

THE EASTERN CARIBBEAN SUPREME COURT

ANGUILLA

IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO. AXAHCV 2014/0076

BETWEEN:

JOSEPH BRICE

Claimant

and

ATTORNEY GENERAL OF ANGUILLA

Defendant

Appearances:

Mr. Joseph Brice in person

Mr. Dwight Horsford, Honourable Attorney General with him Mr. Sasha Courtney
Crown Counsel Attorney General's Chambers of counsel for the Defendant

2022: January 18;
June 2.

Constitutional Motion – Sections 1(a), 3(1)(f), 3(4) and 16 of the Anguilla Constitution Order, 1982 – Wrongful arrest – Claimant alleging breach of rights guaranteed under section 3(1)(f) of Anguilla Constitution Order, 1982 – Claimant alleging that decision to effect his arrest unreasonable in the Wednesbury sense – Claimant also alleging that his arrest was unlawful on the basis of a breach of the provisions of section 24(5) of the Police and Criminal Evidence Act ('PACE') – Whether section 24(5) of PACE received or incorporated in Anguillian law – Section 47 Criminal Procedure Act R.S.A. c. 150 – Section 46 Interpretation and General Clauses Act R.S.A. c. 125 – Sections 3 and 7 West Indies Act, 1967 – Whether claimant entitled to redress under the Constitution for breach of his rights guaranteed by section 3(1)(f) of the Anguilla Constitution Order, 1982 on the basis of breaches of the provisions of PACE

JUDGMENT

[1] **INNOCENT, J.:** The claimant, Mr. Joseph Brice ('Mr. Brice') had filed an Originating Motion (the 'Motion') on 3rd October 2014 seeking interim relief, namely, that the retrial of Indictment No 4 of 2011 be stayed pending the final determination of the Motion, and also that the trial of Indictment No. 5 of 2013 be stayed pending the final determination of the said Motion.

- [2] Mr. Brice also sought declaratory relief under the Anguilla Constitution Order, 1982 (the 'Constitution') to the effect that his arrest on 7th January 2009 was unlawful for want of necessity for the arrest; that his arrest on 18th September 2009 was unlawful for want of necessity for such arrest; that his rights guaranteed under the Constitution were infringed by reason of such unlawful arrest; an order that the last of the two indictments be quashed on the basis of the alleged infringement of his rights guaranteed under the Constitution; and compensation for the said breach of his rights guaranteed under the Constitution pursuant to section 3(4) thereof.
- [3] The Motion came on for hearing before Mathurin J. on 20th October 2014. The Motion was dismissed summarily by the learned judge. There was no hearing of the claim for relief under the Constitution on its merits. Mr. Brice appealed to the Court of Appeal against the decision of Mathurin J. The Court of Appeal allowed his appeal and remitted the matter to the High Court for hearing.
- [4] When the Motion came on for hearing before this Court as differently constituted, Mr. Brice quite understandably sought leave of the court to amend his Motion and supporting documents to reflect what was evidently a substantial change in the landscape since the filing of the Motion. By the time that the Motion came on for rehearing before this Court, Mr. Brice had already been convicted on both indictments. In addition, he was retried on one of the indictments and convicted thereon and sentenced to a term of imprisonment.
- [5] Mr. Brice was granted leave to amend the Motion and to file additional affidavit evidence in light of the substance of the Motion as originally filed having been overtaken by subsequent events.
- [6] Pursuant to the court's order granting leave to amend, Mr. Brice filed an amended motion wherein he included claims for aggravated damages, vindictory damages not hitherto included in the Motion as it was in its previous form. Notwithstanding the added claims not canvassed in the original motion, Mr. Brice relied wholly and substantially on the same grounds as the previous motion.

- [7] Mr. Brice grounded his claim for redress under the Constitution on the basis that the police authority, in this case officers of the Royal Anguilla Police Force ('RAPF'), had exceeded or acted outside of the powers conferred on them by virtue of section 356 of the Criminal Code as it relates to police powers of summary arrest, that is, arrest without warrant.
- [8] The pith and gravamen of Mr. Brice's case in relation to the unlawfulness of his arrests was that in neither instance was there any evidence at all of the necessity of or reasonable grounds for believing that the arrests were necessary. According, to Mr. Brice, in effecting his arrests, the police authority did not take into consideration the provisions of section 24(5) of PACE and their conduct in effecting his summary arrests was contrary to the dictates of section 24(5) of PACE.
- [9] In addition, Mr. Brice claimed that the actions of the officers of the RAPF in effecting his summary arrest was unreasonable in the 'Wednesbury' sense and was contrary to the provisions of section 24(5) of PACE as supplemented by common law powers of arrest. Mr. Brice's contention on this point was that even if the 'necessity criteria' had been complied with, the decision to effect his summary arrest was still subject to review on account of its unreasonableness.
- [10] In support of the foregoing contention Mr. Brice relied on the decision in **Mark Richardson v The Chief Constable of West Midlands Police**¹ where it was held that ex post facto justification is not acceptable as a means to retrospectively explain or justify an arrest.
- [11] Mr. Brice argued, by extension, that the case of **Mark Richards** supports the proposition that where a police officer suspects that an offence has been committed in order for the arrest of a citizen to be lawful, the following considerations must apply, namely, there must be reasonable grounds for suspecting that the person is guilty of it; the grounds for the arrest must be one of those listed in section 24(5) of

¹ [2011] EWHC 773 (QB)

PACE; and the police officer must have reasonable grounds for believing that it is 'necessary' to arrest the person.

- [12] For the purposes of exposition, it will be necessary to set out in full the provisions of section 24 of PACE which deals with the power of constables to effect an arrest without warrant. Section 24 reads:

- “(1) A constable may arrest without a warrant—
- (a) anyone who is about to commit an offence;
 - (b) anyone who is in the act of committing an offence;
 - (c) anyone whom he has reasonable grounds for suspecting to be about to commit an offence;
 - (d) anyone whom he has reasonable grounds for suspecting to be committing an offence.
- (2) If a constable has reasonable grounds for suspecting that an offence has been committed, he may arrest without a warrant anyone whom he has reasonable grounds to suspect of being guilty of it.
- (3) If an offence has been committed, a constable may arrest without a warrant—
- (a) anyone who is guilty of the offence;
 - (b) anyone whom he has reasonable grounds for suspecting to be guilty of it.
- (4) But the power of summary arrest conferred by subsection (1), (2) or (3) is exercisable only if the constable has reasonable grounds for believing that for any of the reasons mentioned in subsection (5) it is necessary to arrest the person in question.
- (5) The reasons are—
- (a) to enable the name of the person in question to be ascertained (in the case where the constable does not know, and cannot readily ascertain, the person's name, or has reasonable grounds for doubting whether a name given by the person as his name is his real name);
 - (b) correspondingly as regards the person's address;
 - (c) to prevent the person in question—
 - (i) causing physical injury to himself or any other person;
 - (ii) suffering physical injury;
 - (iii) causing loss of or damage to property;
 - (iv) committing an offence against public decency (subject to subsection (6)); or
 - (v) causing an unlawful obstruction of the highway;
 - (d) to protect a child or other vulnerable person from the person in question;
 - (e) to allow the prompt and effective investigation of the offence or of the conduct of the person in question;

(f) to prevent any prosecution for the offence from being hindered by the disappearance of the person in question.
(6) Subsection (5)(c)(iv) applies only where members of the public going about their normal business cannot reasonably be expected to avoid the person in question.”

[13] Mr. Brice’s argument that the provisions of section 24(5) of PACE were received as part of the law of Anguilla was grounded on the provisions of section 47 of the Criminal Procedure Act and the Common Law (Declaration of Application) Act. In support of his argument in favour of finding that the provisions of PACE were received as part of the law of Anguilla, Mr. Brice relied on the decisions of **Eversley Thompson v The Queen**² and **Shayne Richardson v The Attorney General**³.

[14] Mr. Brice placed what appeared to be substantial emphasis on the dicta of Small Davis J. (Ag) in the case of **Shayne Richardson**⁴ to support his contention that the provisions of PACE could be applied as part of the law of Anguilla. The learned judge in that case had sought guidance from the Codes of Practice made under PACE; however, it does not appear, without making any observations as to the merits of the approach adopted by the judge in that case, that the learned judge expressly adjudged that the provisions of PACE and the Codes of Practice made thereunder were received or imported as part of the laws of Anguilla. In **Shayne Richardson** the learned judge in applying the provisions of section 47 of the CPA, in the absence of specific provisions in the domestic Police Act, said:

“Neither the Anguilla Police Act nor the Police Regulations set out the procedure or guidelines for a police officer exercising his stop and search power. Section 47 of the Criminal Procedure Act provides that “*All other matters of procedure not herein nor in any other Act expressly provided for shall be regulated, as to the admission thereof, by the law of England, and the practice of the Superior Courts of criminal law in England.*” I therefore consider it helpful to turn to the English Police and Criminal Evidence Act and the subsidiary Code of Practice for the Exercise by: Police Officers of Statutory Powers of Stop and Search (“Code A”).⁵

² [1988] UKPC 6

³ [2009] ECSCJ No. 102

⁴ Per Small Davis J. (Ag) at paras 22 – 22

⁵ At para 23

- [15] Having subscribed to the notion of the reception of PACE as part of the law of Anguilla and therefore applicable to the question of the lawfulness of his arrest, Mr. Brice directed the court to the decision in **R v Olden**⁶ in support of the proposition that the doctrine of the 'necessity criteria' as determinative of the lawfulness of an arrest was primordial. In **R v Olden** the Court of Appeal quashed a conviction for the lack of compliance with PACE on the basis of the necessity criteria.
- [16] The Attorney General was vehemently and trenchantly opposed to the arguments advanced by Mr. Brice; particularly as it related to the proposition that the provisions of PACE were received as part of the law in Anguilla and could therefore be applied by the court in deciding the substantive issue of the lawfulness of Mr. Brice's arrest.
- [17] In short, the Attorney General's argument was that Mr. Brice had postulated the incorrect test to be applied in determining the lawfulness of his arrest. According to the Attorney General, the question of whether Mr. Brice's arrests amounted to an infringement of his rights guaranteed by section 3(1)(f) of the Constitution fell to be determined in accordance with section 365 of the Criminal Code and the common law.
- [18] Additionally, the Attorney General took issue with Mr. Brice's claim for damages for the alleged breach of section 3(1) (f) of the Constitution, which Mr. Brice alleged amounted to an infringement of his rights guaranteed thereunder. The court understood the Attorney General's argument to be that the inclusion of additional claims for damages that were not included in the original Motion filed by Mr. Brice fell outside the scope of the remittance to the High Court for rehearing. In a nutshell, Mr. Brice, for all intents and purposes, was advancing a claim for new remedies in the amended Motion, which he was not competent to do.

⁶ [2007] EWCA Crim 726

- [19] Furthermore, the inclusion of these new claims and new remedies have not only transposed the original claim into a substantially different claim but amounts to a blatant infringement of the court's order granting him leave to amend. In the Attorney General's view these offending parts of the amended Motion ought to be struck out and ought not to feature in the court's deliberations. The court is inclined to agree with the Attorney General's argument, for reasons that will become apparent later on in this judgment.
- [20] The case for the Attorney General, simply put, was that at all material times there was ample justification for Mr. Brice's arrest. This justification was founded on the existence of reasonable grounds to suspect that he had committed a criminal offence. Therefore, Mr. Brice's claim for relief under the Constitution on account of the alleged infringement of his rights guaranteed under section 3(1) (f) of the Constitution cannot pass muster.
- [21] In addition, the Attorney General contended that the provisions of PACE relied on by Mr. Brice have not been received as part of the law of Anguilla in the manner advanced by him, or at all; and, in any event, the provisions of PACE share no affinity or kinship to the provisions of section 365 of the Criminal Code and is incapable of adding any gloss or veneer to its interpretation.
- [22] In the circumstances, the Attorney General adopted the position that Mr. Brice's claim for declaratory relief and compensation under the Constitution is premised on an improper basis and, for all intents and purposes, is misguided and misconceived. According to the Attorney General, the resolution of the issues extant in the motion before the court ought not to involve any excursion into the realms of "necessity for the arrest" in the same manner as the legislative construct found in section 24 of PACE. The appropriate test is that obtained at common law and under section 365 of the Criminal Code.
- [23] The court will adopt the following approach in resolving the issues that arise for consideration in the present case. Initially, the court will deal with what can appropriately be regarded as preliminary issues, namely, whether the provisions of

section 24(5) of PACE have been received as part of the law of Anguilla and by extension whether the legislative guide set out in PACE is dispositive of the issue regarding Mr. Brice's arrest; and what are the appropriate legal principles upon which the court must rely in determining the lawfulness of Mr. Brice's arrest.

[24] After the court has made its preliminary findings in relation to the preliminary issues already identified, the court will go on to consider the question of whether there has been an infringement of Mr. Brice's rights guaranteed under section 3(1) (f) of the Constitution and whether Mr. Brice is entitled to redress under section 16(1) of the Constitution.

[25] Thereafter, depending on how the preliminary issues and the substantive issue of the lawfulness of Mr. Brice's arrest have been decided, the court will consider the point raised by the Attorney General in respect of whether Mr. Brice is entitled to compensation by way of damages, if at all, in the manner and on the basis upon which he claims such an entitlement. Although, assuming that the constitutional point is not determined in Mr. Brice's favour, there would be no need to consider the question of compensation or an award of damages contingent on the infringement of any constitutional right.

[26] Before embarking on an assessment of the merits of Mr. Brice's claim for redress under the Constitution, it is necessary for the sake of completeness to deal with a pertinent issue that arose as part of the criticisms leveled by the Attorney General at the relief sought in the Motion. This criticism concerns Mr. Brice's invocation of section 1(a) of the Constitution whereby he alleged that the rights guaranteed to him under the provisions of section 1(a) of the Constitution had been breached in relation to him. Although this allusion to a breach of section 1(a) of the Constitution does not find its embodiment in the substance of the Motion, Mr. Brice included it in the intitlement to the Motion.

[27] The law is well settled that the provisions of section 1 of the Constitution are merely declaratory of the rights enjoyed and protected by the subsequent provisions of the

Constitution. In any event, this aspect of the case is not relevant for the purposes of any of the issues that presently arise for consideration by the court.

- [28] The court has made yet another observation regarding the tenor of Mr. Brice's claim for redress under the Constitution. Unless the court is mistaken, it seems apparent that some of the allegations made by Mr. Brice in his supporting affidavits, are akin to a claim in private law for wrongful arrest, false imprisonment and malicious prosecution, vaguely masked as a claim in public law. It does not appear that Mr. Brice has pursued any remedy in public law; an avenue that was patently opened and available to him. The foregoing observation was yet another basis upon which the Attorney General contended that Mr. Brice ought not to succeed in his claim for redress under the Constitution.
- [29] The court is fortified in its preceding observation, not only in terms of the matters pleaded by Mr. Brice in his affidavit evidence, but also in his formulation of the principles governing the trial of the issue of the lawfulness or otherwise of his arrest. In his submissions filed on 2nd December 2021, Mr. Brice in attempting to distill the principles of law as they relate to what amounts to reasonable grounds for suspecting in order to justify an arrest made without warrant, adverted the court's attention to the fact that DC Marsden was deceased and accordingly was unable to give evidence in relation to his reasonable grounds for suspecting, to permit the court to make a proper assessment of the question as to the reasonableness for his suspicion.
- [30] DC Marsden's death seemed to have had particular relevance to Mr. Brice's case insofar as he argued that "if the arresting officer does not give evidence at the relevant proceedings or if there not be sufficient or any relevant and admissible evidence adduced for the judge to assess whether all elements are present to render the arrest lawful, the police would fail and the challenge would be upheld".

- [31] Mr. Brice carried the foregoing submission further, relying on the case of **Mark Richards**, when he stated in his written submissions that: “Thus the case bears authority for the huge importance of an arresting officer giving evidence in proceedings (at which he would be subjected to cross-examination) where an arrest has been challenged. Given that the arresting officer is individually and independently responsible and accountable in law for his actions, that is the only way that a court can determine the critical issues such as those bearing on the state of mind or belief of the officer at the time of the arrest”.
- [32] In the court’s estimation, it appears that this argument is juxtaposed to the position adopted by Mr. Brice that an assessment of whether there has been an infringement of his rights guaranteed under section 3(1) (f) of the Constitution must be assessed in light of the “necessity criteria” embodied in section 24(5) of PACE. Alternatively, Mr. Brice’s argument must be criticised on the basis that it mimics the vagaries of a civil trial with that of a claim for redress under the Constitution.
- [33] The court is inclined to disagree with Mr. Brice’s propositions on this point. Mr. Brice’s proposition as it relates to the court’s ability to assess the question of the existence of reasonable suspicion in the absence of DC Marsden’s evidence, which is incapable of challenge, is self-defeating to the extent that this indeed being the case makes his case one that is unsuitable to be resolved by way of invoking the provisions of section 16 of the Constitution. In making this point the court is swayed by the salutary warning of Lord Hope of Craighead in **Thakur Persad Jaroo v The Attorney General of Trinidad and Tobago**⁷:

“Their lordships wish to emphasise that the originating motion procedure under s 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. As Lord Mustill indicated in *Nankissoon Boodram v Attorney-General* (1996) 47 WIR 459 at 494, in the context of a complaint that adverse publicity would prejudice the appellant’s right to a fair trial, the question whether the appellant’s complaint that the police were detaining his vehicle was well founded was

⁷ (2002) 59 WIR 519 at para [36]

a matter for decision and, if necessary, remedy by the use of the ordinary and well-established procedures which exist independently of the Constitution. But instead of amending his pleadings to enable him to pursue the common-law remedy that had always been available to him, the appellant chose to adhere to what had now become an unsuitable and inappropriate procedure. Moreover, having decided to adhere to that procedure, he did not challenge the statements in Sgt Flemming's affidavit that further inquiries were being undertaken which would lead to the apprehension of those concerned in the theft of the vehicle and that it was necessary to preserve it as material evidence."

- [34] In any event, the Attorney General countered Mr. Brice's contentions on this point by alerting the court to the objective evidence available in the proceedings from which the court could properly and objectively assess the existence or otherwise of reasonable grounds for suspicion in effecting Mr. Brice's arrest.
- [35] Additionally, the court finds strength in the Attorney General's argument that Mr. Brice has the evidential burden of establishing a breach of his rights guaranteed under section 3(1) (f); when this breach has been established, it is left to the public authority to present evidence establishing justification for the abrogation of that right. The Attorney General argued that Mr. Brice has failed to discharge this evidential burden, and on that basis alone his claim for redress under the Constitution ought to fail.
- [36] The court is inclined to subscribe to the views expressed by the Attorney General on this point. The court has adopted this posture particularly in light of what, for all intents and purposes, may properly be regarded as a concession by Mr. Brice that there is no dispute that there existed reasonable suspicion as a predicate to his arrest. However, it appeared that Mr. Brice clung tightly to the concept of procedural fairness and the doctrine of necessity encapsulated in PACE as the underlying basis for alleging an infringement of his sections 3(1) (f) rights.
- [37] It is worthy of note that Mr. Brice's claim does not hinge on any allegation of wrongful arrest, unlawful detention or malicious prosecution. Therefore, it cannot be said, given the nature of the present proceedings, that there ought to be any adversarial dissection of the evidence relevant to the issue of Mr. Brice's summary arrest.

Indeed, it is clear that the parties to the present proceedings are agreed on the factual matrix and chronology of events giving rise to the present claim. The only question of fact raised by Mr. Brice relates to the principles of procedural fairness and the criteria of necessity that he has relied on to ground his claim. The efficacy and likelihood of success of such an approach will be determined subsequently in this judgment.

- [38] Mr. Brice owned and operated a corporate trust management company named Private International Trust Corporation ('PITCO'). At the material time he provided services to a client company called Regency Holdings Limited ('Regency'). A dispute arose between PITCO and Regency regarding the plight and destination of certain funds held on trust by PITCO on behalf of Regency. The allegation was that Mr. Brice had either wrongfully appropriated the trust's money or converted the same to his use. A report was subsequently made to the police authority presumably by an agent of Regency.
- [39] Mr. Brice was arrested on 7th February 2009 by Detective Constable Anthony Marsden ('Marsden'), a member of the RAPF who has since departed this earthly realm. Mr. Brice was taken to the police station where he was subjected to official questioning. After this period of official questioning, Mr. Brice was charged with the offence of theft contrary to section 242 of the Criminal Code.
- [40] While on bail with respect to the theft offences, Mr. Brice was again arrested on 18th September 2009 in respect of offences in contravention of the Proceeds of Crime Act, 2009. After this subsequent arrest Mr. Brice was not admitted to bail.
- [41] Mr. Brice was subsequently indicted on two counts of theft contrary to section 242 of the Criminal Code and eleven counts of transferring criminal property contrary to section 125(1) of the Proceeds of Crime Act, 2009. He was tried, convicted and sentenced for the offences of theft. He successfully appealed his conviction to the Court of Appeal. The Court of Appeal ordered that he be retried for these offences.

- [42] Upon is retrial, the presiding judge directed the jury to return verdicts of acquittal in respect of the counts related to breaches of the Proceeds of Crime Act. However, he was convicted on one count of theft and sentenced to a term of imprisonment. He appealed this conviction. The Court of Appeal allowed his appeal and quashed his conviction for theft.
- [43] Having set out the foregoing chronology, it appears very doubtful that Mr. Brice would have enjoyed any success in a claim in private law for wrongful detention and malicious prosecution. Mr. Brice was first committed and then tried and convicted for the theft offences. Subsequently he was retried and convicted on one count of theft. Notwithstanding the Court of Appeal's quashing of this conviction which invariably amounted to an acquittal on the substantive charge, the Court of Appeal's decision cannot be interpreted to mean that Mr. Brice had committed no offence. Instead, what is clear from the judgment of the Court of Appeal is that Mr. Brice had not committed the offence for which he stood indicted; however, it did not say that he committed no offence at all, in which case his arrest and prosecution would not have been warranted at all.
- [44] Therefore, in the court's view, Mr. Brice cannot now rely on the fact of the quashing of his conviction as a launch pad for constitutional redress. The Court of Appeal overturned Mr. Brice's conviction on the basis of the learned trial judge having erred in dismissing a submission of no case to answer. The court is fortified in its views on this point by the decision in **Chokoling v Attorney General of Trinidad and Tobago**⁸ where the Privy Council relying on the decision in **Ramesh Lawrence Maharaj v The Attorney General of Trinidad and Tobago (No 2)**⁹ dismissed the applicant's application under section 6(1) the Court of Appeal on the basis that:
- “...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. When there is no higher court to appeal to then none can say that there was error.”

⁸ (1980) 32 WIR 354

⁹ (1978) 30 WIR 310 at 321

Their Lordships in **Chokolingo** reasoned that:

“The normal way in which this interpretative and declaratory function is exercised is by judges sitting in courts of justice for the purpose of deciding disputes between parties to litigation (whether civil or criminal), which involves the application to the particular facts of the case of the law of Trinidad and Tobago that is relevant to the determination of their rights and obligations. It is fundamental to the administration of justice under a Constitution which claims to enshrine the rule of law (preamble to the Constitution, paragraphs (d) and (e)) that if between the parties to the litigation the decision of that court is final (either because there is no right of appeal to a higher court or because neither party has availed himself of an existing right of appeal), the relevant law as interpreted by the judge in reaching the court's decision is the “law” so far as the entitlement of the parties to “due process of law” under section 1(a) and the “protection of the law” under section 1(b) are concerned. Their Lordships repeat what was said in *Ramesh Lawrence Maharaj v Attorney-General of Trinidad and Tobago* (No 2). The fundamental human right guaranteed by section 1(a) and (b) and section 2, of the Constitution is not a legal system which is infallible but one which is fair.”

- [45] Mr. Brice, having conceded as he did in the course of these proceedings that his arrest was predicated on the basis of there being reasonable grounds to suspect that he had committed a criminal offence, it is only left for this court to determine whether Mr. Brice can seek redress under the Constitution for the alleged infringement of section 3(1) (f) on the basis of procedural impropriety and the “necessity criteria” founded on the provisions of section 24(5) of PACE.
- [46] In relation to the charges brought under POCA upon which the trial judge directed a verdict of acquittal, Mr. Brice did not pursue any remedy in private law. The court must be vigilant to prevent the use of claims for redress under the Constitution as a substitute for private law remedies which at times may be properly regarded as tantamount to a collateral attack on perceived actionable wrongs by holders of public office or those who exercise coercive powers on behalf of the state. Such collateral attacks may very well be considered an abuse of process.
- [47] Mr. Brice had previously mounted an unsuccessful challenge to the charges brought under POCA in seeking to have the indictment on these charges quashed or the prosecution of these charges stayed. In any event, without pontificating on the

merits or demerits of this previous challenge, it is obvious that Mr. Brice did not pursue any other form of redress available to him consequent on the disposal of these charges. In addition, Mr. Brice has not pursued any remedy in private law consequent on the Court of Appeal having set aside his conviction for theft.

[48] In addition, it appears that in light of the Court of Appeal's decision in respect of the present Motion, Mr. Brice has now chosen to pursue his claim for redress under the Constitution with renewed vigour. The court makes this observation in light of the substantial amendments to the Motion itself supported by new affidavit evidence that relate to an award of damages consequent on his having been arrested, charged and prosecuted for the subject offences, albeit unsuccessfully. The tenor of the claim for an award of damages consequent on the alleged breach of his rights guaranteed under the Constitution, suggest that Mr. Brice is seeking to recover damages under section of the Constitution as an alternative or in substitution for any private law remedy he could have pursued.

[49] Notwithstanding the fact that Mr. Brice exceeded the ambit of the court's grant of leave to amend the Motion and supporting affidavit in light of the events that occurred prior and subsequent to the remittal of the Motion to the High Court for rehearing; and thereby, in the court's view, transforming the original Motion into something entirely novel by the inclusion of substantially new relief to that originally claimed, the pursuance of redress under the Constitution in the existing state of affairs as previously described is not only untenable but misguided. This raises the question of whether Mr. Brice's choice to pursue constitutional redress was appropriate in the circumstances.

[50] In answering this question the court is guided by the decision in **Jaroo v The Attorney General** where the Privy Council found, applying the reasoning in **Kemrajh Harrikissoon v Attorney General of Trinidad and Tobago** "that the mere allegation of constitutional breach was insufficient to entitle the applicant to invoke the jurisdiction of the court under (what is now) s 14(1) of the Constitution if it was apparent that the allegation was 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. He said that in his opinion the appellant's motion was inescapably doomed to failure on the merits. But he also said that it connoted a resort to proceedings under the Constitution which lacked bona fides and was so clearly inappropriate as to constitute an abuse of process.”¹⁰

[51] The powers of summary arrest or arrest without warrant conferred on the police are enshrined in the provisions of the Criminal Code and the Police Act and are generally interpreted in accordance with avowed common law principles. This has been the jurisprudence of our courts from inception subject to legislative intervention. Therefore, there can be no question of the existence of a lacuna in the law as it relates to police powers of arrest without warrant.

[52] In relation to the question of whether the provisions of PACE have been received or incorporated as part of the law of Anguilla, the court adopts the considered view that it has not been so received, imported, extended or incorporated. Therefore, the provisions of section 24(5) of PACE cannot provide Mr. Brice any basis for challenging the lawfulness and constitutionality of his arrests.

[53] The court harbours serious doubt as to whether the provisions of section 24(5) of PACE have been received into the law of Anguilla by virtue of the provisions of section 47 of the Criminal Procedure Act (the ‘CPA’). Section 47 of the CPA provides:

“All other matters of procedure not herein nor in any other Act expressly provided for shall be regulated, as to the admission thereof, by the law of England, and the practice of the Superior Courts of criminal law in England.”

[54] On its literal interpretation section 47 of the CPA deals specifically with matters of practice and procedure in criminal courts. It does not purport, by any stretch of the imagination, to extend to matters related to substantive law.

¹⁰ At para [14]

[55] In addition, section 24(5) of PACE deals with the exercise of police powers of arrest. This is an entirely different matter from the subject canvassed in section 47 of the CPA.

[56] The court has examined the provisions of both the Criminal Code and the Anguilla Police Act and has satisfied itself that there is no open reception provision contained therein that is capable of receiving Acts of the United Kingdom Parliament.

[57] Section 2 of the Criminal Code sets out rules of general construction of the Criminal Code and provides:

“Except as otherwise expressly provided in this Code or in the Interpretation and General Clauses Act, this Code shall be interpreted in accordance with the principles of legal interpretation obtaining in England, and expressions used in this Code shall be presumed, so far as is consistent with their context, to be used in accordance with the meanings attached to them in the criminal law of England, and shall be construed in accordance therewith.”

On its plain and ordinary meaning, section 2 of the Criminal Code does not import the statutory laws of the United Kingdom into the law of Anguilla. The purport and effect of the provision is simply to act as a rule and guide to assist with the interpretation of expressions used in the Criminal Code and not to add any gloss on the substantive law as obtained in the Criminal Code itself.

[58] Section 46 of the Interpretation and General Clauses Act (the ‘Interpretation Act’) provides:

“Whenever any Act of the United Kingdom is extended to Anguilla, such Act shall be read with such formal alterations as to names, localities, courts, officers, persons, money, penalties and otherwise as may be necessary to make the same applicable to the circumstances.”

This provision of the Interpretation Act reinforces the point that in order for the provisions of any law passed by an Act of the United Kingdom Parliament to be considered as received or incorporated into the law of Anguilla, there must be in existence an Order in Council or Act of the United Kingdom Parliament which specifically extends that legislation to Anguilla. This is obviously not the case as it relates to PACE.

[59] In arriving at this conclusion, the court examined the provisions of the West Indies Act, 1967. Undoubtedly, Anguilla is a British Overseas Territory. Anguilla assumed this status by virtue of the West Indies Act, 1967 and successor legislation that changed its status from associated statehood to that of overseas territory. Section 3 of the West Indies Act provides:

- (1) Except as provided by subsections (2) to (4) of this section, no Act of the Parliament of the United Kingdom passed on or after the appointed day shall extend, or be deemed to extend, to an associated state as part of its law, unless it is expressly declared in that Act that that state has requested and consented to its being enacted.
- (2) Where any Act of the Parliament of the United Kingdom contains a provision expressly declaring—
 - (a) that that Act, or an enactment contained in it which is specified in that provision, extends to all associated states, or to such one or more associated states as may be so specified, and
 - (b) that it is required so to extend in the interests of the responsibilities of Her Majesty's Government in the United Kingdom relating to defence and external affairs, that Act, or that enactment, as the case may be, shall extend in accordance with that provision notwithstanding anything in the preceding subsection."

[60] In addition, section 7(1) of the West Indies Act provides:

"(1) Without prejudice to the provisions of section 5(4) of this Act, Her Majesty may by Order in Council made at the request and with the consent of any associated state make, as part of the law of that state, any provision which appears to Her Majesty to be necessary or expedient for the peace, order or good government of that state."

Section 9 of the Anguilla Constitution Order, 1982 also provides that:

"Her Majesty reserves to Herself power, with the advice of Her Privy Council, to make laws for the peace, order and good government of Anguilla."

[61] The court has also examined the provisions of the Common Law (Declaration of Application) Act¹¹ relied on by Mr. Brice to buttress his argument that the common law embodied in the provisions of PACE have been imported into the law of Anguilla and ought therefore to be applied in determining whether there has been a breach of his rights guaranteed by section 3(1)(f) of the Constitution. The court has taken

¹¹ R.S.A. c. C60

the view that Mr. Brice's reliance on this statute in support of his case is wholly and entirely misconceived. In fact, the very language of this statute defeats Mr. Brice's argument that it operates to import English Law into the law of Anguilla.

[62] Section 1 of the Common Law (Declaration of Application) Act reads:

"We your Majesty's most dutiful and loyal Subjects, the Commander in Chief of your Majesty's Leeward Charibbee Islands, the General Council, and General Assembly of the said Islands, now met at Nevis, do humbly pray your Majesty that it may be declared, and it is hereby declared by the Authority aforesaid, That the Common Law of England, as far as it stands unaltered by any written Laws of these Islands, or some of them, confirmed by Your Majesty, or some of your Royal Predecessors in Council, or by some Act or Acts of Parliament of the Kingdom of England, extending to these Islands, is in force in each of these your Majesty's Leeward Charibbee Islands, and is the certain Rule whereby the Rights and Properties of your Majesty's good Subjects inhabiting these Islands, are and ought to be determined; and that all Customs or pretended Customs, or Usages, contradictory thereunto, are illegal, null, and void."

The language of section 1 of the Common Law (Declaration of Application) Act can be simply interpreted to mean that the Common Law applies in the absence of any written law extended by Act of the United Kingdom Parliament to Anguilla which contradicts the Common Law. Based on this interpretation, the court accepts that in the absence of any definition of what amounts to reasonable suspicion in the domestic law of Anguilla, the common law would apply. However, the court is of the firm view that this statute does not operate to import the provisions of PACE into domestic law.

[63] For the sake of completeness and for the avoidance as to any doubt with respect to the court's findings relative to the reception of PACE as part of the law of Anguilla, the court will embark on an examination of the authorities relied on by the parties in their oral and written case.

[64] The case of **Eversley Thompson v The Queen**¹² relied on by Mr. Brice turned on the peculiarity of the statutory arrangements in force in Saint Vincent and the

¹² [1998] 2 WLR 927

Grenadines as it pertained to the reception and/or importation of the provisions of PACE 1984 in determining the admissibility of evidence in a criminal trial.

[65] The statutory arrangement in force in Saint Vincent and the Grenadines in the case of **Eversley Thompson v The Queen** were not akin to that which is presently obtained in Anguilla. The court thinks that this distinction is patently clear when one examines the language of the statutory provisions that were accredited with importing the provisions of PACE in that case.

[66] The question decided in the case of **Eversley Thompson v The Queen** was whether and if so to what extent: (i) section 3 of the Evidence Act 1988 (c. 158 of the Laws of Saint Vincent and the Grenadines) and/or (ii) sections 5 and 6 of the Application of English Law Act 1989 (c. 8 of the Laws of Saint Vincent and the Grenadines) and/or (iii) any other law of Saint Vincent and the Grenadines import into (or exclude from) the law of Saint Vincent and the Grenadines the provisions or any of the provisions of the Police and Criminal Evidence Act 1984 applicable in England both generally and as they relate to the admissibility of evidence in criminal proceedings.

[67] Section 3 of the Evidence Act 1988 provided:

“Whenever any question shall arise in any criminal or civil proceedings whatsoever in or before any court, court-martial or tribunal, or before any person having by law, or consent of parties, authority to hear, receive and examine evidence, touching the admissibility or sufficiency of any evidence, the competency or obligation of any witness to give evidence, the swearing of any witness, the form of oath or affirmation to be used by any witness, the admissibility of any question put to any witness, the admissibility or sufficiency of any document, writing, matter or thing tendered in evidence, such question shall, except as provided for in this Act, be decided according to the law and practice administered for the time being in England with such modifications as may be applicable and necessary in Saint Vincent and the Grenadines.”

[68] Section 5 of the Application of English Law Act 1989 provided:

“(1) Subject to the provisions of this section, only the following Acts of Parliament of the United Kingdom shall apply in Saint Vincent and the Grenadines, that is to say — (a) all such Acts as are specified in the Schedule, to the extent specified therein; and (b) any such Act which

applies, either specifically or by general description, by virtue of any Act of the Parliament of Saint Vincent and the Grenadines other than this Act ... (6) The Acts of the Parliament of the United Kingdom which apply by virtue of the provisions of subsection (1)(b) shall apply as they applied in England immediately before 27 December 1989 unless other provision as to the date of application has been made. (7) Subject to the provisions of subsection (8), notwithstanding that any Act of the Parliament of Saint Vincent and the Grenadines which is in force on 27 December 1989 provides that an Act of the Parliament of the United Kingdom (whether by use of the expression 'the law and practice' or otherwise) shall apply as in force in England for the time being, the provisions of subsection (6) shall apply to such Act of the Parliament of the United Kingdom and not the provisions of such other Act and, without prejudice to the generality of the foregoing, section II of the Eastern Caribbean Supreme Court (Saint Vincent and the Grenadines) Act, shall be construed accordingly."

[69] Section 6 of the same Act provided:

"(1) Any Act of the Parliament of the United Kingdom which applies in Saint Vincent and the Grenadines by virtue of the provisions of section 5 shall — (a) be read and construed with such formal alterations and modifications as to names, localities, courts, officers, persons and otherwise as may be necessary to make the Act appropriate to the circumstances; and (b) be subject to such amendment as may have been made, or may hereafter be made, by an Act of the Parliament of Saint Vincent and the Grenadines. (2) Where any conflict arises between the provisions of an Act of the Parliament of the United Kingdom which applies by virtue of the provisions of section 5 and the provisions of an Act of the Parliament of Saint Vincent and the Grenadines, the provisions of the latter shall prevail. (3) Where an Act of the Parliament of the United Kingdom applies in Saint Vincent and the Grenadines by virtue of the provisions of section 5 repealed and replaced an earlier Act of that Parliament but subsidiary legislation made under such earlier Act continues in force, such subsidiary legislation shall, if otherwise applicable, for the purposes of that section, be deemed to have been made under the latter Act."

[70] It was on the basis of the foregoing statutory provisions that the Privy Council held that PACE applied to Saint Vincent and the Grenadines. The court recognises that in the case of **Eversley Thompson v The Queen**, the statutory enactments specifically and not by implication, imported the provisions of PACE into the law of Saint Vincent and the Grenadines. Therefore, there can be no argument with the proposition that the provisions of section 47 of the Criminal Procedure Act and section 2 of the Criminal Code did not specifically, expressly or even by implication import PACE into the law of Anguilla.

[71] The court found it quite fortuitous that Mr. Brice would have relied on the decision in the case of **Earl Hunte v The Queen**.¹³ That case clearly highlights the distinction that the court is striving to make in the present proceedings. Again, the decision in **Earl Hunte v The Queen** amplifies this distinction based on the peculiarity of the reception provision that existed in the Criminal Code 1992 (Saint Lucia). The relevant provision at the time was section 948 of the repealed Criminal Code 1992 which provided:

"Subject to the provisions of this Code or of any other Statute; the law of evidence administered in the Court shall be the same as the law of evidence in criminal causes and matters administered for the time being in the High Court of Justice, and the Courts of Assizes created by Commission of Oyer and Terminer and of Gaol Delivery, in England, so far as such practice and procedure are applicable to the circumstance of this State."

[72] Therefore, based on section 948 of the Criminal Code 1992 the law of evidence as it applied in England for the time being was being applied in Saint Lucia up to 1st January 2005 when the Criminal Code 2004 came into force. Section 5 of the Criminal Code 2004 provided:

"Without prejudice to section 1083 where no provision is made in this Code with respect to the procedure concerning any criminal proceedings before a Court, such procedure at common law as appropriate shall be applied with such modification or adaptation as may be necessary."

[73] Therefore, section 5 of the Criminal Code 2004 replaced the application of the law of evidence administered for the time being in the courts of England with the common law. Section 1083 of the Criminal Code 2004 also altered the provisions of section 948 under the Criminal Code 1992 by conferring power to the Chief Justice and the courts in general to regulate the practice and procedure when there was any lacuna in the Criminal Code 2004. In the circumstances, the reception of PACE into the criminal law and the law of evidence in Saint Lucia was displaced.

[74] Section 1083 of the Criminal Code 2004 provided:

"(1)The Chief Justice may make rules of practice for regulating proceedings in criminal causes and matters, whether in the High Court or district court,

¹³ [2011] ECSCJ No. 4

and in all matters of criminal procedure not provided for by this Code or any other enactment.

(2) Without prejudice to subsection (1) in all cases of procedure not provided by this Code or any rules of practice, or otherwise, the procedure or practice or form in matters of criminal proceedings shall be such as may be directed or approved for the purpose and occasion by the judge in the case of the High Court or by the magistrate in the case of a district court.”

[75] The foregoing exposition on the reception provisions contained in the laws of Saint Vincent and the Grenadines and Saint Lucia was intended to highlight the operation of those provisions as they relate to the importation of English law into the criminal law and law of evidence in those jurisdictions. It can be seen that the provisions contained in section 2 of the Anguilla Criminal Code and section 47 of the CPA are not akin to the reception provisions from the other two jurisdictions examined above.

[76] The court is further fortified in its reasoning by the decision in the case of **Panacom International Inc. v Sunset Investments Ltd and Another**¹⁴ where it was held that section 11 of the Eastern Caribbean Supreme Court Act, 1970 which provided, when no special provision was made in the case of Saint Vincent and the Grenadines, for the exercise of jurisdiction in conformity with the law and practice of the High Court in England was essentially concerned with procedure and did not import into the law of Saint Vincent and the Grenadines procedural provisions (such as Rules of the Supreme Court) which were adjectival and were purely ancillary to English substantive law. The reasoning of the Court of Appeal in **Panacom** was eloquently set out in the dicta of Floissac CJ where he said:

“Section 11 of the Supreme Court Act relates solely to the manner of the exercise of the jurisdiction of the High Court. It is therefore an intrinsically procedural provision. The words 'provisions', 'law' and 'law and practice' appearing in section 11 are evidently intended to be references to procedural (as distinct from substantive) law. The English law intended to be imported by section 11 is the procedural law administered in the High Court of Justice in England. In enacting section 11, the legislature of St Vincent and the Grenadines could not have intended to import English substantive law nor English procedural law which is adjectival and purely ancillary to English substantive law. The English State Immunity Act 1978 is substantive law and the English Order 11, rule 7, and Order 13, rule 7A, are procedural laws adjectival and purely ancillary to that substantive law.

¹⁴ (1994) 47 WIR 139

These procedural English laws are therefore not caught by the Supreme Court Act.”

- [77] The reasoning of the Court of Appeal was applied in the case of **Doyle v Deane**¹⁵ where the Court of Appeal had to consider the question of whether an enactment permitted the importation of substantive or procedural English Law where there was no special provision existing in domestic law. The Court of Appeal in **Doyle v Deane**, relied on and confirmed the decision in **Panacom**. The salutary words of Pereira JA, as she then was, underscores the rationale for the approach taken in relation to section 11 of the Eastern Caribbean Supreme Court Act. Her Ladyship stated:

“In my view, this pronouncement of the scope of s 11 of the Supreme Court Act (which is a provision found in the Supreme Court Acts of all Member States and Territories making up the jurisdiction of the Eastern Caribbean States Supreme Court) is an accurate and as clear and succinct a statement on s 11 as there could be. Furthermore, the notion that all Member States are subject to the importation of English substantive law by virtue of s 11 would leave much to be desired in any sovereign state not to mention the state of uncertainty as to what laws a citizen of the state may be subject at any given point in time and without regard to its own parliament which is charged with the making of laws for the state as it may deem necessary for that state's good governance. Section 11 certainly could not have been intended to have this effect. The emphasised words in the section indicate that the focus on the importation of any law, rule or practice is in respect of the exercise of the jurisdiction as distinct from the importation of English law so as to give jurisdiction.”

- [78] In addition, the court took the view that there is no lacuna in the law as it relates to the powers of arrest without warrant conferred on the police by virtue of the Criminal Code and the Anguilla Police Act. Section 365 of the Criminal Code provides:

“(1) The powers of summary arrest conferred by this section shall apply to offences for which the sentence is fixed by law or for which a person (not previously convicted) may under or by virtue of any enactment be sentenced to imprisonment for a term of 5 years or longer, and to attempts to commit any such offence, and in this Code and in any other law “arrestable offence” means any such offence or attempt.

(2) Any person may arrest, without a warrant, anyone who is, or whom he, with reasonable cause suspects to be, in the act of committing an arrestable offence.

¹⁵ (2012) 82 WIR 287

(3) Where an arrestable offence has been committed, any person may arrest without warrant anyone who is, or whom he, with reasonable cause suspects to be, guilty of the offence.

(4) Where a police officer, with reasonable cause, suspects that an arrestable offence has been committed, he may arrest without warrant anyone whom he, with reasonable cause, suspects to be guilty of that offence.

(5) A police officer may arrest, without warrant, any person who is, or whom he, with reasonable cause, suspects to be, about to commit an arrestable offence.”

[79] In terms of the interpretation of what amounts to “reasonable cause to suspect”, one can only have recourse to the provisions of section 2 of the Criminal Code. The court having subscribed to the view that the provisions of PACE have not been imported as part of the law of Anguilla, it follows therefore that the interpretation of the words “reasonable cause to suspect” used in section 365 of the Criminal Code can be derived from the common law.

[80] Therefore, there is no evidence of PACE having been extended to Anguilla. Hence, the provisions of PACE relied on by Mr. Brice to ground his claim for constitutional redress are ousted by the combined effect of the provisions of section 5 of the Criminal Code, section 3 of the West Indies Act, section 46 of the Interpretation Act and section 9 of the Anguilla Constitution Order.

[81] In the circumstances, Mr. Brice cannot succeed in his claim for redress under the Constitution on the basis that any provision of PACE had been breached in relation to him when he was arrested without warrant. It is evident from the posture adopted by Mr. Brice, both in his written and oral submissions before the court, that he has conceded that at the time of effecting his arrest without warrant there existed reasonable cause to suspect that he had committed the subject offences.

[82] Therefore, Mr. Brice's claim for redress under the Constitution is dismissed. In light of the nature of the proceedings and the chronology of events that preceded it, the court makes no order with respect to costs.

Shawn Innocent
High Court Judge

By the Court

Registrar