

THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

SAINT CHRISTOPHER AND NEVIS

SKBHCVAP2018/0023

BETWEEN

TIMOTHY ABBOTT

Appellant

and

THE ATTORNEY GENERAL OF ST. CHRISTOPHER AND NEVIS

Respondent

Before:

The Hon. Mde. Vicki-Ann Ellis
The Hon. Mr. Eddy D. Ventose
The Hon. Mr. Gerard St. C. Farara

Justice of Appeal
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. Glenford Hamilton for the appellant
Mrs. Simone Bullen-Thompson for the respondent

2024: February 28
June 5

Civil appeal – Constitutional law – Section 18 of the Constitution of Saint Christopher and Nevis - Abuse of process – Parallel legal remedy - Whether seeking constitutional relief amounted to an abuse of process – Section 35 of the Eastern Caribbean Supreme Court (Saint Christopher and Nevis) Act – Whether learned judge erred in not dismissing the application by way of originating motion – Whether learned judge erred in not granting further relief by way of damages to the appellant in respect of the infringement of constitutional rights

On 15th April 2011, the appellant was convicted of fraudulently converting US\$2,220.00 to his own will and benefit and was sentenced to nine (9) months imprisonment with hard labour. He served six (6) months imprisonment then appealed to the Court of Appeal against his conviction and sentence. The issues before the Court included whether the learned magistrate erred in failing to give the appellant an opportunity to elect whether to be tried by jury or to have his case dealt with summarily, contrary to section 51 of the Magistrate's Code of Procedure Act of Saint Christopher and Nevis ("MCPA") and whether the decision of the learned magistrate was unreasonable or cannot be supported by the evidence. The appeal was allowed by the Court.

On 30th June 2016, the appellant filed an application by way of originating motion in which he sought various constitutional reliefs. In a written judgment dated 11th September 2018, the learned trial judge considered four issues. The first issue concerned the extent of the magistrate's jurisdiction under section 51 of the MCPA when faced with an indictable offence under section 19(1)(c) of the MCPA. The learned judge concluded that a magistrate does not have the power or discretion to change an indictable offence to a summary trial. The second and third issues considered by the learned trial judge were as follows: (i) whether there was a breach of the appellant's constitutional right to have a fair trial arising from the magistrate's decision to proceed to conduct the hearing in a way which deprived the appellant of counsel being able to cross-examine certain prosecution witnesses; and (ii) whether there was a breach of the appellant's constitutional rights arising from the magistrate's decision to decline to give the appellant the option to elect whether to be tried by a jury or summarily contrary to section 51 of the MCPA.

In relation to the second and third issues, the learned trial judge explained that section 10(1) of the Constitution guarantees to any person charged with a criminal offence the right to a fair hearing and that the appellant had established that he was entitled to a declaration that his constitutional right to a fair hearing was infringed because of procedural errors on the part of the learned magistrate. Notwithstanding, the learned judge then determined that the appellant had not established that he was entitled to an award of monetary compensatory or vindictory damages primarily as the appellant had already availed himself of the alternative remedy provided for under section 18 of the Constitution by appealing the decision of the learned magistrate which was allowed, his conviction was quashed and he was reinstated in his job and paid his back salary. Further, the learned judge considered that an error of substantive law made by a judge or magistrate resulting in a wrongful imprisonment would not amount to a denial of due process of law, and that such error did not constitute a ground of redress for the contravention of the constitutional right not to be deprived of liberty except by due process of law.

Dissatisfied with the learned judge's decision, the appellant appealed. The main issues before the Court is first, whether the learned trial judge erred in not dismissing the application by way of originating motion and whether the learned trial judge erred in finding that the appellant was not entitled to an award of damages for breach of any constitutional rights arising from the violation of his right to fair hearing or his right to freedom of liberty under

section 18 of the Constitution when he appealed successfully his sentence and conviction by the learned magistrate to the Court of Appeal.

Held: allowing the appeal against the decision of the learned trial judge, setting aside the orders made at subparagraphs 1 and 2 of paragraph [30] of the decision of the learned trial judge and substituting the following: “the application by way of originating motion is dismissed as an abuse or misuse of the court’s process”, and ordering each party to bear their own costs in the appeal, that:

1. Section 35(1)(a) of the Eastern Caribbean Supreme Court (Saint Christopher and Nevis) Act empowers the Court of Appeal to make any order which ought to have been made by the High Court. Pursuant to section 35(2), this power can be exercised even if no notice of appeal or counter notice was filed in respect of part of the decision of the High Court or that any ground for allowing the appeal or for affirming or varying the decision of that of the High Court is not specified in such notice. This power, however, cannot be exercised without allowing the parties to be heard in circumstances where it may prejudice either party to the appeal.

Sections 35(1) and 35(2) of the **Eastern Caribbean Supreme Court (Saint Christopher and Nevis) Act** Cap 3.11 of the Revised Laws of Saint Christopher and Nevis 2009; **Hannays v Baldeosingh** [1992] 1 WLR 395 considered; **Caribbean Welding Supplies Ltd v Attorney General of Trinidad and Tobago** [2024] UKPC 7 applied.

2. A claim for constitutional relief does not ordinarily offer an alternative means of challenging a conviction or a judicial decision, nor an additional means where such a challenge, based on constitutional grounds, has been made and rejected. In this appeal, the appellant had not raised in his grounds of appeal against his conviction, any constitutional issue. However, one of the issues considered by the Court of Appeal in his first appeal was whether the learned magistrate’s decision to proceed in a manner which deprived the appellant of an opportunity to have counsel cross-examine certain prosecution witnesses breached his right to a fair trial. Applying the established principles in this area of constitutional law would have required the learned trial judge to refuse the appellant any constitutional relief on the basis that the remedy for any errors of law (either procedural or substantive) is to appeal to the Court of Appeal, and that errors of procedure (even where they include a failure to observe one (or more) of the fundamental rules of natural justice) did not give the appellant a right to constitutional redress under section 18 of the Constitution.

Harrikissoon v Attorney General of Trinidad and Tobago [1980] A.C. 265 considered; **Mathew McMillan v Alonzo Carty et al** SKBHCV2017/0380 (delivered 20th November 2018, unreported) considered; **Jaroo v Attorney General of Trinidad and Tobago** [2002] UKPC 5 considered; **Chokoling v Attorney**

General of Trinidad and Tobago [1981] 1 WLR 106 applied; **Maharaj v Attorney General of Trinidad and Tobago (No 2)** [1979] AC 385 applied; **Independent Publishing Co. Ltd. v Attorney General of Trinidad and Tobago** [2004] UKPC 26 considered; **Hinds v Attorney General of Barbados** [2001] UKPC 56 considered; **Naidike v Attorney General of Trinidad and Tobago** [2004] UKPC 49 considered.

3. To seek constitutional relief where there is a parallel legal remedy will be an abuse of the court's process in the absence of some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. In this case, the learned judge did not find any circumstances of the appellant's case that included any feature which, at least arguably, indicated that the means of legal redress otherwise available would not be adequate. The alternative means available to the appellant (by way of appeal to the Court of Appeal) to challenge his conviction and sentence were already exhausted by the appellant when he filed his application by originating motion. By seeking such relief in the clear absence of such a feature amounted to a clear abuse of the court's process and the learned trial judge ought to have dismissed the application by way of originating motion.

Independent Publishing Co. Ltd. v Attorney General of Trinidad and Tobago [2004] UKPC 26 considered; **Hinds v Attorney General of Barbados** [2001] UKPC 56 considered; **Brandt v Commissioner of Police and others** [2021] UKPC 12 considered.

4. In any event, the appellant's grounds of appeal have no merit because the learned trial judge exercised her discretion properly in not granting any further relief by way of damages to the appellant in respect of the infringement of his constitutional rights. The learned judge was correct in stating that the exercise by the appellant of his right of appeal would have been sufficient in the circumstances. Consequently, it cannot be said that the learned trial judge erred in the exercise of her discretion to refuse the award of damages to the appellant.

R v Piggott (2015) 88 WIR 299 distinguished.

JUDGMENT

- [1] **VENTOSE JA:** This is an appeal filed by the appellant on 3rd October 2018 against the decision of the learned trial judge dated 11th September 2018 in which she held that although the appellant had established that he was entitled to a declaration that his constitutional right to a fair hearing was contravened because of the procedural

errors by the learned magistrate, the appellant was not entitled to an award of monetary compensatory or vindictory damages under the **Constitution of Saint Christopher and Nevis**¹ (the “**Constitution**”).

Background

- [2] The circumstances giving rise to the appeal are as follows. The appellant, a former police officer, was convicted on 15th April 2011 of fraudulently converting US\$2,220.00 to his own will and benefit and was sentenced to nine (9) months imprisonment with hard labour but he only served six (6) months imprisonment. The appellant appealed against his conviction and sentence to the Court of Appeal on the following grounds: (1) that the decision of the learned magistrate was unreasonable, or cannot be supported having regard to the evidence; (2) that the conviction and sentence were based on a wrong principle, or was such that a magistrate viewing the circumstances reasonably could not properly have so decided; (3) that the sentence imposed was unduly unfair; and (4) that the learned magistrate erred in law in not affording the appellant an opportunity to elect whether he wished to be tried in the Magistrate’s Court or High Court.
- [3] The digest of the Court of Appeal’s decision reveal that the issues before the Court were as follows: (1) whether the learned magistrate erred in failing to give the appellant an opportunity to elect whether to be tried by jury or to have his case dealt with summarily, contrary to section 51 of the **Magistrate’s Code of Procedure Act**² (the “**MCPA**”); (2) whether the learned magistrate’s decision to proceed in a manner which deprived the appellant of an opportunity to have his counsel cross-examine certain prosecution witnesses breached the appellant’s right to a fair trial; (3) whether the decision of the learned magistrate was unreasonable or cannot be supported having regard to the evidence; (4) whether the appellant’s conviction and sentence were based on a wrong principle or were such that a magistrate viewing the

¹ Enacted as Schedule 1 to the Saint Christopher and Nevis Constitution Order, 1983 S.I. No. 881 of 1983, which is the Fourth Schedule to the West Indies Act Cap 1.01 of the Revised Laws of Saint Christopher and Nevis 2017.

² Cap 3.17 of the Revised Laws of Saint Christopher and Nevis 2009.

circumstances reasonably could not properly have so decided; and (5) whether the sentence of nine (9) months imprisonment with hard labour imposed by the learned magistrate was unduly severe. The Court of Appeal delivered an oral ruling on 30th October 2014 in which it allowed the appeal but there are no records of the reasoning of the Court for its decision.

[4] The appellant then filed, on 30th June 2016, an application by way of originating motion in which he sought various reliefs as follows:

- (1) A declaration that his constitutional right to a fair hearing was violated by the learned magistrate, when she misinterpreted section 77 of the [MCPA] and did not allow him to elect for his case to be tried in the High Court of Justice before a judge and jury of his peers.
- (2) A declaration that his constitutional right to legal representation in a criminal proceeding, a case in which his liberty was at stake, was violated by the learned magistrate when she failed to grant his request for an adjournment because his lawyer was otherwise unavailable in the High Court.
- (3) A declaration that the learned magistrate violated his constitutional rights to have examined witnesses against him under the same conditions as witnesses for him when she arbitrarily decided not to recall a witness that gave evidence in the preliminary enquiry, as a witness; in the summary trial.
- (4) A declaration that the learned magistrate violated the claimant's constitutional right to be given adequate time to prepare for his defence, when she arbitrarily decided to proceed summarily in his case, rather than by a preliminary enquiry.

- (5) A declaration that his constitutional rights were violated when the learned magistrate wrongly convicted him, and imposed a harsher sentence than fitted the crime.
- (6) A declaration that his imprisonment at Her Majesty's Prison (HMP) for a period of six months violated his constitutional right to personal liberty, and was in contravention of his right as a citizen of St. Kitts and Nevis.
- (7) A declaration that he is entitled to compensation for the unconstitutional deprivation of his rights and liberties, and for his right to a fair hearing.
- (8) An order that he be paid compensation and vindictory damage for the violation of his constitutional rights and freedom and for the injustice done to him.
- (9) An order for further or any other relief as may be just.
- (10) An order for costs.

The Judgment in the court Below

- [5] In a written judgment dated 11th September 2018, the learned trial judge considered four issues. The first was the extent of the magistrate's jurisdiction under section 51 of the **MCPA** when faced with an indictable offence under section 19(1)(c) of the **MCPA**. The learned trial judge concluded that a magistrate: (1) does not have the power or discretion to change an indictable trial to a summary trial; (2) can abstain from trying an offence summarily and may commit the offender for trial of an indictable offence; and (3) is not empowered to convert an indictment to a summary trial under section 77 of the **MCPA**. The second and third issues considered by the learned trial judge were as follows (i) whether there was a breach of the appellant's constitutional right to have a fair trial arising from the magistrate's decision to proceed

to conduct the hearing in a way which deprived the appellant of counsel being able to cross-examine certain prosecution witnesses; and (ii) whether there was a breach of the appellant's constitutional rights arising from the magistrate's decision to decline to give the appellant the option to elect whether to be tried by a jury or summarily contrary to section 51 of the **MCPA**.

[6] The learned trial judge, in relation to the second and third issues, explained that section 10(1) of the **Constitution** guarantees to any person charged with a criminal offence the right to: (a) a fair hearing, (b) adequate time to defend himself; (c) facilities to examine in, person or by legal representative, the witnesses called by the prosecution, and (d) carry out the examination of witnesses to testify on his behalf on the same conditions as those applying to witnesses called by the prosecution. The learned trial judge also explained that: (1) if a defendant is not allowed to exercise his option to elect his mode of trial; and/or (2) if a new charge is put to a defendant outside the limitation period so that he is not allowed sufficient time to prepare his defence; and/or (3) if a defendant, by virtue of an abrupt change from indictable trial to summary trial is asked to plea for the purposes of the summary trial, and compelled to give evidence; and/or (4) if no account is taken of the potential difficulties which a defendant might have in cross-examining a witness in a summary trial in the absence of his legal representative, then, in these circumstances, the defendant is denied a fair hearing. The learned trial judge then concluded that, after considering the evidence, the legal principles, and the submissions, the appellant had established that he was entitled to a declaration that his constitutional rights to a fair hearing were infringed because of procedural errors on the part of the learned magistrate.

[7] Notwithstanding this critical finding, the judge went on to determine whether the appellant was entitled to an award of compensatory or vindictory damages. The learned trial judge determined that the appellant had not established that he was entitled to an award of monetary compensatory or vindictory damages under the **Constitution** for the following reasons. First, the appellant had already availed himself of the alternative remedy provided for under section 18 of the **Constitution**

by appealing the decision of the learned magistrate, his appeal was allowed, and his conviction was quashed, he was reinstated in his job, and paid his back salary, which, in the view of the learned trial judge, meant that this should have been the end of the matter. Second, citing **Hinds v Attorney General of Barbados**³ and **R v Pigott**,⁴ the appellant already had the opportunity to raise, at his first appeal to the Court of Appeal, the issue of constitutionality that he was now raising in the High Court. The learned trial judge also noted that the appellant did not ask the Court of Appeal for any declaration relating to constitutionality.

- [8] Third, to hold that the appellant was entitled to compensatory damages in the circumstances of this case would be to declare open the floodgates on the coppers of the consolidated fund defending constitutional claims when the law had provided adequate means of redress by way of appeal to the Court of Appeal which route had already been effectively utilised by the appellant. Fourth, citing **Chokolingo v Attorney General of Trinidad and Tobago**,⁵ the learned judge recited the critical holding in **Chokolingo** that an error of substantive law made by a judge or magistrate resulting in a wrongful imprisonment would not amount to a denial of due process of law, and that such error did not constitute a ground of redress for the contravention of the constitutional right not to be deprived of liberty except by due process of law. The fifth reason was based on a passage from **Maharaj v Attorney General of Trinidad and Tobago (No 2)**⁶ where the Privy Council stated (at p. 399) that:

“In the first place, no human right or fundamental freedom recognised by Chapter I of the Constitution is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person's serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. Where there is no higher court to appeal to then none can say that there was error. The fundamental human right is not to a legal system that is infallible but to one that is fair. It is only errors in procedure that are capable of constituting infringements of the rights protected by section 1 (a); and no mere irregularity in procedure is enough, even though it goes to

³ [2001] UKPC 56; [2002] 1 A.C. 854.

⁴ (2015) 88 WIR 299.

⁵ [1981] 1 WLR 106.

⁶ [1979] AC 385.

jurisdiction; the error must amount to a failure to observe one of the fundamental rules of natural justice. Their Lordships do not believe that this can be anything but a very rare event. ...”

- [9] The learned trial judge continued that the appellant was aware of the nature of the offence charged and, accepting that he was not afforded a fair hearing, he was able to access the appellate jurisdiction which the legal and judicial authorities agree is the correct route to pursue where a defendant in criminal proceedings contends that he was denied a fair hearing. The learned trial judge reiterated that the appellant succeeded in the Court of Appeal, he was compensated by way of reinstatement, given his back pay and that this was sufficient.

The Appeal

- [10] On 3rd October 2018, the appellant lodged five grounds of appeal, namely: (1) the learned trial judge misdirected herself and fell into error when, having rightly found that the appellant’s constitutional rights were infringed, she went on to find that his successful appeal of his conviction and sentence by the magistrate to the Court of Appeal precluded him from bringing an action for constitutional relief; (2) the learned trial judge fell into error and rendered that portion of her decision perverse when she considered that the appellant, having been paid back salary by his employer and having his previous conviction quashed were sufficient vindication and compensation to the appellant for the infringement of his constitutional rights; (3) the learned trial judge misconstrued and misapplied the Privy Council decision in **Hinds v Attorney General of Barbados**;⁷ (4) the portion of the judgment that deals with compensation and/or vindictory damages is unreasonable and flawed by irrelevant considerations and failed to take into account matters which are bound to be considered, for example, the appellant served a full term of imprisonment with hard labour; and (5) the appellant has a good and arguable case.

⁷ (2001) 59 WIR 75.

- [11] The main issue that arises in this appeal is whether the learned trial judge erred in finding that the appellant was not entitled to an award of damages for breach of any constitutional rights arising from the violation of his right to fair hearing or his right to freedom of liberty because he had availed himself of an alternative remedy under section 18 of the **Constitution** when he successfully appealed his sentence and conviction by the learned magistrate to the Court of Appeal. Before I proceed to address this issue, it is important first to consider the proper approach which a court should adopt when a defendant during criminal proceedings or after such proceedings have ended, pursues constitutional relief seeking redress for alleged breaches of his or her fundamental rights and freedoms.

The Relevant Constitutional Provision

- [12] The constitutional provision that is relevant to the issue is as follows:

“18. Enforcement of protective provisions.

(1) If any person alleges that any of the provisions of sections 3 to 17 (inclusive) has been, is being or is likely to be contravened in relation to him or her (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter that is lawfully available, that person (or that other person) may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction

(a) to hear and determine any application made by any person in pursuance of subsection (1); and

(b) to determine any question arising in the case of any person that is referred to it in pursuance of subsection (3)

and may make such declarations and orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 3 to 17 (inclusive):

Provided that the High Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.”

Alternative Remedies in Constitutional Law

- [13] The proviso to section 18 of the **Constitution** is a typical one in the constitutions of most Eastern Caribbean states. It gives the discretionary power to the High Court to

decline the grant of any relief for any alleged contravention of the fundamental rights and freedoms provisions if that person has available to him or her adequate means of redress for that alleged contravention under any other law. If a person has an alternative remedy under any other law, he or she cannot invoke the powers of the High Court under the enforcement section in the **Constitution**. The proviso to section 18 therefore prevents the gateway of the enforcement section from being engaged in the first place. In my view, the proviso in section 18 does not apply where the court has already exercised its discretion to grant constitutional redress that the proviso excludes from being considered by the High Court where the person has an alternative remedy.

- [14] The Privy Council first explored this issue in **Harrikissoon v Attorney General of Trinidad and Tobago**⁸ where the appellant, who was transferred from one school to another by the Teaching Service Commission, brought an application by way of originating motion alleging contraventions of his human rights and fundamental freedoms under section 1 of the 1962 Constitution of Trinidad and Tobago. He failed to first make use of the review procedure under regulation 135 of the Public Service Commission Regulations. Lord Diplock stated (at p. 268) as follows:

“The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter I of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.”

⁸ [1980] A.C. 265, [1979] 3 W.L.R. 62

[15] In **Mathew McMillan v Alonzo Carty et al**⁹ I stated (at paragraph [8]) that Lord Diplock in **Harrikissoon** made three important points in that paragraph. First, the mere failure by a public authority to comply with a law does not of itself mean that there is a breach of the fundamental rights and freedoms found in the Constitution. Second, the redress clause will be devalued or diminished if it is used as a general means of judicial control of executive action. Third, and most importantly, if the allegation is made for the sole purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom, the applicant will not be allowed to invoke the jurisdiction of the court. The latter point is of significance because Lord Diplock was not concerned with administrative actions that do not involve any contravention of any human right or fundamental freedom.

[16] The principle emerging from **Harrikissoon** was applied in **Jaroo v Attorney General of Trinidad and Tobago**¹⁰ where police officers kept the appellant's vehicle in their custody despite repeated requests by him for it to be returned. The vehicle was sent to the police for investigation by the licensing authorities who suspected that it might have been stolen. The appellant sought redress under section 14(1) of the Constitution of Trinidad and Tobago for an order for the return of the vehicle, and damages for contravention of his fundamental rights and freedoms under, among other sections, section 4(a) of the Constitution on the ground that he had been deprived of the enjoyment of his property (his vehicle) without due process of law. The question the Privy Council had to answer was whether the constitutional motion was an abuse of process because of the availability of the parallel remedy of an action for delivery in detinue at common law. Lord Hope of Craighead explained that:

"Abuse Of Process

[29] Nevertheless, it has been made clear more than once by their Lordships' Board that the right to apply to the High Court which section 14(1) of the Constitution provides should be exercised only in exceptional circumstances where there is a parallel remedy. ...

⁹ SKBHCV2017/0380 (delivered 20th November 2018, unreported).

¹⁰ [2002] UKPC 5; [2002] 1 AC 871.

[36] Their Lordships wish to emphasise that the originating motion procedure under section 14(1) is appropriate for use in cases where the facts are not in dispute and questions of law only are in issue. It is wholly unsuitable in cases which depend for their decision on the resolution of disputes as to fact. Disputes of that kind must be resolved by using the procedures which are available in the ordinary courts under the common law. ...

[39] Their Lordships respectfully agree with the Court of Appeal that, before he resorts to this procedure, the applicant must consider the true nature of the right allegedly contravened. He must also consider whether, having regard to all the circumstances of the case, some other procedure either under the common law or pursuant to statute might not more conveniently be invoked. If another such procedure is available, resort to the procedure by way of originating motion will be inappropriate and it will be an abuse of the process to resort to it. If, as in this case, it becomes clear after the motion has been filed that the use of the procedure is no longer appropriate, steps should be taken without delay to withdraw the motion from the High Court as its continued use in such circumstances will also be an abuse.”

[17] In **McMillan v Carty et al**,¹¹ I stated (at paragraph [10]) that **Jaroo**, therefore, confirms that: (1) the procedure by way of originating motion should be exercised only in exceptional circumstances where there is a parallel remedy; (2) before resorting to this procedure an applicant must first examine the nature of his claim to determine if there is a parallel remedy at common law or statute; (3) if there is a parallel remedy, resort to the procedure by way of originating motion will be inappropriate and an abuse of process; and (4) if, after the claim is filed, resort to that procedure becomes inappropriate, steps should immediately be taken by the applicant to withdraw the motion, and if it is not withdrawn that will also be an abuse.

[18] The defining feature of the principle recognised in **Harrikissoon** and its progeny is that it applies where the High Court refuses to hear the application by way of originating motion for constitutional redress where there is an adequate remedy available to the person at common law or statute. Where constitutional proceedings are brought, or where they are brought and circumstances change to make resort to the originating procedure inappropriate, and there is a parallel remedy, the

¹¹ Supra n. 10.

constitutional proceedings will be struck out as an abuse of process. In such cases, there will be no determination by the High Court of the merits of the constitutional issues raised in the application by way of originating motion.

[19] Rather than come to a determination that the appellant had an alternative remedy available to him and dismiss his application by way of originating motion for constitutional redress, the learned trial judge found at paragraph [29] that the appellant had established that his constitutional right to a fair hearing was infringed because of procedural errors on the part of the learned magistrate and at paragraph [30] the learned trial judge granted a declaration that the appellant's constitutional right to a fair hearing was violated. The learned trial judge therefore made clear findings on the merits of the appellant's constitutional motion.

[20] Having found that the appellant's constitutional right to a fair hearing was contravened, the question to be determined is whether it was open to the learned trial judge to decline the award of damages to the appellant on the basis that he had already availed himself of the alternative remedy pursuant to section 18 of the **Constitution** by successfully appealing the decision of the learned magistrate to the Court of Appeal. Before doing so, I will also address the approach of the court when an applicant brings constitutional proceedings for redress concerning errors of law (whether substantive or procedural) where he or she has a right of appeal or where he has already exercised his or her right of appeal.

Errors of Law by Judicial Officers

[21] It will be remembered that the learned trial judge cited **Chokoling** for the view that an error of substantive law made by a judge or magistrate resulting in a wrongful imprisonment would not amount to a denial of due process of law and that such error does not constitute a ground of redress for the contravention of the constitutional right not to be deprived of liberty except by due process of law. This principle originates from a statement of Lord Diplock in **Maharaj (No. 2)** where the appellant was sentenced to 7 days imprisonment by a trial judge for contempt. He brought

constitutional proceedings alleging a contravention of his right under section 1(a) of the Constitution of Trinidad and Tobago not to be deprived of his right to liberty except by due process of law. The constitutional motion was dismissed by the High Court. While the constitutional proceedings were in progress, the appellant appealed, with leave of the Judicial Committee, the order of committal of the trial judge. There was no right of appeal to the Court of Appeal from a finding of contempt by a High Court Judge. The Court of Appeal also dismissed his appeal and the appellant appealed to the Judicial Committee of the Privy Council. In the section of the judgment delivered by Lord Diplock dealing with remedies, the following important statement of principle was made (at 399-400):

“In the first place, no human right or fundamental freedom recognised by Chapter I of the Constitution is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the error has resulted in a person's serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. Where there is no higher court to appeal to then none can say that there was error. The fundamental human right is not to a legal system that is infallible but to one that is fair. It is only errors in procedure that are capable of constituting infringements of the rights protected by section 1(a); and no mere irregularity in procedure is enough, even though it goes to jurisdiction; the error must amount to a failure to observe one of the fundamental rules of natural justice. Their Lordships do not believe that this can be anything but a very rare event. In the second place, no change is involved in the rule that a judge cannot be made personally liable for what he has done when acting or purporting to act in a judicial capacity. The claim for redress under section 6 (1) for what has been done by a judge is a claim against the state for what has been done in the exercise of the judicial power of the state. This is not vicarious liability; it is a liability of the state itself. It is not a liability in tort at all; it is a liability in the public law of the state, not of the judge himself, which has been newly created by section 6 (1) and (2) of the Constitution. In the third place, even a failure by a judge to observe one of the fundamental rules of natural justice does not bring the case within section 6 unless it has resulted, is resulting or is likely to result, in a person being deprived of life, liberty, security of the person or enjoyment of property. It is only in the case of imprisonment or corporal punishment already undergone before an appeal can be heard that the consequences of the judgment or order cannot be put right on appeal to an appellate court. It is true that instead of, or even as well as, pursuing the ordinary course of appealing directly to an appellate court, a party to legal proceedings who alleges that a fundamental rule of natural justice has been infringed in the course of the determination of his case, could in theory seek collateral relief in an application to the High Court under section 6 (1) with

a further right of appeal to the Court of Appeal under section 6 (4). The High Court, however, has ample powers, both inherent and under section 6 (2), to prevent its process being misused in this way; for example, it could stay proceedings under section 6 (1) until an appeal against the judgment or order complained of had been disposed of.”

[22] In that passage, Lord Diplock emphasizes that, first, the fundamental rights provisions are not implicated when a person has spent time in prison in respect of a judgment or order that is wrong or liable to be set aside for error of law or fact. Second, the only remedy in such cases is an appeal to a higher court if there is one. Third, the fundamental human right is not to a legal system that is infallible but to one that is fair. Fourth, only errors that amount to a failure to observe one of the fundamental rules of natural justice would offend section 1(a) of the Constitution of Trinidad and Tobago. An attempt by a litigant to bring proceedings in the High Court seeking constitutional relief in circumstances where an appeal lay directly to the Court of Appeal would be an abuse of process and the High Court can, under both its inherent powers and the enforcement section, prevent its processes from being abused. Any such constitutional motion will be struck out as an abuse of process. **Maharaj (No. 2)** emphasizes that errors of fact and law made by a judicial officer will not engage the fundamental rights and freedom provisions of the Constitution, except for a failure to observe one of the fundamental rules of natural justice. It is this exception that lies at the core of the reasoning in **Maharaj (No. 2)**.

[23] The Privy Council accepted that it was contrary to natural justice for the appellant to not be given an opportunity to answer the charge against him. Consequently, there was a breach of the appellant’s fundamental rights and freedoms under the Constitution by depriving him of his liberty without due process of law and for that contravention of his constitutional right, he was entitled to redress under section 6 of the Constitution of Trinidad and Tobago.

[24] In **Chokoling**, the appellant was committed to prison for 21 days for contempt. Rather than appeal his committal to the Court of Appeal, two and a half years later, the appellant applied to the High Court for redress seeking a declaration that he had

been deprived of his liberty without due process of law contrary to section 1(a) of the Constitution of Trinidad and Tobago on the basis that his conduct could not have constituted a contempt in law. Lord Diplock explained (at p. 111-112) that:

“Acceptance of the applicant's argument would have the consequence that in every criminal case, in which a person who had been convicted alleged that the judge had made any error of substantive law as to the necessary characteristics of the offence, there would be parallel remedies available to him: one by appeal to the Court of Appeal, the other by originating application under section 6 (1) of the Constitution to the High Court with further rights of appeal to the Court of Appeal and to the Judicial Committee. These parallel remedies would be also cumulative since the right to apply for redress under section 6 (1) is stated to be “without prejudice to any other action with respect to the same matter which is lawfully available.” The convicted person having exercised unsuccessfully his right of appeal to a higher court, the Court of Appeal, he could nevertheless launch a collateral attack (it may be years later) upon a judgment that the Court of Appeal had upheld, by making an application for redress under section 6 (1) to a court of co-ordinate jurisdiction, the High Court. To give to Chapter I of the Constitution an interpretation which would lead to this result would, in their Lordships' view, be quite irrational and subversive of the rule of law which it is a declared purpose of the Constitution to enshrine.”

[25] The Privy Council held that, even if there had been an error of substantive law in the decision, the appellant had been deprived of his liberty by due process of law in accordance with the provisions of section 1 of the Constitution. The errors of substantive law made by the trial judge did not fall within the exception, recognised in **Maharaj (No. 2)** for a failure to observe one of the fundamental rules of natural justice. The Privy Council, in dismissing the appeal, held that the application by way of originating motion made under section 6(1) of the Constitution of Trinidad and Tobago was misconceived.

[26] The words of the Privy Council in **Chokoling** must be remembered, namely, that to allow an applicant to bring collateral constitutional proceedings for redress under the Constitution after his unsuccessful appeal against conviction would be irrational and subversive to the rule of law that is an enshrined declared purpose of the Constitution. The decision in **Chokoling** reiterates the statement made by Lord Diplock in **Maharaj (No. 2)** that the appropriate method by which an applicant should

challenge a decision of a court which he believes has erred in law is through the appellate process, not through a collateral challenge seeking redress for infringements of the human rights and fundamental freedoms provisions of the Constitution. The effect of **Maharaj (No. 2)** and **Chokolingo** is that a person is precluded from bringing an application by way of originating motion for constitutional redress concerning errors of law or fact made by a trial judge or magistrate when the appeal process provides a parallel remedy. However, in the instant appeal, the learned trial judge did not dismiss or strike out the appellant's constitutional motion as misconceived or an abuse of process applying **Maharaj (No. 2)** and **Chokolingo**. The learned trial judge, as mentioned earlier, granted the appellant a declaration that his constitutional rights had been infringed, because the facts fell within the exception accepted in **Maharaj (No. 2)** in that they that involved more than one failure to observe the fundamental rules of natural justice.

- [27] Recent decisions of the Privy Council have cast some doubt as to the continued correctness of the exception recognised in **Maharaj (No. 2)** concerning a failure to observe one of the fundamental rules of natural justice. In **Independent Publishing Co. Ltd. v Attorney General of Trinidad and Tobago**,¹² the trial judge made a first order postponing the report of a criminal trial, which the appellant journalists breached by publishing reports alluding to those matters. After a hearing and conviction of the two journalists for contempt of court, the trial judge made a second order prohibiting until further notice, the publication of any reference to the contempt proceedings. Two journalists and two newspaper publishers sought redress under section 14 of the Constitution of Trinidad and Tobago arguing that, first, the trial judge had no power to make the postponement orders; and, second, the orders infringed their freedom of speech and the freedom of the press under section 4(i) and (k) of the Constitution; and, third, in the case of the two journalists, that their convictions and sentences infringed their right under section 4(a) of the Constitution not to be deprived of their liberty or property except by due process of law. The trial judge rejected the constitutional motion and aspects of her judgment were upheld on

¹² [2004] UKPC 26; [2005] 1 A.C. 190.

appeal by the Court of Appeal of Trinidad and Tobago. On further appeal, the Privy Council had to reconsider the scope of the **Chokolingo** principle. It must be remembered that before **Independent Publishing**, constitutional redress was only available for errors made by a judicial officer during court proceedings, as mentioned above, for fundamental errors of procedure made by a judge that infringe constitutional rights: **Maharaj (No. 2)**. An error of substantive law that resulted in a wrongful imprisonment which was later set aside is not actionable under the Constitution: **Chokolingo**.

- [28] The Privy Council in **Independent Publishing** examined the principles emerging from **Chokolingo** and its progeny in some detail, stating at the outset that:

“[76] Correctly analysed, the authorities (including those referred to below) establish that it is only when a constitutional motion is properly to be regarded as an abuse of the court’s process that it will be dismissed by reference to some other available remedy.”

The Privy Council held that the newspapers’ application for declaratory relief by way of constitutional motion was not an abuse of process and that it would grant the appellants no constitutional redress beyond a declaration that the right to free expression should not be further contravened by non-publication orders made in excess of the court’s jurisdiction.

- [29] The Privy Council noted that the difference between the journalists and the corporate appellants was that the former, unlike the latter, had the opportunity to dispute the constitutionality of the first order but not the second order in the course of appealing against their contempt convictions. The respondents, relying on **Chokolingo**, argued that “the appellant journalists should not be entitled to constitutional redress even though their contempt convictions were founded upon breaches of an order which the judge mistakenly thought he had power to make”. The Privy Council explained that:

“[80] The respondents argued that by the same token that the Privy Council held Mr Chokolingo not to have been entitled to constitutional relief even had the judge committed him to prison for contempt of court upon a misunderstanding of the law, so too here the appellant journalists should

not be entitled to constitutional redress even though their contempt convictions were founded upon breaches of an order which the judge mistakenly thought he had power to make.

[81] **Chokolingo**, however, cannot in their Lordships' view be understood as deciding that in no case where the judge errs in determining the ingredients of a particular offence will it be open to the aggrieved citizen to seek a declaration of the true legal position by constitutional motion. Despite the reference in Lord Diplock's judgment to the appellant's argument being based on his imprisonment "for exercising his constitutional rights of freedom of expression and freedom of the press", the essential rights being pursued there were those of due process and the protection of the law. The passage just cited from Lord Diplock's judgment was immediately preceded by reference to what he had earlier said in **Maharaj v Attorney General of Trinidad and Tobago (No 2)** [1979] AC 385, 399, [1978] 2 All ER 670 (Maharaj No 2.), namely that the fundamental human right guaranteed by the right to due process and protection of the law "is not to a legal system that is infallible but to one that is fair."

[82] Their Lordships do not regard **Chokolingo** as authority for denying constitutional relief to those like the appellant journalists concerned not with making a parallel or collateral attack on their contempt convictions (which had already been set aside) but rather with vindicating and securing for the future their right to free expression. These appellants too are entitled to a declaration that this right should not hereafter be contravened by non-publication orders made in excess of the court's jurisdiction."

- [30] Having found that the appellant journalists were not precluded by **Chokolingo** from seeking constitutional relief, the other question for the Privy Council was whether Mr. Ali, one of the appellant journalists, was entitled to constitutional redress for the violation of his right to due process. The Privy Council then examined in detail **Maharaj (No. 2)** including the following paragraph of the dissenting judgment of Lord Hailsham of St. Marylebone in **Maharaj (No. 2)** where he stated (at pp. 408-409) that:

"I am, of course, not to be understood as suggesting that a notice of motion under section 6 was an inappropriate procedure in so far as it claims a declaration. It was in fact an alternative to the appeal to the Privy Council. It was not as beneficial to the appellant, as the appeal to the Privy Council ultimately proved, as the Privy Council has jurisdiction to declare (as the High Court probably would not have had) not merely that the appellant had been deprived of due process, but that he was actually innocent of the charge. I am simply saying that, on the view I take, the expression "redress" in subsection (1) of section 6, and the expression "enforcement" in subsection (2), although capable of embracing damages where damages

are available as part of the legal consequences of contravention, do not confer and are not in the context capable of being construed so as to confer, a right of damages where they have not hitherto been available, in this case against the state for the judicial errors of a judge. This, in my view, must be so even though the judge has acted as the committing judge was held to have done in the instant case. Such a right of damages has never existed either against the judge or against the state and is not, in my opinion, conferred by section 6.”

[31] The Privy Council in **Independent Publishing** then concluded that:

“[87] Lord Diplock's judgment has been widely understood to allow for constitutional redress, including the payment of compensation, to anyone whose conviction (a) resulted from a procedural error amounting to a failure to observe one of the fundamental rules of natural justice, and (b) resulted in his losing his liberty before an appeal could be heard. That, however, is not their Lordships' view of the effect of the decision. Of critical importance to its true understanding is that Mr Maharaj had no right of appeal to the Court of Appeal against his committal and equally, therefore, no right to apply for bail pending such an appeal.

[88] In deciding whether someone's section 4(a) "right not to be deprived [of their liberty] except by due process of law" has been violated, it is the legal system as a whole which must be looked at, not merely one part of it. The fundamental human right, as Lord Diplock said, is to "a legal system ... that is fair". Where, as in Mr Maharaj's case, there was no avenue of redress (save only an appeal by special leave direct to the Privy Council) from a manifestly unfair committal to prison, then, despite Lord Hailsham's misgivings on the point, one can understand why the legal system should be characterised as unfair. Where, however, as in the present case, Mr Ali was able to secure his release on bail within four days of his committal—indeed, within only one day of his appeal to the Court of Appeal—their Lordships would hold the legal system as a whole to be a fair one.”

[32] On the facts of the case, the Privy Council held that, since Mr. Ali was able to secure his release on bail within four (4) days of his committal and within only one (1) day of his appeal to the Court of Appeal of Trinidad and Tobago, the legal system as a whole was a fair one. The Privy Council then concluded that:

“[89] Once someone committed to prison for contempt of court could appeal in Trinidad and Tobago to the Court of Appeal, and meantime apply for release on bail, his position became essentially no different from that of a person convicted of any other offence. Convicted persons cannot in the ordinary way, even if ultimately successful on appeal, seek constitutional relief in respect of their time in prison. ...

...

[92] Be that as it may, given that Mr Ali had a right of appeal, their Lordships regard him as having enjoyed the benefit of due process. As in **Hinds**, so too here: any shortcomings in the first hearing could be made good on the appeal and by the grant of bail meanwhile. The system as a whole was fair.

[93] Now that rights of appeal exist, indeed, their Lordships see little reason to maintain the original distinctions made in **Maharaj No. 2** (and still relevant, of course, at the time of **Chokolingo**) between fundamental breaches of natural justice, mere procedural irregularities and errors of law—distinctions which in any event were never very satisfactory for the reasons given by Lord Hailsham."

[33] The Privy Council in **Independent Publishing** also referred to its previous decision in **Hinds** where the appellant was charged and convicted of arson. During his trial in the High Court, the appellant in **Hinds** applied to the judge for a legal aid certificate under section 17(d) of the Community Legal Services Act which would entitle him to free legal representation if the judge certified that the case was either of difficulty or involved a point of law of public importance and required the assistance of an attorney on behalf of the applicant for proper determination. The trial judge refused the application. The appellant's trial continued without him receiving legal representation and he was convicted and sentenced to a term of imprisonment. The Court of Appeal of Barbados upheld the decision of the trial judge, holding that the denial of legal representation at the appellant's trial had not infringed his constitutional rights. Following the dismissal of his appeal against conviction, the appellant brought a constitutional motion complaining that his right to a fair trial had been infringed which was dismissed by the High Court and upheld by the Court of Appeal of Barbados.

[34] On further appeal to the Privy Council, the respondents argued that, first, the appellant was attempting to make a collateral attack on his criminal conviction on constitutional grounds, whereas the proper route to do so was by way of an appeal against his conviction. Second, the appellant had unsuccessfully exercised his right of appeal and had relied on constitutional grounds. Third, the principle of *res judicata*

applies to constitutional relief as it does in other forms of claim. The Privy Council stated that:

“[24] On the facts of this case there is, in the opinion of the Board, no answer to Mr Guthrie's submissions. It would be undesirable to stifle or inhibit the grant of constitutional relief in cases where a claim to such relief is established and such relief is unavailable or not readily available through the ordinary avenue of appeal. As it is a living, so must the Constitution be an effective, instrument. But Lord Diplock's salutary warning remains pertinent: a claim for constitutional relief does not ordinarily offer an alternative means of challenging a conviction or a judicial decision, nor an additional means where such a challenge, based on constitutional grounds, has been made and rejected. The applicant's complaint was one to be pursued by way of appeal against conviction, as it was; his appeal having failed, the Barbadian courts were right to hold that he could not try again in fresh proceedings based on section 24.”

The appeal by the appellant in **Hinds** to the Privy Council was therefore dismissed.

[35] The applicable principles are clear: a claim for constitutional relief does not ordinarily offer an alternative means of challenging a conviction or a judicial decision, nor an additional means where such a challenge, based on constitutional grounds, has been made and rejected. It must be noted that the fair hearing issue raised in **Hinds** was precluded from argument because the Constitution of Barbados does not recognise any right to publicly funded legal representation in criminal matters.

[36] The decision of **Independent Publishing** was considered in **Naidike v Attorney General of Trinidad and Tobago**.¹³ In **Naidike**, the appellant was arrested and detained, pending deportation, without a prior ministerial declaration under section 9(4) of the Immigration Act of Trinidad and Tobago that he had ceased to be a permitted entrant. He brought constitutional proceedings claiming, among other things, that his unlawful arrest and detention violated his fundamental human rights and freedoms contrary to section 4(a) of the Constitution of the Republic of Trinidad and Tobago, namely, his right to liberty. The appellant also sought damages by way of redress under section 14 of the Constitution. The appellant was awarded damages

¹³ [2004] UKPC 49; [2005] 1 AC 538.

by the High Court for the wrongful deprivation of his liberty, but this was overturned by the Court of Appeal of Trinidad and Tobago. The appellant appealed to the Privy Council.

- [37] The respondent submitted that the appellant was not entitled to constitutional relief on two grounds: first, because he was not denied “due process of the law” and, secondly, because his appropriate and only proper remedy was in a private law claim for damages for wrongful arrest and false imprisonment. The Privy Council, in allowing the appeal, explained at paragraph [52] that it was “not impressed by either argument”, stating that, in relation to the first, the “reference to ‘the legal system as a whole’ is not apt to encompass loss of liberty through executive action such as was taken in the present case”; and, in respect of the second, that:

“57 In the present case, however, as has already been made clear, the lawfulness of Dr Naidike's arrest and detention turns entirely on the true construction of the legislation. In any event it is now far too late for the respondent to assert abuse of process. If such a point is to be taken, it must be taken at the outset of proceedings, not as here at a comparatively late stage.”

- [38] In this appeal, the appellant had not raised, in his grounds of appeal against his conviction, any constitutional issue. However, as mentioned above, one of the issues considered by the Court of Appeal was whether the learned magistrate's decision to proceed in a manner which deprived the appellant of an opportunity to have counsel cross-examine certain prosecution witnesses breached his right to a fair trial. It is not clear whether the Court of Appeal allowed the appeal on this specific constitutional issue, examined that issue in any detail or made any findings on it. Applying the established principles in this area of constitutional law would have required the learned trial judge to refuse the appellant any constitutional relief on the basis that the remedy for any errors of law (either procedural or substantive) is to appeal to the Court of Appeal, and that errors of procedure (even where they include a failure to observe one (or more) of the fundamental rules of natural justice) did not give the appellant a right to constitutional redress under section 18 of the Constitution.

Conclusions

- [39] In the respondent's affidavit filed on 15th February 2015 in response to the application by way of originating motion filed by the appellant, the respondent noted that the appellant's conviction was quashed by the Court of Appeal on 30th October 2014. However, the respondent did not aver that the appellant should not have brought the constitutional proceedings because he had availed himself successfully of his right to appeal to the Court of Appeal. The respondent answered the substantive matters raised in the originating motion, stating, first, that the appellant was not entitled to a declaration that his constitutional rights were violated because of the errors made by the learned magistrate and, second, that the respondent should not pay compensatory or vindictory damages to the appellant because his fundamental rights and freedoms were not violated. In the pretrial memorandum filed by the respondent on 4th July 2017, the respondent does not take the point that the appellant, having successfully appealed his conviction to the Court Appeal, was precluded from bringing constitutional motion seeking redress for breach of his fundamental rights and freedoms.
- [40] At no point during the hearing of the application by way of originating motion on 5th February 2018 did the respondent argue that the court should dismiss the application by way of originating motion as an abuse of process or as misconceived because the appellant had successfully availed himself of the parallel remedy of appealing his conviction and sentence to the Court of Appeal. In addition, the respondents did not file a counter notice alleging that the learned trial judge erred in not dismissing the application by way of originating motion as an abuse of process in accordance with the learning in the many decisions of the Privy Council where the applicable principles have been carefully outlined.
- [41] Section 35 of the **Eastern Caribbean Supreme Court (Saint Christopher and Nevis) Act**,¹⁴ (the "ECSC Act") provides as follows:

"Powers of Court of Appeal on hearing an appeal.

¹⁴ Cap 3.11 of the Revised Laws of Saint Christopher and Nevis 2009.

35. (1) On the hearing of an appeal from any order of the High Court in any civil cause or matter, the Court of Appeal shall have power to—
- (a) confirm, vary, amend or set aside the order or make such order as the High Court might have made, or to make any order which ought to have been made, and to make such further or other order as the nature of the case may require;
 - (b) draw inferences of fact;
 - (c) direct the High Court to inquire into and certify its findings on any question which the Court of Appeal thinks fit to be determined before final judgment in the appeal.
- (2) The powers of the Court of Appeal under this section may be exercised notwithstanding that no notice of appeal or respondent's notice has been given in respect of any particular part of the decision of the High Court by any particular party to the proceedings in Court or that any ground for allowing the appeal or for affirming or varying the decision of that Court is not specified in such notice; and the Court of Appeal may make any order in such terms as the Court of Appeal thinks just to ensure the determination on the merits of the real question in controversy between the parties.
- (3) The powers of the Court of Appeal in respect of an appeal shall not be restricted by reason of any interlocutory order from which there has been no appeal.
- (4) The Court of Appeal may make such order as to the whole or any part of the costs of an appeal as may be just, and may, in special circumstances, order that such security shall be given for the costs of an appeal as may be just."

[42] Section 35(1) outlines the powers of the Court of Appeal on an appeal from any order of the High Court in any civil case or matter. One of those powers outlined in sub-section 35(1)(a) includes the power to or to make any order which ought to have been made by the High Court. Section 35(2) makes clear that the powers of the Court of Appeal can be exercised even if no notice of appeal or counter notice was filed in respect of part of the decision of the High Court or that any ground for allowing the appeal or for affirming or varying the decision of the High Court is not specified in such notice.

[43] The scope of the equivalent provisions in the Supreme Court of Judicature Act of Trinidad and Tobago were considered by the Privy Council in **Hannays v Baldeosingh**¹⁵ where one of the two questions considered was the extent of the

¹⁵ [1992] 1 WLR 395.

powers conferred upon the Court of Appeal of Trinidad and Tobago. It is necessary to quote the complete section of the decision of the Privy Council as it is one of two decisions considering that section by the Privy Council. In **Baldeosingh**, the Privy Council stated as follows:

“Powers of the Court of Appeal

In coming to the conclusion that judgment should be given for the plaintiff des Iles J.A. said:

“I am quite aware that this appeal from the decision of Brooks J. is not on an Order 14 summons, but nevertheless, the [defendant] by his appeal therefrom has vested this court with the necessary jurisdiction to deal with the matter under section 39 of c. 4:01 — Supreme Court of Judicature Act, and to make any order, on such terms as the Court of Appeal thinks just, to ensure the determination on the merits of the real question in controversy between the parties, which is the question of the obligation of the [defendant] to pay the amount due on the account stated I am firmly of the view however, that this is a proper case in which this court should, in the exercise of its inherent jurisdiction and the jurisdiction vested in it by section 39 of the Supreme Court of Judicature Act ... dispose of the action at this stage.”

...

Mr. Phelps, for the plaintiff, argued that the section conferred very wide jurisdiction on the Court of Appeal, particularly when it was sought to exercise that jurisdiction in the context of fraud or misbehaviour by a solicitor. However, their Lordships consider that the question is one of construction and that the meaning of the section cannot vary according to the circumstances in which it falls to be applied. Either the Court of Appeal had power to give judgment on the claim or it did not and the conduct of the defendant cannot affect the issue.

The first part of section 39(1)(a) empowers the Court of Appeal inter alia to “make any such order as the court from whose order the appeal is brought might have made.” The last three words cannot be construed as referring to the overall jurisdiction of the court below but must be restricted by the circumstances in which that court acted. Thus one must look at the application before that court and consider what order that court could competently have made thereupon. The reference to “such further or other order” once again must refer to orders consequential upon any order which could or ought to have been made upon the application. Collymore J. having given to the defendant unconditional leave to defend, Brooks J. had no power to give judgment in favour of the plaintiff without a trial.

Section 39(2) does not help the plaintiff because the last sentence presupposes that the order which the Court of Appeal may make arises out

of the decision in the lower court. Furthermore he cannot obtain any assistance from section 39(3). That subsection is in the same terms as Ord. LVIII, r. 14 of the Rules of the Supreme Court, as they were in 1876, and it was said by Mellish L.J. in *Sugden v. Lord St. Leonards* (1876) 1 P.D. 154, 209:

“The object of this was to prevent parties being prejudiced by their having omitted to appeal from an interlocutory order. The whole thing was to be open on the merits before the Court of Appeal.”

It is clear from that dictum that subsection (3) is referring to an appealable order whereas, for the reasons already stated, Collymore J.'s order granting the defendant unconditional leave to defend was unappealable.

The only order which was before the Court of Appeal was that of Brooks J. dismissing the defendant's summons under Ord. 18, r. 10, from which it follows that the Court of Appeal had no jurisdiction to give judgment for the plaintiff.”

[44] In **Caribbean Welding Supplies Ltd v Attorney General of Trinidad and Tobago**,¹⁶ the Privy Council again had to consider the scope of section 39 of the Supreme Court of Judicature Act of Trinidad and Tobago. After quoting the passages to which reference have already been made, the Privy Council summarized the conclusion of the Privy Council in **Baldeosingh** as follows:

“48. The only order which was before the Court of Appeal in *Hannays v Baldeosingh* was that of Brooks J dismissing the defendant's application to strike out the claimant's reply. Brooks J had no jurisdiction on that application to enter judgment for the claimant. Accordingly, the Court of Appeal also did not have jurisdiction under section 39 to give judgment for the claimant; so the Board allowed the defendant's appeal from that order and remitted the case back to the Court of Appeal so that the action might be listed for an early trial.”

[45] Based on these authorities, this Court, in exercising its jurisdiction under section 35(1) of the **ECSC Act**, has a wide range of powers. Section 35(2) allows this Court to exercise any of those powers whether the issue is raised in the notice of appeal or the counter notice or not. This allows this Court to deal with the real question or issue in controversy between the parties in a way that perhaps the parties did not contemplate or may have not recognised at the time of the filing of the notice of

¹⁶ [2024] UKPC 7.

appeal or counter notice. It also gives this Court the opportunity to correct an error made by the decision in the lower court that arises from a misunderstanding of the correct legal principles applicable in any case. Of course, the power granted to this Court under section 35(2) cannot be exercised in circumstances where it may prejudice either party to the appeal. In such a case, the parties should be given notice of the intention by the Court of Appeal to invoke section 35(2) and the reasons for so doing and be given an opportunity to make representations before any decision is made.

- [46] Consequently, after the judgment was reserved in this matter, this Court gave notice on 10th April 2024 to the parties to file further submissions on the following questions: (1) whether the learned trial judge erred in not striking out [or dismissing] the appellant's constitutional motion as an abuse of process because the appellant had successfully availed himself of the collateral remedy in the appellate process by appealing his conviction; and (2) if the answer to question one is yes, whether the Court of Appeal should exercise its powers under section 35(2) of the **ECSC Act** in respect of the decision of the learned trial judge that the appellant's constitutional right to a fair hearing was violated.

Whether the learned trial judge erred

- [47] The appellant submits that the learned trial judge properly exercised her discretion when the case was permitted to go forward in that the learned trial judge was satisfied that no, or no sufficiently, adequate means of redress for the contravention alleged was available to the appellant under any law, and in this regard, the learned trial judge was correct. The appellant also submits that the discretion of the learned trial judge can only be impugned if it is shown that no reasonable judge would exercise the discretion in that way. The appellant contends that the learned trial judge did not err in not striking out the appellant's constitutional motion as an abuse of process by reason that the appellant had successfully availed, citing **Maharaj (No. 2)**. However, the appellant in **Maharaj (No. 2)** had already filed his constitutional motion before he appealed to the Privy Council from the decision of the trial judge to commit him to

prison for contempt of court. Additionally, there was no appeal directly to the Court of Appeal from such a decision.

[48] The appellant cites the decision of this Court in **Rashid A. Pigott v The Queen**¹⁷ for the view that it would not be appropriate to make an order for monetary compensation where a conviction is affirmed. This decision is inapplicable here for the following reasons. First, it concerned an appeal against conviction and sentence to the Court of Appeal, not an appeal against a decision of a trial judge in respect of an application by way of originating motion. Second, the issues raised in this appeal, in respect of alternative or parallel remedies, was not relevant to the determination of the appeal by this Court in **Pigott**. Third, the constitutional issue raised by the appellant in **Pigott** related to his allegation that his constitutional right to a fair hearing within a reasonable time as guaranteed by section 15(1) of the Constitution of Antigua and Barbuda was breached by the State failing to ensure that his appeal against his conviction and sentence was heard within a reasonable time and before the expiration of his sentence.

[49] The appellant in **Pigott** abandoned his original grounds of appeal against sentence at the hearing before this Court and pursued only the constitutional grounds in his amended grounds of appeal. The brief facts of **Pigott** are as follows. On 11th June 2009, the appellant was sentenced to a term of imprisonment for 5 years upon his conviction for building breaking and larceny. His appeal came on for hearing on 8th July 2014 by which time the appellant had served his 5 years and released from prison on 6th October 2012. The appellant argued that his conviction should be quashed because of the constitutional contravention. This Court found that a delay of over 4 years from conviction to hearing of the appeal was inordinate and constituted an infringement of the appellant's rights under section 15(1) of the Constitution. This Court concluded that absent the issue of unfairness of the trial or safety of the conviction, it would not be appropriate to set aside the conviction solely on the basis that there was inordinate delay between the period of the conviction and

¹⁷ ANUHCRA2009/0009 (delivered 13th April 2015, unreported).

the hearing of the appeal. Consequently, this decision does not assist the appellant in this instant appeal.

[50] The statement by this Court in **Pigott** that it would also not be appropriate to make an order for monetary compensation where a conviction is affirmed does not mean that the contrary is true in all circumstances. That statement does not establish that as a matter of law that where a conviction is set aside that an order for monetary compensation necessarily follows.

[51] The respondent, in my view, correctly accepts in accordance with the long line of authorities emanating from the Privy Council, of which **Jaroo** and **Ramanoop v Attorney General of Trinidad and Tobago**,¹⁸ are prime examples, that the resort to the constitutional jurisdiction when there is an effective alternative remedy is, in the absence of some special feature which makes it appropriate, an abuse or misuse of the process of the court. The respondent submits that the finding by the learned trial judge that the appellant had already availed himself of the alternative or collateral remedy of appealing to the Court of Appeal consistent with decisions of the Privy Council such as **Hinds** and **Independent Publishing**. The respondent further submits that the alternative remedy argument applied equally to an alleged breach of section 10 of the **Constitution** (protection of the law) as it was so applied in respect of section 5 of the **Constitution** (deprivation of liberty). The respondent contends that, having regard to the finding of the learned trial judge that the appellant had availed himself of the alternative remedy by way of appeal to the Court of Appeal, the proper course was for the application by way of originating motion to be struck off as an abuse of the process of the court or having heard the application to decline to grant relief and dismiss the claim. The respondent cited **Brandt v Commissioner of Police and others**¹⁹ as authority for the view that where proceedings, or parts of proceedings, are held to be an abuse of the court's process, those proceedings or part thereof should be dismissed. The respondent submitted that in **Brandt** both the

¹⁸ [2005] UKPC 15, [2006] 1 A.C. 328, [2005] 2 W.L.R. 1324.

¹⁹ [2021] UKPC 12; [2021] 1 WLR 3125.

Court of Appeal and the Privy Council upheld the trial judge's dismissal of the appellant's constitutional motion on the ground that the appellant had alternative remedies available to him.

[52] In **Brandt**, rather than making the challenge as to admissibility of certain WhatsApp data in the criminal proceedings, the appellant commenced separate constitutional proceedings challenging the admissibility of WhatsApp data in his criminal trial. The trial judge dismissed the constitutional motion as an abuse of process, and this was upheld by this Court. On further appeal, the Privy Council stated the following principles in relation to abuse of process:

"Legal principles in relation to abuse of process"

34 The boundaries of what may constitute an abuse of the process of the court are not fixed. As Stuart-Smith LJ said in *Ashmore v British Coal Corp*ⁿ[1990] 2 QB 338, 348, the categories are not closed and considerations of public policy and the interests of justice may be very material. Lord Diplock's speech in *Hunter v Chief Constable of the West Midlands Police*ⁿ[1982] AC 529, 536 underlines this point. He stated:

"My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied; those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power."

Abuse of process must involve something which amounts to a misuse of the process of litigation. However, whilst the categories of abuse of process of the court are not fixed there are clear examples which are relevant to this appeal.

35 First, to seek constitutional relief where there is a parallel legal remedy will be an abuse of the court's process in the absence of some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate". The correct approach to determining whether a claim for constitutional relief is an abuse of process because the

applicant has an alternative means of legal redress was explained by Lord Nicholls of Birkenhead, delivering the judgment of the Board in *Attorney General of Trinidad and Tobago v Ramanoop*[2006] 1 AC 328, para 25, as follows:

“where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the court’s process. A typical, but by no means exclusive, example of a special feature would be a case where there has been an arbitrary use of state power.”

There are examples of the application of that approach in cases such as *Harrikissoon v Attorney General of Trinidad and Tobago* [1980] AC 265, 68, *Jaroo v Attorney General of Trinidad and Tobago*[2002] 1 AC 871, para 39 and most recently, in *Warren v The State (Pitcairn Islands)* [2018] UKPC 20 at [11]. This approach prevents unacceptable interruptions in the normal court process, avoids encouraging technical points which have the tendency to divert attention from the real or central issues, and prevents the waste and dissipation of public funds in the pursuit of issues which may well turn out to be of little or no practical relevance in a case when properly viewed at the end of the process. This approach also promotes the rule of law and the finality of litigation by preventing a claim for constitutional relief from being used to mount a collateral attack on, for example, a judge’s exercise of discretion or a criminal conviction, in order to bypass restrictions in the appellate process (see e.g. *Chokolingo v Attorney General of Trinidad and Tobago* [1981] 1 WLR 106, 111–112).”

- [53] The Privy Council noted at paragraph [39] that, generally, in the exercise of discretion, those proceedings, or those parts of proceedings, which are held to be an abuse of the court’s process, should be dismissed.
- [54] It is not disputed that the learned trial judge in the court below found that the appellant had exercised unsuccessfully his right of appeal against his conviction and sentence. To borrow the language used in **Ramanoop**, the learned trial judge did not find any circumstances of the appellant’s case that included any feature which, at least arguably, indicated that the means of legal redress otherwise available would not be adequate. The appellant provided no evidence of that special feature and has also

not shown that there had been an arbitrary use of state power. The alternative means available to the appellant (by way of appeal to the Court of Appeal) to challenge his conviction and sentence were already exhausted by the appellant when he filed his application by way of originating motion. Seeking such relief in the clear absence of such a feature amounted to a misuse, or abuse, of the court's process. Where such an abuse is found, the court, in the exercise of its discretion, should dismiss the application by way of constitutional motion. Accordingly, the learned trial judge ought to have dismissed the application by way of originating motion. For the reasons given above, in my view, the learned trial erred in not dismissing the appellant's application by way of originating motion.

[55] This is an appropriate case for the Court to exercise its power under section 35(1)(a) to make any order which ought to have been made by the learned trial judge. That order should be one dismissing the application by way of originating motion as an abuse or misuse of the court's process.

[56] In any event, the appellant's grounds of appeal have no merit because the learned trial judge exercised her discretion properly in not granting any further relief by way of damages to the appellant in respect of the infringement of his constitutional rights. The learned trial judge was correct in stating that exercise by the appellant of his right of appeal would have been sufficient in the circumstances. Consequently, it cannot be said that the learned trial judge erred in the exercise of her discretion to refuse the award of damages to the appellant.

Disposition

[57] Based on the foregoing, I would allow the appeal against the decision of the learned trial judge, set aside the orders made at subparagraphs 1 and 2 of paragraph [30] of the decision of the learned trial judge and substitute the following:

- (1) The application by way of originating motion is dismissed as an abuse or misuse of the court's process.

[58] Each party shall bear their own costs in the appeal.

[59] I am grateful for the assistance provided by learned counsel.

I concur.

Vicki-Ann Ellis
Justice of Appeal

I concur.

Gerard St. C. Farara
Justice of Appeal [Ag.]

By the Court

Chief Registrar