

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

SAINT CHRISTOPHER AND NEVIS

NEVHCVAP2022/0012

BETWEEN:

LAWWINGTON FORBES

Appellant

and

THE ATTORNEY GENERAL OF SAINT CHRISTOPHER AND NEVIS

Respondent

Before:

The Hon. Mr. Mario Michel
The Hon. Mr. Trevor Ward
The Hon. Mr. Gerard St. C Farara

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

Appearances:

Mr. Eustace Nisbett for the Appellant
Ms. Rivi Lake and Ms. LaShaun Smart for the Respondent

2023: October 24;
December 22.

Interlocutory Appeal – Part 56 of CPR - Constitutional relief – Section 5 of the Constitution of Saint Christopher and Nevis – Deprivation of constitutional right to personal liberty - Appellate interference with trial judge’s discretion – CPR26.3(1)(b) - Whether the learned judge erred in striking out the appellant’s constitutional motion for the deprivation of his personal liberty on the basis that his remand/detention was by an order of a court

On or about 16th April 2016, Mr. Vincie Ferlance was shot and killed at Lime Beach Bar at Pinney’s Beach in Nevis. Following the incident, PC Trevin Mills conducted investigations, which included interviewing those present at the bar when Mr. Ferlance was shot. From these interviews, Mr. Lawwington Forbes (“the appellant”), became a person of interest and the main suspect in the murder. On 17th April 2016, PC Mills sought and obtained a search warrant for the premises of the appellant. The appellant was not present when the search warrant was being executed, nor was anything found to satisfy the warrant. Later that day, the appellant received a phone call from Sgt. Derell

Boon indicating that the police wanted to question him about the murder of Vincie Ferlance, which had taken place the previous day. The appellant stated that he had no information about the murder but that he was available for questioning. When Sgt. Boon located the appellant, he cautioned him and told him that he was being arrested for the murder of Vincie Ferlance. The appellant was subsequently transported to the Charlestown Police Station and handed over to the officers tasked with investigating the murder, where he was detained in the cells at the said police station.

On 18th April 2016, the appellant was interviewed by PC Mills, the lead investigator. The appellant told him that on the night in question, he had been with Mr. Timothy Caines. He said nothing further and was placed back in his cell. PC Mills carried out further investigations and interviews and based on the results of his inquiries, he formally arrested and charged the appellant for the offence of murder on 20th April 2016.

The appellant hired an attorney to represent him in relation to the charge and the impending legal proceedings, and applications for bail were made on his behalf on 6th February 2017 and 29th November 2017 in the Magistrate's Court. Both applications were refused by the court. At a Preliminary Inquiry in March 2018, the appellant was committed to stand trial, and an indictment was laid by the Director of Public Prosecutions on 13th March 2019. The trial began on 18th November 2019 and concluded on 21st November 2019. The trial judge, after hearing the evidence led by the prosecution and noting that the key witness had become unreliable, concluded that a jury would not have had the necessary tools to give adequate consideration to the key witness' statement and that a conviction based on the evidence presented at the trial would have been unsafe. The matter was accordingly dismissed on a no-case submission. This came after the appellant had spent a total of 1,314 days in detention and custody.

On 7th April 2022, the appellant filed an Originating Motion in which he sought constitutional relief pursuant to sections 5, 10 and 18 of the **Constitution of Saint Christopher and Nevis ("the Constitution")** for deprivation of his constitutional right to personal liberty, failure to be given a fair trial within a reasonable time, and for being arrested and charged without reasonable and probable cause. At the first hearing on 21st September 2022, the learned judge, upon considering the affidavits filed by the appellant and the respondent, invited oral submissions from counsel for the parties on the issue of whether the evidence was sufficient to justify a claim for breaches of section 5 of the **Constitution**. At the end of the hearing, the learned judge made an order dismissing paragraph 3 of the fixed date claim form dated 7th April 2022 which sought a declaration that the Claimant's arrest and/or detention from 17th April 2016 to 21st November 2019, being 1,314-days, violated his constitutional right to personal liberty and was a contravention of the provisions of Section 5 of the **Constitution**.

Being dissatisfied with the order of the learned judge, the appellant filed a notice of appeal on 14th February 2023, citing nine grounds of appeal. However, at the hearing of the appeal, only one narrow issue fell to be decided by this Court: Whether the learned judge erred in striking out the appellant's constitutional motion for the deprivation of his personal liberty on the basis that his remand/detention was by an order of a court.

Held: allowing the appeal and setting-aside the order of the learned judge dated 21st September 2022, restoring paragraph 3 of the Originating Motion filed on 7th April 2022 and remitting the matter to the High Court for further case management, and awarding

costs of the hearing before the High Court and two-thirds of those costs in the appeal to the appellant, such costs to be assessed by a judge or master, if not agreed within 21 days from the date of this judgment that:

1. While Part 26 of the **Civil Procedure Rules 2000** (“the CPR”) grants judges the power, as part of their extensive case management powers, to strike out parts of a statement of case if it discloses no reasonable ground for bringing or defending a claim, this power must be exercised with the utmost caution. Striking out a claim is a draconian measure that should be used sparingly and proportionately, especially when a judge is attempting to strike out a claim without the benefit of the evidence being tested and the issues dealt with at a trial. Where issues remain arguable or the full context is not thoroughly explored, judges should avoid prematurely exercising their power to strike out a portion of a claim.

Part 26 of the **Civil Procedure Rules 2000** applied; **Glenworth Emmanuel v Stephen Isidore** DOMHCVAP2014/0018 (delivered 11th August 2015, unreported) followed;

2. This Court will be slow to interfere with case management decisions of judges in the court below. However, the Court will, nonetheless, intervene when it becomes evident that there is a real risk of injustice to one of the parties involved, or if the presiding judge has made a decision or order which exceeds the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.

Multibank FX International Corporation v Von Der Heydt Invest SA BVIHCPMAP2022/0024 (delivered 5th July 2023, unreported) followed.

3. The circumstances of the appellant’s initial detention by the police prior to the him being brought before a Magistrate was not considered by the learned judge in striking out paragraph 3 of the Originating Motion. In doing so, the learned judge committed an error of law such that this Court ought to set aside the strike out order. This is an issue which ought to be inquired into at a full hearing, where the trial judge would have the benefit of hearing the testimony of the witnesses on both sides, including their evidence being tested under cross-examination, and in considering fulsome arguments from counsel for both parties on all the issues which have been raised. If the appellant’s initial arrest and detention is found to be unlawful, the trial judge would then be able to determine whether his continued detention, whether it was by an order of the court or otherwise, continued to be unlawful. The learned judge therefore erred in striking out paragraph 3 of the appellant’s Originating Motion.
4. Section 5(1) of the **Constitution** guarantees a person's right to personal liberty save as may be authorized by law in the cases specified at sub-paragraphs (a) to (k). Sub-paragraph (b) creates an exception for individuals deprived of their liberty in execution of a court's sentence or order in respect of a criminal offence of which he or she has been convicted. The learned judge in his order appears to have struck out the relief claimed at paragraph 3 of the Originating Motion under section 5 of the **Constitution** on the basis of the exception provided for

in sub-paragraph (b) of section 5(1) or upon some principle of law as to the effect of detention by court order on a person's right to claim for deprivation of his or her personal liberty guaranteed by section 5. He found that the appellant's remand/detention was by an Order of the Court and therefore no claim for breaches of section 5 of the **Constitution** can succeed. However, on the facts of the instant matter, an order of the court refusing bail does not satisfy the exception in subsection (b) of section 5 of the **Constitution**. The appellant was never convicted of the criminal offence with which he was charged and for which he was deprived of his personal liberty for 1,314 days. Accordingly, there was no basis upon which the learned judge could conclude, pursuant to section 5(1)(b), that the order of the court refusing bail and remanding the appellant into custody was sufficient to bar him from making a claim for the deprivation of his personal liberty or would render any such claim unsustainable in law. Thus, his order is blatantly wrong, such that this Court must interfere to set it aside.

Section 5 of the **Constitution of Saint Christopher and Nevis** ("the Constitution") Cap. 1.01, Revised Laws of Saint Christopher and Nevis 2009 applied; **Betaudier v Attorney General of Trinidad and Tobago** considered.

5. Sub-paragraph (f) of section 5 (1) of the **Constitution** provides for an exception to the right not to be deprived of one's personal liberty '[u]pon reasonable suspicion of his or her having committed, or being about to commit, a criminal offence under law'. At this stage of the proceedings, it is not for this Court to make any conclusive determination as to the reasonableness or not of the suspicion of the police or the lawfulness of the appellant's arrest. Nor is it for this Court to determine whether the appellant's detention, if initially unlawful, continued to be unlawful after he had been remanded into custody pursuant to an order or orders of a court. However, the evidence and the points canvassed before this Court raised issues which suggest that the appellant has at least an arguable case, that his initial arrest and detention by the police was unlawful and his right to personal liberty guaranteed by section 5 of the **Constitution** was breached, and that his continued detention by order of the court was also unlawful. By striking out paragraph 3 of the appellant's claim for constitutional relief under section 5, the learned judge deprived the appellant of the right to have his claim to such a breach of his constitutional right fully ventilated at a trial.

Al Fayed and others v The Commissioner of Police of the Metropolis and others [2002] All ER (D) 51 (Aug) considered.

JUDGMENT

- [1] **FARARA JA [AG.]:** This is an interlocutory appeal against the order of the learned judge in the court below dated 21st September 2022, in which he struck

out paragraph 3 of the appellant's Originating Motion¹ which sought a declaration that the appellant's arrest and/or detention from 17th April 2016 to 21st November 2019 violated his constitutional right to personal liberty and was a contravention of the provisions of section 5 of the **Constitution of Saint Christopher and Nevis** ("the Constitution")² As the order of the learned judge states, paragraph 3 was struck out on the sole basis that since the appellant's remand and detention was by an order of the court no claim for the breaches of section 5 of the **Constitution** can succeed. The background relevant to the disposition of this appeal is set out below.

Background

- [2] On or about 16th April 2016, Mr. Vincie Ferlance was shot and killed at Lime Beach Bar at Pinney's Beach in Nevis. Following the incident, PC Trevin Mills began conducting investigations, which included interviewing those present at the bar when Mr. Ferlance was shot. From these interviews, Mr. Lawvington Forbes ("the appellant"), a pizza chef at Lime Beach Bar, became a person of interest and the main suspect in the murder. On 17th April 2016, PC Mills sought and obtained a search warrant for the premises of the appellant. The appellant was not present when the search warrant was being executed, nor was anything found to satisfy the warrant.³
- [3] Later that day, the appellant received a phone call from Sgt. Derell Boon indicating that the police wanted to question him about the murder of Vincie Ferlance, which had taken place the previous day. The appellant stated that he had no information about the murder but that he was available for questioning. Later that day, Sgt. Boon located the appellant, at which time he cautioned him and told him that he was being arrested for the murder of Vincie Ferlance. Sgt. Boon then transported him to the Charlestown Police Station and handed him over to the officers tasked with investigating the murder.⁴ The appellant was detained in the cells at the said police station.

¹Brought pursuant to Part 56 of the Civil Procedure Rules 2000.

² Cap. 1.01, Revised Laws of Saint Christopher and Nevis 2009.

³ See Affidavit of Police Constable Trevin Mills, Record of appeal, pp 30-33.

⁴ See Affidavit of Police Sergeant Derell Boon, Record of appeal, pp 26-28.

- [4] On 18th April 2016, the appellant was interviewed by PC Mills, the lead investigator. The appellant told him that on the night in question, he had been with Mr. Timothy Caines. He said nothing further and was placed back in his cell. PC Mills carried out further investigations and interviews and based on the results of his inquiries, he formally arrested and charged the appellant for the offence of murder on 20th April 2016.⁵
- [5] The appellant hired an attorney to represent him in relation to the charge and the impending legal proceedings, and applications for bail were made on his behalf on 6th February 2017 and 29th November 2017 in the Magistrate's Court. Both applications were refused by the court. At a Preliminary Inquiry in March 2018, the appellant was committed to stand trial, and an indictment was laid by the Director of Public Prosecutions on 13th March 2019. The trial of the charge against the appellant began on 18th November 2019 and was completed on 21st November 2019.⁶ The trial judge, after hearing the evidence led by the prosecution and noting that the key witness had become unreliable, concluded that a jury would not have had the necessary tools to give adequate consideration to the statement given by the said key witness. He was also of the view that a conviction based on the evidence presented at the trial would have been unsafe, and the matter was accordingly dismissed on a no-case submission.⁷ This came after the appellant had spent a total of 1,314 days in detention and custody.
- [6] On 7th April 2022, the appellant filed an Originating Motion in which he sought constitutional relief pursuant to sections 5, 10 and 18 of the **Constitution** for deprivation of his constitutional right to personal liberty, failure to be given a fair trial within a reasonable time, and for being arrested and charged without reasonable and probable cause.

⁵ See note 1.

⁶ See the Affidavit of Teshawn Vasquez, Record of appeal, pp 40-43.

⁷ See para 48 of the Decision on No Case Submission, Record of appeal, p 70.

- [7] At the first hearing on 21st September 2022, the learned judge, upon considering the affidavits filed by the appellant and the respondent, invited oral submissions from counsel for the parties on the issue of whether the evidence was sufficient to justify a claim for breaches of section 5 of the **Constitution**. At the end of the hearing, the learned judge made the following order:

“**UPON THE MATTER** coming on for hearing and the Court is minded that the Claimants remand/detention was by an Order of the Court and therefore no claim for the Constitutional breaches of section 5 of the Constitution of Saint Christopher and Nevis can succeed

...

IT IS HEREBY ORDERED THAT:

- (1) The relief sought by the Claimant at paragraph #3 of the Fixed Date Claim Form dated 07 April 2022

“A declaration that the Claimant’s arrest and/or detention from 17 April 2016 to 21 November 2019 being 1,314-days violated his constitutional right to personal liberty and was a contravention of the provisions of Section 5 of the Constitution of Saint Christopher and Nevis;”

is dismissed...”

The appeal

- [8] Being dissatisfied with the order of the learned judge, the appellant filed a notice of appeal on 14th February 2023, citing nine grounds of appeal. However, it became apparent at the hearing of the appeal that only one narrow issue fell to be decided by this Court: Whether the learned judge erred in striking out the appellant’s constitutional motion for the deprivation of his personal liberty on the basis that his remand/detention was by an order of a court.

Whether the learned judge erred in striking out the appellant’s constitutional motion

Appellant’s submissions

- [9] Counsel for the appellant, Mr. Eustace Nisbett, put to the Court that the crux of the appeal hinged on one narrow issue of law which arose from the order of the learned judge: that the remand of the appellant by an order of the court, in this instance by the refusal of bail, did not deprive him of his constitutional right to personal liberty and was a contravention of section 5 of the **Constitution**.

Counsel referred the Court to section 5(1)(b) of the **Constitution** which provides that an exception to a person's constitutional right to personal liberty is if that person has been deprived of their personal liberty in execution of the sentence or order of a court in respect of a criminal offence of which he or she has been convicted. He submitted that the appellant had never been convicted of a criminal offence and that he was merely being held on remand pending trial. Accordingly, the exception at section 5(1)(b) does not apply.

- [10] Mr. Nisbett also highlighted the exception contained in section 5(1)(f) of the **Constitution**, that a person may be deprived of their constitutional right to personal liberty upon reasonable suspicion of him having committed a criminal offence. He noted that although the order of the learned judge striking out paragraph 3 of the Originating Motion was grounded specifically on his detention being by an order of the court and must be taken to be based on section 5(1)(b), section 5(1)(f) would also prove relevant at the eventual trial of the Originating Motion to determine whether the appellant's initial arrest was lawful and to further determine whether his continued detention, whether by order of the court or otherwise, was also lawful. He argued that in the circumstances of this matter, the appellant's claim for the deprivation of his personal liberty contained in paragraph 3 of the Originating Motion should not have been struck out, and that part of the claim should also have been permitted by the learned judge to proceed to trial for the issues to be explored and determined at a full hearing. In doing so, the learned judge acted precipitously and contrary to the well-established test and principles applicable to striking out a party's claim.

Respondent's submissions

- [11] Counsel for the respondent, Ms. Rivi Lake, from the outset pointed out that the appeal was being heard without the benefit of the transcript of proceedings in the court below. She submitted that the learned judge invited counsel for both parties to make oral submissions in relation to section 5(1)(f) of the **Constitution** and to inform the court as to the evidence placed before it to support a claim for the deprivation of the appellant's personal liberty. It was after these submissions that the learned judge concluded that a claim for breaches of section 5 of the **Constitution** could not succeed.

[12] Ms. Lake further asserted that despite the wording of the order, the learned judge did not only contemplate section 5(1)(b) and whether the remand of the appellant was by an order of the court, but that he took a holistic view of the appellant's arrest and detention, including considerations about reasonable suspicion of him having committed an offence for the purposes of section 5(1)(f). She submitted that the judge conducted a thorough evaluation of the evidence and the applicable principles of law and did not err in striking out the appellant's claim for relief under section 5 of the **Constitution**.

[13] In relation to the sole reason stated by the learned judge for making the order, that the detention of the appellant was by an order of the court and therefore no claim for a breach of his constitutional right to personal liberty could succeed, counsel for the respondent contended that the learned judge did not err. She contended also that whether the initial arrest was lawful was directly related to section 5(1)(f) and the existence of a reasonable suspicion that the appellant had committed a crime.

Discussion

[14] The principles guiding appellate interference are well settled and have been repeated in several decisions of this Court. An appellate court will typically be slow to overturn a judge's decision unless it is satisfied that in exercising his judicial discretion, the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors, or by taking into account irrelevant factors; and that, as a result of the error, his decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be blatantly wrong.⁸

[15] An appellate court will be even more reluctant to interfere when the decision being appealed is a case management decision. As Michel JA said in **Multibank FX International Corporation v Von Der Heydt Invest SA**:⁹

⁸ Showa Holdings Co., Ltd v Nicholas James Gronow And John David Ayres (delivered 31st May 2021, unreported).

⁹ BVIHCMAP2022/0024 (delivered 5th July 2023, unreported).

“As the CPR expressly entrusts the High Court with the power and responsibility to actively manage its cases, great deference is paid to a judge’s exercise of discretion in case management decisions. Accordingly, a litigant who challenges a case management decision or order must reach a very high threshold in order to justify an appellate court’s interference with such a decision or order. The test for interfering with a judge’s case management decision or order is not whether the Court of Appeal would have exercised its discretion differently or made a different order or come to a different decision; the Court must be satisfied that the decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.”

[16] Part 26 of the **Civil Procedure Rules 2000** (“the CPR”)¹⁰ bestows a plenitude of powers on a trial judge which allows him to effectively manage the cases which come before him. Particularly, rule 26.3(1)(b) empowers a judge to strike out a statement of case, in whole or in part, if it does not disclose any reasonable ground for bringing or defending a claim. This is the power which the learned judge purported to exercise in his order dated 21st September 2022; the order which has been appealed.

[17] At this juncture, I note that this matter is still in its preliminary stages, this appeal stemming from an order made at the first hearing, and the issues not having been dealt with at a trial. Accordingly, the exploration of the issues in this judgment shall only be to the extent required to determine whether the learned judge erred in striking out paragraph 3 of the appellant’s Originating Motion.

[18] Section 5 (1) of the **Constitution** provides (in relevant part) as follows:

“A person shall not be deprived of his or her personal liberty save as may be authorised by law in any of the following cases, that is to say,

...

(b) in execution of the sentence or order of a court, whether established for Saint Christopher and Nevis or some other country, in respect of a criminal offence of which he or she has been convicted;

...

(f) upon reasonable suspicion of his or her having committed, or being about to commit, a criminal offence under any law...”

¹⁰ Now replaced by the Civil Procedure Rules (Revised Edition) 2023.

- [19] In making the order to strike out paragraph 3 of the appellant's Originating Motion, the only reason cited by the learned judge was that the appellant's remand/detention was by virtue of an order of the court, and therefore no claim for a breach of section 5 of the **Constitution** could succeed.
- [20] Having considered the facts and circumstances which brought the parties before this Court, the sole reason on which the learned judge based his order raises certain important concerns. First, it appears that the learned judge did not contemplate the period of the appellant's initial arrest and detention by the police before he was first brought before the Magistrate's Court and his application for bail was refused. He was arrested and held in custody by police officers carrying out investigations into the murder of Vincie Ferlance. When they were satisfied that the appellant was their prime suspect, they formally charged and arrested him. At that stage, the appellant retained legal counsel who made applications to the court for bail on his behalf. It is only then, when the appellant was refused bail, that the court became involved with his detention.
- [21] This is factual information that would certainly have been before the learned judge. Indeed, it was obvious from the circumstances of the matter for which the appellant had been tried and the charge against him dismissed upon a finding and ruling by the court of no case to answer. It begs the question of whether the reasoning behind the judge's striking out order suggests that irrespective of the manner in which the appellant first came to be detained, and whether it was lawful or not, the subsequent order of the court remanding him into custody prevented him or would deprive him, as a matter of law, from making a claim for the deprivation of his personal liberty for the period up until the refusal of bail, or any period at all.
- [22] The Privy Council in **Betaudier v Attorney General of Trinidad and Tobago**¹¹ quite succinctly noted that '[i]f the arrest of the appellant was unlawful, it follows that his detention following the arrest was unlawful'.¹² Consequently, if the initial period of the appellant's detention, before he was brought before the court and

¹¹ (2021) 98 WIR 472.

¹² Ibid, para 27.

the question of bail arose, was arguably unlawful because there was no probable cause as contemplated by section 5(1)(f) of the **Constitution**, the initial period of his detention would have been a breach of his constitutional right to personal liberty; and, in accordance with **Betaudier**, if the initial arrest was unlawful, his continued detention for a total of 1,314 days, would be equally unlawful. This is certainly arguably correct notwithstanding that the continued detention was as a result of an order of the court. As mentioned, this is not an issue which the learned judge seems to have considered before making the order to strike out paragraph 3 of the appellant's Originating Motion. However, it is an issue of mixed fact and law which this Court is not called on to decide on at this interlocutory stage of the proceedings.

[23] As stated above, from the wording of the order, it appears that the learned judge did not take into account the period of detention, however short it may have been, that was not by an order of the court. It is also rather concerning that the case against the appellant was dismissed on a no-case submission as the trial judge deemed that it would be unsafe to put the evidence before a jury. In my mind, this is but one of several factors, albeit not a decisive one, in any court assessing the reasonableness of the suspicion of the arresting officers, whether there was probable cause for arresting and detaining the appellant, and in determining whether a claim for deprivation of personal liberty holds any merit or any prospect of success. This points also to leaving such matters for more fulsome consideration by the court at a trial of this matter into whether the initial arrest and detention of the appellant was unlawful.

[24] Counsel for the respondent repeatedly suggested to the Court that at the hearing, discussions were not limited to section 5(1)(b) of the **Constitution** and the effect of the orders of the court remanding the appellant into custody, but that a considerable amount of time was spent at the first hearing discussing section 5(1)(f) and the reasonableness of the suspicion on the part of the police officers which led to the appellant's arrest. She argued that this formed a large part of the learned judge's reasoning for concluding that the appellant had no prospect of success on a claim for the deprivation of his personal liberty.

- [25] Counsel directed the Court to the authority of **Calvert Roberts v The Attorney General of Saint Vincent and the Grenadines**.¹³ However, although it dealt with a similar situation regarding the deprivation of the right to personal liberty guaranteed under the Constitution, it takes the respondent's case no further. In that case, Webster J [Ag.] (as he then was), on a claim alleging false imprisonment and a violation of constitutional rights, conducted a thorough exercise of determining the lawfulness of the claimant's arrest. Upon finding that the claimant was lawfully arrested on suspicion of committing an offence punishable with imprisonment, he concluded that his right to personal freedom guaranteed by section 3 of the Constitution¹⁴ was not breached.
- [26] Counsel for the respondent asserted to this Court that the learned judge in the court below embarked on a similar exercise in deciding whether the appellant's claim for relief under section 5 of the **Constitution** had any prospect of success. This was disputed by Mr. Nisbett, learned counsel for the appellant. At the close of the hearing, Ms. Lake made, what can only be categorised as a very belated application for an adjournment, to allow her to furnish the Court with the transcript of proceedings in the court below. This application was refused. The Court was of the view that the respondent had ample opportunity to procure the transcript or at the very least, seek an adjournment pending its receipt if it felt that the transcript was indispensable to a proper resolution of the appeal.
- [27] Furthermore, this Court had before it the order of the learned judge which contained his reason for making said order. Though it was unfortunate that a transcript had not been made available, and that no written judgment was given, this Court is capable of deciding on the plain words stated in the order of the learned judge. There is no doubt in my mind that the lawyers for the parties would have made certain submissions in response to the request of the learned judge which sparked discussion about whether a claim based on section 5 of the **Constitution** was sustainable, as a matter of law. However, whatever may have been the points and counterpoints, and despite the submissions that would have been made, it was for the judge to determine the issue he posed on a

¹³ Civil Suit No. 355 of 1998 (delivered 17th September 2021, unreported).

¹⁴ Written in similar terms to section 5 of the Constitution of Saint Christopher and Nevis.

particular basis. The order that is perfected and sealed reflects the basis on which the judge came to his conclusion and reflects it very clearly without ambiguity. In any event, it was not suggested by Mr. Nisbett that the learned judge had put to him and squarely considered the period of the appellant's detention prior to him being taken before a court and remanded into custody.

[28] The arguments made by counsel for the respondent regarding the existence of a reasonable suspicion that a crime had been committed and her reliance on the **Calvert Roberts** case do no more than underscore the case of the appellant on appeal that the learned judge ought not to have struck out the relief sought at paragraph 3 of the Originating Motion but, instead, ought to have allowed that relief (along with the others) to go to a full determination at trial. This was not a matter fit to be dealt with summarily in the manner in which it was dealt with by the learned judge. There is nothing on the face of the order that lends to an interpretation that the learned judge properly considered the lawfulness of the appellant's arrest, or that he factored into his consideration before making the strike out order, the initial period of the appellant's detention prior to being taken before and remanded by a court.

[29] Sub-paragraph (f) of section 5(1) of the **Constitution** provides for an exception to the right not to be deprived of one's personal liberty '[u]pon reasonable suspicion of his or her having committed, or being about to commit, a criminal offence under law'. Again, I emphasise that, at this stage of the proceedings, it is not for this Court to make any conclusive determination as to the reasonableness or not of the suspicion of the police or the lawfulness of the appellant's arrest. Nor is it for this Court to determine whether the appellant's continued detention, if initially unlawful, continued to be unlawful after he had been remanded into custody pursuant to an order or orders of the court. However, the evidence before the Court and the points canvassed before this Court have raised issues which suggest that the appellant has a good arguable case that his right to personal liberty guaranteed by section 5 of the **Constitution** was breached. As was pointed out in **Al Fayed and others v The**

Commissioner of Police of the Metropolis and others,¹⁵ the appellant would have to prove on a balance of probability that he was physically detained. This was not in dispute in that case nor is it in dispute in the instant case. The onus would then shift to the respondent to prove the existence of facts amounting to reasonable grounds for suspicion, giving rise to the power to arrest. By striking out the appellant's claim for constitutional relief under section 5, the learned judge deprived him of the right to have his claim to such a breach of his constitutional right fully ventilated at a trial.

[30] As stated above, this Court will be very slow to interfere with case management decisions of judges in the court below. However, it is essential to underscore that the Court will, nonetheless, intervene when it becomes evident that there is a real risk of injustice to one of the parties involved, or if the presiding judge has made a decision or order which exceeds the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.

[31] The issue of the appellant's initial detention is a matter which ought to be inquired into at a full hearing, where the trial judge would have the benefit of hearing the testimony of the witnesses on both sides including their evidence being tested under the full glare of the light of cross-examination, and considering fulsome arguments from counsel for both parties on all the issues which have been raised. If the appellant's initial arrest and detention was found to be unlawful, the trial judge would then be in a position to determine whether the continued detention, whether it was by an order of the court or otherwise, continued to be unlawful. On this basis alone, I conclude that the learned judge erred in striking out paragraph 3 of the appellant's Originating Motion.

[32] The foregoing discussion about the lawfulness of the appellant's arrest aside, I turn back to the plain wording of the order of the learned judge as well as the plain wording of section 5(1)(b) of the **Constitution**. Section 5 of the **Constitution** provides that a person shall not be deprived of their personal

¹⁵ [2002] All ER (D) 51 (Aug), para 18.

liberty save as may be authorised by law in the cases listed in that section. Subsection (b) creates an exception to this right where a person has been deprived of their personal liberty 'in execution of the sentence or order of a court... in respect of a criminal offence of which he or she has been convicted' (emphasis mine).

[33] In his order, the learned judge appears to have struck out the relief claimed under section 5 on the basis of the exception provided for in subsection (b) or based upon some unstated principle of law as to the effect of detention by court order in circumstances where the initial arrest and detention might have been unlawful. He found that 'the [appellant's] remand/detention was by an Order of the Court and therefore no claim for the Constitutional breaches of section 5 of the Constitution of Saint Christopher and Nevis can succeed'. However, on the facts of the instant matter, an order of the court refusing bail does not satisfy the exception in subsection (b) of section 5 of the **Constitution**. The sub-section specifically speaks to the detention of a person by order of the court after that person has been convicted of a criminal offence. The appellant was never convicted of the criminal offence with which he was charged and for which he was deprived of his personal liberty for 1,314 days. Accordingly, there was no basis upon which the learned judge could conclude, pursuant to section 5, that the order of the court refusing bail to the appellant was sufficient to bar him from making a claim for the deprivation of his personal liberty. Thus, his order is blatantly wrong, such that this Court must interfere.¹⁶

[34] While the CPR grants judges the power, as part of their extensive case management powers, to strike out parts of a statement of case if it discloses no reasonable ground for bringing or defending a claim, this is a power that must be exercised with the utmost caution. As Thom JA noted in **Glenworth Emmanuel v Stephen Isidore**,¹⁷ striking out has always been regarded as a draconian measure which should be used sparingly and only when it is proportionate to do so. This should be borne in mind even more so where a judge is purporting to strike out a claim, or part thereof, summarily and without

¹⁶ See notes 7 and 8.

¹⁷ DOMHCVAP2014/0018 (delivered 11th August 2015, unreported), para 30.

the benefit of the evidence being tested and the issues dealt with at trial. In instances where issues remain genuinely arguable or where the full context of the matter has not been thoroughly explored, judges should refrain from prematurely exercising their power to strike out a portion of a claim.

[35] Having considered the submissions of the parties, the facts of this case and the applicable principles of law, I am constrained to conclude that the learned judge erred in the exercise of his discretion in striking out paragraph 3 of the appellant's Originating Motion. He failed to take into account relevant factors which would have led him to the conclusion that the appellant's claim required ventilation at trial to ensure that justice was done, especially in a situation where the appellant spent over three and a half years in prison for an offence of which he was never convicted. Neither the reason listed in his order dated 21st September 2022, nor the reasons suggested by counsel for the respondent are capable of justifying the decision, and the order must be set aside. For the reasons set out above, it is the conclusion of this Court that the learned judge committed an error or errors of law which rendered his decision and order striking out paragraph 3 of the appellant's Originating Motion blatantly wrong, such that it must be set aside.

Disposal

[36] Accordingly, I would make the following orders:

- (1) The appeal is allowed and the order of the learned judge dated 21st September 2022 is set aside.
- (2) Paragraph 3 of the Originating Motion filed on 7th April 2022 is restored and the matter is remitted to the High Court for further case management.

- (3) The appellant shall have his costs of the hearing before the High Court and two-thirds of those costs in the appeal, such costs to be assessed by a judge or master, if not agreed within 21 days from the date of this judgment.

I concur.
Mario Michel
Justice of Appeal

I concur.
Trevor Ward
Justice of Appeal

By the Court

Deputy Chief Registrar