

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

SAINT LUCIA

SLUHCVP2020/0004

BETWEEN:

ATTORNEY GENERAL

Appellant

and

**[1] ANTHONY HENRY
[2] FRANCIS NOEL**

Respondents

Before:

The Hon. Dame Janice M. Pereira, DBE
The Hon. Mr. Paul Webster
The Hon. Mr. Brian Cottle

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

Appearances:

Mr. Garth Patterson, QC with him, Mrs. Tina Louison and Mrs. Rochelle John-Charles for the Appellant
Ms. Lydia Faisal for the Respondents

2020: December 10;
2021: November 10.

Civil appeal – Constitutional law — Detention of persons found unfit to plead — Limitations to right to liberty – Doctrine of implied repeal — Whether Criminal Code impliedly repealed conflicting provisions in Mental Hospitals Act — Section 1021 of the Criminal Code – Section 31 of the Mental Hospitals Act of Saint Lucia – Whether there is a statutory requirement that a person found unfit to plead is to be detained in a mental hospital – Obligation of state to conduct periodic reviews of fitness to plead — Whether failure of state to conduct periodic reviews on detainees amounted to a breach of liberty – Protection from inhuman and degrading treatment – Assessment of evidence – Whether detention of a person found unfit to plead in prison can amount to inhuman and degrading treatment — Applicability of European Court of Human Rights jurisprudence in interpreting Commonwealth Constitutions — Whether constitutional right to protection from inhuman and degrading treatment breached by failure of state to conduct periodic reviews on detainees – Whether respondents rights to personal liberty breached in circumstances where detention was for periods which undermined their rights to protection of the law — Redress for breaches of constitutional rights – Damages —

Whether learned judge erred in the assessment of damages – Permanent stay of criminal proceedings – Principles applicable to grant of permanent stay of criminal proceedings

The first respondent, Anthony Henry (“Henry”), was arrested and charged for double murder on 26th September 1995. Henry was found unfit to plead by a judge of the court below on 7th February 2000 and ordered to be detained in custody at Her Majesty’s Prison ‘until the Governor General’s pleasure shall be known’. He was detained at the Bordelais Correctional Facility (“Bordelais”) until he was discharged unconditionally on 30th May 2019, having been detained for 24 years. The second respondent, Francis Noel (“Noel”), was arrested and charged on 13th December 1987 with causing grievous bodily harm. Noel was found unfit to plead and ordered to ‘be detained at the Royal Gaol until the Governor General’s pleasure be known’. He remained detained at Bordelais at least up until the date of the judgment of the court below. Noel has therefore been detained for at least 32 years. From 2003 onwards, during the course of their detention, the respondents were examined by psychiatrists and diagnosed with serious mental illnesses. They were both administered medication but were never admitted to any mental health facility and remained in prison for the entire period of their detention pending recovery of their fitness to plead.

The respondents brought claims in the court below seeking declaratory relief and compensation for breaches of their constitutional rights to personal liberty, protection from inhuman treatment and protection of law arising from the circumstances of their detention. The learned judge granted the respondents’ claims and made declarations that: (1) the State’s detention of the respondents in prison as opposed to a mental health facility after being found unfit to plead was in breach of their right to personal liberty; (2) the State’s failure to provide periodic reviews of the respondents’ fitness to plead after their detention in prison was in breach of their constitutional right to protection against inhuman and degrading punishment; and (3) the State’s detention of the respondents in prison after being found unfit to plead due to mental illness, without any periodic review of their fitness to plead for the duration of their detention was in breach of their right to personal liberty. The judge essentially considered that the respondents, having been found unfit to plead, ought to have been detained in a mental hospital and detaining them in a prison instead, amounted to a breach of their constitutional rights. The judge awarded damages to Noel and Henry in the sums of \$5,031,500.00 and \$3,526,000.00 respectively for the breaches of their rights to personal liberty, calculated at a rate of \$500.00 per day.

The Attorney General, being dissatisfied with the decision of the judge, appealed. The issues for this Court’s consideration are: (i) whether the judge erred in finding that the respondents’ constitutional rights to protection against inhuman and degrading treatment were breached in circumstances where they were detained in a prison without periodic reviews of their fitness to plead; (ii) whether the respondents ought to have been detained at a mental hospital pending their fitness to plead so as to render their detention in a prison in breach of their constitutional right to personal liberty; (iii) whether the judge erred in finding that the respondents’ constitutional right to personal liberty had been breached by the State’s failure to conduct periodic reviews with a view to ascertaining their fitness to plead; and (iv) if the respondents’ rights to personal liberty were breached, whether the judge erred in his assessment of the damages to be awarded.

Held: allowing the appeal in part and making the orders set out at paragraph 142 of the judgment:

1. An appellate court ought only to interfere with a trial judge's exercise of discretion if satisfied that the exercise of discretion or evaluations of the evidence on the basis of which he exercised his discretion were plainly wrong or the exercise of discretion was based on findings which were not open to him or her on the evidence.

Edy Gay Addari v Enzo Addari [2005] ECSCJ No. 125 (delivered 27th June 2005) followed; **Ming Siu Hung and others v J F Ming Inc. and another** [2021] UKPC 1 applied.

2. Detention of a person found unfit to plead in a prison as opposed to a mental hospital will not of itself result in a breach of their constitutional right to protection from inhuman and degrading treatment. A claim which invokes this right must be supported by evidence, on the basis of which a finding of breach may be founded. In this case, there was no direct evidence before the court or inferences drawn by the judge from which a breach of the right to protection from inhuman and degrading treatment could reasonably have been found.

Section 5 of the **Constitution of Saint Lucia**, Cap 1.01 of the Revised Laws of Saint Lucia 2015 considered; **Thomas v Baptiste** [1999] 3 WLR 249 applied; **Higgs and another v Minister of National Security and Others** [1999] UKPC 55 applied; **Ireland v United Kingdom** (1980) 2 EHRR 25 considered; **Mayeka v Belgium** (2008) 46 EHRR 23 considered; **ZH v Hungary** ECHR 1891 (2012), application no. 28973/11 distinguished; **Cable and Wireless v Marpin Telecoms and Broadcasting Company Limited** [2000] UKPC 42 applied; **Observer Publications Limited v Matthew and Others** [2001] UKPC 11 considered; **Strazimiri v Albania** ECHR 028 (2020), application no. 34602/16 distinguished; **WD v Belgium** ECHR 277 (2016), application no. 73548/13 distinguished; **Raffray Taddei v France** ECHR 989 (2010), application no. 36435/07 distinguished; **Novak v Croatia** ECHR 483 (2007), application no. 8883/04 distinguished.

3. A breach of the right to the protection from inhuman and degrading treatment does not automatically follow from the fact that a detention has not been reviewed. The court must be satisfied that, had the periodic reviews taken place as required, the result would more likely than not have been that the detained person would have been permitted to stand trial or have been otherwise released from detention. In this case, the uncontroverted evidence before the judge was that both respondents continued to suffer from serious mental illness up until the date on which the matter was heard in the court below. The right to protection from inhuman and degrading treatment could therefore not have been breached by the fact of their unreviewed detention. Accordingly, it was not open to the judge to find that the respondents' constitutional rights to protection from inhuman and degrading treatment were breached.

Ian Seepersad and Roodal Panchoo v The Attorney General of Trinidad and Tobago [2012] UKPC 4 applied; **Bissessar v The Attorney General**

of **Trinidad and Tobago** Civil Appeal No. P 136 of 2010 (delivered 31st January 2017, unreported) applied.

4. A breach of the right to personal liberty may be found where a person is detained in a place other than that which is specified by an authorising law. Both the **Criminal Code** and the **Mental Hospitals Act** authorise the detention of a person found unfit to plead. Section 31 of the **Mental Hospitals Act** provides for the mandatory detention of a person found to be insane prior to conviction in a mental hospital. However, section 1021(1) of the **Criminal Code** vests in the trial judge a broad discretion to determine the place of detention following a finding of unfitness to plead. Where there is a conflict such as this between the provisions of an earlier and a later enactment, the court may find that the earlier enactment has been impliedly repealed to the extent of the conflicting provision, where such conflict gives rise to an inescapable logical contradiction.
5. It is clear that section 31 of the **Mental Hospitals Act** and section 1021(1) of the **Criminal Code** give rise to an inescapable logical contradiction. The mandate and discretion under the respective enactments are incompatible and cannot peaceably coexist. It follows that the mandatory requirement under the earlier section 31 of the **Mental Hospitals Act** for detention at a mental hospital following a finding of unfitness to plead, has been impliedly repealed by the later **Criminal Code**. Accordingly, there is no requirement in law for an accused person to be detained in a mental hospital pending recovery of their fitness to plead and a judge has a broad discretion to determine the place and manner of detention of the accused.

Section 3 of the **Constitution of Saint Lucia** Cap 1.01 of the Revised Laws of Saint Lucia 2015 considered; Section 31 of the **Mental Hospitals Act** Cap 11.14 of the Revised Laws of Saint Lucia 2015; Section 1021 of the **Criminal Code** 1992 considered; **R v Pinder** [2021] UKPC 13 considered; **Re Greenwood** (1855) 24 LJQB 148 considered; **Re S-C (Mental Patient: Habeas Corpus)** [1996] QB 599 considered; **Commissioner of Prisons and another v Seepersad and another** [2021] UKPC 13 considered; **Ferdinand James v Planviron (Caribbean Practice) Limited and another** [2019] ECSCJ No. 336 (delivered 16th October 2019) considered; **Susan Snelling and Anor v Burstow Parish Council** [2013] EWCA Civ 1411 considered; **O'Byrne v Secretary of State for Environment, Transport and the Regions** [2002] HLR 30 considered.

6. A finding of breach of the constitutional right to personal liberty, on the basis of the failure to conduct periodic reviews of a defendant's fitness to plead, must be made on an assessment of the evidence. In this case, the evidence showed that the respondents continued to suffer from serious mental illness up until the date on which the matter was heard in the court below. It follows that the respondents' unreviewed detentions could not amount to a breach of their rights to personal liberty as no argument could be made on the evidence that they would have been released whether on bail or otherwise had their detention been subject to periodic reviews. Accordingly, the judge erred in finding that the detention of the respondents without periodic

reviews amounted to a breach of their constitutional rights to personal liberty.

7. The circumstances in which the state may derogate from the constitutional right to personal liberty must be construed narrowly and detention under the **Constitution of Saint Lucia** and some other law, can only be lawful when it seeks to achieve the purpose for which it is authorised by the **Constitution of Saint Lucia**. The purpose of section 3(1)(a) of the **Constitution of Saint Lucia** and section 1021 of the **Criminal Code** is to ensure that detention is effected for the limited purpose of permitting a defendant to recover his fitness to plead with a view to standing trial. In this case, it cannot be reasonably said that Noel's detention in excess of 32 years was in legitimate pursuit of his recovery of fitness to stand trial when his period of detention was in excess of the maximum lawful custodial sentence which could have resulted from his trial and possible conviction. The detention therefore became arbitrary at some point and accordingly against the constitutionally enshrined safeguards. Noel's detention, following at the very least, 10 years, therefore could not reasonably have been in continued pursuit of his conviction and sentence for the offence of causing grievous harm.

Section 3(1)(a) of the **Constitution of Saint Lucia** Cap 1.01 of the Revised Laws of Saint Lucia 2015 considered; Section 1021 of the **Criminal Code** 1992 considered; **Liversidge v Anderson** [1942] AC 206 applied; **Dillon v R** [1982] AC 484 considered; **Schlieske v Federal Republic of Germany** [1987] FCA 58 considered; **Re S-C (Mental Patient: Habeas Corpus)** [1996] QB 599 considered; **Bouamar v Belgium** (1988) 11 EHRR 1 considered; **R (Gillan) v Commissioner of Police of the Metropolis** [2006] 2 AC 307 considered; **Winterwerp v Netherlands** (1979) 2 EHRR 387 considered; **Dow v Attorney General** [1992] LRC (Const) 623 considered; **Makuto v The State** [2000] 5 LRC 183 considered.

8. The right to protection of the law is not limited to the compendium of rights set out in section 8 of the **Constitution of Saint Lucia** but is a broad spectrum of rights including the constitutional right to a fair trial within a reasonable time. In this case, Noel and Henry's detention ran counter to their constitutional rights to a fair trial within a reasonable time and the duration of the periods of detention in prison eliminated the possibility of a fair trial. In these circumstances, the respondents' rights to liberty must have been breached as the purpose of their detention had been effectively overtaken by the fact that the period of their detention exceeded the lawful custodial sentence which could have been imposed on them following a possible conviction, and a fair trial could no longer take place due to the passage of time.

Section 8(1) of the **Constitution of Saint Lucia**, Cap 1.01 of the Revised Laws of Saint Lucia 2015 considered; **Attorney General v Joseph and Boyce** [2006] CCJ 1 (AJ) applied; **Ong Ah Chuan v Public Prosecutor** [1981] AC 648 applied; **Jabari Sensimania Nervais v The Queen** [2018] 4

LRC 545 considered; **Jamaicans for Justice v Police Service Commission and another** [2019] UKPC 12 considered; **Commissioner of Prisons and another v Seepersad and another** [2021] UKPC 13 considered; **Maya Leaders Alliance v The Attorney General of Belize** [2015] CCJ 15 (AJ) considered; **Urban St. Brice v The Attorney General of Saint Lucia** SLUHCVAP2018/0036 (delivered 31st July 2020, unreported) applied; **Boolell v The State** [2006] UKPC 46 applied.

9. Where a trial judge exercises the discretion to award damages for breaches of constitutional rights, the quantum must be assessed in light of the particular circumstances of the case and the Court of Appeal ought not to interfere with the judge's award unless it exceeded the generous ambit within which reasonable disagreement is possible and was therefore blatantly wrong. In this case, there was no basis on which damages could have been awarded for the breaches of the respondents' constitutional rights for the entire period of their detention in prison. Further, the court should only use a daily rate in the assessment of damages where the date of the unlawfulness of the detention is readily ascertainable, or where losses incurred are capable of estimation on a per diem basis. As the dates on which the respondents' detention became unlawful is unascertainable, the use of a daily rate was inappropriate. The awards of damages are therefore outside the ambit of reasonable disagreement and are blatantly wrong. In carrying out the assessment of damages afresh, this Court considers it appropriate in the circumstances to award damages in the sums of \$250,000.00 and \$500,000.00 to Henry and Noel respectively for the breaches of their constitutional rights.

Ian Seepersad and Roodal Panchoo v The Attorney General of Trinidad and Tobago [2012] UKPC 4 applied; **James v Attorney General of Trinidad and Tobago** [2010] UKPC 23 considered; **Merson v Cartwright and Anor** [2005] UKPC 38 considered; **Subiah v The Attorney General of Trinidad and Tobago** [2008] UKPC 47 considered; **Martin Alphonso et al v Deodat Ramnath** Civil Appeal No. 1 of 1996 (delivered 21st July 1997, unreported) applied; **Everette Davis v Attorney General of St. Christopher and Nevis** SKBHCV2013/0220 (delivered 30th June 2014, unreported) distinguished; **Takitota v The Attorney General and Others** [2009] UKPC 11 considered; **Wakeem Guishard v The Attorney General of the Virgin Islands** BVIHCVAP2018/0006 (delivered 2nd October 2020, unreported) applied; **Boolell v The State** [2006] UKPC 46 considered.

10. The court will only exercise its discretionary power to grant a stay of criminal proceedings in circumstances where it would be unfair, unlawful or in bad faith to permit the proceedings to continue. The circumstances of this case are extraordinary and given the length of the period that has elapsed since the respondents were charged and the impossibility of a fair trial, it would no longer serve the interests of justice for the prosecution to proceed. Accordingly, the indictments against Henry and Noel for double murder and causing grievous bodily harm respectively ought to be permanently stayed.

JUDGMENT

- [1] **PEREIRA CJ:** This is an appeal by the Attorney General against declarations and awards of damages to the tune of \$5,031,500.00 and \$3,526,000.00 made by a learned judge on 19th February 2020 for breaches of the respondents' right to liberty and the protection from inhuman and degrading treatment under the **Constitution of Saint Lucia**¹ (or "the Constitution").

Background

- [2] The circumstances giving rise to the claims herein weaves a sad tale on any view and in many respects lay bare the deficiencies between State resources and achieving the ideals contained in the Constitution. The respondents, Anthony Henry ("Henry") and Francis Noel ("Noel"), were arrested and charged for serious crimes. Noel was arrested and charged on 13th December 1987 with causing grievous harm. At the time, he was 36 years old. He was held on remand until his arraignment on 20th July 1992 when he was found unfit to plead and ordered by the judge to 'be detained at the Royal Gaol until the Governor General's pleasure shall be known'. At the time of the proceedings in the court below, he was detained at the Bordelais Correctional Facility ("Bordelais") and remained there at least up until the date of the learned judge's judgment. His total period of detention in prison, up until that time, was 32 years.
- [3] Henry was arrested and charged on 26th September 1995 for a double murder. He was certified unfit to plead by a certificate issued by the court below on 7th February 2000 and ordered by a judge to be detained in custody at Her Majesty's Prison 'until the Governor General's pleasure shall be known'. He was detained at Bordelais until he was discharged unconditionally by a judge of the Criminal Division of the High Court on 30th May 2019. His total period of detention in prison was 24 years.

¹ Cap 1.01 of the Revised Laws of Saint Lucia 2015.

- [4] It is undisputed, as indicated by Bordelais Medical Unit's Psychiatric Progress Notes, that Henry and Noel were examined by consulting psychiatrists on several occasions from 2003 onwards. There were no notes evidencing that the respondents had received psychiatric examination at Bordelais or elsewhere for the period 1992-2003. Henry was diagnosed variously with psychosis, schizophrenia, bipolar affective disorder and anti-social personality disorder. Noel was diagnosed as being delusional, schizophrenic and psychotic. They were both administered medication.
- [5] It is also undisputed that, for the entire period of their detention, the respondents were never admitted to any mental health facility in Saint Lucia and that the respondents remained in prison for the entire period of their detention pending recovery of their fitness to plead.

The Claims

- [6] The respondents brought claims in the High Court for breaches of their constitutional rights to personal liberty, protection from inhuman treatment and protection of the law arising from the circumstances of their detention. By their claims, the respondents sought both declaratory relief and compensation for the breaches of their constitutional rights. Henry's amended originating motion sought the following relief:

- "1. a declaration that the failure of the authorities to provide a trial for [Henry] within a reasonable time and in accordance with the requirements of Sections 8(1) and 8(2) of the Constitution of Saint Lucia; was in breach of the Sections thereof;
2. a declaration that [Henry's] detention in prison for 19 [years] was unlawful and in contravention of Section 3 of the Constitution of Saint Lucia;
3. A declaration that the failure by the authorities to regularly review [Henry's] mental fitness in accordance with the law, and his detention in a prison rather than at a mental hospital in accordance with Section 31 of the Mental Hospitals Act, amounts to degrading and inhuman treatment, in contravention of Section 5 of the Constitution of Saint Lucia;
4. An order for compensation for the breach of [Henry's] constitutional rights under Sections 8(1) and 8(2), Section 3 and Section 5 of the Constitution of Saint Lucia;

5. An order for damages in respect of the unlawful detention of [Henry] from February 7th 2000 until his release;

6. An order that [Henry] be released unconditionally by virtue of the said constitutional breaches and by virtue of his psychological evaluation dated the 30th day of December 2017.”

- [7] The relief sought by Noel is identical, save that at paragraph (2) of his amended originating motion, he sought a declaration that his detention in prison for almost three decades was unlawful and in contravention of section 3 of the Constitution and that at paragraph (6) he sought an order that he be released into a mental institution under section 31(1) of the **Mental Hospitals Act**.²
- [8] There was no dispute between the parties either in the court below, or before this Court as to the lawfulness of the initial detention orders made in relation to each of the respondents, and therefore no challenge to their detention on the basis that they were found unfit to plead.
- [9] Henry’s claim was supported by an affidavit sworn by him. He deposed that while in prison he was exposed to persistent taunts by fellow inmates and had been involved in several confrontations. He stated that had he been detained at a mental hospital he would have received controlled and regular treatment for his illness and that in prison he was treated no differently to the other prisoners. Henry maintained in his affidavit that he had received medication while in prison but gave no other evidence in relation to the day-to-day treatment he received there.
- [10] Noel’s claim was supported by an affidavit sworn by his aunt, Agatha Pierre. She deposed that Noel was detained in prison under maximum security and was deteriorating psychologically and would benefit from proper physical and psychiatric care in an environment which caters for his illness such as a mental hospital. She stated that he was frequently beaten by both prison officers and

² Cap 11.14 of the Revised Laws of Saint Lucia 2015.

inmates but gave no other evidence in relation to the day-to-day treatment he received while in prison.

- [11] Notwithstanding the absence of records of psychiatric care for the period 1992-2003, neither Henry nor Noel alleged in their pleadings or by way of evidence that they did not receive medication required for the treatment of their mental illnesses, or that there was any want of medical care by the state in relation to them for that period, or for any time during their detention.

The Judgment in the Court Below

- [12] By a written decision dated 19th February 2020, the learned judge largely granted the respondents' claims. The judge's reasons for his decision in summary were that-

- (i) as a matter of law, the respondents ought to have been detained in a mental hospital after having been found unfit to plead – their detention in a prison as opposed to a mental hospital was therefore unlawful and in breach of their rights to liberty;
- (ii) there was no reliable evidence of the conditions inside and outside of the prison, therefore no declaration as to inhuman treatment could be made on the basis of allegations of matters which obtained inside the prison;
- (iii) prisons are not designed for housing persons who are found unfit to plead or the mentally ill – the fact that the respondents were found unfit to plead and were not detained in a mental hospital diminished their inherent dignity as humans and was in breach of their right to protection from inhuman treatment.
- (iv) as persons who were being deprived of their liberty by the state, the respondents were entitled to periodic reviews by the state as to their fitness to plead – the failure of the state to conduct the said reviews, along with their detention in a prison, reduced their inherent dignity as humans and amounted to inhuman treatment in breach of section 5 of the Constitution;

- (v) the failure of the state to conduct periodic reviews as to the respondents' fitness to plead breached their rights to personal liberty; and
- (vi) the respondents' rights to a fair trial within a reasonable time were not engaged in this case, and the respondents were not entitled to any relief sought for breach of that right.

[13] On the question of damages, the learned judge cited and relied on the decisions of **Everette Davis v Attorney General of St. Christopher and Nevis**,³ **Jermaine Browne v Attorney General of Saint Christopher and Nevis and The Director of Public Prosecutions**⁴ and **Gavin Browne v Attorney General of Saint Christopher and Nevis**.⁵ In those decisions, the court awarded damages at the rate of \$500.00 per day for the infringement of the right to personal liberty. The learned judge adopted that rate and awarded damages accordingly for the breach of the right to personal liberty for the entire period of both the respondents' detention.

[14] On the basis of all the above, the learned judge made the following declarations and orders:

- “(1) A Declaration is granted that the State’s detention of the claimants in prison after being found unfit to plead due to mental illness, instead of in a mental health facility, is in breach of their right to personal liberty.
- (2) A Declaration is granted that the State’s detention of the claimants in prison instead of a mental health facility, after being found unfit to plead due to mental illness, without any periodic review of their fitness to plead, is in breach of their protection against inhuman and degrading punishment and reduces their inherent human dignity.
- (3) A Declaration is granted that the State’s detention of the claimants in prison after being found unfit to plead due to mental illness, without any periodic review for the entire duration of their incarceration to determine whether they had recovered their mental health so as to be fit to plead and stand their trial, is in breach of their right to personal liberty.
- (4) It is ordered that Mr. Francis Noel be transferred to a mental health facility.

³ SKBHCV2013/0220 (delivered 30th June 2014, unreported).

⁴ SKBHCV2016/0074 (delivered 19th November 2018, unreported).

⁵ SKBHCV2018/0108 (delivered 5th April 2019, unreported).

- (5) Damages are awarded to Mr. Francis Noel in the sum of \$5,031,500.00 for his detention in prison for 10,063 days in breach of his right to personal liberty.
- (6) Damages are awarded to Mr. Anthony Henry in the sum of \$3,526,000.00 for his detention in prison for 7,052 days in breach of his right to personal liberty.
- (7) Interest is awarded on the respective damages at the rate of 6% from date of judgment until payment in full is made.
- (8) Prescribed costs are awarded to both claimants.”

The Appeal

- [15] The Attorney General now appeals and seeks to have paragraphs (1), (2), (3), (5) and (6) of the learned judge’s order set aside or, alternatively, that the awards of damages made by the judge be substituted with appropriate awards if it is found that the respondents are entitled to damages for breach of the right to personal liberty. The Attorney General also sought and obtained a stay of execution of the learned judge’s order, which was granted by a single judge of this Court on 21st April 2020.
- [16] The Attorney General relies on 9 grounds of appeal which pose the following 4 questions for this Court’s determination:
 - (1) Did the judge err in his approach to determining whether the respondents’ constitutional right to protection against inhuman and degrading treatment was breached?
 - (2) Was there a statutory requirement that the respondents, who were found unfit to plead, be detained at a mental hospital pending trial so as to render their detention in a prison unlawful and in breach of the right to liberty under the Constitution?
 - (3) Did the judge err by concluding that the respondents’ right to personal liberty had been breached by the state’s failure to conduct periodic reviews with a view to ascertaining their fitness to plead?
 - (4) If the judge correctly concluded that the respondents’ rights to personal liberty had been breached, did the judge err in awarding damages at the rate of \$500.00 per day and for the entire period of the respondents’ detention?

- [17] At the centre of the appeal are the constitutional rights to liberty, protection from inhuman treatment and protection of the law, as well as the provisions of the **Criminal Code**⁶ and the **Mental Hospitals Act**. The relevant constitutional and statutory provisions are set out below.

The Constitutional and Statutory Provisions

(i) The Constitution

- [18] The right to personal liberty is found at section 3 of the Constitution which, so far as is relevant, provides as follows:

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

(a)in consequence of his or her unfitness to plead to a criminal charge or in execution of the sentence or order of a court whether established in Saint Lucia or some other country, in respect of a criminal offence of which he or she has been convicted;

...

(h)in the case of a person who is, or is reasonably suspected to be of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his or her care or treatment or the protection of the community;...”

- [19] Section 5 of the Constitution sets out the right to protection from inhuman treatment. It reads- ‘No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.’

- [20] The right to protection of the law under the Constitution is mentioned firstly in section 1 of the Constitution, which provides:

“Whereas every person in Saint Lucia is entitled to the fundamental rights and freedoms, that is to say, the right, whatever his or her race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely—

(a) life, liberty, security of the person, equality before the law and the protection of the law;

...

the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being

⁶ Criminal Code 1992, Laws of Saint Lucia.

limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest.” (Underlining supplied)

- [21] The right to protection of the law is comprised of an amalgam of complementary protections including those set out under section 8 of the Constitution. Among these complementary protections are the right to a fair hearing within a reasonable time and the presumption of innocence reflected in section 8(1) and section 8(2) as follows:

“(1) 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. (Underlining supplied)

(2) Every person who is charged with a criminal offence—

- (a) shall be presumed to be innocent until he or she is proved or has pleaded guilty;
- (b) shall be informed as soon as reasonably practicable, in a language that he or she understands and in detail, of the nature of the offence charged;
- (c) shall be given adequate time and facilities for the preparation of his or her defence;
- (d) shall be permitted to defend himself or herself before the court in person or, at his or her own expense, by a legal practitioner of his or her own choice;...”.

(ii) The Criminal Code and Mental Hospitals Act

- [22] The sections of the **Criminal Code** which are relevant to the appeal are sections 1019, 1020 and 1021. The provisions of the **Criminal Code** have been amended several times. There however does not appear to be any dispute that the relevant versions of sections 1019, 1020 and 1021 are as follows:

“1019. (1) If any accused person appears before or upon arraignment, to be insane, the Court may order a jury to be impanelled to try the sanity of such person, and the jury shall thereupon, after hearing evidence for that purpose, find whether such person is or is not insane and unfit to take his trial.

(2) If, during the trial of any accused person, such person appears, after the hearing of evidence to that effect or otherwise, to the jury charged with such indictment to be insane, the Court shall, in such case, direct the jury to abstain from finding a verdict upon the indictment, and in lieu thereof, to return a verdict that such person is insane.

(3) But a verdict under this section shall not affect the trial of any person so found to be insane for the offence for which he was indicted, in case he subsequently becomes of sound mind.

1020. Where, in any indictment, any act or omission is charged against any person as an offence, and it is given in evidence on the trial of such person for that offence that he was insane, so as not to be responsible, according to law, for his actions at the time when the act was done or omission made, then, if it appears to the jury, before whom such person is tried, that he did the act or made the omission charged, but was insane as aforesaid at the time when he did or made the same, the jury shall return a special verdict to the effect that the accused was guilty of the act or omission charged against him, but was insane as aforesaid at the time when he did the act or made the omission.

1021. (1)Where any person is found to be insane under the provisions of section 1019, or has a special verdict found against him, under the provisions of the preceding section, the Court shall direct the finding of the jury to be recorded and thereupon the Court may order such person to be detained in safe custody, in such place and manner as the Court thinks fit, until the Governor-General's pleasure shall be known.

(2)The Judge shall immediately report the finding of the jury and the detention of such person to the Governor General who shall order such person to be dealt with as a person of unsound mind under the laws of this State for the time being in force for the care and custody of persons of unsound mind, or otherwise as he may think proper."
(Underlining supplied)

[23] The **Mental Hospitals Act**, by its long title is 'An Act to provide for the custody of persons of unsound mind'. Section 31 of the **Mental Hospitals Act** is relevant to this appeal. It provides:

"31. Insanity before verdict

(1)If any person, upon arraignment before the High Court in its criminal jurisdiction or during his or her trial for any offence, is found by the jury to be insane, the Court shall order that the trial of such person be postponed until he or she becomes of sound mind and that in the meantime he or she be detained in custody in such mental hospital as the Court appoints until Her Majesty's pleasure is known, and thereupon the Governor General on behalf of Her Majesty may give such order for the safe custody of such person until he or she becomes of sound mind as the Governor General thinks fit.

(2)If any person charged before any Court with any crime or offence appears to the Court to be of unsound mind and it shall not be practicable to hold an inquiry as to the state of mind of

such person, it is lawful for the Court to order such person to be detained in custody in a mental hospital, which for this purpose shall be deemed to be a prison, until an inquiry can with reasonable expedition be held.”

The Applicable Legal Principles

- [24] Before addressing the substantive issues, I remind myself of the principles which form the foundational legal context of this appeal.

(i) Challenges to Exercise of Discretion

- [25] Firstly, as will soon become apparent, this appeal challenges the learned judge’s exercise of discretion to grant the declarations he did and to award damages in the sum and for the period that he did, as well as the evaluations of the evidence made by the judge on the basis of which the judge exercised his discretion to grant the said relief.

- [26] As Gordon JA held in **Edy Gay Addari v Enzo Addari**,⁷ an appellate court ought not to set aside a lower court’s exercise of discretion on the basis, alone, that it would have exercised the discretion exercised by the judge or evaluated the evidence in another way. Rather, an appellate court ought only to interfere with a judge’s exercise of discretion if satisfied that the exercise of discretion or evaluations of the evidence on the basis of which he exercised his discretion were plainly wrong or the exercise of discretion was based on findings which were not open to him or her on the evidence.⁸

- [27] In the recent decision of **Ming Siu Hung and others v J F Ming Inc and another**,⁹ the Privy Council had occasion to discuss at some length the confluence of the restraint required to be exercised on appeals from exercises of discretion and findings of fact. At paragraph 22, Lord Briggs stated:

“Finally, it is not an answer to the need for the exercise of appellate restraint for the appeal court to regard itself as well placed as the judge

⁷ [2005] ECSCJ No. 125 (delivered 27th June 2005).

⁸ See for example *Dufour and Others v Henelair Corporation Ltd and Others* (1996) 52 WIR 188 and *Yates Associates Construction Company Ltd v Blue Sand Investments Limited* BVIHCVAP2012/0028 (delivered 20th April 2016, unreported).

⁹ [2021] UKPC 1.

to carry out the relevant task. In Zuckerman on Civil Procedure: Principles of Practice, 3rd ed (2013), at para 24.204 it is observed:

'It has been said that a review of the lower court's decision on a question of fact is different from a review of the lower court's exercise of discretion. The difference between the two kinds of judicial exercise is undeniable, but it does not call for a difference in appellate restraint to interference with the lower court's decision. For while it is true that in the case of discretion the appeal court may be as well placed as the trial court to exercise it, the primary responsibility rests with the trial court not the appeal court. This is true not only with regard to case management decisions but also other decisions requiring the balancing of different factors as in care proceedings for instance'."

- [28] From these cases, and the many others on the role of an appellate court in the context of an appeal of this nature, it is clear that this Court is required, on this appeal, to exercise restraint taking into account the high threshold for appellate interference which the cases establish.

(ii) Interpreting constitutions and fundamental rights provisions

- [29] Secondly, the appeal flows from a claim and decision in the court below invoking the jurisdiction of the High Court to redress breaches of fundamental human rights provisions under the Constitution.

- [30] The broad principles applicable to the interpretation of fundamental rights and freedoms provisions in Commonwealth Caribbean Constitutions are well known. As I recently observed in **Attorney General of Saint Christopher and Nevis v Denzil Douglas**,¹⁰ it is now trite that post-independence Commonwealth constitutions are 'sui generis' [instruments] calling for principles of interpretation of [their] own, suitable to [their] character and are to be interpreted generously, purposively and with a view to avoiding 'tabulated legalism'.¹¹ In similar stead, Lord Keith in **Attorney General of Trinidad and Tobago v Whiteman**¹² said: 'the language of the constitution falls to be construed, not in a narrow and legalistic way, but broadly and purposively, so as to give effect to its spirit and this is particularly true of those provisions which are concerned with the

¹⁰ (2002) 96 WIR 355.

¹¹ See: *Minister of Home Affairs v Fisher* [1980] AC 319.

¹² [1991] UKPC 16.

protection of human rights'. These principles have been recognised and applied in decisions from this jurisdiction, the most oft cited of which is the decision of Byron CJ in **Attorney General of Grenada v The Grenada Bar Association**.¹³ The upshot of these decisions is that the fundamental rights provisions in our Constitutions must be interpreted and enforced generously and in a manner which gives effect to the substantive protections they seek to offer.

- [31] On the flip side of this generous interpretation of fundamental rights provisions, is that derogations from rights must be construed narrowly with a similar view to securing the most meaningful protection for the guaranteed rights. This principle of interpretation is borne out by a number of cases, including **Attorney General v Coard**,¹⁴ **R v Hughes**¹⁵ and **Lambert Watson v R**.¹⁶

(iii) Use of ECHR jurisprudence

- [32] Thirdly, the Privy Council in **Commissioner of Prisons and another v Seepersad and another**,¹⁷ recently reiterated the well-established practice of constitutional interpretation to the effect that 'the court engaged in the interpretation exercise must be alert to the historical context of the constitutional instrument in question'. It is accepted that many of the fundamental rights provisions contained in Commonwealth Caribbean Constitutions were inspired in form and substance by the European Convention on Human Rights (the "ECHR"). In the Privy Council's decision in **Minister of Home Affairs v Fisher**,¹⁸ an appeal from Bermuda, Lord Wilberforce opined at paragraph 382 that- 'the Constitutions of most Caribbean territories, [were] greatly influenced by the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969)'.

- [33] The use of ECHR jurisprudence as a guide to interpreting our own fundamental rights provisions has become commonplace and is evidenced in decisions of

¹³ Grenada Civil Appeal No. 8 of 1999 (delivered 21st February 2000, unreported).

¹⁴ (2005) 68 WIR 289.

¹⁵ [2002] UKPC 34.

¹⁶ [2004] UKPC 34.

¹⁷ [2021] UKPC 13.

¹⁸ [1980] AC 319.

this Court such as **Attorney General of Saint of Lucia v Sexius**¹⁹ and **George Blaize v Bernard La Mothe**.²⁰ Of particular relevance here, is that the utilisation by Blenman JA of ECHR jurisprudence in **Sexius** in relation to the **Constitution of Saint Lucia** was approved by the Privy Council.²¹ I can see no reason to depart from this practice in the present case which invokes the protection against inhuman and degrading treatment and the right to personal liberty, both of which are framed in materially equivalent terms to articles 3 and 5 of the ECHR.

Issue 1 – Inhuman treatment

(i) The judge's approach to the evidence

- [34] The learned judge recounts that the respondents' claims for inhuman treatment centred on assertions that the conditions under which they were detained were punitive rather than treatment oriented; they were made to wear blue penal uniform which suggested that they had been detained following trial and conviction as opposed to pending trial; had deficient diets and were harassed by inmates and officers.²² The Attorney General's short point on this issue is that the judge erred in his approach to his evaluations on this issue, and that, in any event, there was no sufficient evidence before the learned judge to justify a finding that the respondents were subjected to inhuman and degrading treatment.
- [35] The learned judge in his judgment very clearly expressed some agreement with the Attorney General in this regard and formed the view that the respondents did not provide any reliable evidence of the living conditions inside and outside the prison, in support of their contention that the conditions under which they were detained amounted to inhuman and degrading treatment. The judge accordingly did not make any declaration as to the inhuman and degrading treatment on those specific bases alleged by the respondents.

¹⁹ [2014] ECSCJ No. 239 (delivered 27th October 2014).

²⁰ [2012] ECSCJ No. 373 (delivered 9th October 2012).

²¹ See *Sexius v The Attorney General of Saint of Lucia* [2017] UKPC 26.

²² See paragraph 54 of the judgment.

[36] The judge however went on to make findings that the respondents' right to protection against inhuman treatment had been breached on the basis that, generally, the detention of persons found unfit to plead in a prison rather than in a mental hospital, as required by law in and of itself, amounts to inhuman and degrading treatment; and that there had been no periodic reviews of the respondents' fitness to plead for the duration of the time in prison. The judge took the view at paragraph 56 that- 'The imprisonment of persons requiring psychiatric treatment in a mental health facility amounts to the criminalization of the mentally ill'. At paragraph 58 of his judgment, the learned judge continued:

"Prisons are not designed as facilities for the mentally ill, yet it is the case that throughout the Commonwealth Caribbean many mentally ill persons who cannot access psychiatric treatment are simply swept into the criminal justice system after they commit a crime, and very often even when they have not been adjudged as having committed any crime. While there are conscientious and committed consulting psychiatrists providing services, prison mental health services are woefully inadequate, understaffed and limited. If prisoners without mental illness struggle to keep mental and emotional equilibrium in prison, it must be next to impossible for those with mental disorders to cope in a prison."

[37] At paragraph 59, the judge concluded:

"The detention of the claimants, being mentally ill persons, in prison for 20 years and 27.5 years, respectively, without any periodic reviews of their fitness to plead, amounts to inhuman and degrading treatment. Further, when no regular reviews are held, not only the mentally disabled accused suffer, but the public at large since there is less and less chance of a fair trial and accountability for the crime."

[38] The learned judge's statements on this issue are very broad and clearly embracing of any circumstance in which a person who is found unfit to plead is detained in a prison as opposed to a mental hospital. The judge's analysis on this issue tends to suggest that any such detention will breach the right of a detainee, who has been found unfit to plead, to the protection against inhuman punishment. In so far as the judge took that view, I am compelled to disagree and consider that the judge erred in principle in so finding.

[39] The protection against inhuman and degrading treatment and punishment has been discussed in several cases. In **Thomas v Baptiste**,²³ the applicants were charged and convicted of murder and sentenced to death. Pending the execution of their death sentences, the applicants were detained in ‘cramped and foul-smelling cells and were deprived of exercise of access to the open air for long periods of time’. The question posed by the majority of the Privy Council was:

“...whether the conditions in which the applicants were kept involved so much pain and suffering or such deprivation of the elementary necessities of life that they amounted to treatment which went beyond the harsh and could properly be described as cruel and unusual.”

[40] In answering this question, Lord Millet stated that:

“Whether or not the conditions in which the applicants were kept amounted to cruel and unusual treatment is a value judgment in which it is necessary to take account of local conditions both in and outside prison.” (Underlining supplied)

[41] In similar vein, Lord Steyn in his (albeit dissenting) judgment in the Privy Council case **Higgs and Another v Minister of National Security and Others**²⁴ made the following observations in relation to the court’s role where the protection against inhuman treatment has been claimed:

“Inhuman treatment may take the form of the causing of physical or mental suffering or both: see *Republic of Ireland v United Kingdom*, 2 E.R.R.R. 25, 79-80, para. 167. Unlike torture, inhuman treatment under article 17(1) does not require proof of deliberate causing of very serious or cruel suffering: *ibid*... In judging cases under article 3 of the European Convention the court considers the actual facts of the case in order to assess whether the impact on the individual of the treatment or punishment was inhuman or degrading. This is illustrated by the observations of the court in *Soering v United Kingdom* (1989) 11 E.H.R.R. 439...”. (Underlining supplied)

[42] The jurisprudence from the European Court of Human Rights (the “ECtHR”) evidenced in cases such as **Ireland v United Kingdom**²⁵ and **Mayeka v Belgium**,²⁶ makes it clear that treatment or punishment which engages the

²³ [1999] 3 WLR 249.

²⁴ [1999] UKPC 55.

²⁵ (1980) 2 EHRR 25, ECtHR at para 162.

²⁶ (2008) 46 EHRR 23 at para 48.

protection against inhuman and degrading treatment, must reach a 'minimum level of severity'. The ECtHR in **Ireland v United Kingdom** expressed itself as follows in relation to the matters considered in determining whether the minimum level of severity has been attained:

“The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.”

[43] These three cases are illustrative of the point, and there are several other cases like them. Leaving aside the differences in language used by the Privy Council and the ECtHR to describe the legal threshold for determining state liability for breach of the right to protection against inhuman treatment, it is clear that a conclusion that the right has been breached cannot be made without an assessment of the evidence of the particular circumstances, punishment or treatment to which the claimants were subjected; and, a claim which invokes the right to protection from inhuman treatment must be supported by evidence, on the basis of which a finding of breach may be founded.

[44] It is not the law that the right to protection from inhuman treatment can be successfully engaged in the absence of evidence to enable the court to make such a finding. Indeed, the Court is enjoined by the authorities on the protection against inhuman treatment, to take account of the totality of the circumstances. Even in cases involving allegations of torture, which is undoubtedly one of the most inhuman and degrading forms of treatment, an applicant has the responsibility of showing that the treatment they received was of the nature that would warrant the vindication of the law.²⁷ It follows then that it would not be correct as a matter of principle to make any sweeping statements on the legality of every detention which falls within this broad category in circumstances where the jurisprudence does not suggest that such sweeping statements are appropriate or permissible.

²⁷ See *Ireland v United Kingdom* (1980) 2 EHRR 25.

[45] In arriving at his conclusion, the judge placed great store on the decision of **ZH v Hungary**,²⁸ a case decided by the ECtHR in 2008. That was a case brought by ZH – a 25-year-old man who was deaf, could not verbally communicate, read or write, and had intellectual disabilities. ZH's only means of communication was a specific form of sign language which only his mother was capable of understanding.

[46] ZH was arrested for theft and was interrogated by the police in the absence of his mother. At the end of his interrogation, the police gave ZH a piece of paper and forced him to sign to confirm that he understood the charges against him. He was detained for 3 months prior to his trial. In prison, his mother was only allowed to visit him every two weeks, and so he was effectively denied the possibility of communicating with anyone. Six weeks into his pre-trial detention, the prison moved ZH into a cell with one of his relatives. That cell was close to the prison director's office. Other inmates were asked to help him write letters.

[47] The ECtHR held that:

“Where the authorities decided to detain a person with disabilities, they had to demonstrate special care in guaranteeing such conditions as corresponding to the persons individual needs resulting from his disability. States had an obligation to take particular measures which provided effective protection of vulnerable persons and included reasonable steps to prevent ill treatment of which the authorities had or ought to have had knowledge.”

[48] The Court continued:

“In the instant case, given that the applicant belonged to a particularly vulnerable group and that as such he should have benefitted from reasonable steps on the side of the authorities to prevent situations likely to result in inhuman and degrading treatment, it was incumbent on the government to prove that the authorities had taken the requisite measures. However, the government had failed to meet that burden of proof in a satisfactory manner, especially in respect of the initial period of the detention. Despite the authorities' laudable but belated efforts to address his situation – the applicant's incarceration without the requisite measures taken within a reasonable time had to have resulted in a situation that amounted to inhuman and degrading treatment in breach of art 3 of the Convention, on account of his multiple disabilities.”

²⁸ ECHR 1891 (2012) application no. 28973/11.

[49] With respect, I do not share the view that **ZH v Hungary** supports a conclusion that detention of any person found unfit to plead in a prison as opposed to a mental hospital will result in a breach of their right to protection from inhuman treatment. The judgment of the ECtHR in **ZH v Hungary** imposes a clear requirement on the state to prove that it took appropriate steps within a reasonable time to prevent ill-treatment of vulnerable detainees. This, the Court described as a 'burden of proof' resting on the state in relation to ill-treatment of which the authorities 'had or ought to have had knowledge'. It cannot be said however that this burden on the state absolves a claimant, in a case where the right to inhuman treatment is sought to be engaged, of the obligation to raise at least an arguable case on his or her pleadings and evidence, as to the treatment which it is claimed occasioned a breach of their fundamental rights. In other words, it does not follow that a burden on the state to show that it took appropriate steps to address ongoing or prospective ill-treatment entirely reverses the burden of proof in a claim for breach of the right to protection from inhuman treatment.

[50] Indeed, it is now axiomatic that a person who claims that their constitutional rights have been breached bears the burden of proving that a *prima facie* breach of their rights has occurred. Thereafter, the burden rests on the state to justify or negative the alleged breach. If any authority is needed for this approach, the decisions of the Privy Council in **Cable and Wireless v Marpin Telecoms and Broadcasting Company Limited**²⁹ and **Observer Publications Limited v Matthew and Others**³⁰ suffice. Accordingly, in circumstances where the respondents sought a declaration that the fact of detention in a prison as opposed to a mental hospital amounted to inhuman and degrading treatment, it was for them to raise at least an arguable case on the evidence that their fundamental rights as vulnerable persons had been breached either by the positive acts or the omissions of the state, and it was for the judge to analyse that evidence and to satisfy himself that the peculiar circumstances of the respondents' cases warranted a finding that the right was breached.

²⁹ [2000] UKPC 42.

³⁰ [2001] UKPC 11.

[51] I reiterate here that the learned judge found, as a matter of fact, that there was no credible evidence as to the general conditions in which the respondents were detained in prison. This finding is not the subject of a counter appeal by the respondents and is eminently correct in light of documents produced before us in the record of appeal. Like the complaints raised as to the respondents' clothing and diet, the judge did not have before him any evidence as to the conditions in the prison, and the prison authorities' conduct in relation to the respondents, save and except the evidence of the psychiatric evaluations and treatment given to the respondents throughout their detention. The judge also had no evidence before him that the respondents would have received different treatment were they detained in a mental hospital as opposed to a prison. There was no evidence before the court of ill-treatment, want of care or, critically, no direct evidence or inferences drawn by the judge as to any actual negative impact of the detention on the respondents upon which a finding of breach of the right to protection from inhuman treatment could reasonably be founded. Short of any finding to that end, the learned judge records at paragraph 42 that the respondents' detention in a prison 'may have contributed to the failure of the claimants to have sufficiently recovered their mental health to stand trial'. This leads me to conclude that the judge's declaration on inhuman treatment has been fundamentally impugned.

[52] Moreover, a global view of the jurisprudence of the ECtHR on the issue of inhuman and degrading treatment arising from the detention of persons suffering with mental illness does not support the learned judge's interpretation of the ECtHR's decision in **ZH v Hungary**. In **Strazimiri v Albania**,³¹ the ECtHR considered that the applicants were in a state of therapeutic abandonment – he was receiving no individual treatment plan and no psychiatric care. The applicant was detained in a prison building which was in an advanced state of dilapidation as opposed to a mental hospital. There was evidence that the applicant was directly affected by the poor conditions of his detention. The ECtHR concluded that the applicant's right to protection against inhuman and degrading treatment was breached.

³¹ ECHR 028 (2020), application no. 34602/16.

- [53] In **WD v Belgium**,³² the evidence before the ECtHR was that the applicant was detained in a prison with no treatment for nine years, and that this caused him particular acute hardship and distress which was so intense that it exceeded the unavoidable level of suffering inherent in detention. The Court similarly concluded that the applicant's right to protection against inhuman and degrading treatment was breached.
- [54] In **Raffray Taddei v France**,³³ the ECtHR likewise concluded that an applicant's right to protection from inhuman and degrading treatment was breached. The applicant was suffering from a number of medical conditions including severe anorexia. The medical practitioners who examined the applicant made reports to the state authorities that the applicant's condition was deteriorating and that her 'respiratory and metabolic disorders (under-nutrition) [were] worrying and required specialized treatment in a hospital nutrition facility'.
- [55] On the other hand, is the decision of **Novak v Croatia**.³⁴ The applicant complained that while he was detained in the Varaždin Prison following a conviction, he received inadequate treatment for his post-traumatic stress disorder. The ECtHR held that there had been no violation of the right to protection from inhuman and degrading treatment, given in particular that the applicant had not provided any documentation to prove that his detention conditions had led to a deterioration of his mental health.
- [56] These cases confirm that a conclusion that the right to protection from inhuman and degrading treatment is breached is dependent on an assessment of the circumstances of each case including, as Lord Steyn observed in **Higgs and Another v Minister of National Security and Others**, the impact on the applicant of the impugned treatment. By logical extension, the cases therefore also do not lend support to the conclusion that the right to protection from inhuman and degrading treatment is breached by the fact alone that a person is detained in a prison as opposed to a mental hospital. The kind of evidence in

³² ECHR 277 (2016), application no. 73548/13.

³³ ECHR 989 (2010), application no. 36435/07.

³⁴ ECHR 483 (2007), application no.8883/04.

relation to actual incidents of ill-treatment or degradation suffered by the applicants which was before the ECtHR in the above discussed cases, and which enabled the court to conclude that the right to protection against inhuman treatment was breached, was not considered by the judge in this case. I am satisfied therefore that the learned judge's declaration on this issue must be set aside.

[57] In concluding as I have, I note that the judge did not refer in his judgment to any evidence in relation to this head of the respondents' claim, save for his reference to the medical treatment the respondents received in prison. The learned judge's decision was instead clearly based on his view that the law does not countenance the detention of persons found unfit to plead in a prison as opposed to a mental hospital. In this Court's recent decision in **Jhawnie Gage v The Attorney General of Dominica**,³⁵ Baptiste JA and Webster JA [Ag.] reiterated that the failure of a judge to mention all the aspects of a case upon which a finding is based, will not, of itself, repudiate the judge's decision. An appellate court therefore ought not to take too mechanistic or literalistic of an approach to a lower court's judge's judgment with a view to justifying undue appellate activism. In fact, the appellate court is obligated to presume that the judge took all the relevant matters into account notwithstanding that the judge's judgment does not expressly indicate that this was the case.

[58] The position taken by Baptiste JA and Webster JA [Ag.] in **Jhawnie Gage** is consistent with the longstanding pronouncements of the courts of England in cases such as **Piglowska v Pigloski**³⁶ and **Watt (Or Thomas) v Thomas**³⁷ and the recent Privy Council decision in **Ming Sui Hung and Others v J F Ming Inc and Another**.³⁸ This line of cases in my view however does not avail the judge's decision in this case, as the judge made clear that his decision was based on the mere fact that the respondents were detained in a prison as opposed to a

³⁵ DOMHCVAP2020/0005 (delivered 11th June 2021, unreported).

³⁶ [1999] 1 WLR 1360.

³⁷ [1947] AC 484.

³⁸ [2021] UKPC 1.

mental hospital, without periodic reviews as to their fitness to plead. This is all the more so given his finding of a lack of an evidentiary basis on this aspect.

(ii) The relationship between the lack of periodic reviews and the finding of inhuman treatment

[59] The judge included as part of his conclusion on the issue of inhuman treatment, the fact that the respondents had not been reviewed to determine their fitness to plead or return to trial. I am also of the view that the judge erred in principle in so doing. The right to periodic reviews by the courts of a detainee's detention is discussed in several cases in the context of legislation which provides for the passage of indeterminate criminal sentences. Most recently in the Commonwealth Caribbean, was the decision of **Ian Seepersad and Roodal Panchoo v The Attorney General of Trinidad and Tobago**.³⁹ Those cases impose an obligation on the state to regularly review the detention of a convicted person with a view to determining whether the convict has been sufficiently punished for the crime they have committed and whether the continued detention of the convict can be justified. The approach adopted in relation to periodic reviews of sentences was adopted by the Trinidad and Tobago Court of Appeal in **Bissessar v The Attorney General of Trinidad and Tobago**⁴⁰ in relation to the detention of persons found unfit to plead.

[60] While questions as to the frequency of periodic reviews, the procedure to be adopted by the state and who should conduct periodic reviews, may be subject to further argument, the general approach adopted by the Court of Appeal in Trinidad and Tobago in **Bissessar** is, in my view, correct. It can hardly be gainsaid that the right to personal liberty is given high importance as a fundamental human right. The law is clear that personal liberty is to be the norm, derogations from the norm must be justified by the state, and must not offend other fundamental constitutional principles and protections such as the rule of law and the rights to due process and the protection of law (a point which I develop further in my discussion on issues 2 and 3). If convicted persons are

³⁹ [2012] UKPC 4.

⁴⁰ Civil Appeal No. P 136 of 2010 (delivered 31st January 2017, unreported).

afforded the benefit of periodic reviews of their sentences, in order to ascertain whether the legitimate purpose of their detention have abated or been satisfied, it would only follow rationally that the same protections must apply with at least equal or greater force to persons detained on a charge or suspicion of having committed an offence, who have not been made subject to the trial process in circumstances as here where they were found unfit to plead, and therefore have not been found guilty of a criminal offence by a court.

[61] It is in my view at the very least arguable that the fact that a detention was unreviewed may factor into a conclusion that the right to protection from inhuman and degrading treatment has been breached. However, a breach of the right to the protection from inhuman treatment does not automatically follow from the fact that a detention has not been reviewed. Such a finding of breach must, again, be founded on an assessment of the evidence and circumstances of each case. For my part, I am unable to see how, in this case, the respondents' unreviewed detention could, without more, amount to a breach of the protection against inhuman and degrading treatment.

[62] I agree with the submissions made by Mr. Patterson, QC that in order to find that an unreviewed detention has given rise to a breach of a constitutional right, the court must be satisfied that the detained person was prejudiced by the failure to conduct reviews. In my view, a detainee would have to show that had the periodic reviews taken place as required, the result would more likely than not have been that he or she would have been permitted to stand trial or have been otherwise released from detention, and therefore that there was some connection between the failure to conduct periodic reviews and the continued detention of the detainee. In other words, a detainee would have to show at the very least that it was more likely than not that they recovered their fitness to plead and therefore that, taking into account all other relevant circumstances, their continued detention amounted to inhuman or degrading treatment. None of this evidence was before the learned judge. It could therefore not be said that the sole fact of the respondents' detentions having been unreviewed could have given rise to a finding that the respondents' detention on the grounds of unfitness to plead could amount to inhuman and degrading treatment.

[63] In the cases of both respondents, there was however no evidence which could tend to establish that either of the respondents ever recovered fitness to plead while detained. On the contrary, the uncontroverted evidence before the judge was that both respondents continued to suffer from serious mental illness up until the time that the matter was heard in the court below. No prejudice could therefore arise from the fact of their unreviewed detention. It follows then that the respondents' unreviewed detentions could/did not amount to inhuman or degrading treatment or punishment.

[64] In all the circumstances, I am of the view that the judge erred in principle in making the declaration he did in relation to the respondents' right to protection from inhuman and degrading punishment or treatment. I would therefore allow the appeal so far as it pertains to the judge's treatment of the right to protection against inhuman treatment, and set aside the judge's declaration at paragraph (2) of his order.

Issues 2 and 3 – The Right To Liberty

(i) Mental Hospital vs Prison- The Applicable Statute

[65] Section 3 of the Constitution (quoted above) makes provision for the derogation of the right to liberty in the circumstances set out in the section and in a manner which is 'authorized by law'. Cases such as **R v Pinder**,⁴¹ **Re Greenwood**,⁴² and **Re S-C (Mental Patient: Habeas Corpus)**⁴³ and recently the decision of the Privy Council in **Commissioner of Prisons and another v Seepersad and another**⁴⁴ recognise that detention in a place other than that which is specified by an 'authorising law' for the purposes of the right to personal liberty, will result in a breach of a detainee's right to personal liberty.

[66] The crux of the Attorney General's position on this issue is that the learned judge erred in so far as he concluded that there was a statutory requirement for the respondents to be detained in a mental hospital as opposed to a prison, and therefore that the respondents' detention in a prison as opposed to a mental

⁴¹ [2002] UKPC 46.

⁴² (1855) 24 LJQB 148.

⁴³ [1996] QB 599.

⁴⁴ [2021] UKPC 13.

hospital breached their right to liberty. The Attorney General firstly argues that section 1021(1) of the **Criminal Code** does not impose a requirement for the trial judge to commit a person found unfit to plead to a mental hospital as opposed to a prison. On my reading of the judgment, the learned judge did not seem to be suggesting that it did. In any event, however, I agree with this submission.

[67] Section 1021(1) of the **Criminal Code** grants the judge a discretion to detain a person found unfit to plead 'in safe custody, in such place and manner as the Court thinks fit, until the Governor-General's pleasure shall be known'.⁴⁵ This provision clearly does not require a judge to detain a person found unfit to plead in a mental hospital. I agree with the Attorney General that in as much as section 31 of the **Mental Hospitals Act** (quoted above) appears to mandatorily require a judge to detain a person found unfit to plead in a mental hospital, it conflicts with the discretionary power vested in the judge under section 1021(1) of the **Criminal Code**, and the former to the extent of that conflict has been impliedly repealed and is of no legislative effect.

[68] The general principles on implied repeal were most recently applied by this Court in the decision of **Ferdinand James v Planviron (Caribbean Practice) Limited and another**.⁴⁶ In summary, those principles are that:

- (1) Later enactments which conflict with but do not expressly repeal earlier ones, may occasion an implied repeal of the earlier enactment.
- (2) Implied repeal is not favoured by the courts, as it involves a process of construction by the courts, the end-result of which is to impute or ascribe an intention to Parliament, in the absence of clear and express language, that an earlier enactment is to cease to be effective. There is therefore a strong presumption against implied repeal and a court ought not to arrive at such a conclusion lightly.

⁴⁵ This provision has been amended to read '... until the Chief's Justice's pleasure shall be known'.

⁴⁶ [2019] ECSCJ No. 336 (delivered 16th October 2019).

(3) The existence of a conflict between enactments is not determinative of the question of implied repeal. Before arriving at a conclusion that an enactment has been impliedly repealed, the court must attempt to construe the conflicting enactments together.

(4) In carrying out the construction exercise required, the central question to be determined is whether the conflicting enactments are so inconsistent or repugnant to each other that effect cannot be given to both at the same time.

[69] To these principles, I add the words of the Court of Appeal of England in its recent decision in **Susan Snelling and Anor v Burstow Parish Council**,⁴⁷ which, in my view, accord with the established principles. In **Susan Snelling**, Patten LJ, citing the decision of Laws LJ in **O'Byrne v Secretary of State for Environment, Transport and the Regions**⁴⁸ opined that an implied repeal will only occur if there is an 'inescapable logical contradiction between the earlier and the later statute'. In **O'Byrne**, Laws LJ opined:

"The contradiction must be inescapable; so that where (as here) an implied repeal is said to be based on the construction of the later statute, that construction must be shown to be the only rational interpretation which is available."

[70] Section 31 of the **Mental Hospitals Act** predates section 1021(1) of the **Criminal Code**. The **Mental Hospitals Act** mandatorily provides for detention of a person found to be 'insane' prior to conviction in a mental hospital whereas section 1021(1) of the **Criminal Code** vests in the trial judge a broad discretion to determine the place of detention following a finding of unfitness to plead. In my view, section 31 of the **Mental Hospitals Act** and section 1021(1) of the **Criminal Code** give rise to an inescapable logical conflict. The mandate and discretion under the respective enactments are patently incompatible and cannot peaceably coexist. They place the court in a situation where it has to choose whether to deal with the same person under one or the other of the two provisions. The conclusion ineluctably follows that the earlier section 31 of the

⁴⁷ [2013] EWCA Civ 1411.

⁴⁸ [2002] HLR 30.

Mental Hospitals Act has been impliedly repealed to the extent of its inconsistency with the later in time section 1021(1) of the **Criminal Code**. In coming to this conclusion, I also take into account that:

- (i) The **Criminal Code** has been amended and re-enacted several times; and on each iteration of the **Criminal Code**, the legislature has re-enacted provisions with similar wording, or of similar effect to section 1021(1) which vest the judge in those circumstances with a broad discretion to determine where a person found unfit to plead is to be detained pending fitness to stand trial. Parliament must be taken to have intended that this was a decision best left to the trial judge who would be better placed to make an informed assessment of adequacy of places for detention, at least, as a first step.
- (ii) The **Mental Hospitals Act** is a pre-independence statute which was transplanted from the United Kingdom and remains part of the laws of Saint Lucia, but has not been substantially amended since its reception; and
- (iii) The **Criminal Code** is clearly a comprehensive legislative Code containing the procedural and substantive law relevant to the determination of criminal charges before the Saint Lucian courts – The **Criminal Code** is therefore specific legislation which applies to the determination of the criminal matters and the procedure attendant thereto.

[71] I would therefore conclude that the law of Saint Lucia in relation to the detention of accused persons found unfit to plead is that, following a finding by the jury that a person is unfit to plead, the judge has a broad discretion to determine the place and manner of the detention of the accused. There is no requirement in law for the judge to order an accused to be detained in a mental hospital at the time that the finding of unfitness to plead is made by the jury. While, I do not doubt that a judge's exercise of the broad discretion under the **Criminal Code** will frequently result in an order for detention in a mental hospital, so as to afford

the accused the earliest access to the resources of the state in order to hopefully regain fitness to plead and stand trial, such an order is not required as a matter of law.

[72] In concluding as he did, that the law of Saint Lucia for the treatment of persons found unfit to plead requires detention in a mental hospital, the learned judge focused on section 1021(2) of the **Criminal Code** which, for emphasis, provides that:

“The Judge shall immediately report the finding of the jury [that an accused person is unfit to plead] and the detention of such person to the Governor General who shall order such person to be dealt with as a person of unsound mind under the laws of this State for the time being in force for the care and custody of persons of unsound mind, or otherwise as he may think proper.”

[73] Section 1021(2) requires the judge presiding over the criminal proceedings to immediately report a jury finding of unfitness to plead to the Governor General. There is no evidence that the judge, in either Noel or Henry’s case, reported the jury’s findings to the Governor General. The judge reasoned that in the absence of evidence of a report to or an order by the Governor General, ‘the default position under the Act is that the judge would have ordered the person to be detained in a mental hospital, not in a prison, until he becomes of sound mind’. Even if the judge is correct that the default position would obtain, and there is no presumption of regularity operating in favour of the state which would enable the courts to overlook the fact that no evidence of a report to or order by the Governor General was made (a presumption which the Attorney General argues applies to this case), I have earlier reasoned that a judge is not required by section 1021 of the **Criminal Code** to order that a person found unfit to plead be detained in a mental hospital. Given my earlier reasoning, the judge’s view of the legal position that would obtain in default of evidence of a referral to or order by the Governor General, does not support the conclusion that the respondent’s detention in a mental hospital as opposed to a prison breached their rights to liberty in this regard.

[74] At paragraph 31 onwards, the judge, in effect, formed the view that the Governor General, upon receiving a report from the judge under section 1021(2) of the

Criminal Code, is required by the section to make an order for the detention of a person found unfit to plead to be dealt with as a person of unsound mind under the **Mental Hospitals Act** only, and is unable to make any other order. In other words, the Governor General does not possess any discretion to make an order for the continued detention or treatment of a person found unfit to plead in any place other than a mental hospital. I am again compelled to disagree. It cannot be reasonably disputed that section 1021(2), by its reference to the 'the laws of this State for the time being in force for the care and custody of persons of unsound mind' refers to the **Mental Hospitals Act** and any other law in force for the same purpose. However, the language of section 1021(2) is permissive and not mandatory in nature in relation to the type of order required of the Governor General in these circumstances. Section 1021(2) by its clear language does not require the Governor General to engage the provisions of the **Mental Hospitals Act** in the exercise of his or her powers in relation to a person found unfit to plead but permits the Governor General to make an order that a person found unfit to plead be dealt with in any manner 'otherwise as he [or she] may think proper'. Section 1021(2) therefore, in similar stead to section 1021(1), does not mandatorily require the Governor General to make an order for the custody of a person found unfit to plead to be in a mental hospital.

- [75] It is worth mentioning that the case law from the ECtHR can be read to suggest that detention in a prison as opposed to mental hospital may give rise to a breach of a person's right to liberty. The legal framework within which those cases were decided however is patently different from that in the present appeal. In **Ashingdane v United Kingdom**⁴⁹ for example, the ECtHR was concerned with a claim for a breach of the right to liberty pursuant to article 5(1)(e) of the ECHR which deals with the deprivations of liberty for the purpose of preventing the spreading of infectious diseases, or of persons of unsound mind, alcoholics or drug addicts or vagrants. The domestic law in that case which authorised such detention was the UK Mental Health Act 1959, an Act which made provision for the care and custody of persons of unsound mind. In that context, the ECtHR stated that:

⁴⁹[1985] ECHR 8225/78.

“...there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention. In principle, the ‘detention’ of a person as a mental health patient will only be ‘lawful’ for the purposes of [sub-paragraph (e) of paragraph 1 (art. 5-1-e)] if effected in a hospital, clinic or other appropriate institution authorised for that purpose. However, subject to the foregoing, Article [5 para. 1 (e) (art. 5-1-e)] is not in principle concerned with suitable treatment or conditions (see the above-mentioned Winterwerp judgment, p. 21, para. 51)”.

[76] The findings of the ECtHR here are in my view consistent with decisions like **Re S-C (Mental Patient: Habeas Corpus)** which, in substance, address the requirement for compliance with the law which authorises a deprivation of liberty, in circumstances where the law specifies the place at which a person is to be detained on mental health grounds pursuant to article 5(1)(e) of the ECHR. It appears to me therefore that these cases are materially distinguishable on their facts and that there is no broad common law rule which requires that a person who has been found unfit to plead be detained at a mental hospital and not a prison. Even if the requirement under the ECHR jurisprudence that ‘...there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention’ applies to all cases in which the right to liberty is engaged, a breach of such a requirement, by virtue of the fact that it is not contained within the **Criminal Code** (or any other statute enabling or the Constitution), would not entitle a person to relief under the Constitution without evidence that the place of detention was in fact unsuitable for the detention of the accused person, and that, in a case such as this, that the accused persons’ chances of recovering their mental health in order to stand trial were lower than they would have been in a mental hospital in Saint Lucia. No such evidence was presented in this case and the Court cannot assume that this would have been the case.

[77] I also observe that the respondents’ claim in the court below was not a challenge to their detention on the basis that the Governor General or the respective judges of the High Court ought to have, in the peculiar circumstances of their cases, exercised their discretion to make an order for them to be dealt with under the **Mental Hospitals Act**. Their claim instead, was that their detention in a prison as opposed to a mental hospital was a statutory requirement which was

breached, thereby rendering their detention unlawful having regard to their right to liberty under the Constitution. In the absence of arguments or any clear evidence seeking or in support of the grant of relief on such a basis, the foregoing analysis (including my findings on the inhuman treatment issue) therefore forecloses on the respondents' opportunity, in these proceedings, to obtain any relief on the basis that the respondents should have been detained at a mental hospital.

[78] In summary therefore, I find that:

- (i) The mandatory requirement under section 31 of the **Mental Hospitals Act** for detention at a mental hospital following a finding of unfitness to plead has been impliedly repealed.
- (ii) Following a finding of unfitness to plead, the judge has a broad discretion under the **Criminal Code** to make an order as to the detention of an accused in any such place – such place may include a mental hospital.
- (iii) The Governor General, upon receipt of a report that a person has been found unfit to plead, is required by the **Criminal Code** to make an order that the person be dealt with in accordance with the laws in place for dealing with persons of unsound mind, or otherwise as he or she thinks fit. This is not a mandatory requirement that the Governor General make an order that every person found unfit to plead be detained in a mental hospital, and the Governor General possesses a discretion to order such a person to be dealt with as he or she may think proper.
- (iv) There is therefore no general requirement under the **Criminal Code** for every person found unfit to plead to be detained in a mental hospital pending trial.

[79] Accordingly, the learned judge erred in principle to the extent that he reasoned that there was a statutory requirement for the respondents to be detained in a mental hospital as opposed to a prison. It follows then that the detention of the

respondents in a prison as opposed to a mental hospital, in the circumstances of this case, could not be in breach of the section 1021 of the **Criminal Code**, which authorises the detention of accused persons found unfit to plead and thereby in breach of the respondents' right to liberty. The declaration made at paragraph (1) of the learned judge's order, that the respondents' right to personal liberty was infringed on that basis, should therefore be set aside.

(ii) No Periodic Reviews

[80] The Attorney General argues that the judge was wrong to conclude that the respondents' right to liberty was breached in this case because their detention in prison was not subject to periodic reviews to ascertain whether they had assumed fitness to plead and be tried.

[81] In line with my findings on the issue of inhuman treatment, it is, in my view, at the very least arguable that the fact that a detention was unreviewed may factor into a conclusion that the right to liberty has been breached. However, I am unable to see how, in this case, such a breach could be made out on the evidence. Again, there was no evidence which could tend to establish that either of the respondents ever assumed or recovered fitness to plead while detained. On the contrary, the uncontroverted evidence before the judge was that both respondents continued to suffer from serious mental illness up until the time they were last assessed by the state's psychiatrists.⁵⁰ No prejudice could therefore arise from the fact that they had not been subjected to periodic reviews to determine whether they were fit to plead and stand trial. It follows then that the respondents' unreviewed detentions could not amount to a breach of their rights to liberty as no argument could be made on the evidence that they would have been released whether on bail or otherwise had they been subject to periodic reviews.

[82] I therefore agree with the Attorney General that the learned judge erred in principle in finding that the detention of the respondents without periodic reviews amounted to a breach of their rights to liberty, and in making a declaration to

⁵⁰ The respondents were last assessed by the state's psychiatrists on 13th March 2019.

that effect at paragraph (3) of his order that the detention of the respondents without periodic reviews amounted to a breach of their rights to liberty.

(iii) The otherwise lawfulness of the detention

[83] I have concluded that the learned judge erred in making the declaration that he did at paragraph (3) of his order, that the detention of the respondents without periodic reviews amounted to a breach of their rights to liberty. I, however, like the learned judge, am of the view that there was a clear breach of the respondents' right to liberty in this case for other reasons which I now give.

[84] The right to liberty is one to which the law has traditionally attached great significance. At common law, there is a presumption in favour of liberty. As Lord Atkin said in **Liversidge v Anderson** - 'a principle which again is one of the pillars of liberty is that in English law every imprisonment is prima facie unlawful and that is for a person directing imprisonment to justify his act'.⁵¹ As the general legal presumption favours liberty, other presumptions cannot go in the opposite direction. Accordingly, in **Dillon v R**,⁵² the Privy Council held that, in a case concerning the liberty of a subject- 'there is... no room for presumptions in favour of the Crown'. Similarly, in **Schlieske v Federal Republic of Germany**,⁵³ the Federal Court of Australia stated that, as extradition involves the liberty of the subject, 'we do not think the common law rule presuming the regularity of official acts has any relevance'.

[85] The right to liberty as set out in section 3 of the Constitution contains its own expressed and built-in limitations. According to the clear words of section 3, these limitations may be engaged by the state, when 'authorized by law'. There is considerable jurisprudence on the meaning of the expression 'authorized by law' and expressions similar to it.⁵⁴ It is clear that at English common law and under human rights regimes which recognise such a carve out, the requirement

⁵¹ [1942] AC 206.

⁵² [1982] AC 484.

⁵³ [1987] FCA 58.

⁵⁴ The expressions "prescribed by law", "in accordance with the law" and "authorized by law" are understood to bear the same meaning. See Lord Bingham in *R (Gillan) v Commissioner of Police of the Metropolis* [2006] 2 AC 307.

for a limitation to the right to liberty to be authorized or prescribed by law is more than a mere aphorism or adjunct to the protection of the right to liberty. For the purposes of this case, I will make reference to four broad and overlapping principles which arise from my reading of the cases on this area.

[86] The first principle is that where a deprivation of liberty is purportedly undertaken pursuant to an authorising law, it must comply with the letter and substance of that law. If it does not, the deprivation will be unlawful and in breach of the right to personal liberty. Thus, in **Re S-C (Mental Patient: Habeas Corpus)**,⁵⁵ where Lord Bingham observed that ‘the circumstances in which the mentally ill may be detained are very carefully prescribed by statute’ and that ‘liberty may be violated only to the extent permitted by law and not otherwise’, it was held that a failure to comply with the procedure for detaining a person ought to result in their release. Similarly, in **Bouamar v Belgium**,⁵⁶ the ECtHR considered that a detention which did not comply with Belgian domestic law which authorised the applicant’s detention, was necessarily in breach of the right to liberty under the ECHR.

[87] Secondly, the objective of the requirement that a derogation from the right to liberty be authorised or prescribed by law is to ensure that a derogation is executed in a manner that is in keeping with existing domestic law and is therefore not arbitrary. On the issue of arbitrariness, Lord Bingham in **R (Gillan) v Commissioner of Police of the Metropolis**,⁵⁷ commented on the ‘prescribed by law’ requirement contained in the ECHR, in the following way:

“The lawfulness requirement in the Convention addresses supremely important features of the rule of law. The exercise of power by public officials, as it affects members of the public, must be governed by clear and publicly-accessible rules of law. The public must not be vulnerable to interference by public officials acting on any personal whim, caprice, malice, predilection or purpose other than that for which the power was conferred. This is what, in this context, is meant by arbitrariness, which is the antithesis of legality.” (Underlining supplied)

⁵⁵ [2003] UKHL 39.

⁵⁶ (1988) 11 EHRR 1, at para 47.

⁵⁷ [2006] 2 AC 307.

- [88] Lord Bingham's discussion on arbitrariness, focuses on the legal basis upon which a person may be deprived of liberty. Another dimension to the issue of arbitrariness, is explored by the learned authors of **Lester, Pannick & Herberg on Human Rights** who opine that- '[a]rticle 5 has been held to prohibit deprivation of liberty which is 'arbitrary' in its motivation or effect. A detention will be arbitrary if it is not in keeping with the purpose of the restrictions permissible under art 5(1) or with art 5 generally.'⁵⁸ (Underlining supplied) These principles are borne out by in the decision of the ECtHR in **Winterwerp v Netherlands**,⁵⁹ where the court held, *inter alia*, that a detainee's mental health issue must be of a kind and degree warranting compulsory detention; and the validity of a detainee's compulsory detention depends on the persistence of that mental health issue. Accordingly, where an applicant, who had been detained for mental health reasons, had recovered their mental health, the applicant was entitled to release on the basis that their detention was no longer justifiable, and their continued detention was in the circumstances arbitrary.
- [89] Thirdly, assuming that a deprivation of liberty is executed in a manner that complies with the authorising domestic law, that deprivation must also accord with other fundamental principles of legality or constitutionality. On the issue of compliance with other constitutional principles, the ECtHR has consistently emphasised that it is one of the fundamental principles of a democratic society that the state must strictly adhere to the rule of law when interfering with the right to personal liberty. This incorporates not only the substantive and procedural requirements of an authorising law, but also contemplates more generally, the overall lawfulness of the detention having regard to other legal principles.⁶⁰

⁵⁸ Lester, Pannick and Hemberg: Human Rights Law and Practice (3rd edn, Butterworths Law 2009).

⁵⁹ (1979) 2 EHRR 387.

⁶⁰ *Brogan v United Kingdom* (1988) 11 EHRR 117, at para 58; *Engel v Netherlands* (1976) 1 EHRR 647, at para 69; *Askoy v Turkey* (1996) 23 EHRR 553, at para 76.

- [90] Fourthly, the circumstances under which the state may deprive a person of their right to liberty must be narrowly construed with a view to giving effect to the purpose for which the derogation is permitted.⁶¹
- [91] I can see no good basis on which these principles should be disappplied in this case as they accord with my understanding of the right to liberty as it is framed under the Saint Lucian Constitution. In my view, section 3 of the Constitution very clearly contemplates derogations from the right to liberty in the circumstances set out in the section. The requirement for a deprivation of liberty to be 'authorised by law' is a clear safeguard against arbitrary or unjustified interferences with the right to liberty. In the context of Saint Lucia's written Constitution, the 'authorised by law' requirement must include not only the common law and statutes which regulate a particular type of deprivation of liberty, but also the expressed and implied doctrines contained in the Constitution which is the supreme law in Saint Lucia.
- [92] Critically, the circumstances in which the state may derogate from the right to liberty under the Constitution must be construed narrowly. This accords with the settled jurisprudence in our Courts that fundamental rights and freedoms in our written Constitutions must be given as broad an interpretation as possible, and limitations given a narrow interpretation, so as to give efficacy to the protections afforded under those rights, including the decisions of **Dow v Attorney General**⁶² and **Makuto v The State**,⁶³ which show that the principle that restrictions on fundamental rights are to be narrowly construed applies with even more force where the right concerned the freedoms of a subject.
- [93] The effect of these principles in the circumstances of this case, is that a detention authorised under section 3 of the Constitution and some other law, can only be lawful when it seeks to achieve the purpose for which it is authorised by the Constitution and the authorising law, and nothing more. Therefore, the

⁶¹ *Guzzardi v Italy* (1980) 3 EHRR 333, at paras 98 and 100; *Winterwerp v Netherlands* (1979) 2 EHRR 387, at para 37; *Quinn v France* (1995) 21 EHRR 529, at para 42.

⁶² [1992] LRC (Const) 623.

⁶³ [2000] 5 LRC 183.

fact that the Constitution and **Criminal Code** in this case authorised the detention of the respondents because they were unfit to plead, and that detention was executed in keeping with the procedures set out under the **Criminal Code**, does not grant the state an unfettered right to detain a person found unfit to plead. Detention for unfitness to plead, pursuant to section 3 of the Constitution and Section 1021 of the **Criminal Code**, must be effected only in so far as it is necessary to pursue the objectives for which it was intended, and only to the extent that it is necessary to pursue those objectives.

[94] The objectives of section 3(1)(a) of the Constitution and the interlocking provisions of section 1021 of the **Criminal Code** are in my view clear. A detention effected under those provisions is for the limited purpose of permitting a defendant to recover their fitness to plead with a view to standing trial. In this case, Noel was charged with an offence which carried a maximum sentence of 10 years. Yet, the total period of time spent on remand from the date of his initial arrest and detention to the date of the learned judge's judgment was approximately 32 years. It could not reasonably be said that his detention, after 10 years, was in legitimate pursuit of recovery of his mental health and his return to the High Court to stand trial, when the time he had already spent on remand was in excess of the lawful custodial sentence which could have resulted from his trial and conviction. I say this also bearing in mind that it does not seem to be the case that sentencing practices in the jurisdiction of the Eastern Caribbean Supreme Court sanction, as reasonable, the imposition of a maximum sentence of imprisonment, and therefore that had Noel been convicted the maximum sentence of ten years would not likely have been imposed in any event. It is then also likely that the need for his detention would have abated prior to 10 years into his detention. Noel's detention therefore following, at the very least, 10 years, could therefore not reasonably have been in continued pursuit of his conviction and sentence for the offence of causing grievous harm.

[95] In passing, it was the Attorney General's argument in the court below that Noel would have been detained in any event, pursuant to section 3(1)(h) of the Constitution, which makes provision for the state to deprive a person of their liberty on mental health grounds for the purpose of protecting the public. This

argument was rightly dismissed by the judge. Like detention for unfitness to plead, deprivations of liberty on mental health grounds must also be executed in a manner authorised by law. The authorising law for that purpose is the **Mental Hospitals Act** which sets out its own distinct procedure for the detention of such persons at sections 3 to 7. The cases I have discussed above, like **Re S-C (Mental Patient: Habeas Corpus)**, in addition to the well-known case of **De Merieux v The Attorney General of Barbados**,⁶⁴ underscore that where a person is to be deprived of their liberty on mental health grounds, the procedures prescribed by law for effecting that deprivation are to be observed. This was not done in relation to Noel. Those provisions therefore do not avail the state in this case.

[96] On the other hand, Henry was charged in relation to a double murder, with the possibility of a maximum sentence of life imprisonment. The total period of his detention from the date of his arrest to the date of his unconditional discharge was approximately 24 years. While it cannot be said with any certainty that Henry was detained for a period in excess of any possible sentence which would have been imposed had he been found guilty by a jury, I am of the view that the period of his detention (as does Noel's) nonetheless raises issues as to the possibility of a fair trial and more broadly, the right to protection of the law and therefore that the detention of the respondents did not comport with other fundamental principles of legality and was in breach of the respondents' rights to liberty.

[97] The right to protection of the law is embodied generally in section 1 of the Constitution which is quoted above. Section 8 of the Constitution, the material aspects of which are set out above, addresses the right to the protection of the law more substantively, and includes provisions which secure, among other rights, the right to a fair hearing within a reasonable time and the presumption of innocence. It was decided by the Caribbean Court of Justice in **Attorney General v Joseph and Boyce**⁶⁵ that the right to protection of the law is in no way limited to or circumscribed by the matters outlined in section 8 of the

⁶⁴ (1982) 17 Barb LR 14 (HC).

⁶⁵ [2006] CCJ 1 (AJ) at para.60.

Constitution.⁶⁶ In a joint judgment, de la Bastide PCCJ and Saunders JCCJ in **Joseph and Boyce** observed as follows in relation to section 18 of the Barbados Constitution which is in *pari materia* to section 8 of the Constitution:

“... In the case of the right to the protection of the law...it is clear that section 18 does not provide, nor does it purport to provide, an exhaustive definition of what that right involves or what the limitations on it are. There is no mention in that section of the protection of the law, which is in itself an indication that section 18 is not intended to be an exhaustive exposition of that right. Indeed, the right to the protection of the law is so broad and pervasive that it would be well-nigh impossible to encapsulate in a section of a constitution all the ways in which it may be invoked or can be infringed. Section 18 deals only with the impact of the right on legal proceedings, both criminal and civil, and the provisions which it contains are geared exclusively to ensuring that both the process by which the guilt or innocence of a man charged with a criminal offence is determined as well as that by which the existence or extent of a civil right or obligation is established, are conducted fairly. But the right to the protection of the law is, as we shall seek to demonstrate, much wider in the scope of its application. The protection which this right was afforded by the Barbados Constitution, would be a very poor thing indeed if it were limited to cases in which there had been a contravention of the provisions of section 18.”

[98] Saunders JCCJ further noted, referring to the judgment of Lord Diplock in **Ong Ah Chuan v Public Prosecutor**,⁶⁷ that the right to protection of the law refers to a system of law which incorporates fundamental rules of natural justice that had formed part of the common law of England, and that ‘due process of law’ is a compendious expression which does not bear reference to any particular principle or statute, but invokes the concept of law itself and the universally accepted standards of justice observed by civilized nations which adhere to the rule of law. As much was expressed in the recent Caribbean Court of Justice decision in **Jabari Sensimania Nervais v The Queen**⁶⁸ where Sir Dennis Byron, PCCJ stated that ‘the right to protection of the law is the same as due process which connotes procedural fairness which invokes the concept of the rule of law. Protection of the law is therefore one of the underlying core elements of the rule of law which is inherent to the Constitution’.

⁶⁶ See also *Nervais v R* [2018] 4 LRC 545 at para. 25.

⁶⁷ [1981] AC 648.

⁶⁸ [2018] 4 LRC 545.

[99] Indeed, since **Joseph and Boyce**, the ambit of the constitutional right to protection of the law has been the subject of much judicial commentary emanating from both the Judicial Committee of the Privy Council and the Caribbean Court of Justice. Anderson JCCJ in the Caribbean Court of Justice decision in **Maya Leaders Alliance v The Attorney General of Belize**⁶⁹ described the right to protection of the law in the following way:

“...The right to protection of the law is a multi-dimensional, broad and pervasive constitutional precept grounded in fundamental notions of justice and the rule of law. The right to protection of the law prohibits acts by the Government which arbitrarily or unfairly deprive individuals of their basic constitutional rights to life, liberty or property. It encompasses the right of every citizen of access to the courts and other judicial bodies established by law to prosecute and demand effective relief to remedy any breaches of their constitutional rights. However the concept goes beyond such questions of access and includes the right of the citizen to be afforded, ‘adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power.’ The right to protection of the law may, in appropriate cases, require the relevant organs of the state to take positive action in order to secure and ensure the enjoyment of basic constitutional rights. In appropriate cases, the action or failure of the state may result in a breach of the right to protection of the law. Where the citizen has been denied rights of access and the procedural fairness demanded by natural justice, or where the citizen’s rights have otherwise been frustrated because of government action or omission, there may be ample grounds for finding a breach of the protection of the law for which damages may be an appropriate remedy.”

[100] The pronouncements of Anderson JCCJ were adopted by the Privy Council in the decision of **Jamaicans for Justice v Police Service Commission and another**⁷⁰ and the very recent case of **Commissioner of Prisons and another v Seepersad and another**,⁷¹ in which Sir Bernard McCloskey reinforced that the right to protection of the law is ‘a broad spectrum right’ that ‘encompasses access to and the enjoyment of the fundamental rules of natural justice’.

[101] It is clear from the authorities referred to above that the right to protection of the law is not limited to the compendium of rights set out in section 8 of the Constitution, but is a broad spectrum of rights which engage the rule of law itself

⁶⁹ [2015] CCJ 15 (AJ).

⁷⁰ [2019] UKPC 12.

⁷¹ [2021] UKPC 13.

and universally accepted standards of justice. It is indeed impossible to encapsulate in a section of a Constitution all the ways in which the right may be invoked or infringed.

[102] In this Court's recent decision in **Urban St. Brice v The Attorney General of Saint Lucia**,⁷² Baptiste JA discussed in detail the right to a fair trial within a reasonable time which is part of the package of rights under the broader umbrella of the right to the protection of the law. Baptiste JA considered a number of decisions from the Privy Council on the issue of delay, and made the following remarks:

"[23] Section 8(1) of the Constitution of Saint Lucia is a fundamentally important constitutional guarantee. It provides: '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.' Section 10(1) of the Constitution of Mauritius contains a guarantee in terms identical to that of section 8(1) of Saint Lucia, that: 'where a person is charged with a criminal offence, 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.' In giving the opinion of the Board in **Boolell v The State**, Lord Carswell stated: '[i]f a criminal trial 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.' Lord Carswell said that this represents the law of Mauritius. In my judgment, it also represents the law of Saint Lucia, having regard to the identical nature of the respective provisions.

[24] From the authorities cited earlier, like **Boolell**, **Aubeeluck** and **Elaheebocus**, it is clear that in the face of a challenge founded on section 8(1) of the Constitution of Saint Lucia, with respect to the hearing of a criminal charge within a reasonable time, the conduct of an appellant causative of the delay, or the fact that an appellant was largely responsible for the delay, does not necessarily trump the reasonable time guarantee. The time may come where the overall delay is so great, irrespective of who caused it, that the court is impelled to conclude that the reasonable time guarantee has been breached."

[103] Baptiste JA considered that in the case of **Boolell**, the Privy Council was impelled to conclude that the fair trial within a reasonable time guarantee was

⁷² SLUHCVP2018/0036 (delivered 31st July 2020, unreported).

breached after a 12 year delay in bringing the appellant to trial, regardless of who caused the delay. Baptiste JA concluded:

“[27] Further, a finding that a defendant is largely responsible for the delay in the completion of the trial is not decisive of the question as to whether the reasonable time guarantee in the Constitution has been breached. Accordingly, the Learned Judge erred in law in not recognising that it is no answer to a constitutional challenge founded on a breach of the reasonable time requirement that the conduct of the appellant largely contributed to the delay. This has been illustrated in a number of cases at the highest level of authority, like **Boolell v The State**. As stated earlier, the twelve-year period of delay impelled the finding of a constitutional breach, notwithstanding earlier authority that a defendant cannot ordinarily complain of a delay authored by him.

[28] The delay in St. Brice is significantly longer than in **Boolell**. Indubitably, the extraordinary time period which has elapsed from the time of St. Brice’s arrest and charge in November 2002 to the present, without the murder charge having been finally heard and determined, leads to the insuppressible conclusion that the overall delay is so great that the reasonable time guarantee ordained by section 8(1) of the Constitution has been violated.”

[104] I do not doubt, given the findings of the Privy Council in **Boolell** and of this Court in **Urban St. Brice**, that following the passage of, at the very least, 12 years, the respondents’ right to a fair trial within a reasonable time was breached. At minimum therefore, Noel’s detention in prison for at least 20 years and Henry’s for at least 12 years ran counter to their rights to trial within a reasonable time. I also do not doubt that, given the total period of their respective detentions in prison, a fair trial was no longer possible in either of the respondents’ cases and therefore that, the detentions became arbitrary at some point as the purpose for which it was effected (to bring them to trial, following recovery of their fitness to plead) would have abated; the respondents’ right to protection of the law had been engaged and breached; and that the detention of the respondents did not comport with fundamental principles of legality and was in breach of their rights to liberty.

[105] I do not doubt that courts are required, when determining matters concerning the prosecution of accused persons, to pay regard to the inherent need to safeguard the interest of the public in the prosecution of crimes, and should not lightly take action to stymie steps taken in pursuance of this public interest. It

could not however be that the Constitution, which provides for the detention of a person pending their trial, could be taken to permit the detention of such a person for a period in excess of the number of years for which he might have been sentenced had he or she been convicted, or past any period of time in which it may be said that a fair trial could still occur, merely in the interest of securing a successful prosecution and conviction. I do not doubt that the respondents were initially duly detained for unfitness to plead and that such detention was pursuant to an intention to bring them to trial in respect of the offences for which they were charged. However, their rights to liberty must have been breached in circumstances where the purpose of their detention (i.e. bringing them to trial for specific offences) had been effectively overtaken by the fact that the period of their detention exceeded the lawful custodial sanction which could have been imposed on them following a possible conviction, and where the authorities are clear that their rights to protection of the law (by way of the trial within a reasonable time guarantee) would have been breached, and where it is clear that a fair trial could no longer take place due to the passage of time.

[106] The authorities are clear that arbitrariness is the antithesis of the rule of law and the protection of the law.⁷³ On my analysis, the respondents' detention assumed arbitrariness at some point in time, given the time that has elapsed since they were charged.

[107] In all the circumstances, I am of the view that the judge was correct to conclude as he did that the respondents' rights to liberty were breached in this case. As is clear from all that I have said however, my reasons for arriving at the conclusion that the right to liberty was breached differ from that of the learned judge's. I would therefore dismiss the appeal on this point and affirm the declaration made by the judge at paragraph (3), but vary that declaration as follows:

“(3) A Declaration is granted that the State's detention of the claimants in prison after being found unfit to plead due to mental illness, for

⁷³ See for example *Lassalle v The Attorney General*, Civil Appeal No. 2 of 1971.

periods which undermined their right to protection of the law, is in breach of their right to personal liberty.”

[108] Before turning to the issue of damages, I wish to make a few further remarks on the judge’s treatment of the respondents’ claim to breach of the right to protection of the law. In their amended originating motion filed on 6th February 2019, the respondents sought a declaration that the failure of the authorities to provide a trial within a reasonable time and in accordance with the requirements of section 8(1) and 8(2) of the Constitution was in breach of the sections thereof. The respondents’ allegations in the court below in respect of the breach of the right to protection of the law related solely to the right to a fair trial within a reasonable time and the learned judge confined his findings to this narrow point. At paragraphs 61 and 62 of the judgment, he observed that:

“61. The claimants were both charged with criminal offences. Neither claimant could have been tried because each was found unfit to plead due to mental illness. If there had been periodic reviews, which concluded that they remained unfit to stand trial, they could not have been brought to trial, no matter how long they remained incarcerated. The right to a trial within a reasonable time is not triggered until they are fit to plead. There having been no periodic reviews, we shall never know whether they were ever fit to stand trial. The state conceded that, in relation to Mr. Henry, there is some evidence that he was stable between 2003 and 2007, but does “stable” mean fit to stand trial? Without proper periodic reviews, it is entirely speculative. This makes it impossible to say when the claimants could have been tried and equally impossible to say what was the period of delay in bringing them to trial and whether, in the circumstances, it was unreasonable. In Bissessar, the court took the approach of awarding damages for failure to conduct period reviews in breach of protection of law provisions.

62. I think the approach in the circumstances of this case should be to award damages based on my finding that they were deprived of their personal liberty in a manner that was not authorized by law. Where a claimant seeks damages for breach of the right to a trial within a reasonable time, what he is seeking to vindicate is his or her right to personal liberty, to not be kept in prison awaiting trial longer than can be reasonably expected. Similarly, the award of damages for failure to conduct period reviews of a person’s fitness to stand trial is ultimately directed at vindicating personal liberty.”

[109] As I have stated above, it is clear from the authorities referred to above that the right to protection of the law is not limited to the compendium of rights set out in section 8 of the Constitution, but is a broad spectrum of rights which engage the

concept of law itself and universally accepted standards of justice. It is indeed impossible to encapsulate in a section of a Constitution all the ways in which the right may be invoked or infringed. In my view, notwithstanding that the respondents alleged in their amended originating motion a breach of the right to protection of the law under sections 8(1) and (2), it was open to the judge to make findings on a breach of the right to protection of the law broadly. In other words, the judge was not required to confine himself to considering the respondents' claims in this regard through the narrow lens of sections 8(1) and (2).

[110] It is settled by the Privy Council decision in **Desir v Alcide**⁷⁴ that a party is required only to plead sufficient facts which go to show the existence of a cause of action. This is all the more so in constitutional cases where it is accepted that the court has more latitude in granting relief even on narrowly framed pleadings. Accordingly, while the respondents' originating motion made specific mention of sections 8(1) and (2), I am of the view that these references and the facts relied upon by the respondents were sufficient to raise the right to protection of the law, broadly. Following **Desir**, I am satisfied that the learned judge could have gone on to consider whether the failure to conduct periodic reviews may also have amounted to a breach of the right to protection of the law broadly.

[111] Indeed, the failure to ensure periodic reviews may, of itself, amount to a breach of the right to protection of the law. This was the conclusion arrived at by the Court of Appeal of Trinidad and Tobago in **Bissessar**, whose reasoning I consider apt and adopt. In **Bissessar**, the appellant was charged with murder and was found to be unfit to take his trial. In October 2001, the trial judge ordered that the appellant 'be detained in safe custody [in a hospital] and be treated for [his] mental illness...until the President's pleasure is known'. The appellant spent some seven years and nine months at the criminally insane unit at the hospital, until the trial judge, at a case management conference for constitutional proceedings filed by him, directed that he be discharged from the hospital and returned to prison to await his trial on the charge of murder.

⁷⁴ [2015] UKPC 24.

[112] The appellant subsequently filed proceedings alleging that he had been fit to take his trial since October 2001 and the delay in discharging him from the hospital resulted in a breach of his rights under sections 4(a), (b) and (d) and sections 5(2) (a), (b), (e) and (h) (the protection of the law provisions) of the Constitution of Trinidad and Tobago. In finding that the appellant's constitutional right to protection of the law was breached by the state's failure to conduct periodic reviews of his fitness to stand trial, Bereaux JA at paragraph 39 of the judgment stated:

“(i) The appellant was entitled to a periodic review of his fitness to take his trial during the entire period of his detention at the criminally insane unit of the [hospital]. This entitlement arose (i) as a common law right and (ii) implicitly from the nature of the order of [the trial judge].

(ii) Such a right of periodic review included the right to be told of the outcome of the review as well as to the creation of a procedure by which any recommendation of the review body for his discharge could be facilitated. This is consistent with the requirements of section 5(2)(h) of the Constitution.

...

(iv) On the evidence, the appellant was fit to take his trial as early as October 2001. However, there was no proper or effective system in place to facilitate his discharge even upon such a recommendation by the review body. The absence of such a system was a breach of the appellant's right to the protection of the law and to such procedural provisions necessary to give effect to his constitutional rights.”

[113] Having regard to the reasoning in **Bissessar**, the respondents' right to protection of the law may likely have been infringed by the State's failure to conduct regular periodic reviews of their fitness to plead. However, the learned judge's refusal to make a declaration as to the breach of the right to protection of the law, and to award damages, has not been challenged by the respondents by way of a cross appeal. Further, the Attorney General has challenged the judge's finding of fact that there were no periodic reviews of the respondents' fitness to plead. In the circumstances, I would refrain from granting any separate declaration as to the respondents' right to protection of the law in relation to the state's failure to conduct regular periodic reviews of the respondents' fitness to plead.

[114] I now turn to the issue of the appropriate remedies to be awarded in the circumstances.

Issue 4 – The Remedies Issue

- [115] As earlier mentioned, the learned judge awarded damages for the entire period of the respondents' detention. The judge's reasoning on the issue of damages is reflected at paragraph 63 of his judgment as follows:

“In the recent decisions of **Everette Davis v Attorney General of [Saint] Christopher and Nevis** (2014), **Jermaine Browne v Attorney General of [Saint] Christopher and Nevis** (2018) and **Gavin Browne v Attorney General of [Saint] Christopher and Nevis** (2019), High Courts of the Eastern Caribbean awarded damages at the rate of \$500.00 per day for the infringement of the right to personal liberty. I see no reason to depart from this assessment.”

- [116] It is, at the very least arguable, given the many imponderables in this case, that declaratory and mandatory coercive relief, along with a permanent stay of the charges against the respondents, might have provided emphatic vindication of the respondents' constitutional rights.⁷⁵ However, the Attorney General, to his credit, has not sought to so do. Rather it was implicitly accepted that were the court to conclude that the respondents' constitutional rights were breached it would be appropriate to consider a compensatory award by way of vindication. However, what the Attorney General challenges are the daily rate and the period for which damages were awarded. The Attorney General argues that the judge was wrong to award damages for the entire period of the respondents' detention and that the daily rate of damages awarded by the judge was arbitrary and not supported by the analysis required and requests this Court to exercise the discretion as to damages afresh, and reassess the period in relation to which damages should be paid to the respondents.

- [117] The power of the Court to grant redress for breaches of constitutional rights is expressed in section 16 of the Constitution (“the redress clause”) which provides that:

“If any person alleges that any of the provisions of sections 2 to 15 inclusive has been, is being or is likely to be contravened in relation to him or her (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person),

⁷⁵ See for example the decisions of the Privy Council in *Inniss v Attorney General of St Christopher and Nevis* [2008] UKPC 42, para 21; *James v Attorney General of Trinidad and Tobago* [2010] UKPC 23, para 37; and *Ian Seepersad and Roodal Panchoo v The Attorney General of Trinidad and Tobago* [2012] UKPC 4 which make reference to such an approach.

then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.”

[118] It is now well established that the court is not generally limited in the range of reliefs it may grant under the redress clause of a post-colonial Commonwealth Caribbean Constitution with a view to vindicating the breach of a constitutional right.⁷⁶ Any and all relief granted under the redress clause is discretionary,⁷⁷ and may include an award of damages.⁷⁸

[119] In **Ian Seepersad and Roodal Panchoo v The Attorney General of Trinidad and Tobago**,⁷⁹ Lord Hope makes plain that there is no right to damages for breach of one’s constitutional rights. Similarly, Lord Kerr said in **James v Attorney General of Trinidad and Tobago**⁸⁰ at paragraph 36 that to treat entitlement to monetary compensation as automatic where violation of a constitutional right has occurred would undermine the discretion that is invested in the court by the Constitution – it will all depend on the circumstances. It is instead for the Court to determine whether it should award damages, and what the quantum of those damages should be. The law is clear that the assessment of compensation in relation to breaches of constitutional rights is a fact sensitive exercise. For example, in **Merson v Cartwright and Anor**, Lord Scott remarked, in relation to awards of damages for breaches of constitutional rights, that-

“The purpose is to vindicate the right of the complainant, whether a citizen or a visitor, to carry on his or her life in the Bahamas free from unjustified executive interference, mistreatment or oppression. The sum appropriate to be awarded to achieve this purpose will depend upon the nature of the particular infringement and the circumstances relating to that infringement. It will be a sum at the discretion of the trial judge.”⁸¹

Similarly, in **Subiah v The Attorney General of Trinidad and Tobago**,⁸² Lord Bingham made the following observation at paragraph 11 about the court’s role

⁷⁶ Fraser v Attorney General [2008] UKPC 25.

⁷⁷ See: Maharaj v The Attorney General of Trinidad and Tobago [1979] AC 385.

⁷⁸ Ibid, n. 77.

⁷⁹ [2012] UKPC 4.

⁸⁰ [2010] UKPC 23.

⁸¹ [2005] UKPC 38.

⁸² [2008] UKPC 47.

in the assessment of awards of compensation in relation to breaches of constitutional rights - 'Such compensation will be assessed on ordinary principles settled in the local jurisdiction, taking account of all the relevant facts and circumstances of the particular case and the particular victim'.

- [120] The task of assessing damages relative to a breach of fundamental rights is eminently within the domain of the trial judge in the court below and, by its nature, an appeal against a judge's award of compensation engages the rules which circumscribe an appellate court's review of the exercise of a discretionary power. As Satrohan Singh JA stated at paragraph 19 of **Martin Alphonso et al v Deodat Ramnath**:

"...it must be recognised that the burden on the appellant who invites interference with an award of damages that has commended itself to the trial Judge is indeed a heavy one. The assessment of those damages is peculiarly in the province of the judge. A Court of Appeal has not the advantage of seeing the witnesses especially the injured person, a matter which is of grave importance in drawing conclusions as to the quantum of damage from the evidence that they give. If the judge had taken all the proper elements of damage into consideration and had awarded what he deemed to be fair and reasonable compensation under all the circumstances of the case, we ought not, unless under very exceptional circumstances, to disturb his award. The mere fact that the Judge's award is for a larger or smaller sum than we would have given is not of itself a sufficient reason for disturbing the award.

But, we are powered to interfere with the award if we are clearly of the opinion that, having regard to all the circumstances of the case, we cannot find any reasonable proportion between the amount awarded and the loss sustained, or if the damages are out of all proportion to the circumstances of the case. This Court will also interfere if the Judge misapprehended the facts, took irrelevant factors into consideration or applied a wrong principle of law, or applied a wrong measure of damages which made his award a wholly erroneous estimate of the damage suffered. The award of damages is a matter for the exercise of the trial judge's judicial discretion and unless we can say that the judge's award exceeded the generous ambit within which reasonable disagreement is possible and was therefore clearly and blatantly wrong we will not interfere."⁸³

⁸³ Civil Appeal No. 1 of 1996 (delivered 21st July 1997, unreported); See also *Michael Francois v Ryan Richards* GDAHCVAP2013/0033 (delivered 1st June 2018, unreported) and *Wakeem Guishard v The Attorney General of The Virgin Islands* BVIHCVAP2018/0006 (delivered 2nd October 2020, unreported).

[121] As with the declarations made by the learned judge, this Court therefore ought only to interfere with the judge's awards of compensation if satisfied that the awards were perverse, in the sense described by Satrohan Singh JA in **Martin Alphonso**.⁸⁴

[122] In this case, I am satisfied that there is sufficient basis to interfere with the judge's order as to damages. I have earlier concluded that the judge's declarations at paragraphs (1) and (2) of his order which related to the respondents' right to liberty and right to protection against inhuman treatment should both be set aside. I have also concluded that the judge was correct to conclude that the respondents' rights to liberty were breached, but not on account of the respondents' detention in a prison as opposed to a mental hospital without periodic reviews (as the judge found), but rather on the basis that the detention of the respondents was otherwise unlawful for being in breach of their rights to protection of the law, having become arbitrary at some point in time.

[123] The clear upshot of those conclusions is that the judge's awards of damages for the entirety of the respondents' detention have been fundamentally undermined. The declarations made by the judge at paragraphs (1) and (2) of his order were clearly the foundation of his awards for the extent of the respondents' detention. Those declarations, as they were, rendered the respondents' detention unlawful, from the very start, in short, unlawful *ab initio*, on the basis that the respondents ought never to have been detained in a prison in the first place. Further, that the failure to conduct periodic reviews as to their fitness to plead completely repudiated the lawfulness of their detention, also, from the very moment the detention order was made. As I have reasoned to the contrary, there is no longer any basis on which damages could be awarded to the respondents for breaches of their constitutional rights for the entire period of their detention in prison.

[124] Furthermore, and in any event, I am also of the view that the daily rate of \$500.00 in damages for each day of the respondents' detention adopted by the judge

⁸⁴ See also *Dufour and Others v Henelair Corporation Ltd and Others* (1996) 52 WIR 188.

cannot be sustained. The judge's sole reasons expressed for using the said daily rate are reflected above. On the face of his reasoning, the judge did not conduct the fact-sensitive analysis discussed by the Privy Council in **Subiah** or **Merson**, with a view to determining the appropriate award of damages to be made in this case. At paragraph 63 of his judgment, the judge is seen to merely adopt the daily rates which have been used in previous decisions of the High Court in other states, without any consideration of the peculiar facts of the respondents' cases. In my view, it is not enough for a judge in deciding on a suitable compensatory award to be made to a person for breach of his/her constitutional rights, to simply adopt a rate which had been used in previous cases. Mere deference by one judge, to the rate of damages awarded by another judge in the particular circumstances of another case, entirely avoids the fact-sensitive analysis required by the decided cases, and is not appropriate.

- [125] What is more is that, as the Attorney General has pointed out, the awards of damages, in at least **Everette Davis v Attorney General of Saint Christopher and Nevis**, were arrived at purportedly by employing the forensic approach commended to cases of this nature by the Privy Council in cases like **Ramanoop, Merson, Everton Welch v The Attorney General**⁸⁵ and **Subiah**. Furthermore, and as the Attorney General points out, the learned judge simply applied the rate of \$500.00 per day across the entire period of the respondents' detention in prison, without any regard to the principle mentioned by the Privy Council in **Takitota v The Attorney General and Others**⁸⁶ that 'it is usual and proper to reduce the level of damages by tapering them when dealing with an extended period of unlawful imprisonment'. The daily rate of \$500.00 in these circumstances is therefore arbitrary and excessive when applied in the manner applied by the learned judge and, in my view, therefore cannot be sustained. In these premises, the judge's awards of damages at paragraphs (5) and (6) of his order are therefore perverse in the sense contemplated by Satrohan Singh JA in **Martin Alphonso**, and should be set aside.

⁸⁵ [2013] UKPC 21.

⁸⁶ [2009] UKPC 11. See also *Thompson v Commissioner of Police of the Metropolis* [1998] 1 QB 498.

- [126] The Attorney General invites this Court to exercise the discretion as to damages afresh, and reassess the period and the rate at which damages are due to the respondents. The Attorney General has argued before us that the rate of \$80.00 per day would be an appropriate daily rate to be awarded in this case, were this Court to find that the respondents' constitutional right to liberty was breached.
- [127] In determining the appropriate sums to be awarded in relation to a breach of constitutional right, one must bear in mind the well-known principles which underpin awards of damages in constitutional cases. The first is that the primary purpose of the grant of relief relative to a breach of a constitutional right is to vindicate the right. In **Merson v Cartwright and Anor**, Lord Scott remarked, in relation to awards of damages for breaches of constitutional rights, that:
- “The purpose is to vindicate the right of the complainant, whether a citizen or a visitor, to carry on his or her life in the Bahamas free from unjustified executive interference, mistreatment or oppression. The sum appropriate to be awarded to achieve this purpose will depend upon the nature of the particular infringement and the circumstances relating to that infringement.”
- [128] Second, the approach to be adopted by the Court in assessing the damages is to take account of all the relevant circumstances of the case, is now settled. In **Subiah**, Lord Bingham stated:
- “Such compensation will be assessed on ordinary principles as settled in the local jurisdiction, taking account of all the relevant facts and circumstances of the particular case and the particular victim. Thus the sum assessed as compensation will take account of whatever aggravating features there may be in the case, although it is not necessary and not usually desirable... for the allowance for aggravated damages to be separately identified.”
- [129] Third, in assessing the heads of damages which may be awarded, the court may award compensation for actual losses suffered by a claimant, exemplary damages in relation to any oppressive, arbitrary or unconstitutional actions by servants of the government, and may, by its award, reflect a sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter future breaches.⁸⁷

⁸⁷ Attorney General of Trinidad and Tobago v Ramanoop [2006] 1 AC 328.

[130] Fourth, in quantifying the amount of damages to be awarded, the Court must also ensure that the relief awarded is reasonable and does not exceed what is necessary to vindicate the constitutional right. Patterson JA in **Doris Fuller v Attorney General**, explained the principle in this way:

“Where an award of monetary compensation is appropriate, the crucial question must be what is a reasonable amount in the circumstances of the particular case. The infringement should be viewed in its true perspective, an infringement of the sacrosanct fundamental rights and freedoms of the individual and a breach of the supreme law of the land by the State itself. But that does not mean that the infringement should be blown out of all proportion to reality, nor does it mean that it should be trivialised. In like manner, the award should not be so large as to be a windfall nor should it be so small as to be nugatory.”

This rule is also borne out by the passages from **Merson** and **Takitota** (in respect of the tapering of an award for damages) both of which are quoted above.

[131] Fifth, among the relevant circumstances to be taken into account is whether other forms of relief will, along with the award of damages, provide sufficient vindication of the constitutional right. Accordingly, the court must also consider whether any award of damages, or a nominal award of damages, is appropriate where other forms of relief (for example, declaratory relief) would go a far way toward vindicating the constitutional right.⁸⁸ In this case, therefore, we are enjoined to consider the question of damages in relation to the breaches of the respondents rights, alongside the declaratory and other relief awarded by the judge, or proposed to be awarded by this Court in this case.

[132] To these well-known principles, I add my own views in relation to the method used to quantify damages. There are cases in which the court’s determination of the quantum of an award rate will involve the use of a daily rate at which damages are to be awarded. The cases in which the courts have readily awarded damages at a daily rate in cases of deprivation of liberty are those where the date of the unlawfulness of the detention is readily ascertainable, or

⁸⁸ *Inniss v Attorney General of St. Christopher and Nevis* [2008] UKPC 42 at para 21; *James v Attorney General of Trinidad and Tobago* [2010] UKPC 23 at para 37.

where losses incurred by the claimant are capable of estimation on a *per diem* basis. One recent case from this Court is **Wakeem Guishard v The Attorney General of the Virgin Islands**.⁸⁹

[133] The Privy Council's decision in **Takitota**, shows that the preliminary assessment conducted by a court when awarding damages at a daily rate, will primarily be mathematical. This is, in any event, self-evident. The court in those cases will arrive at an initial sum to be awarded in damages by multiplying the daily rate which it has deemed appropriate, with the number of days in respect of which the damages should be awarded. This fact alone strongly suggests that the use of a daily rate may not sensibly work in cases where there is no ascertainable number of days to which the daily rate of damages can be applied.. In such cases, the use of a daily rate will therefore be inappropriate.

[134] In this case, while it is clear that Henry and Noel were initially lawfully deprived of their liberty by the orders of the High Court made on 7th February 2000 and 20th July 1992 respectively, it cannot be said that their detention became unlawful at a specific date on the calendar as, in my analysis, the character of their detentions in prison changed over time. At paragraph 88 of this judgment, I noted that Noel's right to liberty would have been breached, at the very least, when 10 years had passed since he was charged for the offence of causing grievous harm, 10 years being the maximum (though unlikely) sentence which could have been lawfully imposed by a court were he to have been found guilty for that offence. Furthermore, I observed, and taking the worst-case scenario, that given the sentencing practices in the jurisdiction of this Court, Noel would not have received a maximum sentence of 10 years were he to have been convicted. Similarly, at paragraph 92 in this judgment, I also referred to the decision of the Privy Council in **Boolell v The State**, a decision from Mauritius, and the decision of **Urban St. Brice v The Attorney General of Saint Lucia** which considered that the right to fair trial within a reasonable time was breached after 12 years (following the decision of the Privy Council in **Boolell**) regardless of who authored the delay. I formed the view that in both the respondents'

⁸⁹ BVIHCVAP2018/0006 (delivered 2nd October 2020, unreported).

cases, a fair trial could no longer be possible. The application of a daily rate in a case such as this, will engage obvious logical difficulties. I therefore decline the Attorney General's invitation to apply a daily rate of \$80.00.

[135] Turning to the assessment and quantification exercise, I have considered the evidence and orders which were made by the learned judge which I now propose to set aside. In my estimation, it is appropriate to order the sums of \$250,000.00 and \$500,000.00 to Henry and Noel respectively, as damages for the breach of their constitutional rights. I consider, in weighing all the facts and circumstances in this case, that these sums are sufficient to reflect society's outrage at the breach of the respondents' constitutional rights. In arriving at these figures, I have had regard to the following factors to which I now turn.

[136] In relation to Noel, I have considered the following facts:

- (1) Noel was arrested and charged on 13th December 1987 for the serious offence of causing grievous harm. He was 36 years old at the time.
- (2) Noel was held on remand until his arraignment on 20th July 1992 when he was found unfit to plead and ordered by a judge to be detained at the Royal Gaol until the Governor General's pleasure shall be known;
- (3) He remained detained at Bordelais at least up until the date of the learned judge's judgment and has therefore been detained for no less than 32 years;
- (4) The offence of grievous harm carries a maximum sentence of ten years imprisonment;
- (5) Noel has been mentally ill for most of his life and has been receiving medication throughout the period of his detention;
- (6) Noel has been detained under maximum security for the majority of his detention and is therefore physically separated from other prisoners.

- (7) Noel is now 70 years old. In the affidavit in support of his claim, it is stated that he has been deteriorating psychologically and losing the ability to care for his personal needs including his hygiene. It is also stated that he was frequently beaten by both prison officers and inmates but there is no other evidence in relation to the day to day treatment he received while in prison; and
- (8) While it is stated in the said affidavit that Noel sometimes worked as a labourer and did 'odd jobs', there is no evidence of any actual loss of income or other losses suffered by him as a result of his detention nor is there evidence that he possessed any particular skills or qualifications.

[137] In relation to Henry I have considered that:

- (1) Henry was arrested and charged on 25th September 1995 for the serious offence of double murder. He was 20 years old at the time;
- (2) Henry was held on remand until his arraignment on 7th February 2000 when he was found unfit to plead and ordered by a judge to be detained in custody at Her Majesty's Prison until the Governor General's pleasure shall be known. He remained so detained until he was discharged unconditionally by the High Court sitting in its criminal jurisdiction on 30th May 2019, having been detained for 24 years.
- (3) Henry has been mentally ill for most of his life and had received medication throughout the period of his detention;
- (4) Henry stated in his affidavit in support of his claim that his detention had been a difficult experience for him as he had been subject to persistent taunts by other prisoners and became involved in several confrontations because of these taunts. He also stated that he was treated no differently from other prisoners except that he was provided with medication.

- (5) There is no other evidence in relation to the day to day treatment he received while in prison;
- (6) There is no evidence that Henry was employed or earned an income or possessed any particular skills or qualifications prior to his detention; and
- (7) There is no evidence that Henry had suffered any actual losses as a result of his detention.

[138] In relation to both Noel and Henry, I make the following observations:

- (i) No evidence of any job, income, or any other actual losses have been provided by the respondents in support of their prayer for damages, apart from bald assertions that they suffered loss and damage as a result of being detained in a manner not suited to their mental condition;
- (ii) There should be a sum awarded to reflect the public policy underpinning an award of damages in cases where constitutional rights have been breached. This policy is essentially that the sum of damages awarded should vindicate the constitutional rights infringed;
- (iv) The facts of the respondents' cases engage the highly important rights to liberty and the protection of the law and there is obvious public interest in the State's respect for these rights;
- (v) Both respondents are entitled and will receive declarations that their rights to liberty were breached, and in circumstances where there is no evidence of actual pecuniary loss suffered by the respondents, the breaches of their rights will be recognised by nominal awards of damages which are proportionate with the serious breaches of their constitutional rights;
- (vi) Both respondents were charged with very serious indictable offences and the legitimacy of their detention when first effected on 7th February

2000 in respect of Henry and on 20th July 1992 in respect of Noel is not in issue;

- (vii) Both respondents are entitled to a permanent stay of the indictments which are relevant to this appeal (a point which I will develop in the paragraphs below).

The Permanent Stay

[139] At this stage, there can be no doubt that the interests of justice militate against the trial of the respondents. The Court has not been apprised of the State's intention one way or the other in relation to the prosecution of the respondents. The learned judge was advised that Henry was unconditionally discharged by the High Court on 30th May 2019.⁹⁰ No further information was provided in relation to this discharge. Further, the judge ordered that Noel be transferred to a mental hospital. There is no information as to whether this was in fact done. It bears noting that the judge in the court below made no orders pertaining to the life of the indictments proffered against the respondents. This, in my view, though not specifically requested by the respondents, was clearly open to the judge on the facts of this case. Given the judge's findings with which I have agreed, and the findings which I have made in this judgment, it is clear to me that a permanent stay of the indictments is required in respect of both respondents.

[140] A number of the general principles which guide the court when considering whether to grant a permanent stay of criminal proceedings were recently discussed by Baptiste JA in **Urban St. Brice**. Those general principles in summary are that:

- (i) the grant of a stay of criminal of proceedings is an exercise of the court's discretion.⁹¹

⁹⁰ See para. 9 of the learned judge's judgment.

⁹¹ R v Horseferry Road Magistrates Court, ex p Bennett [1994] 1 AC 42.

- (ii) the court may stay criminal proceedings where, in the circumstances of a case, it would be unfair, unlawful or in bad faith to permit the criminal proceedings to continue.
- (iii) the court is ordinarily obliged to try an accused person brought before its criminal jurisdiction - a stay of criminal proceedings therefore is exceptional and must be exercised carefully, sparingly and only for compelling reasons.⁹²
- (iv) a stay of criminal proceedings is essentially a remedy of last resort and should only be deployed in circumstances where there is no lesser remedy capable of vindicating an accused person's constitutional rights.⁹³

[141] I am satisfied that in the circumstances, it is unfair, unlawful and unconstitutional to permit the criminal proceedings against the respondents to continue. The circumstances of this case are extraordinary, by any measure. Given the period of time that has elapsed since they were initially charged, it would no longer serve the interests of justice for the prosecution to proceed. Indeed, as I stated earlier, I am satisfied that the respondents cannot ever have a fair trial for alleged offences which date back to September 1995 in respect of Henry and December 1987 in respect of Noel. I would therefore order, as a part of the relief to be granted in this case, that the indictments against Henry and Noel for double murder and causing grievous harm respectively be stayed permanently.

Conclusion

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

- (1) The appeal is allowed in part.
- (2) The declarations made by the judge at paragraphs (1) and (2) of his order in relation to the respondents' rights to liberty and protection from inhuman treatment are set aside.

⁹² R v DS [2020] EWCA Crim 285.

⁹³ See The Queen v Scott Crawley & Ors. [2014] EWCA Crim 1028 and Attorney General's Reference (No. 2 of 2001) [2004] AC 72.

(3) The declaration made by the judge at paragraph (3) of his order in relation to the respondents' right to liberty is affirmed, save that it is varied as follows:

“(3) A Declaration is granted that the State’s detention of the claimants in prison after being found unfit to plead due to mental illness, for periods which undermined their rights to protection of the law, is in breach of their right to personal liberty.”

(4) The awards of damages made by the learned judge at paragraphs (5) and (6) of his order are set aside and substituted with awards of damages in the sums of \$250,000.00 and \$500,000.00 to Henry and Noel respectively for the breach of their constitutional rights with interest at the statutory rate of 6% from the date of this judgment until payment.

(5) The stay of execution of the judgment of the learned judge granted by a single judge of this Court on 21st April 2020 is discharged.

(6) There is no order as to costs on the appeal.

[143] This appeal concerned issues which have not previously been canvassed by any written decision of this Court. I express my gratitude to counsel on both sides for their assistance.

Postscript

[144] There is no denying that the circumstances of this case represent systemic failings of the State in relation to the overall treatment of criminal defendants who are found unfit to plead, and are allowed to ‘fall through the cracks’ of the criminal justice system. I feel compelled to reiterate that under the **Criminal Code**, judges of the High Court have a discretion as to the place and manner of detention of accused persons who are found unfit to plead upon arraignment. This discretion should be exercised on the basis of the facts before the court. Invariably, an unfit defendant ought to be detained in a place and manner best suited for their recovery based on the advice of state actors who are tasked with their care and custody and having regard to factors such as the infrastructure

for treatment available and the general safety of the accused, so as to enable where possible recovery of their fitness to plead and stand trial.

[145] It also bears underscoring that the latest iteration of section 1020(2) of the **Criminal Code** requires judges to report findings of a defendant's unfitness to plead to the Chief Justice who shall order such persons to be dealt with under the provisions of the **Mental Hospitals Act** or otherwise as appropriate. This is a crucial step to be followed in ensuring that the Executive fulfils the mandate of the **Mental Hospitals Act**.

[146] Lastly, both the Executive and prosecuting authorities must be proactive in the management of cases involving unfit defendants, and develop a comprehensive and collaborative framework which enables such defendants to receive appropriate psychological and judicial reviews and determinations of their fitness to plead. Increased oversight and management of these cases will also enable the taking of timely and appropriate steps in cases where the interests of justice are no longer served by the detention of a defendant pending recovery of their fitness to plead.

[147] It is my hope that this bit of guidance will result in treatment of accused persons of unsound mind which accords with their constitutionally guaranteed rights.

I concur.
Paul Webster
Justice of Appeal [Ag.]

I concur
Brian Cottle
Justice of Appeal [Ag.]

By the Court

Chief Registrar