



1 **IN THE GRAND COURT OF THE CAYMAN ISLANDS**  
2 **CRIMINAL DIVISION**  
3

4 **NEUTRAL CITATION NUMBER [2025] CIGC (CRIM) 31**  
5 **INDICTMENT NO: 135 of 2024**  
6

7  
8 **R**  
9

10 **V.**  
11

12 **FABIAN O'CONNOR JR.**  
13  
14  
15

16 **Appearances:** **Ms. Angelique McLoughlin, Crown Counsel, Office of the Director of Public**  
17 **Prosecutions for the Prosecution**  
18

19 **Mr. Clayton Phuran for the Defence**  
20  
21

22 **Before:** **The Hon. Justice Cheryll Richards KC**  
23

24 **Submissions Heard:** **3<sup>rd</sup> March 2025**  
25

26 **Ruling:** **4<sup>th</sup> March 2025**  
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31 ***Criminal Law*** – *Application in the course of trial for a stay of proceedings as an Abuse of Process, Closed*  
32 *Circuit Television footage not obtained by the police; Applicable test; High threshold.*  
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## RULING

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3 1. This is an application by the defence that the prosecution be stayed as an abuse of process. The  
4 application is made under the two categories of abuse of process as set out in the leading case of  
5 ***R v Maxwell***<sup>1</sup> that: -
  - 6 i. it is impossible to give the accused a fair trial and,
  - 7 ii. it would offend the court's sense of justice to try the accused under these  
8 circumstances.
- 9  
10 2. The defendant is charged with a single offence of Reckless and Negligent Act, contrary to section  
11 210 (a) of the ***Penal Code*** (2022 Revision). The particulars are that he, on the 23<sup>rd</sup> of  
12 August 2023, at Seafarer's Way, George Town, Grand Cayman, Cayman Islands being a public  
13 place drove a Toyota Noah in a manner so rash or negligent as to endanger human life or safety.  
14
- 15 3. It is alleged that the defendant, while driving his motor vehicle, swerved the vehicle towards the  
16 complainant, who was on traffic duties at the traffic lights at the intersection of Seafarer's Way  
17 and Fort Street. The swerving was such that the complainant had to jump out of the way to avoid  
18 being hit.  
19
- 20 4. The single factual element relied on by the defence for the purpose of this application is the  
21 failure of the police officers investigating the allegations to obtain Closed Circuit Television,  
22 (“CCTV”) footage which captured the incident.  
23
- 24 5. It is common ground that there are multiple CCTV cameras on the Port Authority building, which  
25 is nearby, and on the buildings of a number of stores in the area. The defence assert that this is  
26 essential evidence which should have been obtained, the absence of which deprives the defendant  
27 of the opportunity to prove his innocence.  
28
- 29 6. The test which is to be applied in cases such as this is set out in ***R (Ebrahim) v Feltham***

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<sup>1</sup> 2010 UKSC 48

1 *Magistrate's Court; Mouat v DPP*<sup>2</sup>. The court should first decide whether there was a duty on  
2 the part of the police or prosecuting authorities to obtain or retain the material identified.  
3 Secondly, if there had been a breach of such a duty, any unfairness resulting from it should  
4 normally be dealt with in the course of the trial. The Court held that no stay should be imposed  
5 unless the defendant showed on the balance of probabilities, either that by reason of the breach  
6 he would suffer serious prejudice such that it would be impossible for a fair trial to be held or  
7 that there had been such bad faith or serious fault on the part of the police or prosecuting  
8 authorities that it was not fair for the defendant to be tried.  
9

10 7. In paragraph 17 of the judgment in the case, the Court described the jurisdiction to stay  
11 proceedings as one which ought to be employed in exceptional circumstances whatever the  
12 reasons submitted for invoking it.  
13

14 8. In category 1 cases where the question is whether there can be a fair trial, the first principle is  
15 that fairness refers to fairness to both sides. The second principle is that the trial process is  
16 equipped to deal with the bulk of the complaints on which applications for a stay are founded.  
17

18 9. The Court said that the circumstances in which a court would be able to conclude with sufficient  
19 reason that a trial of a defendant would inevitably be unfair are likely to be few and far between.  
20 At paragraph 27 of the judgment the court said this:  
21

22 "It must be remembered that it is common place in criminal trials for the defendant to rely  
23 on holes in the prosecution's case; for example, a failure to take fingerprints or a failure to  
24 submit evidential material for forensic examination. If in such a case there is sufficient  
25 credible evidence, apart from the missing evidence which, if believed, would justify a safe  
26 conviction, then a trial should proceed, leaving the defendant to seek to persuade the jury  
27 or justices not to convict, because evidence which might otherwise have been available  
28 was not before the court through no fault of his. Often the absence of a video film or  
29 fingerprints or DNA material is likely to hamper the prosecution as much as the defence".  
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<sup>2</sup> [2001] 1 WLR 1293



- 1 10. In the instant case, this Court heard evidence on the *voir dire* from two witnesses.  
2
- 3 11. In summary, PC Tyrik Taylor testified that he went to the stores in the area to look for CCTV  
4 footage. He went to Diamonds International store. He went to Häagen-Dazs store and the store  
5 beside it. He spoke to staff who showed him how the cameras were positioned, and he formed  
6 the view that these would not have captured the area where the incident allegedly occurred. He  
7 did not go over to the Port Authority. He said that when he looked around at the Port Authority  
8 building, he didn't physically observe any cameras where the incident allegedly took place, so he  
9 did not bother to go. He did not look at any footage from any location. He said that there were  
10 Government cameras on the stop lights, but he does not believe that these were working.  
11
- 12 12. Sergeant Junior Durrant was the senior officer in charge of the case. He said that he assigned PC  
13 Taylor and told him how to go about the investigation. He testified that he advised PC Taylor to  
14 visit the scene and to check for witnesses and CCTV. He advised him to go to the Port Authority  
15 to check for cameras, because he knew that the Port Authority had cameras covering the area.  
16 PC Taylor did not carry out his instructions.  
17
- 18 13. Sergeant Durrant said that as a result of the complainant's constant enquiries, he, Sergeant  
19 Durrant, went with the complainant to the Port Authority but by the time he got there, the footage  
20 had been overwritten one day earlier. He went to Diamonds International and they advised him  
21 that the footage from their store had already been overwritten.  
22
- 23 14. Sergeant Durrant said that the Port Authority cameras which he viewed covered the area of the  
24 alleged incident.
- 25  
26 15. In answer to a question from the Court, he said he had not followed up with PC Taylor to see  
27 what PC Taylor had done, until the complainant spoke with him.  
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1 16. The defence position, in summary, is that the police and prosecution were under a duty to secure  
2 the video evidence from all of the cameras in the vicinity. It is that there has been misconduct in  
3 this case to such an extent that it would be unfair to try the defendant. Alternatively, it is said  
4 that there has been a lackadaisical failure on the part of the police which reaches the high  
5 threshold necessary for the jurisdiction of a stay to be invoked. Counsel submits that there have  
6 been failures, omissions and untruthfulness by the police.

7  
8 17. Counsel also submits at paragraph 36 of the defence written submissions that there can be no fair  
9 trial when key evidence has not been obtained by the investigating bodies, which if obtained,  
10 would have exonerated the defendant. What is submitted is that this is not because of  
11 incompetence, but because of intentional misconduct or genuine indifference. Counsel describes  
12 the failings on the part of the police in this case as deliberate.

13  
14 18. The prosecution submits in reply that a fair trial is not impossible in this case, and that the high  
15 threshold which is required, as per the dicta in the cases of *R v Maxwell* and *Ebrahim and Others*  
16 has not been met.

17  
18 19. Counsel for the prosecution submits, at paragraph 26 of the prosecution's written submissions,  
19 that in the instant case the alleged misconduct is limited to potentially false statements about  
20 checking the CCTV footage. Counsel also submits that: -

- 21 i. There is no evidence that the alleged misconduct was part of a deliberate attempt  
22 to pervert the course of justice.  
23 ii. The alleged misconduct has been identified and can be addressed during trial  
24 through cross-examination.  
25 iii. Unlike in the case of *Maxwell*, the alleged misconduct does not taint the entirety  
26 of the Crown's case.

27 Counsel further submits that there is no clear evidence of serious misconduct in this case and refers  
28 to the judgment of Quin J. in the case of the *R v Anglin*<sup>3</sup>.



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<sup>3</sup> [2008] CILR 292



1 **DECISION**

- 2
- 3 20. Having considered all the submissions and cited cases, this Court accepts the submission of the
- 4 defence that there was a duty to secure and obtain the footage which covered the relevant area
- 5 where the incident allegedly occurred at the traffic lights on Seafarers Way. PS Durrant's
- 6 evidence is that the Port Authority cameras did cover the area. It is not clear whether cameras
- 7 from individual stores would have also covered the area but plainly PC Taylor ought to have done
- 8 more than look at the position of the cameras. He ought to have viewed the footage from the
- 9 various stores. I find that there was a breach of duty to obtain and retain the CCTV material.
- 10
- 11 21. The next question is whether on a balance of probabilities, I am satisfied that the defendant would
- 12 suffer serious prejudice, to the extent that it would be impossible for him to have a fair trial or,
- 13 for there to be a fair trial.
- 14
- 15 22. I am mindful of what the Court said at paragraph 27 of the judgment in the case of *Ebrahim and*
- 16 *Others* referred to above. The fact is that the absence of CCTV footage will impact the
- 17 prosecution in this case as it will the defence. These are failings which can be highlighted to the
- 18 jury. The absence does not mean that there cannot be a fair trial, particularly in circumstances
- 19 where there is other evidence. There is in this case evidence from the complainant.
- 20
- 21 23. I have considered with care the application of the second part of the test. Having seen and heard
- 22 the witnesses on the *voir dire*, I do not find that there is bad faith or serious fault on the part of
- 23 the police. I do not find that there was *mala fides*, that they were deliberately trying not to obtain
- 24 the evidence. Plainly, Officer Taylor did not act with alacrity, thoroughness or dispatch. His
- 25 attention to detail does not appear to have been much exercised. I accept that he was a very junior
- 26 officer. Sergeant Durrant, as the more senior officer of nineteen years, as the defence point out,
- 27 and as the prosecution has conceded, failed to adequately supervise PC Taylor. Sergeant Durrant
- 28 himself failed to act with any sense of urgency in respect of this case. Perhaps this is because he
- 29 believed that his instructions had been or were being carried out.
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- 31 24. In the case of *Anglin*, Quin J. at paragraph 23 of that judgment found that the defence had
- 32 established indolence, forgetfulness and negligence. The learned Judge went on to find that this

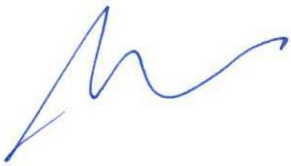
1 fell short of the high threshold necessary for the jurisdiction of a stay to be invoked.  
2

3 25. I have considered the alternative submission of the defence in this case in referring to the obiter  
4 statements in the cited cases, that a lackadaisical approach can, in certain circumstances, reach  
5 that high threshold.  
6

7 26. I have considered all of the evidence given in this case. I do not consider that the absence of  
8 energy or a sense of urgency constitutes serious misbehaviour such as to reach the high threshold  
9 necessary to invoke the jurisdiction for a stay. I also do not consider that the negligence in this  
10 case or "indolence" to use the words of Quin J. rises to that level such as to justify the invocation  
11 of what is described as an "exceptional course".  
12

13 27. I conclude that the matters raised are properly matters which can be dealt with as part of the trial  
14 process with the appropriate directions. The application for a stay is therefore refused.

15  
16 **Dated this the 4<sup>th</sup> March 2025**

A handwritten signature in blue ink, appearing to be 'Cheryll Richards', written in a cursive style.

17  
18 **The Hon. Justice Cheryll Richards KC**  
19 **Judge of the Grand Court**