictment was defective, in that:

        a. there was no statutory offence of incitement in the Commonwealth of Dominica nor any statute which makes incitement an indictable offence;[10]

        b. the Common Law offence of incitement was replaced in England by statute, prior to when Dominica gained its Independence and received the laws of England. What Dominica received in 1978 was the English statutory formulation;[11]

        c. the particulars of the offence were bad because of obscurity as they did not properly disclose any offence;[12]

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[5] Section 4. See as well section 6 which deals with apprehension of persons unlawfully assembled after proclamation

[6] Per Mr Letang, Notice of Application, paragraph 1) and Mr Richards, Notice of Application, under Relief Sought paragraph (iii)

[7] Per Mr Letang, Notice of Application paragraph 1)

[8] Per Mr Bruney, concluding paragraph of his Submissions filed on the 17th of February 2025

[9] Per Mr Richards, Notice of Application concluding paragraph

[10] Ground 2) of the First Defendant's Notice of Application

[11] Ground 5) of the First Defendant's Notice of Application

[12] Ground 3) of the First Defendant's Notice of Application

d. it was duplicitous, it cited a variety of conducts, and it related to more than one act;[13]

2) There was a breach of the Defendant's right to a fair hearing within a reasonable time;[14]

3) The charge was oppressive, politically intriguing and motivated, and was an abuse of the process of the Court in that:

a. there were statutory provisions covering the conduct alleged in the indictment;

b. there were concurrent summary proceedings underway concerning the same or similar facts that underlie the indictment.[15]

12. Mr Richards on behalf of the Second Defendant submitted that:

1) The indictment was bad, in that: -

a. joining the three Defendants in a single count was oppressive and embarrassing to the Second Defendant. It would cause prejudice and result in a miscarriage of justice;[16]

b. it was duplicitous, containing allegations that were stated to be in the alternative;[17]

c. it was irregular, misleading, with particulars omitted;[18]

2) There was an inordinate, unjustifiable delay which grossly contravenes the Defendant's right to a fair trial;[19] and

3) The proceedings were an abuse of the process of the Court.[20]

13. Mr Bruney on behalf of the Third Defendant submitted that the issues to be resolved at this stage were:

[13] Ground 8) and Ground 12 of the First Defendant's Notice of Application
[14] Ground 10) of the First Defendant's Notice of Application
[15] Ground 17) along with Ground 13), Ground 14), and Ground 15 of the First Defendant's Notice of Application
[16] Ground 1 of the Second Defendant's Notice of Application
[17] Ground 2 of the Second Defendant's Notice of Application
[18] Ground 3 of the Second Defendant's Notice of Application
[19] Ground 4 of the Second Defendant's Notice of Application
[20] Ground 4 of the Second Defendant's Notice of Application

1) Whether there was an infringement of the Defendant's rights to a fair trial within a reasonable time as provided for in the **Constitution of the Commonwealth of Dominica**;[21] and

2) Whether the particulars of the offence stated in the indictment provided sufficient clarity as to what offence the Defendant may have committed.[22]

State's response

14. Counsel for the State filed three separate bundles responding to issues raised on behalf of the different Defendants in the respective submissions. In essence, the State's submissions addressed three substantive issues:

    1) Adequacy of the indictment:
        a. Incitement at common law;
        b. Whether Dominica received the Common Law offence of incitement at Independence in November 1978;
        c. What is the offending conduct the Defendants are accused of;
        d. Whether the indictment sufficiently describes the offending conduct;
        e. What remedies are available in the event that the particulars are deemed to be insufficient?

    2) Delay:
        a. Whether in fact there has been any delay;
        b. Did the conduct of the Defendants contribute to any perceived delay?
        c. Did the State act improperly in causing any delay? (that is, could the State's conduct be faulted);
        d. What is the appropriate remedy if there was delay?

    3) Joinder of the Defendants – principles and practice.

15. Mr Khan, KC, in his written submissions summarized the State's case as being:

> "the accused did unlawfully incite persons to act in such a manner that would jeopardize public safety, endanger public peace and cause a tumultuous disturbance."[23]

[21] At 1. Page 1 of the Third Defendant's Submissions
[22] At 2. Page 3 of the Third Defendant's Submissions
[23] Paragraph 30, State Response to Application of Thomson Fontaine

16. Senior Counsel indicated that the target crime of the offence was a riot.[24] The State's allegation was that "the Defendants were inciting others to engage in riotous conduct."[25] He submitted that the particulars sufficiently described what case the Defendants were required to answer.

17. Mr Khan, SC, in his oral submissions noted that the defendants are alleged to have incited a riot and that riot is punishable under the **Riot Act**, which provides that:

> "Any person who is convicted of the offence of riot is liable to imprisonment for three years."[26]

18. The State submitted that the particulars in the indictment was sufficient. The State further submitted in the alternative, if there were defects in the indictment, then pursuant to section 6 of the **Indictment Act**[27] the indictment can be amended at any stage of a trial to meet the circumstances of the case.

19. Learned Senior Counsel submitted that there were "external circumstances beyond the Prosecution's control"[28] which caused delays. He submitted that there was the impact of a natural disaster, as "Hurricane Maria in September 2017 caused unprecedented disruption to judicial operations throughout the jurisdiction. The resulting systemic delays were unavoidable."[29] There was also the "shuffling of judicial officers"[30] and in relation to the Third Defendant Mr Linton, the "multiple transfers and recusals caused the matter to restart *de novo*, creating approximately two years of delay."[31] Counsel for the State submitted that the "delays were neither deliberate nor attributable to prosecutorial misconduct but arose from external exigencies and the Defendant's own conduct."[32]

20. Learned Senior Counsel submitted that "a fair trial remains entirely possible and there was no demonstrable prejudice to the Defence's ability to present its case."[33] He contended that:

> "Unless the Defence can show serious prejudice to its case… the Court is poised to uphold this equilibrium, ensuring justice is neither rushed nor denied."

21. The State maintained that a permanent stay of proceedings was neither automatic nor routine.[34] Senior Counsel stated that the jurisdiction to stay a criminal proceedings on the

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[24] Paragraphs 33, and 36, State Response to Application of Thomson Fontaine
[25] Paragraph 35, State Response to Application of Thomson Fontaine
[26] At section 2
[27] Chapter 12:02 of the Laws of the Commonwealth of Dominica, Revised Edition 1997
[28] Paragraph 5, State Response to Application of Thomson Fontaine
[29] Paragraph 9, State Response to Application of Thomson Fontaine
[30] Paragraph 9, State Response to Application of Lennox Linton
[31] As above
[32] Paragraph 28, (Corrigendum) State Response to Application of Edison James
[33] Paragraph 8, last bullet point, Response to Application of Thomson Fontaine
[34] Paragraph 22, State Response to Application of Lennox Linton

ground of delay was exceptional and should rarely be exercised in the absence of fault on the prosecution or its agents.[35]

22. Regarding joinder of the three Defendants, Senior Counsel said that the State's case was one of joint enterprise to incite.[36] Further, given the principles governing joint trials, it was "not only proper but serves the interests of justice in this case"[37] to have a joint trial given the settled considerations in determining joinder of Defendants.

Background

23. The Complaint against Mr Fontaine was filed in the Magistrate's Court on the 3rd of August 2017. On the 26th of July 2023, Mr Fontaine was committed to stand trial at the High Court.

24. The Complaint against Mr Linton was filed at the Magistrate's Court on the 3rd of August 2017. The Complaint recited that Mr Linton committed the offence between the 22nd day of January 2017 and the 7th day of February 2017. Mr Linton was committed on the 22nd day of July 2024 to stand trial at the High Court.

25. The Complaint against Mr James was filed in the Magistrate's Court on the 3rd of August 2017. On the 16th of February 2024, Mr James was committed to stand trial at the High Court.

Incitement – an introduction

26. The learned authors of **Archbold Criminal Pleadings Evidence & Practice, Thirty–Sixth Edition**,[38] state that:

> "To solicit or incite another to commit a felony or misdemeanour is an indictable misdemeanor at common law, even though the solicitation or incitement is of no effect…. It is immaterial whether the principal offence is one existing by the common law or is created by statute."[39]

27. The learned authors of **Archbold** cite the decision in **R v Higgins**[40] at the beginning of the nineteenth century as the seminal case recognizing incitement as a common law offence.

28. The *actus reus* of the inchoate offence of incitement is that the incitor seeks to influence or persuade or pressure an incitee to commit a criminal offence. This means that if what the incitor is seeking to get the incitee to do is not a criminal offence, then a charge of incitement cannot succeed.

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[35] Paragraph 19, State Response to Application of Lennox Linton
[36] Paragraph 39, State Response to Application of Lennox Linton
[37] Paragraph 36, State Response to Application of Lennox Linton
[38] By Butler and Garcia, Sweet & Maxwell
[39] At paragraph 4091
[40] (1801) 2 East 5

29. The *mens rea* of incitement is the incitor's intention that the incitee will perform the particular criminal act that the incitor instigates.

30. According to the Irish Law Reform Commission:

> "The *mens rea* of the speaker is key. That is, whether the expression of desire is made with the intention that the listener will go on to bring about the outcome desired."[41]

31. It is necessary to note that the offence is complete once the incitor has transmitted to the incitee a desire to have the criminal act done. This means first of all that the communication must have been received by the incitee. Secondly, there is no need for the incitee to perform the act, or to have been influenced to commit the incited crime, as the offence is complete once the incitee receives the communication.

32. The Irish Law Reform Commission cites the case of **People (DPP) v Murtagh**[42] for the proposition that -

> "the incitement does not have to succeed in order for the offence of incitement to be made out. That is, the incitement does not have to be acted upon. Furthermore, though the incitement must reach the mind of another and seek to influence it, it does not have to actually influence their mind; it is not necessary for the incitee to have contemplated doing the incited offence as a result of the incitement."[43]

33. Incitement is described as a preparatory offence. Where, however, the incited principal offence is performed or committed at the behest of the incitor, then the incitor may then be tried and convicted for the principal offence as an accomplice.

> "Incitement, like attempt and conspiracy, is a separate and distinct offence from the offence which is the subject of incitement. Attempt, incitement and conspiracy can overlap in their applications to criminal conduct…. Unlike attempt and conspiracy, however, incitement is not punishable in the same severity as the principal offence."[44]

34. With regard to the evidence needed to prove incitement, **Archbold, Thirty-Sixth Edition,** noted:

> "Prove the soliciting or inciting as alleged in the indictment. Prove it in the same manner as the offence of being an accessory before the fact would be proved,

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[41] Chapter 4, Incitement, at page 105
[42] [1990] 1 IR 339
[43] Chapter 4, Incitement, at page 105
[44] https://wwww.ag.gov.au/crime/publications/commonwealth-criminal-code-guide-practitioners-draft/part-24-extensions-criminal-liability/division

> except that this offence is committed although the offence solicited was not in fact committed."[45]

> "To support an indictment for being accessory before the fact, there must be some active proceeding on the part of the prisoner; i.e., he must procure, incite or in some other way encourage the act done by the principal."[46]

35. The Common Law offence of incitement has been replaced by a statutory framework in many countries. Indeed, as noted in **Blacklstone's Criminal Practice 2017**,[47] the Common Law offence of incitement has been abolished in England and replaced by statute.[48]

36. It is not intended to go into any exhaustive discussion at this stage regarding the offence of incitement and the indictment. As Learned Senior Counsel, Mr Khan, stated in his submissions, it is "prudent to address the delay issue and then [the other] issues raised."[49]

The Constitution

37. The **Constitution of the Commonwealth of Dominica**[50] guarantees certain fundamental rights to each and every person. The 'Provisions to secure protection of law' can be found in section 8. Of particular importance to this matter is subsection (1) which provides that:

> "If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."[51]

38. Mr Justice Odel Adams in **Patrick Bailey v The Attorney-General and Director of Public Prosecutions**,[52] opined:

> "[I]t is important to appreciate that while the principles underlining the right to an expeditious hearing are evolving as our written constitutions are being interpreted, the English from whom we have inherited our jurisprudential legacy continue to develop common law principles when dealing with the question of delay in their courts as they did before we were granted written constitutions on becoming independent nations."[53]

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[45] Paragraph 4096
[46] Paragraph 4153
[47] Oxford University Press
[48] See Blackstone's Criminal Practice 2017, at A5.1: "The common law offence of incitement was abolished by the SCA 2007, s. 59, with effect from 1 October 2008 and supplanted by offences created by the Act."
[49] Paragraph 2 of State Response to Application of Thomson Fontaine
[50] Chapter 1:01 of the Laws of the Commonwealth of Dominica, Revised Edition 1997
[51] Section 8(1)
[52] Saint Vincent and the Grenadines High Court Civil Claim No 79/1999
[53] At page 2, first paragraph

39. In **Ricardo Britton and Rohan McCarthy v Rex**,[54] Mr Justice Leighton Pusey stated:

> "The common law powers to order a stay in proceedings against an abuse of process is linked to the constitutional guarantee of a right to a fair trial…. [T]he constitutional guarantee expands, enhances and cements the common law powers that a court has to protect against an abuse of process…. [T]he constitutional guarantee does not deprive this court of that power to protect against an abuse of process."[55]

Needham's Point Declaration

40. The **Needham's Point Declaration** is reflective of the standards that criminal justice practitioners in the Caribbean have committed themselves to achieving and implementing by October 2025. The Declaration was acclaimed at the conclusion of the 7th Biennial Conference of the Caribbean Court of Justice, CCJ, Academy for Law[56] on *Criminal Justice Reform: Achieving a Modern Criminal Justice System (in the Caribbean)*.

41. One of the early judgments referencing the **Needham's Point Declaration** was **The State v Andrew Armour**.[57] In that case it was noted that:

> "78. There is an abundance of cases emanating from the Commonwealth Caribbean that address the issue of delay, whether under the broad rubric of an abuse of process which includes circumstances which offend the court's sense of justice and propriety, or as the constitutional imperative of a right to a fair trial where the circumstances may be such that a defendant may suffer specific prejudice.
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> "79. To sustain faith in the rule of law and the administration of justice, the mantra of 'justice delayed is justice denied' ought to reverberate throughout the criminal justice system. Unreasonable, unnecessary and excessive delays must not be countenanced. The criminal justice system must operate to protect the rights and interests of the innocent accused, and ensure that the guilty are swiftly punished.
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> "80. This postscript was added because instinctively, it appears that the length of time between the charge and the hearing of the matter at the High Court was unacceptably wrong. Whether such a delay would justify a stay, however, would depend entirely on the circumstances of the particular case."

42. The extract from **Andrew Armour** stated above was repeated by Madam Justice Nalini Singh of Trinidad and Tobago in **The State v Ricardo Goeffoer and others**.[58] **Goeffoer and**

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[54] [2025] JSMC Crim 1

[55] At paragraph [30]

[56] Held at the Hilton Hotel, Needham's Point, Barbados, 18th to 20th of October 2023

[57] DOMHCR: 2022/0002 delivered on the 25th of October 2023

[58] CR-HC-POS-IND-449-2022-1, decision delivered on the 20th of November 2024

others concerned twelve cases in which warrants were not executed. Sing J stayed the prosecution of nine Defendants; the other three Defendants were dead at the time of the judgment.

43. Madam Justice Singh affirmed the value of the "robust framework"[59] of the **Needham's Point Declaration** whose principles -

> "reflect a collective regional commitment to ensuring that justice is delivered without unnecessary or excessive delay, reinforcing the fundamental principle that justice delayed is justice denied."[60]

44. Singh J noted that:

> "These delays are not merely excessive; they are unprecedented and fundamentally undermine the very purpose of the criminal justice system. As highlighted in **The State v Andrew Armour** (supra), such unreasonable delays offend the Court's sense of justice and propriety and erode public confidence in the rule of law. The declaration's principles serve as a powerful reminder that the criminal justice system must operate efficiently to protect the rights of the accused and ensure that justice is both timely and fair."[61]

45. In the Belizean case, **The King v Shawn Hertular**,[62] Sylvester J discharged the murder accused for want of prosecution and he examined the abuse of process by the Prosecution. The Judge stated:

> "This inexcusable delay and/or disregard for the Court and the judicial process cannot be tolerated. If this is allowed to continue, confidence in the justice system would be eroded. If it is allowed to go unnoticed, when looking at the factual matrix, the Court would be flouting its duty as the bastion of justice."[63]

46. Sylvester J, in the course of the **Hertular** judgment, referred to the Dominican case, **The State v Prisma Joseph**,[64] where the timeline outlined in the **Needham's Point Declaration** was noted.

47. In **Prisma Joseph**, the Defendant upon arraignment pleaded guilty to one count of deception, an offence which carried a maximum sentence of ten years. However, Mr Joseph's matter languished in the system for nine-and-a half years before getting to the High Court. It was noted that:

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[59] Paragraph [109]
[60] As above
[61] Paragraph [110]
[62] Indictment No: C3/2023, delivered on the 19th of March 2024
[63] At paragraph [27]
[64] DOMHCR: 2023/0015, judgment delivered on the 23rd of February 2024

"[53] Such delays can and do have a deleterious effect on the rule of law.

"[54] The **Needham's Point Declaration**… provides a worthy aspirational benchmark for all persons connected to the justice system:

> '19. That as a rule, trials should be held within one (1) year of the accused being charged (for indictable offences) and six (6) months (for summary offences). During the necessary transitional stage to this ideal, trials should be held within two (2) to three (3) years of an accused being charged (for indictable offences) and twelve (12) months for summary offences'.

"[55] The delay between Mr Joseph's arrest and getting the matter to trial, on the basis of what is disclosed in the deposition, appears to be solely attributable to the State.

"[56] State functionaries have an obligation to ensure that there is a fair trial within a reasonable time. To do nothing about this unbecoming and undesirable practice of delay would be to give silent approval to the transgression."

48. It is apparent that the consensus underlying the **Needham's Point Declaration** is given real meaning in the judicial pronouncements.

49. At the level of the executive, the **Needham's Point Declaration** was endorsed by Heads of Government of the Caribbean Community, CARICOM.[65] It was acknowledged:

> "That as a matter of urgency each Member State of the Caribbean Community develop, adopt, and implement a holistic and inclusive Criminal Justice Reform Strategy."[66]

50. The CARICOM Heads undertook to:

> "Convene a dialogue between Heads of Government and Judiciary leaders to address crime, violence and law enforcement challenges in the region."[67]

Chief Justice Guidelines

51. Dominica is part of the unified Eastern Caribbean Supreme Court, ECSC.

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[65] See the George-Bridge Declaration of the 2nd Regional Symposium on Crime and Violence as a Public Health Issue in Georgetown, Guyana, 22nd of November 2024 as well as the Forty Eighth Meeting of the Conference of Heads of Government of CARICOM in Barbados, 21st February 2025

[66] George-Bridge Declaration

[67] As above

52. The ECSC Member Countries all have a shared commitment to the rule of law. It has not always been possible for all the rules and criminal law procedures to be implemented simultaneously or standardized across the Court's jurisdiction. For example, significant progress has been made in having a uniformed approach to sentencing. But in other areas of criminal justice practice – for example committal proceedings or Judge Only Trials - the situation may be uneven.

53. Former Chief Justice of the ECSC, Sir Dennis Byron, introduced the **Magistrate's Court Pre-Trial Time Limit Guidelines, 2003**,[68] in Saint Vincent and the Grenadines. Some of the provisions of the **Guidelines** bear repeating.

54. Guideline 5 addresses 'Period of date of charge to first appearance.' It states:

    i. An accused who is on bail must make his first appearance in court within a maximum period of two weeks from the date when the charge is laid.

    ii. An accused who is in custody must make his first appearance in court on the first court sitting after the date on which the charge is laid.

    iii. An accused which (sic) is brought before the court by summons must make his first appearance in court within a maximum of 4 weeks from the date on which the summons is issued.

55. The 'Period of date of first appearance to trial' is addressed in Guideline 6. It states:

    i. An Accused who is on bail must appear before the court and be tried within four months of his first appearance in court.

    ii. An accused who is in custody must appear before the court and be tried within three months of his first appearance in court.

56. Matters such as the present one involving these three Defendants where there is a preliminary inquiry is addressed in Guideline 7. It states:

    "In proceedings in which a court is to hold a preliminary inquiry and:

    i. the accused is on bail, the time within which the preliminary inquiry must be conducted must not exceed six months; or

    ii. the accused is in custody, the time within which the preliminary inquiry must be conducted must not exceed three months from the date on which the charge is laid."

[68] It entered into force on the 1st day of July 2003

57. Guideline 8 provides that:

> "Notwithstanding the time periods provided in Guidelines 6(i), 6(ii) and 7, where the accused:
>
> i. is on bail, the maximum time period between his first appearance in court and the disposal of the matter whether by means of conviction, acquittal or a preliminary inquiry must not exceed six months;
>
> ii. is in the (sic) custody, the maximum time period between his first appearance in court and the disposal of the matter whether by means of conviction, acquittal or a preliminary inquiry must not exceed three months.

58. The Guidelines provided for oral or written applications to be made for the extension or further extension of the prescribed time limits.

ECSC jurisprudence

59. Counsel Mr Bruney for the Third Defendant in his written submissions referred to the decision of the Honourable Mr Justice Davidson K. Baptiste in **Andrew Westfield v The Attorney-General and The Director of Public Prosecutions**.[69] This was a 1998 case from Saint Vincent and the Grenadines.

60. Mr Westfield, in December 1994, was charged summarily for possession of cocaine for the purpose of drug trafficking. Subsequent to Mr Westfield being charged, the Director of Public Prosecutions obtained an *ex parte* order, prohibiting Mr Westfield from dealing with certain specified realisable property and other realisable property. The maximum sentence that could have been imposed at that time for the drug trafficking offence was three years imprisonment. No effort was made to prosecute the matter for three years and ten months. Mr Westfield was summoned to attend Court towards the end of October 1998 and the Prosecution requested an adjournment to February 1999. Mr Westfield petitioned the High Court for a stay of proceedings, stating that the trial was a breach of his constitutional right to secure protection of the law; he said that it was unreasonable, wrongful and an abuse of process to proceed with the trial. Mr Westfield also said that the continuation of the restraint order was onerous, burdensome and unreasonable. Baptiste J granted the reliefs that were sought by Mr Westfield.

61. Mr Justice Baptiste stated in the Andrew Westfield case:

> "The question is whether in the circumstances of the instant case the applicant's right to a fair trial has been infringed.

[69] Saint Vincent and the Grenadines High Court Civil Claim No 464/1998, written judgment delivered 19th November 1998

"I have no difficulty in answering the question in the affirmative….

"I declare that section 8(1) of the Constitution which afforded the applicant the right to a fair trial within a reasonable time by an independent and impartial Court established by law has been infringed."[70]

62. The authorities referenced in **Andrew Westfield** were the Privy Council's decision in **Herbert Bell v Director of Public Prosecutions of Jamaica and another**[71] and the American case of **Barker v Wingo**.[72]

63. The **Andrew Westfield** decision was cited by the Honourable Mr Justice Odel Adams in **Patrick Bailey v The Attorney-General and The Director of Public Prosecutions**.[73] Mr Bailey was charged in March 1994 with rape. He was not taken before the Magistrate until the beginning of April 1997. His preliminary inquiry was not completed until the end of August 1998. Adams J declared that Mr Bailey's fundamental right to a fair trial within a reasonable time was contravened.

64. In the course of his judgment, Adams J pointed to the difference between the guarantees of a fair trial and the right to be tried within a reasonable time. Adams J referred to the speech of Lord Keith of Kinkel in the Privy Council matter, **Director of Public Prosecutions and Another v Jaikaram Tokai and others,**[74] where Lord Keith said:

"This passage highlights the distinction between the constitutional right to a trial within a reasonable time and the constitutional right only to a fair trial. The latter right is to be secured by the procedure exercised by the trial judge which in an exceptional case involving delay may include the grant of a stay. The former right however may be invoked by constitutional motion in advance of any trial."[75]

65. The State's failure to explain the delay in **Bailey** weighed against the Respondents. Justice Adams noted that -

"[I]t was a reasonable inference that the failure of the Prosecution to have provided the Court with a reason for the delay between charge and preliminary inquiry makes it more probable than not that there was no satisfactory reason to submit."[76]

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[70] Pages 3 and 4 of the judgment
[71] [1985] 2 All ER 585, [1985] AC 937, (1985) 32 WIR 317 (PC)
[72] (1972) 407 US 514, USSC
[73] Saint Vincent and the Grenadines High Court Civil Claim No 79/1999
[74] [1996] 3 WLR 149, [1996] AC 856, [1996] LRC 314, 48 WIR 376 (PC)
[75] At page 158. Lord Keith was referring to what Lord Templeman said in Bell v DPP at page 321 of 32 WIR, the ending of the paragraph states: "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 unreasonable time."
[76] At page 14

66. Justice Adams went on to state that:

> "In a fledgling democracy… judges must forever be vigilant lest we fail to detect the subtlety that sometimes slowly undermines the process of justice. Were we to fail in this noble task events might woefully lead us to that dreadful day when blindfolded as she always is Justice may be found prostrate within her hallowed walls and judges numbered among her assassins."[77]

67. In Saint Lucia, Shanks J in **Nazereus Andrew v The Attorney-General**[78] declared that the Claimant's rights under section 8(1) of the **Constitution of Saint Lucia** had been contravened. The Court in its June 2005 ruling found that Mr Andrew had not been afforded a hearing within a reasonable time of the criminal charge being laid against him.

68. Mr Andrew was charged seven years earlier, on the 2nd of March 1998, with having committed the offence of causing grievous bodily harm on the 15th of February 1998. Seven months after Mr Andrew was charged, on the 2nd of October 1998, his matter was committed to the next practicable sitting of the High Court. Nothing happened for the next six years and on the 28th of December 2004, Mr Andrew was summoned to appear at the High Court. Mr Andrew then brought a constitutional motion citing a breach of his right to be afforded a fair hearing within a reasonable time.

69. Shanks J, although finding a breach of Mr Andrew's rights, did not order a stay of the proceedings against Mr Andrew. Instead, the Judge directed that the trial of the criminal proceedings be held at the earliest opportunity, and stated that after the criminal trial, Mr Andrew may apply for an assessment of what compensation should be ordered by the Court to be paid to him in respect of the contravention of his rights.

70. Justice Shanks noted that –

> "the right to a hearing within a reasonable time is a separate and distinct right to a fair hearing and there is no requirement on the Claimant to show that he will be prejudiced in the conduct of his defence at his criminal trial in order to establish that the former right has been infringed."[79]

71. Justice Shanks distilled from the authorities several propositions as to how the constitutional provision of a "reasonable time" ought to be construed. The Judge noted:[80]

    1) "A 'reasonable time' is not defined in advance in years and months: it depends on all the circumstances of the individual case;

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[77] Page 14 of the Patrick Bailey judgment
[78] SLUHCV2005/0090
[79] Paragraph [6]
[80] At paragraph [7]

2) “Time runs from the date of the charge and not the date of commission of the alleged offence;

3) “The first step is to consider the length of the delay: if it gives ‘grounds for real concern’ the court must go on to consider the detailed circumstances, including the explanation or justification put forward; if not, the delay is very unlikely to be excessive (see **Dyer v Watson**[81]);

4) “The relevant circumstances in assessing whether a reasonable time has passed are:

   a. The nature and complexity of the case: the more complex and involved the case, the longer it will take to prepare;

   b. the conduct of the prosecution: this must be looked at in the context of local conditions as to which see (5) below;

   c. the conduct of the defendant: it will tell against him if he has himself indulged in procedural time wasting or has acceded to requests for adjournment[s] or failed to assert his right to a trial within a reasonable time;

   d. the effect (or likely effect) of any delay on the defendant: if the Defendant is incarcerated or is very young or unwell or there is particular evidence which may disappear if the matter is not dealt with quickly, greater expedition may be required;

5) “The circumstances must be considered in the light of local conditions, legal, economic, social and cultural. The court can take account of economic realities, in particular lack of resources and skilled staff on the part of prosecuting authorities, but there are limits to this; the constitutional rights of the individual defendant cannot be replaced at the mercy of Government inefficiency (see **Bell v DPP**[82] and **Mungroo v The Queen**[83]);

6) “The defendant need not show that his defence of the criminal charges will be prejudiced by the delay and/or that he will not receive a fair trial in order [to] establish a breach of the right to have his case heard within a reasonable time (though such considerations may be relevant factors in assessing the how long is reasonable under paragraph above).”

[81] [2002] 1 AC 370 (PC), [2001] UKPC D1, at paragraph 52
[82] [1986] LRC (Const) 392 at 401i to 402
[83] [1991] 1 WLR 1352 at 1354F to 1355C

72. The Judge opined that in future, it would be preferable for the trial Judge to hear at the outset of the criminal trail any application regarding a breach of a constitutional right and for a stay on the ground of an abuse of process.

73. Here in the Commonwealth of Dominica, the Honourable Mr Justice Thomas Astaphan, KC, granted a permanent stay in **The State v Yannick Lander**.[84] In that case the Defendant/Applicant was accused of murder, an offence for which the death penalty is provided but one which may attract a sentence of life imprisonment. Astaphan J said:

> "I find on the undisputed evidence before me that the passage of 14 years and five months without the Applicant's trial being completed, in and of itself, and without more, constitutes a breach of his right to be tried within a reasonable time as guaranteed by section 8(1) of the **Constitution of the Commonwealth of Dominica**."

74. Two of the cases that Justice Astaphan, KC, relied on were **Mervin Cameron v Attorney General of Jamaica**,[85] and **R v Barrett Richard Jordan**,[86] which was a decision of the Supreme Court of Canada.[87]

75. Astaphan J noted:

> "The **Dominica Constitution**, in section 8(1) guarantees the right to be tried within a reasonable time, same as the **Canadian Charter**, and indeed the **Jamaican Charter of Fundamental Rights and Freedoms**. The principles which found the Canadian Supreme Court's decision are no less applicable in interpreting and enforcing section 8(1) rights in the Commonwealth of Dominica, and it is the constitutional obligation of the Court to fashion a remedy for the purpose of enforcing or securing the enforcement of these Rights. There is no remedy, short of abdicating the Court's obligation that can enforce or secure the enforcement of the Right to be tried within a reasonable time – absent presumptive ceilings like in Canada – other than a permanent stay. The reasonable time has expired. It cannot be retrieved. It is gone. Over. Time lost is never regained. This is an immutable Law of Nature. Anything else, including formulaic differentiation on 'fair trial' assumptions, degrades the guaranteed Right to be tried within a reasonable time, and subordinates it to the fair trial Right. The Constitution does not admit of that."[88]

76. Astaphan J supported the revised 'presumptive ceilings' which the Canadian Supreme Court established in **Jordan**.[89] The Court set thirty months as the ceiling for cases in the superior

[84] DOMHCR:2017/0028
[85] [2018] JMFCFULL 1
[86] [2016] 4 LRC 469, [2016] 1 SCR 631, 2016 SCC 27
[87] Judgment rendered on the 8th of July 2016
[88] At paragraph [105]
[89] See paragraph [105] of Jordan

court and eighteen months for those tried in provincial court. Any delay beyond the ceiling becomes presumptively unreasonable. Once the ceiling is exceeded, the burden would be on the Prosecution to rebut the presumption of unreasonableness by showing exceptional circumstances (matters which were outside of the Prosecution's control). Regarding possible time lines for cases of delay in the Commonwealth of Dominica where the State can show exceptional circumstances, Justice Astaphan opined that:

> "If the necessary bases are established to the satisfaction of the court, then the case should be tried within 8 months of that date for an indictable offence, and 4 months for a summary offence."[90]

77. When there is an unjustified breach of an individual's constitutional right to a fair hearing within a reasonable time, it is apparent that the appropriate remedy is a stay of the proceedings.

A recent regional case

78. In Jamaica, the Honourable Justice Leighton Pusey on the 23rd of January 2025 delivered an instructive decision in the application of **Ricardo Britton and Rohan McCarthy v Rex**[91] for a stay of proceedings.

79. Mr Britton and Mr McCarthy were jointly charged in 2006 for murder, which occurred in 2004. They underwent a first jury trial commencing in 2009 and were convicted of murder in 2010. The Court of Appeal overturned that conviction and directed that a retrial occurs before the end of the 2012 Michelmas Term. That retrial did not proceed until 2014 and resulted in a hung jury. A new trial was ordered. There were plea and case management hearings prior to the commencement of the third trial. In 2016, there were two failed attempts to get the trial underway and further failed attempts to do so in 2017 and 2018. At the 2018 trial date it was determined that the State was not ready to proceed and the matter was sent back for plea and case management hearings. There were further attempts to commence the retrial in October and November 2024, but there was an issue regarding the availability of transcripts from the first trial. Those were the circumstances that formed the background to Pusey J's order that the three counts of murder against Mr Britton and Mr McCarthy be permanently stayed and the State barred from initiating any further proceedings against them.

80. Pusey J said:

> "After determining that the delay has prejudiced the Applicants, and after carefully considering all relevant factors, the Court concludes that continuing with the third

[90] At paragraph [117]
[91] [2025] JSMC Crim 1

trial of this matter would constitute an abuse of process. In the interest of justice, the Court is of the view that the trial should not proceed."[92]

81. Pusey J at the commencement of his judgment set the framework for understanding the principles of the right to a trial within a reasonable time and its application to the rule of law. He said:

> "Justice must proceed with purposeful urgency, respecting the rights of both the accused and the accuser. When the passage of time skews the balance and when proceedings drag on interminably, the very essence of fairness begins to unravel. Thus, a call to dismiss is not a call to forget, it is a call to preserve the higher ideals of fairness, underscoring the truth that justice, to remain just, must also be timely."[93]

82. The provision at section 19(1) of the **Jamaican Charter of Fundamental Rights and Freedoms** guaranteeing a right to a fair hearing within a reasonable time is worded similarly to section 8(1) of the **Constitution of the Commonwealth of Dominica**.

83. Pusey J described the right to a fair trial as "a cornerstone"[94] of the justice system. He went on to say:

> "The right to a fair trial encompasses several critical safeguards. These include the presumption of innocence until proven guilty, the right to legal representation, the ability to cross-examine witnesses, and access to evidence. Additionally, trials must be within a reasonable time…. These protections collectively aim to uphold the integrity of the judicial process, ensuring that justice is administered equitably and transparently. These protections also exist to protect the accused against prejudice arising from inordinate and unjustified delays which undermines the integrity of the judicial process."

84. Justice Pusey in examining the importance of the reasons for the delay, noted that the State needed to function with utmost candor:

> "[57] All delays attributable to the State, whether arising from the actions or inactions of the Office of the Director of Public Prosecutions, the police, or the Court, must be carefully examined and considered as relevant factors in the overall assessment of the matter. The cumulative effect of such delays, regardless of their source within the State apparatus, directly impacts the administration of justice and the ability of Applicants to mount a defence. This principle underscores the necessity of holding all state actors to a standard of diligence and timeliness in the conduct of proceedings, as any lapse has the potential to undermine confidence in the judicial process.

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[92] Paragraph [84]
[93] Paragraph [1]
[94] Paragraph [33]

"[58] There being no evidence by the Respondent in relation to explaining the delay or any evidence in relation to the institutional delay, the court is constrained to find that the delay was inordinate and unjustified."

85. Once there is any delay in the hearing of a matter, the State is duty-bound to present evidence that seeks to explain and to justify the reasons for the breach of an individual's fundamental right that is guaranteed by the Constitution – the highest law of the land. As indicated earlier in **Bailey**, the absence of evidence, as different from argument, on behalf of the State explaining the delay has to be construed that no good reason exists.

Appellate and Apex Court Decisions

86. In 2020, the Court of Appeal of the Eastern Caribbean Supreme Court in **Urban St Brice v The Attorney-General of Saint Lucia**[95] **-**

- allowed Mr St Brice's appeal;
- declared that the Appellant's right to a fair hearing within a reasonable time as guaranteed by section 8(1) of the **Constitution of Saint Lucia** had been breached;
- ordered a permanent stay of the criminal proceedings; and
- ordered that the State pay costs to Mr St Brice.

87. Honourable Justice of Appeal Mr Davidson K. Baptiste elegantly summarised the matter this way:

"Another chapter in the extraordinary saga of Urban St Brice. In November 2002, St Brice was charged with murder. In the year 2020, there is yet to be a disposition or determination of the charge. This is not to say that matters have been in repose. Several things have occurred in the interregnum, including a murder trial and conviction, a successful appeal against conviction in 2007, several aborted murder retrials, various constitutional applications, applications for a stay of proceedings, judicial review applications and several appeals."[96]

88. The delay in the matter was substantially attributable to Mr St Brice. There were, for example, thirty-three adjournments between October 2008 and May 2011, owing to, among other things the absence of Mr St Brice's counsel, and various applications on behalf of Mr St Brice such as to stay proceedings and to exclude certain evidence. The Court of Appeal in considering the contextual history of the case and analyzing the authorities, held that –

[95] SLUHCVA2018/0036
[96] Paragraph [1]

> "A finding that a defendant is largely responsible for the delay in the completion of his criminal trial is not decisive of whether the right to a fair hearing within a reasonable time has been breached, as the time may come when the overall delay is so great, irrespective of who caused it, that the court is impelled to conclude that the right has been breached…. The learned judge erred in law by focusing on the cause of the delay in the matter and by failing to directly addressing [sic] the question of overall delay in the context of the constitutional guarantee to a fair hearing within a reasonable time, irrespective of who caused, authored or orchestrated it. In the circumstances the extraordinary time period which has elapsed from the time of Mr St Brice's arrest and charge in November 2002 to present, without the murder charge having been finally heard and determined, leads to the insuppressible conclusion that the overall delay has been so great that the reasonable time guarantee in section 8(1) of the Constitution has been violated."[97]

89. The Caribbean Court of Justice, CCJ, in **Frank Errol Gibson v The Attorney-General of Barbados**,[98] stated that:

> "A finding that there has indeed been unreasonable delay in bringing the accused to trial must be made on a case by case basis. It cannot be reached by applying mathematical formula although the mere lapse of an inordinate time will raise a presumption, rebuttable by the State, that there has been undue delay. Before making such a finding, the court must consider, in addition to the length of the delay, such factors as the complexity of the case, the reasons for the delay and specifically the conduct both of the accused and of the State. An accused who is the cause and not the victim of the delay will understandably have some difficulty in establishing that his trial is not being heard within a reasonable time. One must not lose sight of the fact, however, that it is the responsibility of the State to bring an accused person to trial and to ensure that the justice system is not manipulated by the accused for his own ends. Even where an accused person causes or contributes to the delay, a time could eventually be reached where a court may be obliged to conclude that notwithstanding the conduct of the accused, the overall delay has been too great to resist finding that there has been a breach of the guarantee."[99]

90. In **Suraj Singh v Sichan Harrychan**[100] the CCJ had before it a matter that had its genesis in September 2007. Mr Harrychan was convicted in the Magistrate's Court in November 2010. There was an issue with regard to the lodging of his Notice of Appeal. He was however placed on bail pending appeal. In October 2013, three years after Mr Harrychan's conviction and sentence, the Magistrate submitted the memorandum of reasons. A year and a half elapsed before the notice of readiness of proceedings was received by Mr Harrychan's attorney in April 2015.

[97] The headnote, at Held 1.
[98] [2010] CCJ 3 (AJ)
[99] Paragraph 58
[100] [2016] CCJ 12 (AJ)

91. Sir Dennis Byron, PCCJ, in delivering the judgment in **Harrychan** stated:

> "The Delay in this case has been entirely unacceptable and the fact that the Respondent has been on bail can be no proper excuse for it[101].
>
> "The unacceptable delay poses a severe challenge to this Court to ensure that a just decision is given in all the circumstances of the case.[102]
>
> "From the standpoints of fairness and due process, the excessive judicial delay that has characterized this matter from its inception is of grave concern. It cannot be an acceptable situation in any modern justice system that appeals of this nature should be subjected to delays of this magnitude. As this Court has had occasion to remark, inordinate delay denies parties '…the access to justice to which they are entitled and undermine[s] public confidence in the administration of justice': **Barbados Rediffusion Service Limited v Mirchandani (No 1)**.[103] In order to maintain that entitlement and the public confidence the judiciary has the responsibility to ensure that cases which come before it are dealt with in as timely and expeditious a manner as possible."[104]

92. The issue of whether or not Mr Harrychan's constitutional right to a fair hearing within a reasonable time had been infringed was remitted to the Guyana Court of Appeal for its consideration; the CCJ noted that the constitutional issue of delay was not argued before the Court of Appeal.

93. The CCJ made it clear in **Singh v Harrychan** that computation of time regarding delay extended up to the final determination of the matter at the Apex level:

> "…inordinate and inexcusable delays could raise fundamental rights issues. Where the delay has been inordinate to the point of being wholly unreasonable in the circumstances of the case, particularly if, but not necessarily because, the party aggrieved has done all in his power to demand compliance, fair trial considerations and issues of the fundamental right to a fair trial within a reasonable time could arise. This reasonable time necessarily includes the appellate process…."[105]

94. The CCJ Judges noted that:

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[101] Paragraph [25]
[102] Paragraph [26]
[103] [2005] CCJ 1 (AJ), 69 WIR 35, at paragraph [45]
[104] Paragraph [28]
[105] Paragraph [29]

"a conviction may be vacated for violation of the constitutional right to a fair hearing in a reasonable time."[106]

95. In **Vishnu Bridgelall v Hardat Hariprashad**,[107] the CCJ reiterated the Court's observations expressed in **Singh v Harrychan** where it said that:

> "…in doing justice, the extent and nature of the delay on the part of public officials, such as clerk and the magistrate… ought always to be of concern to an appellate court."[108]

96. The CCJ also approvingly noted the Canadian case of **R v Jordan**,[109] stating:

> "The simple truth is that, as noted recently by the Supreme Court of Canada in relation to that country, excessive delays are tolerated because there is now 'a culture of complacency within the system towards delay'.[110] Indeed, judicial experience has shown that when apex courts evince a firm position of intolerance towards this culture, the necessary measures are invariably introduced to enable and facilitate the reduction, if not elimination, of unnecessary delay."[111]

97. The Apex Court for the Commonwealth of Dominica is the CCJ.

Chronology

98. The State sought to provide what it termed "Chronology of Events and Factors Leading to Delay"[112] in relation to the Third Defendant, Mr James. According to the timeline in the State's submission:[113]

- February 7, 2017: The alleged offence occurred in Roseau.
- August 3, 2017: The initial complaint filed.
- September 2017 Hurricane Maria hits Dominica.
- September 2018 – October 2019 Third Defendant absent from jurisdiction.

[106] Paragraph [29]
[107] [2017] CCJ 05 (AJ), GYCR2016/003 694
[108] Paragraph [29] of Singh v Harrychan and paragraph [37] of Vishnu Bridgelall v Hardat Hariprashad
[109] [2016] 4 LRC 469. [2016] 1 SCR 631, 2016 SCC 27
[110] Paragraph [4] of Jordan
[111] Paragraph 40
[112] Corrigendum to the State Response to Application of Accused No 3, Edison James, filed on the 20th of February 2025
[113] Pages 8 and 9 of the Corrigendum

- December 2018: Full disclosure of 75 witness statements and exhibits made to the Defence.

- October 15, 2019 – February 2020 – Defendant appeared, triggering procedural delays, including a denied joinder application and adjournment *sine die*.

- April 2023: Case relisted, hearings commenced.

- February 16, 2024: Matter committed to the High Court

99. There were a few things apparent in the State's Chronology.

1) The State contends that the initial complaint was filed within the statutory limitation period, which they expressed to be six months. The filing of the complaint occurred 178 days, or twenty-five weeks and 3 days, or five months and twenty eight days, after the offence.

2) The learning on last minute filing of complaints is well-known and need not be repeated at this stage. The State no doubt relied on six months being the common law limitation rather than the twelve months provided by the **Riot Act**, for offences committed under that Statute.

3) While Hurricane Maria hit Dominica on the 18th of September 2017, the absence of solid admissible evidence from a deponent stating any special impact of the natural disaster nullifies Counsel's assertion that it adversely affected these Defendants. Hurricane Maria occurred just seven weeks after the filing of the matter; it took seven years before the Defendant was committed. Was this matter affected by Hurricane Maria more than any other matter?

4) Nothing happened in the case against Mr James for more than three years. The matter apparently went into hibernation. According to the State's chronology, it was adjourned *sine die* on the 3rd of February 2020 until April 2023. No explanation was offered for this.

5) The State claimed that between September 2018 and October 2019 that Mr James "absented himself from the jurisdiction without providing a firm return date, forcing repeated adjournments."[114] But

[114] Page 9, first bullet point

the State said that during this same period, in December 2018, they were able to give him "full disclosure."

6) There was another lapse of one year (less eighteen days) following the committal of the matter to the High Court and Mr James being indicted.

100. Mr Fontaine, on the 17th of February 2025, filed an Affidavit in support of his application. No affidavit was filed refuting or rebutting what he deponed to. According to Mr Fontaine:

- In February 2017, he was a member of the United Workers Party, UWP, and an Opposition Senator in the Dominica House of Assembly.

- On the 12th of February 2017, after 2:00 p.m., he was arrested by the police, who said he was attempting to overthrow the Government. He was taken to the Criminal Investigations Department, CID, where he was questioned by the police. He was released after 9:00 p.m. and told to return to the CID the following day.

- On the 13th of February 2017, he was interviewed for a further two hours, then released without charge.

- He worked in South Sudan. When he returned to the State on April 2018, he was served with two summons to attend court. The summonses were dated the 23rd of March 2018 and he was required to attend court on the 20th of September 2018.

- Mr Fontaine did not attend court on the 20th of September 2018 as be had returned to South Sudan in relation to his employment. His attorney attended the Magistrates Court and an adjourned date was given for the 22nd of November 2018, but Mr Fontaine was still overseas. A bench warrant was issued for his arrest.

- He was arrested on Saturday the 23rd of April 2022. He was given bail two days later, on the 25th of April 2022.

- He has traveled from South Sudan to Dominica for Court. He made eighteen appearances in person at Court.

- His matter was committed to the High Court for trial on the 26th of July 2023.

- On the 1st of February 2025 he was served with the indictment.

- He is now indicted for an offence he allegedly committed eight years ago. The particulars of the charge does not disclose whom he incited, nor which statute he allegedly incited persons to breach.

- To try the incitement matter is unfair to him and a violation of his right to be tried within a reasonable time; it is unjust, oppressive and an abuse of process.

Assessment

101. Was there unreasonable delay in the prosecution of Mr Fontaine, Mr Linton and Mr James? What does all the learning on the constitutional right to a fair hearing within a reasonable time point to? And, if there was unreasonable delay, what are the consequences with regard to the prosecution of the Defendants?

102. Mr Khan, SC, referred to the case of **Loftus Durand, Arthurton Martin, James Daisy v The Attorney-General of the Commonwealth of Dominica and The Commissioner of Police**,[115] where it was stated that:

> "The fundamental rights of people are always subject to the limitations of the law, the rights and freedoms of others, and the public interest."[116]

103. Counsel contended that:

> "the fundamental right of the Accused to a fair hearing within a reasonable time is subject to the public interest of having a trial to determine the guilt of the Accused."[117]

104. The public interest may however be broader than the narrow parameters placed on it by Counsel but include things such as fairness, eliminating abuse, upholding the rule of law, keeping the steams of justice pure and undefiled, and reasonableness.

105. The State agreed that the CCJ case of **Gibson** was relevant, in that it -

> "provides the sound guidance for addressing delays in criminal proceedings, emphasizing proportionality, contextual fairness and the societal imperative of adjudicating serious crime."[118]

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[115] DOMHCV2019/0130
[116] At paragraph 88 (6)
[117] Paragraph 27, State Response to Application of Thomson Fontaine
[118] Paragraph 18, State Response to Application of Thomson Fontaine

106. The State noted that **Gibson** -

> "explicitly advocates for a practical, solutions-oriented approach when reasonable trial delays are breached.[119]
>
> "This precedent underscores the importance of balancing individual rights with the public interest, while acknowledging the realities of systemic changes."[120]

107. The balancing of accountability with due process does not mean that both things are given identical weight. Rather, it is an instruction to consider fairly all matters. Also, when there is an egregious breach of an individual's constitutional right to a fair hearing within a reasonable time, that individual is not required to demonstrate "serious prejudice"[121] or that the Court is duty bound to uphold an equilibrium to ensure that there is a trial, regardless of any breaches.

108. It is useful to recall some of the considerations identified by the CCJ in **Gibson** in determining whether or not there has been unreasonable delay:

> "the court must consider, in addition to the length of the delay, such factors as the complexity of the case, the reasons for the delay and specifically the conduct both of the accused and of the State."[122]

109. The three Defendants were separately charged in 2017 for the inchoate offence of incitement. Following separate committal proceedings, they were committed to stand trial in July 2023 (Mr Fontaine), February 2024 (Mr James) and July 2024 (Mr Linton). The indictment was filed on the 29th of January 2025 and served on the Defendants sometime thereafter. The lengthy delay from the date of being charged to the matter arriving at the High Court is obvious. A total of seven and a half years.

110. The incitement referred to in the indictment appears to refer to public order offences. Such an allegation requires the State merely to show in relation to each Defendant that he intentionally communicated to someone, through words or deeds that the person does some act that is a crime. The level of difficulty in proving the offence is extremely low. This matter did not require any forensic or scientific or expert or specialized expertise; there was no requirement for complicated investigation. There is no need to show that anyone did anything whatsoever in response to the incitement. Indeed, if the conduct of inciting an offence is acted upon, the Defendants would then be an accessory to the principal offence.

[119] Paragraph 15, State Response to Application of Lennox Linton
[120] Paragraph 16, State Response to Application of Lennox Linton
[121] As submitted by the State. See paragraph 22 of the State Response to Application of Thomson Fontaine
[122] Paragraph [58]

111. The State did not provide any affidavit evidence detailing how the "external exigencies,"[123] "supervening events" and "acts of God"[124] such as Hurricane Maria and the Covid-19 epidemic directly and specifically impacted the guarantee given to the Defendants of their right to a fair hearing in a reasonable time.

112. Offences contrary to the **Public Order Act** are triable summarily and carry a maximum penalty of a fine of ten thousand dollars or to imprisonment for six months. Under the **Riot Act**, the penalty is three years imprisonment for riot; and five years' imprisonment for unlawful assembly after a proclamation is read calling on those gathered to disperse.

113. At common law, inchoate offences attract a lesser penalty than the completed offence. An offender who is found guilty of inciting any of the public order offences, whether under the **Public Order Act** or the **Riot Act** would therefore be liable to a punishment that is less than what is provided for anyone who is guilty of the completed offence.

114. Further, the Acting Chief Justice of the Eastern Caribbean Supreme Court recently reissued the **General Sentencing Principles**.[125] Among the matters it addresses is "Attempts & Conspiracy." It states:

> "In sentencing for inchoate offences, the court should apply the guideline for the substantive offence. Sentence should be based on the seriousness of the harm intended, and culpability, even if not caused.
>
> > "a. Concerning attempts, having calculated the appropriate sentence using the relevant guideline there should be some small adjustment to reflect the fact that the completed offence was not carried out."[126]

115. Incitement, like attempts and conspiracy, is an inchoate offence. Arguably, incitement although in a similar class to an attempt, is a lesser offence than attempt – which falls short of the completed offence. It is noted once again that at Common Law, incitement attracted a lesser penalty than the principal offence.

116. The State contends that the law provides for a penalty of up to seven years for an individual convicted of incitement. This is based on the fact that the charge is contrary to the Common Law and the **Criminal Law and Procedure Act**[127] provides that:

> "(1) Any person convicted of a felony for which no punishment is specially provided is liable to imprisonment for seven years.

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[123] Paragraph 28 of the State Response to Application of Edison James

[124] Paragraph 23, second bullet point of the State Response to Application of Thomas Fontaine and paragraph 26, second bullet point of the State Response to Application of Lennox Linton

[125] Practice Direction 8A No 1 of 2025

[126] Relevant Factor No 16 at page 6

[127] Chapter 12:01 of the Laws of the Commonwealth of Dominica, Revised Edition

> "(2) Any person convicted of a misdemeanor or of any indictable offence for which no punishment is specifically provided is liable to imprisonment for two years."[128]

117. On the State's view, for the offence of inciting a riot, the matter will fall under section 56(1) of the **Criminal Law and Procedure Act**. There was no counter argument from the Defendants on this point as to whether the Common Law offence of incitement was a felony or it fell under 56(2) and therefore carried a maximum sentence of two years.

118. It is reasonable to conclude, however, that the upper limit of seven years would apply to those people convicted of inciting far more serious indictable offences.

119. It is not necessary however for present purposes to resolve what possible penalty inciting an offence that is contrary to the **Riot Act** would attract.

120. What however is clear, is that based on the principles of the Common Law and the **ECSC Sentencing Guidelines** the Defendants were not in peril of being sentenced for anything close to seven years but rather something less than the penalty for the substantive offence which is three years.

121. Even if the State's view was accepted that the maximum sentence imposable for this offence was seven years, it has to be borne in mind that Mr Fontaine, Mr Linton and Mr James have been waiting for their trial for eight years. That time exceeds any possible punishment that could be imposed for the offence. That cannot be right, fair, or just.

122. This situation clearly is one of those circumstances described in **Gibson** where "the overall delay has been too great to resist finding that there has been a breach of the guarantee"[129] of a right to a fair trial within a reasonable time under section 8(1) of the Constitution.

123. On the evidence presented in this matter, responsibility for the delay cannot be attributed to the Defendants, but rests squarely in the province of the State.

124. The delay in this matter has been palpably and exceedingly long. The protracted delay present in this case offends any sense of reasonableness or justice or fairness. There was an obvious breach of the constitutionally enshrined rights of Mr Fontaine, Mr Linton, and Mr James to a fair trial within a reasonable time.

125. Any prosecution of the Defendants at this time in relation to the events of February 2017 amounts to not only a violation of the rights of Mr Fontaine, Mr Linton and Mr James, but clearly amounts to an abuse of the process of the Court.

126. The cases against the three Defendants must be permanently stayed.

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[128] At section 56

[129] At paragraph 58 of Gibson

127. Given the determination that the indictment must be permanently stayed, there is no need for any further discussion of the indictment, or of the issue of separate trials.

Jordan, a postscript

128. Mention was made during the course of this decision to the Supreme Court of Canada's judgment in **R v Jordan**. That case was referenced in relation to the judgments of Mr Justice Astaphan, KC, in **Yannick Lander** and the Judges of the CCJ in **Vishnu Bridgelall**. (Although it was not stated in this decision, Pusey J in **Ricardo Britton and Rohan McCarthy** also made notable references to **Jordan**).

129. **Jordan** was presided over by a panel of nine judges. That Court was assisted by multiple counsel; apart from the Counsel representing the Appellant and the Respondent, there was input on behalf of the Attorney-General of Alberta, the British Columbia Civil Liberties Association, and the Criminal Lawyers Association (Ontario) as interveners.

130. The Appellant was charged along with nine other persons in December 2008 for his role in a dial-a-dope operation. There were scheduling challenges with the multiple counsel for the various Defendants. Five of the co-accused entered guilty pleas or were severed from the matter. In May 2011, following the preliminary inquiry, the Appellant and two co-accused were committed to stand trial. The trial ended in February 2013, a little more than four years after Mr Jordan was first charged. Mr Jordan was convicted. His conviction was upheld by the Court of Appeal. However, at the lower Court, prior to trial, the Appellant brought an application seeking a stay of proceedings on the ground of delay. The Trial Judge, dismissed Mr Jordan's application. The Judge applied the framework set out in the case of **R v Morin**.[130] The Supreme Court allowed Mr Jordan's appeal, set aside the conviction and entered a stay of proceedings.

131. The Bill of Rights found in the Constitutions of many Commonwealth Caribbean countries, including the Commonwealth of Dominica, bears much similarity to the **Canadian Charter of Rights and Freedoms.** That makes **Jordan** an important, persuasive authority.

132. The judgment contains several important statements concerning the fundamental right of the citizen to a fair trial in a reasonable time and the rule of law. The Judges said: -

> "Timely justice is one of the hallmarks of a free and democratic society. In the criminal law context it takes on special significance."[131]
>
> "The ability to provide trials within a reasonable time is an indicator of the health and proper functioning of the system itself."[132]

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[130] [1992] 1 SCR 771
[131] Paragraph [1]
[132] Paragraph [3]

"…timely trials are important to maintain overall public confidence in the administration of justice. As McLachlin J (as she then was) put it in **Morin**,[133] 'delays are of consequence not only to the accused, but may affect the public interest in the prompt and fair administration of justice'.[134] Crime is of serious concern to all members of the community. Unreasonable delay leave the innocent in limbo and the guilty go unpunished, thereby offending the community's sense of justice (see **Askov**[135]). Failure 'to deal fairly, quickly and efficiently with criminal trials inevitably leads to the community's frustration with the judicial system and eventually a feeling of contempt for court procedures'[136]."[137]

133. The Judges noted that:-

"…along with other participants in the justice system, this Court has a role to play in changing courtroom culture and facilitating a more efficient criminal justice system, thereby protecting the right to trial within a reasonable time."[138]

134. The aspirational goals of the **Needham's Point Declaration** and the continued efforts of the various participants in the justice system in the Caribbean point to the shared commitment throughout the region to achieve a modern justice system, one that is befitting the democratic tradition, practices and ideals of the region.

Order

135. The order in this matter is as follows:

1) It is declared that the right to a fair trial within a reasonable time guaranteed under section 8(1) of the **Constitution of the Commonwealth of Dominica** to Mr Thomson Fontaine, Mr Lennox Linton, and Mr Edison James has been violated.

2) The indictment dated the 29th of January 2025 which charges Mr Thomson Fontaine, Mr Lennox Linton, and Mr Edison James with incitement is permanently stayed and in the interest of justice, the trial cannot be permitted to proceed.

3) The State is barred from initiating or pursuing any further proceedings against Mr Thomson Fontaine, Mr Lennox Linton, and Mr Edison James in

[133] R v Morin [1992] 1 SCR 771
[134] At page 810
[135] R v Askov [1990] 2 SCR 1199
[136] At page 1221
[137] Paragraph [25]
[138] Paragraph [45]

respect of the incitement charge, or any charge, arising from the facts and evidence which formed the basis of the 7th of February 2017 incitement charge.

136. The Court office shall have conduct of the order.

Colin Williams
High Court Judge

By the Court

Registrar