

Nature and Scope of Delays in the Criminal Division of the High
Court of Barbados:
A Case Study



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Introduction

This paper has its genesis in the Judicial Retreat of the Barbados Judiciary held at Colony Club Hotel, St. James on 16 and 17 November 2007.

The Honourable Chief Justice, Sir David Simmons, K.A., B.C.H., invited the principal agencies involved in the administration of the criminal justice system in Barbados to participate in an historic one day session on 16 November on the subject “Delays in the Criminal Justice System—Causes and Suggested Solutions,” to submit papers and make short presentations to form the basis of a general discussion.

In the session, participants identified the many causes of delays across the criminal justice system, and made recommendations for the reduction of those delays.

Those discussions stimulated the interest of the writer in the delay phenomenon that seems to pervade the administration of justice by the High Court of Barbados. The invitation to participate as a presenter in this session of the conference afforded the opportunity to examine from two case files in the criminal division of the High Court the nature and scope of delays in the

trial of an accused for a non-capital offence between the date of charging of an accused and the date of his trial for that offence in the High Court.

For the purposes of this paper the definition adopted of the term “delay” is taken from the *Blacks Law Dictionary*, as “the period during which something is postponed or slowed.”¹

The Constitution of Barbados (the Constitution) guarantees to every person in Barbados certain fundamental rights and freedoms. Chief among these are (a) the right to life, liberty and security of the person and (b) the protection of the law subject only to respect for the rights and freedoms of others and the public interest.²

To protect that right to personal liberty the Constitution not only stipulates that a person arrested or detained upon reasonable suspicion of having committed or being about to commit a criminal offence and who is not released shall be brought before a court as soon as is reasonably practicable but also that if any such person is not tried within a reasonable time...he shall be released either unconditionally or upon such conditions as are reasonably necessary to ensure his attendance for subsequent trial.³

Further, to secure the right to protection of the law, the Constitution stipulates that a person charged with a criminal offence shall be afforded a

¹ Garner, Bryan A, ed., *Blacks Law Dictionary*, 7th ed. (West Publishing Co., Minnesota, 1999) page 437

² The Constitution of Barbados, S 11(a) and (c)

³ *Ibid.*, S 13(3)(b)

fair hearing **within a reasonable time** by an independent and impartial court unless the charge is withdrawn.⁴

What constitutes “a reasonable time” for the purposes of those provisions of the Constitution has not been defined. However, it seems to me that inherent in the concept of a “reasonable time” is the notion of a lapse of time. The expiration of that lapse of time may trigger a delay in the sense of postponing or slowing down the progress of the trial and may lead to a denial of the constitutional right to a fair hearing within a reasonable time.

A body of jurisprudence in the Caribbean has addressed the concept of a reasonable time within the framework of the constitutional guarantees of the right to a fair hearing. For example in *DPP for Jamaica v Fuertado*⁵ the issue for consideration of the Court of Appeal was whether a period of 22 months from the date of arrest until the start of the proceedings in the magistrate’s court was reasonable in relation to the fair hearing provisions of S. 20(1) of the Constitution of Jamaica which corresponds to S. 18(1) of the Constitution of Barbados.

In delivering the decision of the Court Kerr JA at p. 211 letter H affirmed the view of Fox J in *R v Shirley Chin See*⁶:

⁴ Ibid., S 18(1)

⁵ *DPP for Jamaica v Feurtado* (1979) 30 WIR 206

⁶ *R v Shirley Chin See unreported (Jamaica) Suit No 176/67*

“... [T]he reasonable time contemplated by the provision relates to the period between the date of arrest (not the date of commission of the offence) and the date of trial,”

and remarked at p. 211, letter J that:

“What is a reasonable time would depend on the circumstances of each case, including the nature of the case the formalities of the pre-trial procedures, the facilities existing and the efforts that have been made to conclude the proceedings.”⁷

Methodology

A purposive sample of two case files for non-capital offences from the criminal division of the High Court was drawn.

Principal Crown Counsel with over ten years experience as a prosecutor was asked to identify two case files using as criteria that:

- (a) five years or more had elapsed since the accused was charged;
- (b) as at May 2009, the trial had not yet been completed in the High Court; and
- (c) the case files contained no extraordinary pathologies in terms of the number of persons involved, intricate forensic issues and complexities.

Using these two case files as data sources the writer sought to:

- (1) identify the principal stages of a criminal trial;

⁷ See also the dicta of Peterkin JA in *Halstead v Commissioner of Police* [1978] 25 WIR 522 at 524 letter G; Crane J (as he then was) in *R v Edwin Ogle (1968)* 11 WIR 439 at 442, letter H

- (2) identify the activities and actions which impinge on the progress of a criminal trial at each principal stage;
- (3) extract from the two case files the chronological steps taken to advance each case to trial;
- (4) analyse the nature and scope of delay in each case file as revealed in the chronological steps;
- (5) determine from the case files which stages of the trial seemed to impede the progress of the trial; and
- (6) suggest some ways in which the delays might have been reduced time-wise and their effects mitigated.

Principal Stages in a Criminal Trial

To obtain an ethnographic perspective in identifying the principal stages in a criminal trial, the writer exploited, in brief interviews, the expertise and experience of one senior police prosecutor; two Principal Crown Counsel; one magistrate; the Deputy Director of Public Prosecutions and a judge of the Court of Appeal.

These persons were also asked to identify (a) the activities and actions which seemed to them to impinge on the progress of a criminal trial at each such stage and (b) a range of time which, in their opinion, each stage takes for completion.

Table I below shows the principal stages of a criminal trial as identified; the activities and actions identified as impinging on the progress of the trial at each stage and the range of time for completion of each stage.

Table I: Principal Stages of a Criminal Trial

IV	Commencement	<ul style="list-style-type: none"> Re-scheduling of hearing to fit into the calendar of cases of the court. 	
	Principal Stages of a Criminal Trial	Activities/ Actions which impinge on the progress of a Criminal Trial	Range of Time for Completion
I	Preliminary Charging of Accused and the initial appearance at Magistrate's Court	<ul style="list-style-type: none"> Non-availability of witnesses (overseas witnesses; expert witnesses, e.g. forensic scientists; ballistics or handwriting experts and ex-police officers who have migrated); Adjournment of case—neither prosecution nor defence ready to proceed. Difficulty in locating witnesses (willing and unwilling to attend); Non-availability of defence counsel and police witnesses at ongoing police investigation. 	3 days
II	Police Investigation and Preparation for commencement of Preliminary Inquiry	<ul style="list-style-type: none"> Preparation of police file for use by police prosecutor, progress at High Court); Police work-load; Non-attendance of all co-accused at Preliminary Inquiry where ascending ranks of police officers accused on remand and co-officers accused on bail; Ongoing adjournments to facilitate the foregoing activities. Non-attendance of all defence counsel for co-accused; 	6 months to 8 months
III	Pre-trial disclosure and Scheduling of date for commencement of Preliminary Inquiry	<ul style="list-style-type: none"> Continued re-scheduling of assigned dates to accommodate ongoing police investigation; Completion of police file; Requests by accused/ defence and other matters listed on the court's calendar; Requests by prosecution/ defence for pre-trial disclosure; Insufficient advance warning to counsel/unrepresented accused witnesses (civilian, expert or police) to attend court; Scheduling of dates by court for commencement of Preliminary Inquiry. 	18 months to 24 months
V	Typing of	<ul style="list-style-type: none"> Handwritten deposition evidence 	

	deposition evidence taken at Preliminary Inquiry	to be typed	1 month
VI	Drafting of indictment by Director of Public Prosecutions	<ul style="list-style-type: none"> • Perusal of depositions by Director of Public Prosecutions and legal officers. • Perusal of police file by Director of Public Prosecutions and legal officers. • Drafting of indictment by Director of Public Prosecution's Department. • Non-submission of police file to the office of Director of Public Prosecutions. 	1 month
VII	Preferment of Indictment	<ul style="list-style-type: none"> • Preferment of indictment by Director of Public Prosecutions to Registrar of Supreme Court for signing and service on the accused. 	1 week
VIII	Plea and Directions Hearing	<ul style="list-style-type: none"> • Scheduling of dates for trial at Plea and Directions hearing; • Non-attendance of defence counsel and accused persons on bail at Plea and Directions Hearing; • Non completion by defence counsel or accused of prescribed Plea and Directions questionnaire. 	3 months
IX	Commencement of trial to completion of trial	<ul style="list-style-type: none"> • Re-scheduling of assigned dates for trial at request of (a) unrepresented accused to obtain legal representation; (b) by 	

An analysis of Table I reveals that:

- (1) There is much overlap in the nature of the activities and actions between the stages and in some cases the overlap is major. For example ongoing police investigation and preparation of the police file between Stages II and III;
- (2) The ongoing police investigation and preparation of the police file, requests for pre-trial disclosure by unrepresented accused and defence counsel and adjournments to accommodate these activities take at least 12 to 16 months for completion (Stage II and Stage III).
- (3) The Preliminary Inquiry is slowed down significantly by the non-availability of witnesses (overseas; expert and ex-police officers who have migrated non-availability of defence counsel and police witnesses (in attendance at criminal trials in progress in the High Court); non-attendance of accused and defence counsel and frequent adjournments (Stage IV).
- (4) Many of the actions which delayed a satisfactory and timely completion of the Preliminary Inquiry and identified as slowing mechanisms seemed to have a similar effect on the progress of the trial itself.
- (5) Of the identified principal stages the longest periods of time (18 to 24 months)⁸ and (30 to 36 months) are associated with Stages IV and IX respectively and the shortest periods of time are associated with Stages I; V; VI and VII respectively.

Chronological Steps to Trial—Case file No. 1

⁸ This is significant in light of the data abstracted by two Judicial Assistants at the request of Blackman J (as he then was) from 100 criminal case files scheduled for trial at the April and May Assizes 2007 and presented at the Judicial Retreat 2007. The survey revealed that the average length of time elapsed from the date of charge to the date of committal was 28 months whilst the shortest length of time was 4 months and the longest length of time was 69 months for the case files examined.

For the purposes of this paper, Case file No. 1 and Case file No. 2 shall be referred to as “*The Queen v A.B.*” and “*The Queen v C.D and E.F*” to preserve the anonymity of the accused persons since the trial has not yet been completed in either case.

A.B. was arrested on 2 October 2003 for the offences of possession of a firearm, possession of ammunition and possession of a controlled substance (cocaine).

Table II below sets out in chronological order the steps taken to advance the case to trial as extracted from the case file.

Table II: Chronological Steps Taken to Advance Case file No. 1 to Trial

Date	Nature of Step Taken
4 October 2003	Accused charged with offences
4 October 2003	Shot gun, revolver and cartridges delivered to forensic firearm examiner.
4 February 2004	Suspected controlled drug delivered by investigating officer to forensic scientist for analysis.
23 June 2004	Certificate of analysis dated 20 April 2004 delivered to investigating officer by forensic scientist.
9 July 2004	Accused served with a copy of certificate of analysis
7 July 2006	Commencement of Preliminary Inquiry
6 December	Completion of Preliminary Inquiry

2007	
11 December 2007	Committal of Accused to stand trial.
25 February 2008	Depositions delivered to the office of Director of Public Prosecutions.
5 March 2008	Preferment of Indictment to Registrar of Supreme Court for signing and service on Accused.
28 March 2008	Accused arraigned—Pleads “not guilty”—indicates name of legal counsel who is not present. Matter adjourned to 14 April 2008.
14 April 2008	Matter called before Judge. Named counsel not present. Accused stated he was ill and unable to meet with his named counsel. Accused told to contact named counsel. Matter adjourned to 21 April 2008.
21 April 2008	Matter called before Judge. Named counsel present. Counsel indicated that he had not been properly retained. Matter adjourned to 26 May 2008.
26 May 2008	Matter called before Judge. Named counsel present but withdrew from case with leave of the court. Matter traversed to July sitting.
17 July 2008	Matter called before Judge. Accused admitted that named counsel was not properly retained but insisted that named counsel is his counsel. Counsel not present. Accused warned that matter would commence on 16 October 2008.
16 October 2008	Matter called before another Judge. Named counsel for Accused not present. Matter traversed to January to

The trial history of this case from 28 March 2008 was supplied by the prosecuting counsel assigned to the case. Prosecuting counsel informed that a firm date was fixed for commencement of the trial on 3 March 2009 with the named counsel who had then been properly retained. However, the trial did not commence on that date as the court was then hearing the longest drug trial in the history of criminal trials in Barbados.

Nature and Scope of Delay—Case file No. 1

Between the 4 October 2003 (when Accused charged) and 7 July 2006 (when the Preliminary Inquiry commenced) a period of some 8 ½ months had elapsed. This period appears to reflect the ongoing police investigation and preparation and completion of the police file, necessary prerequisites to the commencement of the Preliminary Inquiry.

Between 7 July 2006 and 11 December 2007 a period of 17 months had elapsed. That period represents the time taken to complete the Preliminary Inquiry in this case file. It is attributable to the interplay of the various activities and actions identified in Table I as impinging on the progress of the case between Stages II and III. More importantly that period of 17 months provides a graphic example of the way in which the Preliminary Inquiry halted the progress of the case within Stage IV.

Between 11 December 2007 and 5 March 2008, a period of approximately 3 months had elapsed. This period is attributable to the typing of the depositions; the delivery of the same to the office of the Director of Public Prosecutions; the drafting of the indictment and its preferment to the Registrar of the Supreme Court.

Remarkably, this period corresponds almost exactly to the period identified in Table I for completion of the Principal Stages V, VI and VII. It shows that the progress of the case at these three stages was unaffected by any untoward delay.

Between 5 March 2008 and 28 March 2008, the case was set for trial at the Plea and Directions Hearing to commence on 28 March 2008. On that date the Accused was arraigned and pleaded “not guilty.” The hearing was adjourned to 14 April 2008 to afford the Accused an opportunity to be represented by counsel at his trial.

To date, some 15 months later, the trial has not yet started. There have been 5 adjournments; all requested by the Accused and related to his inability to properly retain legal counsel. The trial is now scheduled to commence on 23 June 2009.

The case file shows that some 67 months have elapsed since the Accused A.B. was charged with the offences of possession of a firearm,

ammunition and cocaine. It also shows that major periods of delay are located within the investigative and preparatory stages up to the commencement of the Preliminary Inquiry (33 months) and its completion (17 months). Moreover, although 15 months have already elapsed since the completion of the Preliminary Inquiry, to date the trial has not yet started.

Chronological Steps to Trial—Case file No. 2

Case file No. 2 is that of “*The Queen v C.D. and E.F.*” The Accused C.D. and E.F. were charged on 4 May 2001 and 17 October 2002 respectively with the offences of wounding with intent and unlawful wounding. The alleged offences were committed on 27 April 2001.

Table III below sets out in chronological order the steps taken to advance the case to trial as extracted from the case file.

Table III: Chronological Steps Taken to Advance Case file No. 2 to Trial

Date	Nature of Step Taken
4 May 2001	Accused C.D. charged with offences
17 October 2002	Accused E.F. charged with offences (Accused E.F. could not be found)
13 May 2005	Commencement of Preliminary Inquiry.
23 January 2006	Completion of Preliminary Inquiry.
30 January 2006	Committal of both Accused to stand trial.

17 August 2006	Depositions delivered to office of Director of Public Prosecutions.
21 September 2006	Preferment of Indictment to Registrar of Supreme Court for signing and service upon both Accused.
18 September 2007	Matter called before Judge. Both Accused present and represented by counsel. Matter set for trial on 22 October 2007.
22 October 2007	Matter called before Judge. Both Accused present. Adjournment requested by counsel for Accused. Matter adjourned to 14 December 2007 for trial.
14 December 2007	Matter called before Judge. Both Accused present. Counsel for both Accused absent. Matter adjourned to 28 March 2008.
28 March 2008	Matter called before Judge. Accused C.D. absent. Accused E.F. present. Accused E.F. advised court of a change of his counsel. Matter set for mention on 11 April 2008.
11 April 2008	Matter called before Judge. Both Accused absent. No counsel present. Set for mention on 29 September 2008.
29 September 2008	Matter called before Judge. New counsel for both Accused and Accused present. Matter set for trial on 4 November 2008.
4 November 2008	Matter not called. Both Accused and counsel for both accused absent. Prosecution informed that both Accused and virtual complainant were discussing possible settlement.

28 January 2009	Matter called before Judge. Accused C.D. absent. Accused E.F. produced a medical certificate on behalf of Accused C.D. Counsel for both Accused present. Matter set for trial on 23 March 2009.
23 March 2009	Matter was not called in court as another trial was in progress.

The trial history of this case from 18 September 2007 was also provided by the prosecuting counsel assigned to the case. Prosecuting counsel has advised that the matter will be heard in July 2009.

Between 4 May 2001 (when Accused C.D. charged) and 13 May 2005 when the Preliminary Inquiry commenced, a period of 48 months had elapsed. In the case of Accused E.F. a period of 31 months had elapsed.

The period which elapsed under Stages II and III in this case reflects the ongoing police investigation hampered by the difficulties in finding the co-accused E.F. and the severity of injuries sustained by the virtual complainant which required hospitalisation and surgery as late as 2004.

Between 13 May 2005 and 23 January 2006 a period of approximately 8 months had elapsed. That period represents the time taken to complete the Preliminary Inquiry. As in Case file No.1 the length of this period is attributable to the interplay of the various factors identified in Table I as factors with high potential for delaying the progress of the trial within Stage

IV. However, in Case file No.2 the time taken for completion of the Preliminary Inquiry was half as long as for Case file No 1. This wide variance is a telling commentary on the potential of these delaying factors. It was not possible to discover from the case file the reason for the shorter completion of the Preliminary Inquiry in Case file No.2. A generous assumption may be that the Preliminary Inquiry in this case file was fast tracked, given that a period of 48 months and 31 months respectively had already elapsed since the accused men had been charged.

Between 30 January 2006 and 21 September 2006, a period of approximately 9 months had elapsed. This period is assigned to the typing of the depositions, the delivery of the same to the office of the Director of Public Prosecutions, the drafting of the indictment, and its preferment to the Registrar of the Supreme Court.

A period of 7 months had elapsed between the committal of the accused and delivery of the depositions to the office of the Director of Public Prosecutions. The length of this period contrasts sharply with the period of 2 ½ months in Case file No. 1. However, no cause for this wide variance could be discovered from the case file.

As in Case file No 1, the drafting and preferment of the indictment by the Director of Public Prosecutions for Case file No. 2 took just over 1

month for completion. This confirms that within Stages VI and VII, in particular, the progress of the case to trial was unaffected by any untoward delay.

Between 21 September 2006 and 18 September 2007 a period of just under 12 months elapsed before the matter was called before a Judge and a date fixed for trial on 22 October 2007. Again, no cause for the lapse of this long period could be discovered from the case file.

Between 22 October 2007 and 23 March 2009 some 17 months have elapsed and the trial has not started. There have been 9 adjournments: some requested by defence counsel; others caused by the non-appearance of one co-accused or of both accused, or of defence counsel and the final adjournment by the non-completion of a trial in progress. It is difficult to resist drawing the inference that deliberate efforts were being made by the accused to frustrate the hearing.

Case file No. 2 shows that 101 months and 81 months respectively have elapsed since C.D. and E.F. were charged with the offences of wounding with intent and unlawful wounding. As in Case file No. 1, it confirms that major periods of delay are located within the investigative and preparatory stages up to the commencement of the Preliminary Inquiry and its completion. But Case file No. 2 goes beyond this. It shows that

adjournments, the non-appearance of the accused or counsel for the accused operated to impede the progress of the trial. It also shows that other factors, not obvious from the case file without further probing may have operated to impede the progress of the trial.

Impact of Stages on Completion of the trial

From the analysis, it is reasonable and safe to infer that Stage II (police investigation and preparation of the police file); Stage III (pre-trial disclosure); Stage IV (the Preliminary Inquiry); and Stage IX (hearing of the trial) impeded the progress of the trials and by extension their completion.

These inferences are supported both by the activities and actions identified by the resource persons as impinging on the progress of the trial and the range of time allocated by these persons to each of the stages of a criminal trial.

That the police investigation and the preparation of the police file impede the progress of a criminal trial were recognised by Commissioner of Police Dottin in a paper presented by him at the Judicial Retreat 2007 entitled “Delays in the Criminal Justice System Causes and Suggested Solutions.” There, he acknowledged that the challenges confronting the police force derive in the main from:

- “The hierarchical nature of the Force,
- Several layers of supervision; and

- [Its] organisational culture.” (p. 4)

and that the hierarchical structure “impacted on the management of case files as junior officers were required to routinely submit files to supervisors for instructions and guidance during the life of an investigation” (p.4) .

Commissioner Dottin also identified the volume of the case load within the Force and the absence of an equitable distribution of the case load as a “major deficiency.” (p. 5). He illustrated the magnitude of the problem in this way:

“... [It is normal] to find in excess of fifty (50) case files being assigned to one officer for investigation at the same time...the net result of all of this could be substandard investigation, substandard information on files and late submission of case files. Collectively all of these negatively impact the criminal justice system.”

Among the other factors identified by Commissioner Dottin as contributing to delays in criminal trials are:

- the unavailability of exhibits especially those submitted for forensic testing;
- the volume of requests to the Force for pre-trial disclosure; and
- the difficulty in obtaining statements from the Accident and Emergency staff and medical records of victims required to determine the offence with which to charge the accused.

Further, the stages identified in Case files No. 1 and 2 and the weightings given to these stages as impeding the progress of the trial and its

completion were also supported in other presentations made at the Judicial Retreat and in particular that of the Deputy Director of Public Prosecutions.

Suggestions for reduction of delay in the case files

In the two case files much of the delays might have been reduced time-wise and their effects mitigated by:

1. Early submission of exhibits by the investigating officers to the forensic centre for forensic analysis;
2. Closer collaboration among the investigating officers and the forensic centre in order to follow up on the availability of the results of the forensic analysis and timely collection of those results from the forensic centre;
3. Timely completion of the police investigation and completion of police file and pre-trial disclosure taking into account the caseload of the investigating officers; the difficulty of finding co-accused for charging at the same time; and the medical status of the virtual complainant;
4. Leadership in managing and monitoring police files to ensure timely delivery to the office of the Director of Public Prosecutions; and
5. Firm control of the Preliminary Inquiry in the Magistrate's court and of the trial in the High Court, to discourage trivial and time-wasting adjournments.

Conclusion

The major delays shown in both case files occurred within Stages II and III (police investigation and preparation of police file); the Preliminary

Inquiry (Stage IV) and the trial itself (Stage IX). Some countries in the Caribbean and the Commonwealth have abolished the Preliminary Inquiry.

In a “Discussion Paper on Reform of Committal Proceedings” prepared in November of 2008 by the Director of Public Prosecutions, Mr. Charles Leacock Q.C. he strongly recommended its abolition in Barbados and compulsory recourse to the Paper Committal Procedure provided by s. 20 of the *Magistrates Court Act, Cap 116A*.

Recently, the Attorney General of Barbados, the Honourable Freundel Stuart stated that reform in this area is under active consideration by his office. In Barbados the abolition of the Preliminary Inquiry would have an immediate and salutary effect on the length of time now taken for completion of a criminal trial in the High Court.