

THE EASTERN CARIBBEAN SUPREME COURT:

IN THE HIGH COURT OF JUSTICE

Administrative Division

**FEDERATION OF ST CHRISTOPHER AND NEVIS
ST CHRISTOPHER CIRCUIT**

Claim No. SKBHCV2020/0197

In the matter of Sections 5(1)(c), 5(3)(b), 5(5)
and 10(1) of the Constitution of St. Christopher
and Nevis

-and-

In the matter of an application for declaratory
and compensatory relief by GLENVILLE ISLE
pursuant to Section 5(6), 18 (1) & (2).

BETWEEN:

GLENVILLE ISLES

Claimant

-and-

**THE ATTORNEY GENERAL OF
ST. CHRISTOPHER AND NEVIS**

Defendant

Before the Honourable Mr. Justice Pariagsingh (Ag.)

Appearances:

Eustace Nisbett for the Claimant; and
Rivi Lake instructed by Eshé Hendrickson – Johnson for the Defendant.

2023 September 13– Decision

JUDGMENT

Claimant's originating motion for constitutional relief

[1] **PARIAGSINGH J (Ag.):** - Before the Court is the Claimant's amended originating motion¹ seeking the following relief under various sections of the **Constitution of Saint Christopher and Nevis** ("the Constitution"):

1. A declaration that the arrest of the Claimant was arbitrary, unlawful and contravened Section 5(1) of the Constitution of Saint Christopher and Nevis;
2. A declaration that the continued detention of the Claimant beyond the legislative 72-hours before being brought before a court was unconstitutional contract to section 5(3)(b) of the Constitution of Saint Christopher and Nevis;
3. A declaration that the continued arrest and remand of the Claimant, without bail and without a trial from in or about 15 January 2011 until in or about December 2015 was a breach of his constitutional rights contrary to 5(5) of the Constitution of Saint Christopher and Nevis;
4. A declaration that the Claimant was not afforded a fair trial within a reasonable time and breached his constitutional rights contrary to section 10(1) of the Constitution of Saint Christopher and Nevis.
5. An order that the Claimant is entitled to vindicatory damages;
6. An order that the Claimant is entitled to exemplary damages;
7. Interest pursuant to section 27 of the Eastern Caribbean Supreme Court Act;
8. Interest pursuant to the Judgment Act;
9. Any such further relief as this Honourable Court deems just; and
10. Costs.

[2] The evidence in this claim is contained in the following affidavits and witness statement:

1. Affidavit of Glenville Isles filed on October 22, 2020;
2. Affidavit of Nigel Caines filed on November 26, 2020;

¹ Filed on October 22, 2020. Permission was granted at the commencement of the trial to amended the ground of the motion to include relief under section 10 (1) of the Constitution of Saint Christopher and Nevis.

3. Affidavit of Elvin Brown filed on December 15, 2020;
4. Affidavit of Crislohn Williams filed on March 02, 2021;
5. Affidavit of Glenville Isles filed on March 02, 2021;
6. Affidavit of Glenville Isles (second affidavit) filed on March 02, 2021;
7. Affidavit of Elvin Brown filed on June 10, 2021; and
8. Witness statement of Tashna Powell Williams filed on June 18, 2021.

Summary of evidence of the Claimant:

- [3] The Claimant is a farmer by trade. On December 27, 2010 at about 6:30 am he was arrested by officers of the Crown. He contends that he was told that he was wanted in connection with the attempted murder of Floretta Williams a person who he previously had a relationship with. The Claimant contends that he was taken to the JNF France Hospital so that Ms. Williams could identify him but when she was asked if he was the person who “did this” to her she replied “no”. He was then taken to the Basseterre Police Station where he remained detained until about 10:00 am on December 30, 2010² before he was released without charge.
- [4] About 2 weeks after his release, the Claimant was again arrested. He was then charged with offence of attempted murder. He contends that subsequent to him being charged he made repeated request for bail which were denied.
- [5] The Claimant was tried and found guilty of the offence charged. His conviction was subsequently quashed following a successful appeal and a retrial ordered. In 2017 following a retrial, the Claimant was acquitted.

²² Roughly 75 hours by the Claimant’s evidence

[6] The Claimant contends that he spent approximately 5 years on remand before being given an opportunity for bail.

[7] He claims that prior to the charges he was a successful farmer. He contends that since his acquittal he has struggled in many ways and therefore seeks the relief claimed. The Claimant contends that the Crown by its servants and/or agents lacked the legislative authority to arrest him and as such contravened his constitutional rights.

Preliminary Issue – Cross-examination in constitutional proceedings

[8] At the commencement of the trial, Counsel for the Claimant signalled his intention to cross examine some of the deponents of the affidavits filed on behalf of the Defendant. I enquired whether permission was sought or granted for cross examination of any deponents. Counsel for the Claimant referred the Court to a previous order made at the PTR which mandated that all witnesses be present at the trial for cross examination.

[9] The parties were provided with the decision in the case of **Marcia Ayres – Caesar v Judicial and Legal Services Commission**³ which judgment was upheld by the Board of the Judicial Committee on appeal in Privy Council Appeal No: JCPC-0091/2019.⁴ The matter was stood down to allow both parties to consider this authority and watch the recoded decision of Board delivered by Lady Hale in keeping with the rules of natural justice before addressing whether the Claimant was entitled to cross examine all deponents on their affidavits or whether permission had to be sought and granted for cross examination. When the matter

³ Civil Appeals Nos: 46 and 47 of 2019 (Trinidad and Tobago)

⁴ No written judgment was given by the Board as it indicated in its brief oral reasons that because the matter had to be remitted to the High Court for trial, it did not wish to make any statements on the matter save that the appeal was dismissed as the trial was still pending before the High Court.

was recalled, counsel for the Claimant, correctly in my view, accepted that he was not entitled to cross examine all deponents on their affidavit as a matter of course and made an oral application for permission to cross examine two deponents on certain paragraphs which was granted.

- [10] The decision in **Ayres- Caesar** is binding on this Court. Jamadar JA (as he then was) in delivering the decision of the Court of Appeal of Trinidad and Tobago (upheld by the Board) stated at paragraph 46 that:

‘ [46] The trial judge’s statement of the relevant legal principles was not altogether wrong, (See AG v Dumas [2017] UKPC 12, at para 15, citing with approval, Bobb v Manning [2006] UKPC 22, and State of Rajasthan v Union of India AIR [1977 SC 1361, per Bhagwati J) except that he seemed to consider that this was a pure judicial review matter. Clearly it is also a constitutional review matter. He was however right in the general opinion that in judicial review, cross-examination is exceptional, it may be permitted if there are disputes on central and crucial factual issues, and if it is necessary to assist in resolving them. This is indeed so for both administrative and constitutional review. It is ordinarily so because in public law matters the primary facts are often not in dispute, or only in dispute on peripheral aspects. In part this is also because, public authorities are frank, forthright and transparent in their decision-making processes (as they are always expected to be), and so the factual underpinnings which inform the bases for challenges are often not really in material dispute.’

- [11] In my respectful view, the Claimant is not entitled as of right to cross examine witnesses at the trial of an administrative without having first obtained permission. Permission is obtained in the usual course by filing an application, identifying the paragraphs which permission is sought to cross examine on and satisfying the Court that there is a dispute on a central (not peripheral) fact that is a critical factual issue necessary to be resolved for the resolution of the claim.

- [12] In resolving this preliminary issue in the trial, the Claimant was granted permission to cross examine Nigel Caines on paragraphs 5 and 10; and Elvin Brown on paragraph 9 of their affidavits filed on December 15, 2020.

Issues for consideration

- [13] The issues arising on this originating motion are:
1. Whether the arrest of the claimant was arbitrary, unlawful and contravened section 5(1) of the Constitution?
 2. Whether the detention of the claimant beyond the 72-hours before being brought before a court was unconstitutional contract to section 5(3)(b) of the Constitution?
 3. Whether the continued arrest and remand of the claimant without bail and without trial from on or about January 15, 2011 to December 2015 was in breach of his constitutional right protected by section 5(5) of the Constitution?
 4. Whether the claimant was afforded a fair trial within a reasonable time in keeping with section 10(1) of the Constitution?
 5. Whether the claimant is entitled to relief on any of his claims?
- [14] It is convenient to address issues 1 and 2 together as they address the lawfulness of the claimant's arrest and detention.

Issues 1 & 2 – The Arrests and Detention

- [15] From claimant's evidence and the submissions made on his behalf, it is clear that he seeks to challenge two incidents of purported arrest. The first was on December 27, 2010, and the second was 2 weeks after, on a date in January 2011.
- [16] I will deal with each incident separately.

The December 27, 2010 Incident and Subsequent Detention

- [17] The claimant alleges that he was arrested on December 27, 2010 and invites the court to conclude that his arrest was unlawful for three reasons. The first is that he was arrested by a member of the Royal Saint Christopher and Nevis Defence Force (“the Defence Force”) who did not have the legal authority to arrest him. The second is that the police did not have reasonable and probable cause to arrest him. The third is that the claimant was arrested and detained for 75 hours which is more than the period permitted by law. The defendant however asserts that no arrest was carried about by a member of the Defence Force and that the claimant voluntarily accompanied them to the hospital. Furthermore, the defendant contends that the claimant was arrested on the basis of reasonable suspicion.
- [18] The court is required to determine first whether the incident on December 17, 2010 amounted to an arrest.
- [19] An arrest has historically been defined as the actual seizing or touching of an individual with a view to restraining him: **Alderson v Booth**.⁵ However, there is no requirement in law for an arrest to be entail physical restraints or any physical contact. In **Alderson v Booth**, Lord Parker CJ stated- “...whereas there was a time when it was held that there could be no lawful arrest unless there was an actual seizing or touching, it is quite clear that that is no longer the law.” The modern law is that-
- “...an arrest is constituted when any form of words is used which, in the circumstances of the case, were calculated to bring to the accused's notice, and did bring to the accused's notice, that he was under compulsion and thereafter he submitted to that compulsion.”

⁵[1969] 2 QB 216

[20] In **Shaaban Bin Hussein and others v Chong Fook Kam and Another**,⁶ Lord Devlin summarised the components of an arrest as follows:

“An arrest occurs when a police officer states in terms that he is arresting or when he uses force to restrain the individual concerned. It also occurs when by words or conduct he makes it clear that he will if necessary use force to prevent the individual from going back where he may want to go. It does not occur when he stops an individual to make inquiries.”

[21] Thus in the Jamaican case of **Owen Sampson v R**⁷ where a police officer invited a person to “go down” to the police station, without there being any physical restraint, those words were sufficient to constitute an arrest. However, in **Donnelly v Jackman**⁸ it was held that tapping a person on the shoulder with a view to speaking to him, not to detain him, is not an arrest. What is required is that a restriction on personal liberty has been effect in the circumstances where the arrestee knows that he cannot leave or submits to the compulsion of the arrestor.

[22] It is clear from the case law that whether an arrest has occurred is a question of fact to be determined on close examination of the evidence.

[23] Mr Isles’ evidence in relation to the December 27 incident is that:

1. On December 27, 2010 at either 5:00 am or 6:30 am, Mr. Nigel Caines and Mr. Phillips visited his home in a pick-up truck with “a number of Defence personnel with big guns drawn”.
2. He was “arrested” by a member of the Royal Saint Christopher and Nevis Defence Force after being told that he was wanted in connection to the attempted murder of Floretta Williams. The Defence Force personnel did not

⁶[1970] A.C. 942 at p. 47B

⁷(1954) 6 JLR 292.

⁸[1970] 1 All ER 987.

tell the claimant that he was under arrest – he “took their actions to mean that [he] was under arrest”.

3. He was handcuffed by a member of the Defence Force at the instruction of another member of the Defence Force.
4. There were no police officers accompanying the Defence Force officers when he was arrested.
5. He was taken to the JNF Hospital so that Floretta Williams could identify him.
6. There were no police officers accompanying the Defence Force officers when he was taken to the hospital.
7. He remained handcuffed at the hospital.
8. Throughout his entire encounter with the Defence Force officers, he was never told that he was under arrest.
9. He remained with the Defence Force members until being taken to the Basseterre Police Station where he was questioned by a police officer.
10. He was questioned by the police at the Police Station on the 27th, 28th and 29th of December, and remained at the Police Station in Basseterre until December 30, 2010.

[24] The evidence on behalf of the Attorney General is that:

1. On December 27, 2010, Mr Nigel Caines, Warrant Officer II of the St. Kitts and Nevis Defence Force, and other Defence Force personnel visited the claimant's home. Mr Caines identified himself as a member of the Defence Force and asked the claimant questions in relation to the alleged attempted murder of Floretta Williams.
2. The Defence Force personnel visited the Claimant's home while responding to a telephone call giving information about the attempted murder.
3. The claimant was taken to the JNF Hospital by the Defence personnel.
4. Mr Caines then “told [the claimant] that we were going to take him to the police station for questioning”. The claimant voluntarily agreed to go with the Defence Force personnel and was left at the Police Station for questioning.

5. At no point on December 27 was the claimant handcuffed or charged with any offence by the Defence Force personnel or the police.

[25] In my view, the evidence is sufficient to support the claim that Mr Isles was arrested by the Defence Force personnel at his home on December 27, 2010.

[26] I accept that the Defence Force personnel visited the claimant at his home on December 27, 2010, with guns drawn, to question him in relation to the alleged murder of Floretta Williams. The personnel were responding to information received in relation to the alleged attempted murder, and advised the claimant of the reason for their presence at his home.

[27] I accept that the Defence Force personnel did not tell the claimant that he was under arrest. And, I note that it is disputed whether the claimant was placed in handcuffed. As **Alderson v Booth** explains, however, physical restraint is not required for an arrest. Words alone may also amount to an arrest if the form of words used is calculated in the circumstances of the case to bring to a person's notice that he is under compulsion and he then submits to the compulsion. Therefore the absence of physical restraint, does not preclude this court from concluding that the claimant was arrested.

[28] I accept that the claimant was of the view that he was being arrested, and therefore under compulsion to go with the officers. Such a view by the claimant was reasonable in the circumstances where the Defence Force personnel visited his home, with guns drawn, to question him, having advised him of their reason for their presence at his home, and of their intention to take him to the JNF Hospital. I am satisfied on a balance of probabilities that the claimant was arrested by Defence Force personnel on December 27, 2010, and I so find.

- [29] Having found that there was an arrest, it now falls to me to determine whether the arrest was lawful. The lawfulness of the December 27 arrest in my view hinges on whether the Defence Force personnel had the lawful authority to arrest the Claimant. I find that the Defence Force personnel did not have lawful authority to arrest the claimant for the reasons below.
- [30] The arrest by the Defence Force personnel was without a warrant. The power to arrest without a warrant is carefully regulated by the combination of statute and common law in Saint Christopher and Nevis. Without reciting the extent of the law on this point, it suffices to say that the power to arrest without a warrant is granted to members of the police force under section 6(1) of the **Police Act**,⁹ and under common law to ordinary citizens who witness certain crimes. The **Defence Force Act**,¹⁰ which is the statutory basis for powers exercised by members of the Defence Force, does not make any provision for Defence Force personnel to make an arrest in the circumstances of this case. The powers of arrest of members of the Defence Force are very limited. Section 39 of the **Defence Force Act** gives limited powers of arrest to coast guard officers of the defence forces. Save for this express power of arrest, the other powers of arrest relate to disciplinary proceedings and proceedings subject to court martial.
- [31] The Defence Force personnel were neither police officers nor private citizens who witnessed the alleged attempted murder. The Attorney General has not provided this court with any legal basis upon which Defence Force personnel could have exercised a power of arrest in the circumstances of this case. In the absence of any legal basis, brought to this court's attention, which authorized an arrest by Defence Force personnel in this case, the arrest by the personnel was unlawful.

⁹No. 6 of 2003.

¹⁰Chap 19:14.

[32] Given my conclusion that the arrest of the claimant by the Defence Force personnel was unlawful, it is unnecessary for me to determine whether the arrest was based on a reasonable cause, for the reason that even if the Defence Force personnel had reasonable suspicion, they did not have the power in law to arrest the claimant. It also follows then that the entire period during which the claimant was detained following his arrest by the Defence Force personnel would be unlawful. This position was stated by the Board in **Betaudier v Attorney General (Trinidad and Tobago)**¹¹ who stated at paragraph 27, that: “If the arrest of the appellant was unlawful, it follows that his detention following the arrest was unlawful.”

The January 2011 Arrest

[33] It is not disputed that the claimant was arrested by Sergeant Glenville Brown in January 2011, around 2 weeks after he was released from the custody of the police in December 2010. Sergeant Brown is the police officer who investigate the attempted murder of Floretta Williams, questioned the claimant at the Basseterre Police Station, and arrested and charged the claimant in January 2011. The claimant however contends that his arrest was without reasonable suspicion.

[34] The requirement for reasonable suspicion as the basis of an arrest was stated by the Board in in **Betaudier v Attorney General (Trinidad and Tobago)**¹² where at paragraph 17 Lord Lloyd- Jones delivering the decision of the Board stated:

“17. In considering whether there is reasonable cause for an officer’s suspicion that a person has committed an arrestable offence, it is necessary to focus on the offence which he is suspected of having committed. The officer must have in mind facts which are capable of supporting a reasonable suspicion that the person arrested committed an offence of the particular kind which the officer has in mind. In the

¹¹ [2021] UKPC 7.

¹² [2021] UKPC 7.

context of the present case it is necessary to focus on such matters in the mind of PC Maharaj as may support his suspicion that the appellant had committed an offence of kidnapping.”

[35] In **Everette Davis v The Attorney General of St. Christopher and Nevis**,¹³

Ramdhani J [Ag.] summarised the test for reasonable suspicion:

“The test as to whether there is reasonable and probable cause is both subjective and objective.¹ The perceived facts must be such as to allow the reasonable third person and actually cause the officer in question to suspect that the person has committed or is about to commit a crime. It does not matter if the information available to the police leads equally or more to a view that the person may be innocent of the offence, once it leads reasonably to a conclusion that he may have committed, or is about to commit the offence, that is sufficient to ground the arrest. The reasonable police officer is assumed to know the law and possessed of the information in the possession of the arresting officer, and would have believed that the claimant was guilty of the offence for which he was arrested. The term ‘reasonable suspicion’ relates to the existence of facts at the time.”

[36] Whether the claimant was arrested on the basis of reasonable suspicion is a short point. Having considered the evidence, I am of the view that the January 2011 arrest was lawful. The evidence is that at the time the claimant was charged in January, Sergeant Brown had evidence that Floretta Williams was shot in the head and was suffering serious injuries. Sergeant Brown had the evidence from the virtual complainant who identified the claimant, a person with whom she previously shared a relationship and who was known to her, saying that she was shot by him. Those facts are, in my view, sufficient to provide reasonable suspicion to arrest and to lay the charges that Sergeant Brown did.

[37] As foreshadowed, Sergeant Brown was cross-examined at the hearing of the originating motion. He was cross examined to ascertain the information he had

¹³ SKBHCV2013/0220 (delivered 30th June 2014).

in his possession when the Claimant was originally detained on December 27, 2010. He said quite frontally he did not have information at that time hence the Claimant was released. He also indicated that he met with Ms. Williams sometime after and obtained certain information. Counsel suggested to Sergeant Brown that the information he had at the investigative stage was different from the information witnesses gave at the trial Sergeant Brown was taken to several portions of the transcript of the evidence which dealt with the inconsistencies in Ms. Williams' evidence, and the probability of her identification evidence on the night of the incident. Inconsistencies were also highlighted with the clothing of the attacker, who was home at the material time, if there was electricity and whether there was a screen to the front of Ms. William's window. The fact that critical evidence may have been discredited, or found unreliable or insufficient at the trial stage is, in my view, respectfully, beside the point. In my view this is immaterial as it is not the function of the investigator to determine from the evidence what is true and what is not. All the investigator has to have is an honest believe in the guilt of the person charged based on reasonable grounds. It is not for the investigator to resolve the facts.

- [38] In these premises, I find that the January 2011 arrest was made with reasonable suspicion and was therefore lawful.

Entitlement to relief

- [39] It is well-established that an unlawful arrest and detention gives rise to a prima facie breach of a person's constitutional right to liberty.¹⁴ The question however now falls to be decided – whether constitutional relief should be granted in relation to the claimant's December 27, 2010 arrest.

¹⁴ See *Ramsingh v The Attorney General of Trinidad and Tobago* [2012] UKPC 16 at para. 8(i).

[40] It is well-known that the court will generally not grant relief on the constitutional motion to a claimant who does not avail themselves of available alternative remedies. The court's practice of refusing to grant relief in cases where there are available alternative remedies has been extensively discussed by the Board in cases such as **Jaroo v The Attorney General of Trinidad and Tobago**¹⁵ and **Attorney General v Ramanoop**.¹⁶ In **Jaroo v The Attorney General of Trinidad and Tobago**, Lord Hope stated at paragraphs 38 and 39 that:

“38. The appropriateness or otherwise of the use of the procedure afforded by [s.18] must be capable of being tested at the outset when the person applies by way of originating motion to the High Court. All the court has before it at that stage is the allegation. The answer to the question whether or not the allegation can be established lies in the future.

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.”

[41] The claimant has contended that he should be granted relief in this case, and that he is not precluded from seeking relief by his failure to pursue tortious action against the Attorney General for false imprisonment in relation to his December 27, 2010 arrest. I disagree. In my view, the wrongful arrest and detention of the

¹⁵ [2002] UKPC 5.

¹⁶ [2005] UKPC 15.

Claimant could and ought properly to have been vindicated by way of a tortious action.

[42] It is important to note that the claimant's originating motion was filed over 9 years after he was arrested. The limitation period prescribed by section 4 of the **Limitation Act**,¹⁷ for tortious claims would therefore have expired. Thus, at the time the claimant filed his originating motion, his ability to pursue relief in a tort claim had therefore been extinguished. To grant relief on the claimant's motion would deprive the Attorney General of the defence of limitation which may be available to it pursuant to section 4 of the **Limitation Act**, and effectively to circumvent those provisions to grant relief which ought to have been sought on in a tortious claim.

[43] The law is clear that resort to constitutional proceedings in clear instances of an available common law remedy after the limitation period has expired, in the absence of a cogent explanation for the delay in commencing the constitutional proceedings. In **Durity v The Attorney General of Trinidad and Tobago**,¹⁸ the Privy Council at paragraph 35 in a judgment delivered by Lord Nicholls stated that:

"When a court is exercising its jurisdiction under s 14 of the Constitution and has to consider whether there has been delay such as would render the proceedings an abuse or would disentitle the claimant to relief, it will usually be important to consider whether the impugned decision or conduct was susceptible of adequate redress by a timely application to the court under its ordinary, non-constitutional jurisdiction. If it was, and if such an application was not made and would now be out of time, then, failing a cogent explanation the court may readily conclude that the claimant's constitutional motion is a misuse of the court's constitutional jurisdiction. This principle is well established."

¹⁷ CAP 5:09

¹⁸ [2002] UKPC 20.

- [44] In my view, there is no discernible feature which makes the claimant's claim pertaining to his first arrest particularly suitable for being pursued in a constitutional claim as distinct from a common law tortious action. Furthermore, the claimant has not advanced any good explanation for not pursuing a common law tortious action for his initial arrest and detention. I am therefore not minded to grant discretionary relief under the constitution in this case, notwithstanding my finding that the claimant's December 27, 2010 arrest was unlawful.
- [45] The claimant in his written submissions relies on the case of **Dustin Lapsey v Attorney General of St. Christopher and Nevis**¹⁹ in support of his contention that in several cases in this jurisdiction similar arguments of alternative remedies have been dismissed as the originating motion procedure are more apt for cases of this nature. In **Lapsey**, in which the learned judge referred to the case of **Jermaine Brown v Attorney General**,²⁰ the claims which were before the Court in the originating motions dealt with not only the arrest but also dealt with the right to a fair trial within a reasonable time and generally the trial process. The arrests, charges and trial were part of one factual sequence. That is not the position in the instant case. In this case the Claimant was arrested twice. On his initial arrest, he could have and ought to have in my view, properly launched a common law claim in tort for damages. This cause of action accrued on December 27, 2010 and was not dependent on any further events to crystalised his claim. This claim could have been pursued despite him being arrested a second time, and subsequently charged. The issue on his first arrest was the lawful authority of members of the Defence Force to arrest him. That in my view had nothing to do with his second arrest and subsequent charge. That in my view distinguishes this case from the case of **Lapsey**.

¹⁹ NEVHCV2019/0086 (delivered March 29, 2021)

²⁰ SKBHCV2016/0074 (delivered November 19, 2018)

- [46] For all the above reasons, the claimant's claim for relief in relation to his arrests is dismissed.

Issue 3 – Arrest and Remand without Bail or Trial

- [47] The claimant contends that his "continued arrest and remand of the Claimant, without bail and without a trial from in/or about 15 January 2011 until in/or about December 2015 was a breach of his constitutional rights contrary to 5(5) of the Constitution".
- [48] Section 5(5) of the Constitution provides as follows:
- "If any person arrested or detained as mentioned in subsection 3(b) is not tried within a reasonable time, without prejudice to any further proceedings that may be brought against him, she shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or proceedings preliminary to trial, and such conditions may include bail so long as it is not excessive."
- [49] I wish to state at the outset that Mr Isles' claim for a declaration proceeds on the basis that he was remanded "without bail and without a trial from January 15, 2011 to December 2015". This claim on assumptions which are either factually inaccurate or based on a misunderstanding of section 5(5) of the Constitution.
- [50] First, as a matter of fact, the claimant was not detained "without bail and without trial from January, 15 2011 to December 2015". It is not disputed that the claimant was arrested on or about January 15, 2011. It is also not disputed that the claimant's first trial took place on November 21, 22 and 23, 2011. As a result of that trial, he was convicted of attempted murder on December 8, 2011. The claimant's first trial was completed within approximately 11 months of his arrest on January 15, 2011. He was therefore tried during the time he complains that he was not.

[51] Second, the clear words of section 5(5) afford an individual who has been arrested or detained pursuant to section 5(3)(b) of the Constitution (upon suspicion of having committed or being about to commit a criminal offence), the right to conditional or unconditional release in the event they are not tried within a reasonable time. It therefore is for Mr Isles to show that his trial did not take place within a reasonable time, and that he ought to have been released conditionally or unconditionally. Critically, section 5(5) speaks to arrest and detention prior to trial. Thus, although the claimant seeks to claim that his post-conviction detention is relevant for the purposes of section 5(5), the only relevant period the court can consider, for the purpose of section 5(5), is the period between the claimant's arrest or detention on about January 15, 2011 to the conclusion of his trial on December 8, 2011. As already stated, Mr. Isles was tried within 11 months of being arrested. The period of 11 months cannot be considered an unreasonable time for trial. On any view, Mr Isles cannot claim that he was not tried within a reasonable time and thus entitled to be released conditionally or unconditionally.

[52] Lastly, and by the way, it appears to be the claimant's understanding that section 5(5) affords the constitutional right to be released on bail notwithstanding his individual circumstances. Section 5(5) is a reflexive mechanism which is triggered once there is delay in the conduct of a defendant's trial. Section 5(5) does not afford a defendant a right to be released on bail. Defendants in criminal proceedings instead have a right to access bail before trial in accordance with the established principles that regulate such access. In this case, the claimant certainly had access to bail. On his own admission, the claimant sought bail "repeatedly" and was refused repeatedly. Section 5(5) is not engaged solely by the repeated refusal of bail.

Issue 4 – Fair trial within a reasonable time

- [53] The claimant contends that his right to a fair hearing within a reasonable time under section 10(1) of the Constitution was breached. Section 10(1) provides as that: “If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.”
- [54] In **Darmalingum v The State**²¹ the Privy Council interpreted section 10(1) of the Constitution of Mauritius which is framed in terms equivalent to section 10(1) of the Constitution of Saint Christopher and Nevis. The Board held that section 10(1) contains three separate guarantees, namely (1) a right to a fair hearing; (2) within a reasonable time; (3) by an independent and impartial court established by law.
- [55] In **Boolel v The State**²² the Board affirmed the separate nature of these guarantees, and stated particularly, that “if a criminal case is not heard and completed within a reasonable time, that will of itself constitute a breach of section 10(1) of the Constitution, whether or not the defendant has been prejudiced by the delay”.
- [56] The claimant has sought to assert both that there was unreasonable delay between his initial trial and the conclusion of his retrial, and that his trial was unfair and not by an independent and impartial court.

Reasonable time

- [57] The claimant argues that there was a 3 year and 7-month delay in the hearing of this appeal, and a 6-year delay from the filing of his appeal to the conclusion of his retrial. He argues that these delays breached his reasonable time guarantee under section 10 of the Constitution.

²¹ [2000] 1 WLR 2303.

²² [2006] UKPC 46.

- [58] The claimant contends that, in determining whether the claimant's reasonable time guarantee has been breached, this court should consider the five factors set out by the court in **Selwyn Charles v Attorney General**.²³ Those factors are: (i) the length of the delay; (ii) the reason or explanation given to justify the delay; (iii) the responsibility of the accused for asserting his rights; (iv) the prejudice to the accused; and (v) the nature of the charges.
- [59] I observe however that the list of factors set in **Selwyn Charles** is derived from a series of cases which are of some vintage, including **Bell v Director of Public Prosecutions** which was decided by the Privy Council in 1985.²⁴ In **Boolell v The State**, the Board took the view that the approach taken previously by it in **Bell** and other cases was erroneous, in as much as it considered that a complaint about the unreasonable delay must be accompanied by proof of prejudice or unfairness in the trial arising from or caused by delay.
- [60] The Board in **Boolell** instead approved lengthy portions of its decision in **Dyer v Watson**²⁵ and the decision of the House of Lords in **Attorney General's Reference (No 2 of 2001)**²⁶ which are material to determining the reasonableness of the time taken to complete the hearing of a criminal case. In summary those principles are:
- (i) The threshold of proving a breach of the reasonable time requirement is a high one, not easily crossed.
 - (ii) The outcome of cases involving the reasonable time guarantee will depend on the facts of each case. The court must look at the whole picture.

²³ ANUHCv2011/0069 (delivered 2nd March 2011).

²⁴ [1985] 2 All ER 585.

²⁵ [2002] UKPC D1

²⁶ [2003] UKHL 68

- (iii) The first step the court must take is to consider the period of time which has elapsed between the defendant was charged and the trial. Unless that period is one which, on its face and without more, gives grounds for real concern it is will be certainly unnecessary to go further, and the claim should be dismissed.
- (iv) If the period which has elapsed is one which, on its face and without more, gives grounds for real concern, the court must look into the detailed facts and circumstances of the particular case, and the state is required to explain and justify the excessive lapse of time.
- (v) In examining the facts of each case, the court must consider the complexity of the case, the conduct of the defendant, and the manner in which the case has been dealt with by the administrative and judicial authorities.
- (vi) If the breach of the reasonable time requirement is established retrospectively, after there has been a hearing, the appropriate remedy may be a public acknowledgement of the breach, a reduction in the penalty imposed on a convicted defendant or the payment of compensation to an acquitted defendant. It will only be appropriate to quash a defendant's conviction if the hearing was unfair or it was unfair to try the defendant at all.

[61] In keeping with the guidance of the Privy Council in **Boolell**, the starting point is to determine and examine the period of delay complained of. The length of delay in issue in this matter is not straightforward. The Attorney General has however helpfully provided an extensive picture of the procedural history of this matter in the affidavits of Elvin Brown filed on December 15, 2020 and June 10, 2021, and the witness statement of Tashna Powell Williams filed on June 18, 2021. The relevant parts of that history are:

- (i) The claimant was arrested and charged on about January 15, 2011.

- (ii) The claimant's preliminary inquiry was completed on April 15, 2011 and he was committed to stand trial in the High Court.
- (iii) The trial of the matter was conducted at the High Court on November 21, 22 and 23, 2011.
- (iv) The claimant was convicted of the offence of attempted murder of Floretta Williams on December 8, 2011.
- (v) Sentence was handed down on December 14, 2011.
- (vi) The claimant filed a notice of appeal on December 17, 2011.
- (vii) The claimant's appeal came up for status hearing before Pereira CJ in the Court of Appeal, on June 11, 2013. The learned Chief Justice gave directions for the preparation of the transcript of the notes of evidence and directed that the matter be listed for the first sitting of the Court of Appeal in Saint Christopher and Nevis in 2014.
- (viii) The transcript was prepared as directed on March 5, 2014.
- (ix) The appeal came up for hearing on June 11, 2014 but was adjourned at the request of the applicant, with no objection by the Director of Public Prosecutions, so as to allow the claimant to file written submissions in support of his appeal. Directions were given for the filing of submissions and for the listing of the appeal at a later sitting in Saint Christopher and Nevis.
- (x) The appeal was heard on June 4, 2015 the appeal was allowed and the matter remitted to the High Court for retrial.
- (xi) The claimant was granted bail by the Court of Appeal in 2015.
- (xii) The claimant was retried sometime in 2017 and acquitted of the charge of attempted murder.

[62] As is evident, this was not simply a matter of the Claimant awaiting trial for one singular entire period. Rather the total timeframe of 6 years between the claimant's initial trial in 2011 and his acquittal on retrial in 2017, was punctuated by the claimant's initial trial, the appeal, the claimant's release on bail.

- [63] From the evidence, it appears that the claimant's appeal was initially forestalled by issues relating to the preparation of the record in the High Court. In her witness statement, Tashna Powell Williams indicated that there had been a backlog of transcripts which delayed the production of the record for the claimant's appeal. However, once an order had been made by Pereira CJ for the production of the notes of evidence and the record on June 11, 2013, the preparation of those documents was expedited.
- [64] When the appeal next came on for hearing on June 11, 2014, the matter was adjourned at the request of the claimant to permit him to file written submissions. This adjournment further delayed the hearing of the appeal by one year. The appeal was heard and determined at its next listed date in Saint Christopher and Nevis.
- [65] Having examined the totality of the circumstances surrounding the appeal, I am satisfied that the delay in the progress of the appeal proceedings, being, in total, 3 years and 7 months, was not unreasonable. The reasons for the delay fell at the feet of both the court and the claimant. The reasons given for the delay on the side of the court were reasonable and delays were addressed by the court through directions and the expedited preparation of the transcripts on the footing of those directions. The claimant contributed to the delay in the progress of his own matter, when he requested an adjournment to file written submissions. This further delay was accommodated by the court, and directions were given for the progression of the matter for a full hearing once the submissions were filed.
- [66] At the appeal stage therefore it seems that the delay in hearing the appeal was at both the hands of the court and the claimant, and were not unreasonable.

[67] I note that after there was no explanation or insights by either the state or the claimant as to the reasons for the delay between the hearing of the claimant's appeal and the retrial. The claimant has not given any information about that period and whether he asserted his rights to demand a speedy retrial, what caused the delay or whether he had any role in the authoring the delay. Similarly, the Attorney General has not offered this court any insight into the delay for that period. This court cannot simply speculate on what happened during that time period. Without any information, I am prepared to find that the delay between the hearing of the appeal and the retrial was not unreasonable.

[68] Taking both a global and a granular look at the delay in this case, I am not prepared to find that the claimant's right to trial within a reasonable time was breached.

Fair Trial

[69] The claimant's arguments on fair trial can be dealt with shortly. The claimant claims that his initial trial was unfair because- (i) he was unrepresented at his bail application, trial, retrial and appeal but that was not taken into consideration and no guidance was given to him by the court as an unrepresented litigant; (ii) he conducted his trial without disclosure; (iii) there were irregularities surrounding disclosure and his ability to call witnesses in the Magistrate's court and in the High Court; (iv) the High Court Judge was hostile to him as a self-represented litigant and made certain prejudicial comments that would lead a bystander to conclude that he was guilty; (v) the judge's summation and directions featured significant discrepancies were found to have resulted in a miscarriage of justice; and (vi) the claimant was unjustly refused bail.

[70] I do not agree with the claimant that these are matters which should compel this court to grant constitutional relief. All the above matters are issues which ought to have been raised in the criminal proceedings, or in an appeal from the criminal

proceedings, and not in a separate constitutional motion. The recent decision of the Privy Council in **Brandt v The Commissioner of Police**²⁷ makes the point that separate constitutional proceedings ought not to be issued where complaints about the trial process have arisen, in circumstances where the trial and appellate processes provide an adequate forum for resolving those issues.

[71] In the circumstances of this case, the claimant's rights have been vindicated through the criminal process. His conviction and sentence were quashed and a retrial ordered. On retrial, he was acquitted. There is now no indictment to be quashed or stayed, or any further directions that can be given to remedy his grievances with the trial process. He has been vindicated to the extent that the law permits on matters of this nature. Furthermore, it is not the practice to grant damages where a litigant is aggrieved by errors in the trial process.

[72] In the circumstances, I am not minded to conclude that the claimant's rights under section 10 of the Constitution have been breached.

Costs:

[73] Generally, costs are only ordered in administrative proceedings when the institution was unreasonable. This case dangerously borders on being unreasonably brought. Not every acquittal gives rise to a claim for Constitutional relief or malicious prosecution. The Board made the point in **Juman v Attorney General**²⁸ that regardless of how negligent or reckless an investigation is, malice is not inferred for the purpose of malicious prosecution. Similarly, I find that a careful analysis of the law in this area would have led to sound advice that the present claim, being purely reactive to the Claimant's acquittal, was abusive and unreasonable. More so, since from the evidence the Claimant simply sat by and did nothing about his first arrest.

²⁷ [2021] UKPC 12.

²⁸ [2017] UKPC 3

[74] It is hard to conclude that the entirety of the claim was abusive as the issues regarding the constitutionality of the arrest and delay in the trial process were not frivolous.

[75] Applying the issue based approach, at least one half of the Claimant's relief claimed was abusive. In the circumstances, the Claimant shall pay one half of the Defendant's costs of this claim to be assessed (on the standard basis) by this Court in default of agreement within 28 days of the date of this order.

Order

[76] For all the foregoing reasons, I make the following orders:

1. The claimant's claim is dismissed.
2. The Claimant shall pay the one half of the Defendant's costs of this claim to be assessed (on the standard basis) by this Court in default of agreement.

**Alvin Pariagsingh
Judge (Ag.)**

By the Court,

Registrar