



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

4 **INDICTMENT NOS: 100 & 101 OF 2022**
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8 **R**
9

10 **V.**
11

12 **GERALD GURVIN BUSH**
13
14

15 **Appearances:** **Ms. Kerri-Ann Gillies, Crown Counsel 1 of the Office of the**
16 **Director of Public Prosecutions for the Prosecution**

17 **Mr. John Furniss and Mr. Crister Brady for the Defence**
18

19 **Before:** **Justice Cheryll Richards KC**

20 **Submissions Heard:** **14th June 2023**
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22 **Ruling Delivered:** **18th August 2023**
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24

25 **HEADNOTE**
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27 *Criminal Law- Application for a stay of the Indictment on the ground of abuse of process, Excessive delay in*
28 *bringing charges, Case discontinued against Co-Accused, Applicable principles.*
29



RULING

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3 1. This is an application by the defence for a stay of the Indictment against the defendant
4 Gerald Gurvin Bush as an abuse of process. The application is made on two grounds: -

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6 i) Delay; and

7 ii) lack of parity in prosecuting the defendant but discontinuing against the former
8 co-defendant Mark Kennedy Bush.

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10 2. The defendant is charged on the Indictment with three counts of Handling Stolen Goods
11 contrary to s.260(2) of the *Penal Code* 2019 Revision. The first count charges him with
12 handling a Movado watch on or before March 2019. The second with handling a Tag
13 Heur watch on or before the 30th May 2019. On the third count he was jointly charged
14 with Mark Bush with handling a Cartier watch on or before the 14th March 2019.

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16 3. The evidence in summary appears to be that following various burglaries which took
17 place in March and April 2018, the police attended the business premises in March 2019.
18 This is a business which trades in the purchase and sale of secondhand items. They
19 recovered evidence that Gerald Bush had attempted to pawn the Cartier watch. A picture
20 of the same watch was downloaded from the phone of Mark Bush. The Tag Heur watch
21 had been pawned by the defendant Gerald Bush at the said business.

22
23 4. The defendant Gerald Bush was arrested on the 5th March 2020. The Movado watch was
24 found during a search of his home. It was identified as stolen from one of the burglaries.

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26 5. In interviews under caution in June 2020 the defendant Gerald Bush said that he had
27 received all the items from Mark Bush who is his cousin.
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1 6. The police file of evidence was submitted to the prosecution's Office on the 3rd
2 September 2020. The charging decision was rendered almost two years later on the 24th
3 July 2022. Charges were laid on the 3rd August 2022.

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5 7. On the 28th April 2023 following representations made by his attorney the prosecution
6 discontinued the case against Mark Bush citing public interest grounds. These are said to
7 be that he had been convicted and sentenced for similar conduct including in respect of
8 a burglary involving one of the same complainants in this Indictment.

9
10 8. Defence Counsel points out that this defendant was arrested some two years after the
11 burglary and charged two and half years later, a total of four and a half years. It is noted
12 that evidence only came to light in 2019. The prosecution say that the delay in the
13 charging decision was due to "institutional administrative matters" in its Office. The
14 defence say that the case is not a complicated one nor one that required further evidence
15 to be obtained. It is said that the reason put forward by the prosecution is not rational or
16 justifiable.

17
18 9. On the second ground of parity, the defence in summary argues that the second defendant
19 who had the case discontinued against him is being rewarded for having a criminal
20 record, while this defendant who does not have a long criminal history is treated
21 differently. Counsel's main point is that this defendant cannot have a fair trial because
22 he has lost the opportunity to confront his co-defendant Mark Bush before the jury and
23 put his case that the items were received from him.



1 10. Counsel relies on the case of *R. v Forsythe*¹ in which the English Court of Appeal
2 expressed question about decisions made in respect of co-defendants. The Court said
3 this:-

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5 *“Not unnaturally Mr Robertson suggested that it was equally unfair to try the*
6 *appellant in the absence of Mr Nadir. Answering this ground of appeal, Mr Calvert-*
7 *Smith attempted to point out differences between the two cases but we confess he*
8 *did not convince us of their significance. On its face it seems a strange decision to*
9 *press home the prosecution against one who appears to have been involved at short*
10 *notice in assisting in an isolated transaction on the fringe of an immense misuse of*
11 *company funds and at the same time to release from all criminal responsibility the*
12 *group chief accountant alleged to have been more closely, extensively and*
13 *frequently involved. The decision to do so is the prerogative of the SFO and does*
14 *not in our judgment itself amount to an abuse of process. It is not for us to say*
15 *whether such a choice accords with ordinary notions of even handedness or is likely*
16 *to enhance the public perception of the fairness of a prosecuting authority.”*

17
18 11. The prosecution opposes the instant application and by reference to cases including that
19 of *Warren v. Attorney General for Jersey*² submits in summary that the threshold for an
20 abuse of process application to succeed is a high one and has not been met in this case.
21 It is submitted that the defendant has not established that he cannot receive a fair trial.

22
23 12. I am conscious that this very short ruling does not set out in full the very detailed, well
24 researched and helpful arguments of both Counsel. I thank Counsel for their research and
25 assistance to the Court.

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¹ [1997] 2 Cr. App. R. 299

² [2012] 1 AC 22 PC



1 13. I consider it sufficient to say this. The Court’s jurisdiction in an abuse of process
2 application is well known. It is set out in a number of cases including in the local case
3 of **R. v. Anglin**³, a decision of Justice Quin.

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5 14. The Court has power to stay criminal proceedings in two categories of cases:-

- 6
7 1. Where it will be impossible for the defendant to have a fair trial; and
8 2. Where it would not be fair to try the defendant.

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10 15. In the leading case of **Horseferry Road Magistrates’ Court ex parte Bennett**⁴ it was
11 made plain that the discretion to grant a stay “*must be exercised carefully and sparingly*
12 *and only for very compelling reasons. The discretion to stay is not a disciplinary*
13 *jurisdiction and ought not to be exercised in order to express the court’s disapproval*
14 *of official conduct*”.

15
16 16. With respect to delay, the general principles in summary are these: Where delay is
17 deliberate this is likely to lead to a conclusion of abuse of process. Delay which is not
18 deliberate but is inordinate or unconscionable due to the inefficiency of the prosecution
19 may also lead to a stay of proceedings but serious prejudice from the delay must be
20 present (See **Gateshead Justices ex parte Smith**⁵). Such prejudice may either be inferred
21 or proven.

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³ [2008] CILR 292

⁴ [1994] 1 A.C. 42

⁵ [1985] 149 JP 681



1 17. Counsel for the prosecution has also drawn the Court's attention to the observations of
2 Lord Lowry in the cited case of **R. v. Horseferry Road Magistrates' Court ex parte**
3 **Bennett**. The learned Judge said this: -

4
5 *"Discretion to stay is not a disciplinary jurisdiction and ought not to be exercised*
6 *in order to express the court's disapproval of official conduct. Accordingly, if the*
7 *prosecuting authorities have been guilty of culpable delay but the prospect of a fair*
8 *trial has not been prejudiced, the court ought not to stay the proceedings merely*
9 *"pour encourager les autres".*

10
11 18. In the case of **Attorney General's Ref (No. 1 of 1990)**⁶ Lord Lane CJ said this :-

12
13 *"Stays imposed on the grounds of delay or for any other reason should only be*
14 *employed in exceptional circumstances ... In principle, therefore, even where the*
15 *delay can be said to be unjustifiable, the imposition of a permanent stay should be*
16 *the exception rather than the rule. Still more rare should be cases where a stay can*
17 *properly be imposed in the absence of any fault on the part of the complainant or*
18 *prosecution. Delay due merely to the complexity of the case or contributed to by the*
19 *actions of the defendant himself should never be the foundation for a stay ... [N]o*
20 *stay should be imposed unless the defendant shows on the balance of probabilities*
21 *that owing to the delay he will suffer serious prejudice to the extent that no fair trial*
22 *can be held: in other words, that the continuance of the prosecution amounts to a*
23 *misuse of the process of the court. In assessing whether there is likely to be*
24 *prejudice and if so whether it can properly be described as serious, the following*
25 *matters should be borne in mind: first, the power of the judge at common law and*
26 *under the PACE 1984 to regulate the admissibility of evidence; secondly, the trial*
27 *process itself, which should ensure that all relevant factual issues arising from*

⁶ [1992] QB 630 (at pp. 643-4),



1 *delay will be placed before the jury as part of the evidence for their consideration,*
2 *together with the powers of the judge to give appropriate directions to the jury*
3 *before they consider their verdict.”*
4

5 19. The position was summarised in the leading case of ***R v S(P)***⁷ as follows:-
6

- 7 i. “Even where delay is unjustifiable, a permanent stay should be the
8 exception rather than the rule;
9 ii. Where there is no fault on the part of the complainant or the prosecution,
10 it will be very rare for a stay to be granted;
11 iii. No stay should be granted in the absence of serious prejudice to the
12 defence so that no fair trial can be held;
13 iv. When assessing possible serious prejudice, the judge should bear in mind his
14 or her power to regulate the admissibility of evidence and that the trial process
15 itself should ensure that all relevant factual issues arising from delay will be
16 placed before the jury for their consideration in accordance with appropriate
17 direction from the judge; and
18 v. If, having considered all these factors, a judge’s assessment is that a fair trial
19 will be possible, a stay should not be granted.”
20

21 20. In this case, the question is whether the delay has been such that the defendant would be
22 seriously prejudiced in his defence. The evidence as to the conduct of the defendant at
23 the business premises comes from documents and from Closed Circuit Television
24 (“CCTV”) recordings. His defence is that he received all the items from Mark Bush. He
25 made statements to this effect in June 2020, and these can be used to refresh his memory.
26 I have thus considered the nature of the evidence and the submissions of his Counsel. I
27 am not satisfied that he would suffer serious prejudice by the delay which has occurred.

⁷ [2006]2 Cr. App. R. 23



1 The delay which has occurred can be highlighted to the jury as well as the negligent
2 conduct of the prosecution.

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4 21. With respect to the second limb of the abuse of process jurisdiction, I have considered
5 whether it offends the Court's sense of justice to try this defendant both by reason of the
6 delay and in particular because of the decision made as to his co-accused. In the
7 judgment in the case of *R. v. Anglin*, Justice Quin allowed that case to continue where it
8 was found that there had been mistakes, incompetence and neglect but no mala fides or
9 dishonesty.

10
11 22. In this case, the prosecution has made a decision to treat one defendant differently than
12 the other and has stated its reasons for so doing. As the cited cases highlight it is not the
13 purview of the courts to say whether such a choice accords with ordinary notions of
14 evenhandedness. I also note that there are visible differences between the two cases. The
15 defendant's co-accused was charged with only one of the three counts which this
16 defendant faces.

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18 23. The fact of the separate treatment does not in all the circumstances offend the Court's
19 sense of justice.

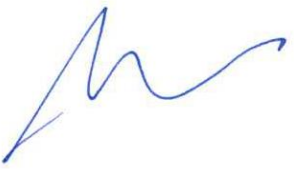
20
21 24. As to the impact upon the fairness of the trial of this defendant, there are many cases
22 where one defendant is tried in the absence of other persons allegedly involved. The fact
23 of the absence of the co-defendant can be the subject of directions. The defendant will
24 have the opportunity to put his case against Mark Bush in the course of any trial.

25
26 25. In conclusion, the delay which the negligence and inefficiency of the prosecution has
27 caused is culpable and is to be deprecated. However applying the legal principles it has
28 not been shown that the prospect of a fair trial has been prejudiced. It does not offend the
29 Court's sense of justice and propriety to be asked to try this defendant in the

1 circumstances of this case. There was no mala fides identified or bad faith. The
2 circumstances cannot be said to be exceptional. The threshold for the exercise of the
3 discretion to grant a stay is a high one and has not been met.

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5 26. The application for the stay is therefore refused.

6
7 **Dated this the 18th day of August 2023**

A handwritten signature in blue ink, consisting of a series of connected loops and curves, positioned to the left of the judge's name.

8
9 **The Hon. Justice Cheryll Richards KC**
10 **Judge of the Grand Court**