

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
STATE OF SAINT VINCENT AND THE GRENADINES



CLAIM NO 112 of 2014

IN THE MATTER OF AN APPLICATION BY ALI GIBSON

AND

IN THE MATTER OF THE CONSTITUTION OF SAINT VINCENT AND THE
GRENADINES CAP. 10 OF THE LAWS OF SAINT VINCENT AND THE
GRENADINES REVISED EDITION 2009

AND

IN THE MATTER OF AN APPLICATION BY ALI GIBSON A PERSON ALLEGING
THAT HIS RIGHTS GUARANTEED TO HIM BY SECTIONS 1 AND 8 OF THE
CONSTITUTION OF ST. VINCENT AND THE GRENADINES ARE BEING OR ARE
LIKELY TO BE CONTRAVENED IN RELATION TO HIM FOR REDRESS IN
ACCORDANCE WITH SECTION 16 OF THE CONSTITUTION

AND

IN THE MATTER OF 17 OF 2007

BETWEEN

ALI GIBSON

APPLICANT/CLAIMANT

AND

THE ATTORNEY GENERAL OF

ST. VINCENT AND THE GRENADINES

RESPONDENT

Appearances: Ms. Nicole Sylvester and Ms Lakeisha John for the Applicant, Mr Colin
Williams, Mrs Tamika MacKenzie and Ms Karen Duncan for the Respondent

2014: Oct 25
Dec 4

DECISION

[1] **Henry, J. (Ag.):** The Applicant filed a Notice of Application on June 26, 2014 in which he seeks an Order *inter alia* for the State of Saint Vincent and the Grenadines to provide the necessary funds for a DNA expert with all incidental and related costs attendant thereto such as airfare to attend trial, accommodation to attend trial, cost of report, fees to procure the DNA expert to attend the actual trial; and stay of proceedings until the DNA expert is appointed, expert report paid for and all attendant cost of such an expert is paid for by the State.” The Notice of Application was supported by three Affidavits of Kemilia Anderson filed on June 20 and 27, 2014 respectively and October 7, 2014.

BACKGROUND

[2] On October 5th, 2006, the Applicant in this matter, Ali Gibson, was committed to stand trial for the murder of Lakether Duke. An indictment by the learned Director of Public Prosecutions dated May 31, 2007 was brought against the applicant. It appears from the records that the trial was traversed and has not yet commenced. The instant Application was filed just prior to the conclusion of the previous session of the criminal assizes and was deferred until the current session due to the departure of the trial judge from the jurisdiction. This case was listed for case management on October 9, 2014. On that occasion, learned counsel for the applicant presented the application for consideration as part of the case management proceedings.

[3] The Application is purportedly made pursuant to sections 1 and 8 of the Constitution of Saint Vincent and the Grenadines. By its very nature and content, being an application for an administrative order, it invokes the provisions of Parts 56 and 27 of the Civil Procedure Rules (“CPR”) 2000. The High Court Constitutional Redress Rules¹ and Part 56 of the CPR establish the procedure for initiating applications for administrative orders.² The Applicant did not comply with

¹ Cap. 10 of the 2009 Revised Laws of Saint Vincent and the Grenadines

² Rules 56.1 and 56.7 of the CPR 2000

those procedures by filing a Fixed Date Claim Form³, heading up the application "Originating Motion"⁴ or filing an affidavit by the claimant/applicant.⁵ Notwithstanding, the court in exercise of its powers under Rule 26.9(4) of the CPR 2000 has decided that in pursuance of the overriding objective and in light of the delay in setting this matter down for hearing within four weeks as mandated by the CPR⁶ it is just and equitable in all the circumstances to make an order to put things right. Accordingly, it is ordered that the failure of the applicant to initiate proceedings and proceed in accordance with Part 56 of the CPR is not fatal to his claim and the Notice of Application will be treated as a Fixed Date Claim Form, and it and other pleadings in this matter are hereby deemed properly filed as required by Part 56 of the CPR 2000. The Applicant will accordingly be referred to hereafter as the claimant.

- [4] The court has also had regard to the length of time that has transpired since the claimant was committed to stand trial. In an effort to expedite the progression of those criminal proceedings, the court declined to issue directions pursuant to Rule 56.11 of the CPR and decided to treat the first hearing as a trial of the claim as it is a matter which the court considered could be dealt with summarily, it appearing that all of the relevant facts were before the court on the Affidavits of Kemilia Anderson and J-Lany Williams and the depositions recorded at the preliminary inquiry of which the court takes judicial notice. In addition, the Application as framed outlines the grounds on which relief is being sought, the facts on which the claim is made, identified and effected service on the appropriate defendants. Similarly, counsel for the claimant and the respondent have canvassed widely the legal issues which the court will need to consider and have provided substantial submissions in this regard. The matter is accordingly being dealt with pursuant to Rules 56.11 and 27.2(3) of the CPR 2000.

³ Rule 56.7(1) of the CPR 2000

⁴ Rule 56.7(2) of the CPR 2000

⁵ Rule 56.7(6) & (7) of the CPR 2000

⁶ Rule 56.7(8) of the CPR 2000

[5] The Affidavits of Kemilia Anderson filed on June 20, and October 7, 2014 merely repeat the grounds of the application and the submissions made by learned counsel for the claimant and add nothing to the factual background or issues in this case.

[6] In response to the claim, the respondent filed on October 1, 2014, an affidavit of J-Lany Williams Crown Counsel in the chambers of the Honourable Attorney General in opposition to the claim. In it, Mr Williams repeats some of the arguments outlined in the written submissions filed on behalf of the respondent. He deponed *inter alia* that:

(a) As there is no DNA expert available in Saint Vincent and the Grenadines, the State provided funds to obtain the services of an independent DNA analysis (sic) from the Federal Bureau of Investigations (FBI) located at Quantico, Virginia in the United States of America, with all the attendant and related costs which were occasioned.

(b) This independent DNA expert evidence has already been provided by the State through the said laboratory of the FBI; and which independent DNA expert evidence had been properly provided to the Applicant as seen in exhibit "KA1" attached to the Affidavit of Kemilia Anderson.

(c) The scientific analyses provided by the FBI laboratory are widely considered to be independent, impartial, unbiased and fair by the State of Saint Vincent and the Grenadines, and so too by several other Caribbean States.

(d) The request for a second independent DNA expert report is baseless, unnecessary, wholly unsupported by the evidence provided by the Applicant; and would result in an unnecessary additional and duplicate expenditure on the part of the State.

(e) The name "Ivan James" was referred to in the deposition of Sergeant 222 Selwyn Jack at the Preliminary Inquiry of 17 of 2007. The relevant portions of the Deposition are attached and marked "JW1".

(f) The applicant has failed to demonstrate that without the services of an additional independent DNA expert his trial would not be fair, and has failed to show to the court how his rights are being or at risk of being infringed.

(g) That we cannot admit or deny whether the applicant currently has no access to funds and is indigent, as we have no information upon which to confirm or deny same.

(h) The Applicant's claims are without merit and should be dismissed.

[7] The deposition of the investigating officer in the criminal murder case against the claimant, Sgt. Selwyn Jack, was exhibited to Mr J-Lany Williams' affidavit along with the DNA report submitted by the FBI laboratory which is the subject matter of this claim. In his deposition, Sgt. Jack detailed the steps he took during the course of his investigation into the murder of Lakether Duke including the fact that intimate samples were taken from the claimant and submitted to the FBI laboratory in Quantico for DNA analysis on August 28, 2005. He indicated in his deposition that he received the results of that analysis on October 5, 2006 and notified the claimant accordingly. While Sgt. Jack states in his deposition that samples were taken from one Philmore Allen and one Ivan James, he did not say that those samples formed the subject matter of the report from the FBI laboratory.

[8] Sgt. Jack's deposition refers to the report received from the FBI laboratory. J-Lany Williams' affidavit⁷ acknowledges that this is the report exhibited to the Affidavit of Kemilia Anderson filed on June 20, 2014.⁸ It is important to detail the contents of the

⁷ See paragraph 4(b)

⁸ See paragraph 21

report. On page 1 it is addressed to the Commissioner of Police and dated September 29, 2006. The address on the letterhead is: FBI Laboratory, 2501 Investigation Parkway, Quantico, Virginia, 22135. The case ID No is entered as 95A-HQ-1507124, Lab No. 050823004 PF OI. The reference is "Communication dated August 16, 2005". It is titled:

Ivan James;
Ali Gibson,
Lakether Duke – Victim
Homicide Offenses

The date specimens were received was given as August 23, 2005. It lists the Items from Lakether Duke as: Q1 – vaginal swab; Q4 - Oral Swab and Q6 – Fingernail scrapings. Under the rubric "Items from Ali Gibson" the following are listed: Q11 – swab from right arm; Q13 – pants; K1 Liquid blood sample from Lakether Duke; K3 – Liquid blood sample from Alfred Philmore Allan; K4 - Liquid blood sample from Ivan James; and K6 - Liquid blood sample from Ali Gibson. This is followed in the report by the statement "This report contains the results of the nuclear DNA analyses and supplements the FBI Laboratory report dated January 3, 2006." No mention is made by Sgt. Jack in his deposition of a report dated January 3, 2006.

[9] The Results of the Examinations are set out on pages 2 and 3 of the report. Of significance are the findings that:

(a) Based on the STR typing results and to a reasonable degree of scientific certainty, the contributor of specimen K6 (Gibson) is the source of the DNA obtained from specimen Q1.

(b) Based on the STR typing results and to a reasonable degree of scientific certainty, the contributor of specimen Q4 (Duke) is the source of the DNA obtained from specimen Q13 – 1.

(c) The STR typing results from specimen Q6 indicate the presence of DNA from more than one individual.

[10] Under the rubric "Remarks", the author of the report states that the results of additional FBI Laboratory examinations are the subjects of separate reports and also that upon completion of all requested examinations, the submitted items will be returned to you under separate cover. The report is signed Eric G. Pokorak, DNA Analysis Unit 1, 703-632-7586. An apparent footnote on the final page states "This report contains the opinions/interpretations of the examiner(s) who issued the report."

[11] On reviewing the report and the depositions, I make the following observations:

(a) The report on its face appears to deal with "Homicide Offenses", suggesting more than one. No explanation is provided by the investigating officer in his deposition regarding this and no deposition was taken from the examiner or examiners who conducted the analysis or analyses and prepared the report.

(b) A number of samples listed under the rubric "Items from Ali Gibson" refers to other individuals: Lakether Duke, Alfred Philmore Allan and Ivan James. While Sgt. Jack indicated that samples were taken from them during his investigation, he does not say what he did with those samples. It is not apparent on the face of Sgt. Jack's deposition that the samples taken from Allen and Jack were the subject of the report received from the FBI laboratory.

(c) The report refers to pants being Q13. None of the witnesses who gave depositions in the criminal case account for the genesis of those pants. Sgt. Jack does not depone that he recovered pants as part of his investigations or that he submitted pants to the FBI laboratory. The only statement he made in relation to pants is on page 18 of his deposition

where he states "That pants was Gibson's pants."

(d) The report mentions a report dated January 3, 2006 but there is no record in the depositions of such a report. The writer of the report states that he received the samples on August 23, 2005 while Sgt. Jack says that he delivered them to the FBI Laboratory on August 28, 2005.

(e) The sample described as the fingernail clippings of the deceased, based on the findings in the report, contained the DNA of more than one individual.

(f) It is not evident whether Erik G. Pokorak is the analyst who conducted the DNA analysis and if so, what are his credentials.

[12] I hasten to add that in response to a question from the court during the hearing, the learned Director of Public Prosecutions said that the Respondent has no information whether the expert's qualifications and other background details were provided to the claimant. It is against this background that the present claim was brought and is being considered.

GROUND ON WHICH RELIEF IS SOUGHT

[13] The grounds on which the Application was made and which now form the claimant's statement of case were set out as follows:

1. The claimant was committed to stand trial for murder on the 5th October 2006.
2. The claimant is indigent and was not provided with a Lawyer at the Preliminary Enquiry stage.

3. Counsel Nicole Sylvester was appointed by the State through its very limited legal aid scheme to represent the claimant as the assizes.
4. Vital independent DNA Expert Evidence is needed for the claimant's defence is not available because the claimant has no access to funds to pay for and provide for same. The independent DNA evidence is required to enable the claimant to properly prepare his defence.
5. The claimant being a man of no means and in the interest of justice and having regard to the nature of the offence requires that full and effective legal aid be provided to the claimant.
6. Failure to provide the claimant with an independent DNA Expert for his defence tantamounts (sic) to an abuse of process and deprivation of a fair trial to the claimant.
7. The claimant is in desperate need of independent DNA Expert Evidence to conduct his defence and is in no position to do so without the aid of legal aid funds being provided to facilitate same.
8. The lack of independent DNA Expert Evidence deprives and prevents the claimant from raising and/or relying and/or effectively raising and/or relying on a defence.
9. What is even of greater significant (sic) is that there is no such DNA Expert available in the State of St. Vincent and the Grenadines and as such the claimant will require funds to obtain the services of a DNA Expert from abroad with all the attendant and related costs that would be so occasioned.
10. This matter is brought to the Court's attention either as the High Court Criminal jurisdiction on the basis that to proceed with the claimant's trial will tantamount (sic) to an abuse of process and a deprivation of the concept of

equality of arms and the right to effective participation at trial and or alternatively, it is filed in the constitutional jurisdiction of the Court.

11. In the circumstances the State of St Vincent and the Grenadines has contravened and or is likely to be contravened (sic) the fundamental rights of the claimant as guaranteed to him under section 1 and 8 of the Constitution Cap 10.
12. Further, what is of note is that when one examines the DNA Report as disclosed by the State, on the face it (sic) there are inconsistencies which further bolsters the desirability of an independent DNA Expert Report.
13. The State of St. Vincent and the Grenadines is a signatory to the European Convention in (sic) the protection of Human Rights which mirrors Section 8 of the constitution of St. Vincent and the Grenadines.
14. Art 14 of the International Covenant on Civil and Political Rights (ICCPR) to which instrument St. Vincent and the Grenadines is a party also contains similar minimum standards (sic) as outlined above.
15. This is an indictable matter for one of the most serious offences in the State in the (sic) death penalty and conviction could be had based on the evidence of a DNA Expert and it would be unjust, unfair, prejudicial that the Applicant is not able to avail himself of such an expertise through public funds.
16. Due process and the protection of Law as enshrined in the constitution of St. Vincent and the Grenadines would be compromised.
17. On the face of the report it is titled IVA James, Ali Gibson on page 1, Ivan James are not names known to the claimant.

On page 2 of the report it refers to liquid blood sample from Alfred Philmore Allen, Ivan James and Ali Gibson.

18. The FBI laboratory report is at page 28 to 31 on the deposition. A copy of the report is annexed hereto and marked 'A'.

19. The claimant is deprived of equality of arms, fairness and the protection of the Law.”

SUBMISSIONS - CLAIMANT

[14] Learned Counsel for the claimant, Ms Nicole Sylvester filed written submissions on June 20, 2014 and supplemented them by oral submissions at the hearing on October 25, 2014. Her submissions overlap in parts but are retained in this decision as comprehensively as urged on the court to ensure cohesiveness. They essentially are that:

1. The right to life is a fundamental right in law and is enshrined in sections 1 and 2 of the Constitution – **R. v Hughes**⁹; **R. v. Spence**¹⁰. Section 8 (1) and (2) of the Constitution further guarantees the right to a fair and public hearing in the determination of any criminal charge. One essential aspect of the right to a fair trial is the right to have adequate time and facilities to prepare a defence. In cases of murder, the gravity of the charge required counsel to pursue with his client “a full and searching inquiry into the facts”. The right to adequate facilities to prepare a defence includes the right of the accused to obtain the opinion of independent experts in the course of preparing and presenting a defence – section 8(2) of the Constitution, Article 6(3)(b) of the European Convention on Human Rights (“ECHR”) and Article 14 of the International Covenant on Civil and Political Rights (“ICCPR”).
2. The accused is indigent and through no fault of his is unable to obtain independent medical expertise – DNA evidence. The interests of justice require that an accused in these circumstances be provided with independent medical expertise to assess and evaluate the DNA Report to be relied upon

⁹ [2002] UKPC 12

¹⁰ [2001] UKPC 35

by the prosecution. The cost occasioned by such an expert ought to be provided for at public expense i.e. the State. In any indictable matter which is to be tried before a judge and jury that may result in death upon conviction, the interests of justice require that an indigent accused who wishes to have independent DNA expertise to assess and evaluate the potential evidence against him be provided with such expertise at public expense. The absence of such an evaluation for an accused who cannot afford to pay for such services means that the trial is unfair and any conviction derived thereon should be quashed – **Deitrich v R**¹¹.

3. To allow the accused to stand trial without the benefit of independent medical expertise is to deprive him of the chance of an acquittal on a serious charge and any conviction derived thereon ought to be set aside as being unsafe and unsatisfactory. It is the duty of the trial judge to stay the criminal proceedings until a DNA Expert is made available to the accused. There is no reason to wait until an unfair trial has begun before taking steps to forestall it – **Frank Gibson case**¹².
4. The right to a fair trial implies also the appearance of impartiality not only actual impartiality. It includes the right to effective access to the court, equality of arms and the right to effective participation in the proceedings. The concept of equality of arms introduced by the European Court of Human Rights in **Neumeister v. Austria**¹³ requires a fair balance between the opportunities afforded to the parties involved in litigation. Each party must be on the same level playing field and no party should be subjected to conditions that place the party at a substantial disadvantage in relation to the opponent. The provision of the State's DNA expert flies in the face of the concept of "equality of arms", removes the notion of a level playing field and places the accused at a

¹¹ [1992] ALR 3185 at 338

¹² Ibid.

¹³ [1968] 1 EHRR 91

substantial disadvantage. In order to ensure that there is a level playing field, the State should provide funds for an independent DNA Expert.

5. Any society which seeks to secure its peace and good order by administration of criminal justice should accept as one of the costs of providing a civilized system of justice, the costs of providing independent medical expertise where it is needed to guarantee the fairness of a criminal trial – section 8 (2) (a) & (c) of the Constitution. If an accused charged with murder who through no fault on his part is unable to obtain independent medical expertise applies to the trial judge for a stay, in the absence of exceptional circumstances the trial should be stayed until independent DNA expertise is available. To continue a trial in such circumstances is unfair and would deny the claimant facilities for examining witnesses for the Crown – section 2 of the Constitution; and any conviction derived thereon ought to be quashed by an appellate court for reason that there has been a miscarriage of justice in that the accused has been convicted without a fair trial.
6. The right of an accused to secure a fair trial is a fundamental element of our criminal justice system – **Jago v. District Court of New South Wales**¹⁴. The right of the accused is manifested in rules of law and of practice designed to regulate the course of the trial – **R. v. Sang**¹⁵. The claimant would not be able to have a fair trial unless he is provided with state-funded DNA expertise by an independent expert because:

- (a) the only evidence in the criminal matter which purports to connect the claimant to the offence is an FBI laboratory report provided by the prosecution. *Ex facie* on the document there are inconsistencies.

¹⁴ [1989] 87 ALR 577; 168 CLR 23 per Mason CJ at 29, Deane J at 56, Tooney J at 72, Gaundron J at 75.

¹⁵ [1980] AC 402

(b) The claimant is fettered from being able to challenge the veracity and cogency of that document without the aid of a DNA expert to assist him in analyzing the DNA Report provided by the prosecution in terms of formulating the questions, and assisting in the probing and testing of that evidence (which is of a complex and scientific nature) and to point out to the jury any weaknesses in that report – adopting and embracing the findings of the court in the **Frank Errol Gibson case – para. 37**. The peculiar circumstances of this case require the assistance and expertise of someone who is separate and distinct from the expert services provided in this case.

(c) The expert who prepared the report cannot be expected to provide the type of probing testing information that this accused would be required to assist him in pointing out to the jury the weaknesses that may be inherent in the very report.

7. The inherent jurisdiction of the court extends to a power to stay proceedings to prevent an abuse of process or the prosecution of a criminal proceeding which will result in an unfair trial – **Barton v. R**¹⁶. It is in the interest of justice and a fair trial that an accused is able to avail himself of all possible defences, particularly where a conviction or acquittal could only be had based on the evidence of a DNA expert and where no such expert is available in the State. In those circumstances, it is the duty of the trial judge to exercise his discretion to stay the criminal proceedings until an expert is made available.

8. The requirement of due process and protection of the law as enshrined in section 8 of the Constitution requires that the accused must be provided with independent medical expertise to enable him to properly defend the charge of murder; a conviction secured in the absence of such expertise ought to be

¹⁶ [1980] 147 CLR 75 at 95-6; 32 ALR 499

quashed – **Moiseyev v Russia**¹⁷, **Piruzyan v. Armenia**¹⁸, **Sanchez-Reisse v Switzerland**¹⁹.

9. The only evidence that purports to link the accused to the crime is one that is highly scientific, without which there is no case against the accused. The claimant requires the aid/assistance of an independent DNA expert so that he would not be hampered in his defence. The claimant does not allege that the report is tainted in any way regarding lack of independence between the office of the DPP and the FBI's laboratory, but its reliability is in question. The claimant also relied on the case of **Frank Errol Gibson**²⁰.
10. The FBI report lacks the required independence because at no point did it have the Applicant's input and at no point was he provided with copies of any instructions given to the expert when the exhibits were sent. It is envisaged that the analysis of samples already analyzed by the FBI expert would be necessary – Affidavit of Kemilia Anderson.
11. The claimant is not asking for costs in excess of what legal aid would provide.

SUBMISSIONS – RESPONDENT

[15] Learned Counsel for the Respondent Ms Duncan filed written submissions. She submitted *inter alia* that:

1. The claimant contends that there are "inconsistencies" in the FBI report, which, he claims further bolster the desirability of an independent DNA Expert Report. He does not set out what these inconsistencies are, but later states that, "On the face of the report it is titled IVA James, Ali Gibson on page 1, Ivan James are not names known to the claimant." It appears as if the

¹⁷ No. 629/00 decision given on 6th April 2009, paras. 217, 220, 221, 223, 224

¹⁸ 33376/07 paras. 107, 108, 116 decision given on 26th September 2012

¹⁹ 9862/82 decision given on 21st October 1986 at paras. 46-51

²⁰ Ibid.

presence of the name "Ivan James" on the Report is the feature of the FBI Report that leads the claimant to believe the document has "inconsistencies".

2. The issues arising from the contention of the claimant are:

(a) Whether the FBI Report is independent "DNA Expert evidence".

(b) Whether the State of Saint Vincent and the Grenadines has contravened or is likely to contravene the fundamental rights guaranteed to the claimant by sections 1 and 8 of the Constitution. Within this issue, the question arises whether the provision of a second independent DNA Expert Report is a "facility" within the meaning of section 8 of the Constitution.

(c) Whether the absence of a second independent DNA Expert Report would deprive the claimant of:

(i) the concept of equality of arms;

(ii) a fair trial; or

(iii) will amount to an abuse of the process of the Court.

3. The Laboratory of the Federal Bureau of Investigations ("FBI Laboratory") is an internationally recognized division of the Federal Bureau of Investigations ("FBI"), which provides forensic analysis services as its facilities in Quantico, in the State of Virginia, in the United States of America.

4. The FBI Laboratory is an independent expert organization that is in no way funded by or connected to the State of Saint Vincent and the Grenadines. The analysis conducted by the FBI Laboratory is science-based and is provided by a non-State actor. Any contention that the analysis conducted, and the resultant report provided, by the FBI Laboratory is not independent is wholly without logic or merit.

5. The FBI Laboratory, as an independent actor with arguably unparalleled expertise in the field of forensic science has provided "independent DNA Expert evidence". This independent expert DNA evidence has been provided to the claimant.
6. The claimant has not sought to provide any evidence to support his attack on the independence of the FBI Laboratory and any questioning of the independence and expertise of the FBI laboratory, in this context must fail.
7. Paragraph 14 of Kemilia Anderson's affidavit states that there are "inconsistencies" in the FBI Report but does not outline what are the purported inconsistencies.
8. By stating that Ivan James are not names known to the Applicant, the claimant appears to be casting doubt on the FBI Report based on the presence of the name of a person he alleges that he does not know. In this regard, the testimony of J-Lany Williams to which is exhibited a portion of the deposition of the investigating officer (in which he attests that he took samples from James Allen and Philmore Allen during his investigation) provides a cogent explanation regarding the presence of the name James Allen on the FBI Report. Consequently, there is no reason whatsoever to indict the independence and expertise of the FBI Laboratory or the FBI Report and there is no information in the FBI Report to cast doubt as to its quality. The claim is accordingly baseless and must fail.
9. The claimant who is allegedly indigent had counsel appointed by the State through its legal aid scheme to represent the claimant at the Assizes. The provision of State-funded legal aid is not a constitutional right but based on a policy decision taken by the State. The State has therefore provided the claimant with more than is even guaranteed under the Constitution.
10. Section 8 of the Constitution guarantees that every person who is charged with a criminal offence shall be given adequate time and facilities for the preparation

of his defence. In order to show that the Constitution is being or is likely to be contravened the claimant must show that the provision of a second independent DNA Expert Report is included in the term "facilities". Not only is a second independent DNA Expert Report not included in the term "facilities", but the State is not obligated under the Constitution to provide any independent expert DNA Report at all, yet it has. In support Learned Counsel cited the decision of the Caribbean Court of Justice in the case **Frank Errol Gibson v. The Attorney General of Barbados**²¹.

11. The **Frank Errol Gibson case**²² can be distinguished from the instant one on the facts:

- (a) The State did not provide forensic analysis in the **Frank Gibson case** whereas in this one an independent DNA Expert Report has already been provided;
- (b) The claimant in this case is requesting that he be provided with funds to secure a second independent DNA Report and based on the dicta contained at paras. 28 to 32 of the **Frank Errol Gibson case**, it would be straining the meaning of the term "facilities" to include within it any such obligation on the part of the State to provide an accused with the services of an expert funded by the State.

The provision of a second "independent" DNA Expert and Report does not fall within the meaning of "facilities" referred to in section 8 of the Constitution of Saint Vincent and the Grenadines.

12. Relying on para. 33 of the **Frank Errol Gibson** judgment, section 8 of the Constitution like section 18(2) of Barbados' states that the facilities afforded must be adequate. The facilities afforded to the claimant have been more than adequate, having been provided with counsel by the State through its legal aid scheme; and an independent DNA Expert Report provided by the prominent FBI in the United States of America.

²¹ CCJ Appeal No CV 1 of 2010, BB Civil Appeal No 8 of 2007.

²² Ibid.

13. The concept of a fair trial involves fairness to the prosecution, the public and the defendant²³. It is for the claimant to demonstrate that without the services of a second independent DNA Expert that his impending trial would not be fair - dicta of the CCJ in the **Frank Errol Gibson case**²⁴. The claimant has failed to show this. The DNA Expert Report provided by the FBI is an independent and unbiased one. The State has provided the Report to the claimant. Unlike the Frank Gibson case, an independent expert report exists. The claimant seems to suggest by his submissions that a truly "independent" report must be skewed in favor of the claimant.
14. The claimant's upcoming trial given the FBI Report and provision of counsel by the State for the claimant is one that prima facie appears fair both from the perspective of the accused and the community – para. 38 of the **Frank Errol Gibson case**.
15. An abuse of process has been defined as: "Something so unfair and wrong that the court should not allow a prosecutor to proceed with what is in all other respects a regular proceeding...". The issue of abuse does not arise. The respondent has done nothing so unfair that the Court should interrupt the flow of proceedings against the claimant. The circumstances surrounding the claimant's case including the provision of Counsel and an independent DNA Expert and Report affords the claimant the opportunity to vigorously conduct his defence and to conduct "a full and searching inquiry into the facts". The constitutional requirements have been upheld in this case in every material regard.
16. The FBI Report was provided to the claimant within sufficient time to prepare his defence. The claimant was provided with the contact details of the FBI expert at the Preliminary Inquiry – in the deposition. The claimant has failed to

²³ DPP v. Meakin [2006] EWHC 1067

²⁴ Frank Errol Gibson case at para. 34

show that the State is contravening or is likely to contravene his constitutional rights. The independent expert report contains no inconsistencies and raises no *prima facie* information to cast doubt on its quality. The Court should accordingly refuse the Orders sought by the claimant.

ISSUES

[16] The issues for consideration are threefold:

1. Whether the claimant has established that the State of Saint Vincent and the Grenadines has contravened or is likely to contravene fundamental rights guaranteed to him under section 1 of the Constitution?
2. Whether the claimant has established that the State of Saint Vincent and the Grenadines has contravened or is likely to contravene fundamental rights to a fair trial guaranteed to him under section 8 of the Constitution?
3. Whether the claimant is entitled to be provided with state-funded services of a DNA expert and/or a stay of criminal proceedings pursuant to section 8 of the Constitution?

LAW, ANALYSIS AND FINDINGS

[17] Sections 1, 8 (1) & (2) and 16 of the Constitution of Saint Vincent and the Grenadines²⁵ are pertinent to the issues before the court and provide respectively:

- "1. Whereas every person in Saint Vincent and the Grenadines is entitled to the fundamental rights and freedoms, that is to say, the right, whatever his 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,

²⁵ First Schedule to the Saint Vincent and the Grenadines Constitution Order, Cap. 10 of the Revised Laws of Saint Vincent and the Grenadines

namely –

- (a) life, liberty, security of the person and the protection of the law;
- (b) freedom of conscience, of expression and of assembly and association; and
- (c) protection for the privacy of his home and other property and from deprivation of property without compensation,

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 on those provisions, being 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.

8. (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.

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

- (a) shall be presumed to be innocent until he is proved or has pleaded guilty;
- (b) ...
- (c) shall be given adequate time and facilities for the preparation of his defence;
- (d) shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court, and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution;

and...

16. (1) If any person alleges that any provisions of sections 2 to 15 inclusive of this Constitution has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter that is lawfully available, that person (or that other person) may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction –

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

(b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3) of this section,

and may make such declarations and orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 2 to 15 (inclusive) of this Constitution:

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

(3) ...

(4) ...

(5) The High Court shall have such powers in addition to those conferred by this section as may be conferred upon it by Parliament for the purpose of enabling it more effectively to exercise the jurisdiction conferred on it by this section.

(6) The Chief Justice may make rules with respect to the practice and procedure of the High Court in relation to the jurisdiction and powers conferred on it by or under this section (including rules with respect to the time within which applications may be brought and references shall be made to the High Court)."

Issue No. 1 - Whether the claimant has established that the State of Saint Vincent and the Grenadines has contravened or is likely to contravene fundamental rights guaranteed to him under section 1 of the Constitution

[18] An examination of section 1 of the Constitution demonstrates that it is declaratory only of the effect of the ensuing provisions and does not create any fundamental rights and protections outside of sections 2 – 15 of the Constitution. Section 16 (1) of the Constitution expressly provides that the rights and freedoms are set out in sections 2 through 15. Issue No. 1 is therefore answered in the negative.

Issue No. 2 Whether the claimant has established that the State of Saint Vincent and the Grenadines has contravened or is likely to contravene fundamental rights to a fair trial guaranteed to him under section 8 of the Constitution

[19] The claimant makes several assertions against the respondent under the broad heading of "unfair trial". In this regard, the claimant accuses the respondent of failing to provide him with adequate facilities for the preparation of his defence as mandated by section 8(2)(c) of the Constitution. He also claims that the respondent has failed or refused to afford him the facilities to examine the expert witness which the Crown intends to call at his trial for murder in contravention or threatened contravention of section 8 (2) (c) of the Constitution. He insists that in order to present a defence at his trial, he must have the services of a DNA expert to advise him, conduct DNA analysis

and also to assist him with formulating questions for the DNA expert which the Crown intends to call as a witness. Essentially, the claimant maintains that failure of the State to provide him with a state-funded DNA expert would render his trial unfair as he is indigent and unable to pay for those services himself and is a failure of the State to place him on perfect parity with the prosecutorial arm of the State. The claimant relies on the provisions of the Constitution and similar provisions in the European Convention on Human Rights ("ECHR") and the International Covenant on Civil and Political Rights ("ICCPR"). Their application in decided cases outside of our jurisdiction demonstrates the widespread recognition of the fundamental human rights and freedoms enshrined in those laws.

[20] The decision of the Caribbean Court of Justice ("CCJ") in the case of **Frank Errol Gibson v. The Attorney General of Barbados**²⁶ is very instructive in relation to the multiple pronged approach taken by the claimant in his challenge to the fairness of his impending trial. In summary, in that case an accused charged with murder challenged the reliance of the Crown on the findings of a medical practitioner who purported to conduct examinations in the field of odontology on samples recovered from the accused. The accused applied to the court for an order that the State fund the appointment of the services of an odontologist on his behalf as he was indigent. The CCJ considered the applicable provisions of the Barbados Constitution and the several issues in that case and concluded that section 18(2) of the Constitution does not give an accused a right to the services of an expert funded by the State. Section 18 (2) of the Barbados Constitution is identical to the provisions of section 8(2) of the Saint Vincent and the Grenadines Constitution. Likewise, section 24 of the Barbados Constitution is identical to section 18 of the Saint Vincent and the Grenadines Constitution. The principles emerging from the **Frank Errol Gibson case** are therefore applicable in the instant matter.

[21] At paragraphs 36 and 37 of its judgment, the CCJ stated:

²⁶ CCJ Appeal No CV 1 of 2010, BB Civil Appeal No 8 of 2007.

"[36] ...a court may only make such an order²⁷ if after a careful examination of the facts of the particular case the court considered that a fair trial required it. Section 24(1) of the Constitution requires a court to examine the specific circumstances of the accused and the entire context before determining whether it is appropriate to grant relief.

"[37] The starting point in the assessment is the presumption of innocence."

[22] After giving careful consideration to the factual background as set out at paragraphs [2] through [12] above, in particular:

- (a) some of the results in the report signed by Erik G. Pokorak, one of which suggests that more than one person might have had contact with the deceased whose DNA was left under her fingernails;
- (b) the presumption of innocence;
- (c) the claimant's assertions that he is indigent, unable to pay for the services of a DNA expert and that the only evidence linking him to the commission of the crime with which he is charged is of a highly scientific nature;
- (d) that the claimant is charged with murder for which he could be convicted and sentenced to death;²⁸ and
- (e) the substantive submissions by counsel on both sides.

the court must question whether it is fair and in the interests of justice to permit the trial to continue without at the very minimum ensuring that the claimant is provided an opportunity to seek clarification about the DNA analysis and the several concerns he has raised.

²⁷ An order providing an accused with the services of a state-funded expert

²⁸ Section 159 of the Criminal Code, Cap. 171 of the 2009 Revised Laws of the State of Saint Vincent and the Grenadines

[23] After commenting that section 18(2) of the Barbados Constitution is almost identical to the ECHR, the judges in the **Frank Errol Gibson case** held that an accused does not have a right to the services of a state-funded expert under the Constitution. Their Lordships stated at paragraphs [28], [29] and [31] of their decision:

"[28] ...It is true that the term "facilities" found in those texts is usually defined merely by reference to what the term includes but an examination of the jurisprudence emanating from the European Court of Human Rights gives no support to the contention that the expression should be construed to include the provision of an expert funded by the State. It is usually interpreted to embrace such matters as: a) tangible objects such as pen, paper, computer and books that will assist in the preparation of one's defence; b) save where the public interest or statute requires otherwise, a right of disclosure to the prosecution's file, an opportunity for the accused to acquaint himself with the result of investigations carried out throughout the proceedings, access to all relevant elements that have been or could be collected by the competent authorities... See *Jespers v. Belgium*, *Mayzit v Russia* and *Natunen v Finland*".

[29] ...Article 14(3)(b) of the ICCPR similarly confers on everyone charged with a criminal offence the right "to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing". The United Nations Human Rights Committee has stated that "facilities" in this context "must include access to documents and other evidence; this access must include all material that the prosecution plans to offer in court against the accused or that are exculpatory.

[31] Having reviewed all the authorities cited to us we are not

persuaded that section 18(2) gives an accused a right to the services of an expert *funded by the State*. It seems to us that it would be straining the meaning of the term to include within it any such obligation on the part of the State. Interpreting the provision in this way would necessarily mean that this "right" could properly be claimed on any occasion and under any circumstance by "every person who is charged with a criminal offence". ... But the Constitution does not envisage that on each occasion an accused, indigent or otherwise, would have to have the assistance of an expert, the State must pay for him to acquire those services." (underlining mine)

[24] While Saint Vincent and the Grenadines is not a party to the ECHR, it became a party to the ICCPR on November 9, 1981. The CCJ's reasoning and findings on the meaning of "facilities" are compelling and accordingly I adopt and apply them to the instant case. I have reviewed the decision of the European Court of Human Rights in the **Moiseyev v. Russia case**²⁹ submitted by the Claimant on this point. The judges examined the allegations by the applicant that he was transported in deplorable conditions to the court house and not given appropriate access to the documents in the case file and was restricted in the use of his notes. Clearly, those factual conditions fall squarely within the definition of facilities as outlined in the **Frank Gibson case**. The facts of the instant case do not. I therefore find that the expression "facilities" in section 8(2)(c) of the Constitution does not create a right for an accused to be provided with state-funded services of a medical expert unless he demonstrates that to deprive him of that facility would effectively deny him a fair trial. The central question to be decided therefore is whether the claimant has established that in order for him to have a fair trial he must be provided at the State's expense with the services of a DNA expert.

²⁹ Ibid.

[25] It was urged on this court by the claimant that the concept of equality at arms requires that he be placed on equal footing with the prosecution, at the expense of the State, during his criminal trial and that any derogation from that contravenes a constitutionally protected right. In response to a similar submission in the **Frank Gibson case**, the CCJ rejected that argument and held:³⁰

"[33] ...it must be pointed out that so far as the provision of "facilities" is concerned this salutary principle does not imply that an indigent accused must be placed on perfect parity with the prosecution. The prosecutorial arm of government has access to the enormous resources of the State. As such, it is not unreasonable to expect that quite often there may be a marked inequality between the facilities at the disposal of the prosecution and those available to an accused. Section 18(2) consequently stipulates that the facilities afforded to the accused must be "adequate"."

I adopt and apply that reasoning in the instant case for the reasons expressed by their Lordships. The case of **Neumeister**³¹ does nothing controvert that learning. I accordingly hold that the claimant is not entitled without more to be placed on equal footing with the prosecution as was suggested on his behalf.

[26] The main prong of the claimant's challenge to the fairness of the criminal proceedings which the prosecution has launched appears to be that the claimant has not had the opportunity to present any questions for consideration by the DNA expert, and that the FBI analyst who conducted the tests and prepared the report is not in position to properly advise him regarding challenging the results of the DNA analysis conducted and to offer him guidance on probing any weaknesses in the process undertaken. He complains that DNA science and methodology is complex and no

³⁰ Paragraph 33

³¹ Ibid.

professionals qualified in that area are readily accessible in Saint Vincent and the Grenadines. The claimant does not question the independence of the FBI laboratory nor is he challenging the validity of the process utilized by the FBI laboratory in conducting its analysis. He is insisting on the appointment of an independent DNA expert to carry out the same analysis. While his complaints might very well be legitimate, the claimant has failed to provide affidavit evidence which establishes that the conclusions in the report from the FBI laboratory are faulty or questionable. He does not establish on a balance of probabilities that the only way for him to obtain clarification of his concerns is to conduct a full DNA analysis himself through his own "independent" DNA expert. In addition, the claimant has not provided any information regarding the expenses associated with retaining a DNA expert.

[27] As indicated in the background facts in this decision, there are areas in the FBI DNA report which would require further explanation. The prosecution should be in a position to provide the claimant with the contact details for the analyst(s) who conducted the tests to enable him to obtain those particulars. In the event that those initial queries reveal the need for more rigorous and searching investigation including repeat of the DNA tests, the prosecutorial team (as ministers of justice) and the legal representative for the claimant collectively as officers of the court should be able to resolve those matters without recourse to the court. The claimant has not set out in his affidavit what attempts if any he has made to seek clarification or further details regarding the procedure adopted in performing the DNA tests and what queries he has made of the respondent on this and related matters. The claimant on the facts he has advanced in support of his claim and on a balance of probabilities, has fallen short of establishing that his constitutionally guaranteed right to a fair trial has been infringed or is likely to be infringed unless the State provides him with the services of an independent DNA expert at its expense.

[28] In this regard, there is not enough material before the court from which this conclusion can be ineluctably drawn. It may be that further exploration would demonstrate that the prosecution's case is fatally compromised, that no further tests are needed or even that indeed additional tests are needed, or another approach is

desirable. In case additional tests are warranted, the claimant, armed with all pertinent details could make the appropriate application to the court for redress. At this stage, the application is devoid of the necessary supporting information in that it does not contain sufficient details which would ground the claim for an order for the appointment of a DNA expert for the defence at the expense of the State. Neither the claimant nor any accused is entitled to the relief sought on a mere assertion that he is indigent, that the evidence proposed to be led against him is highly scientific and that he requires a vital independent DNA expert to advise him on his defence.³² There must be something more. I accordingly find that on all the circumstances of this case, the claimant has failed to make out that the State of Saint Vincent and the Grenadines has contravened or is likely to contravene his fundamental rights to a fair trial guaranteed under section 8 of the Constitution. What the application has done however is to place the State and in particular the prosecution on notice that the claimant wishes to have further disclosure which on all the circumstances of the case is manifestly desirable.

Issue No. 3 - Whether the claimant is entitled to be provided with state-funded services of a DNA expert and/or a stay of criminal proceedings pursuant to section 8 of the Constitution

[29] In view of the finding on Issue No. 2, it is not necessary to consider the third issue and no finding is made on it. It is also not necessary to explore the submissions by counsel for respondent that the FBI report is independent beyond stating that there is no doubt in my mind that the report of the FBI expert was obtained based on instructions provided by the Commissioner of Police without consultation with the defence. That fact *per se* does not invalidate the report on the basis that it is not independent. In addition, the cases submitted by learned counsel Ms Sylvester regarding the issue of grant of a permanent stay³³ supports the position that the court's powers to grant a stay are discretionary and "to be used only in exceptional circumstances to stay criminal proceedings." The facts as made out by the accused in this case, fail to establish exceptional circumstances which would justify a stay at this juncture. Suffice it to say

³² See paragraphs 4 and 6 of the Affidavit of Kemilia Anderson filed on June 20, 2014.

³³ See for example *Jago v. District Court of New South Wales* *ibid*.

that this case highlights the urgent imperative for the Crown to consider initiating discussions with the Bar Association to collaborate on the possible formulation of guidelines governing a joint approach to obtaining expert evidence of the highly scientific nature of DNA profiling in criminal matters.

ORDER

[30] For the foregoing reasons, this case is not one which lends itself to the grant of the reliefs sought. Due to the peculiar circumstances of this case the court considers it appropriate to issue directions to the parties pursuant to section 16(2) of the Constitution. Accordingly, the parties are directed to:

- (a) convene a meeting within the next 21 days to hold discussions with a view to ensuring that the claimant is provided by the prosecution with all necessary details surrounding the preparation of the DNA report (including gaining access to additional reports and other documentation which have been provided by the FBI analyst).
- (b) exchange information and conclude such negotiations as may be necessary to resolve any outstanding concerns which the claimant might have regarding a threat to his constitutionally protected right to a fair trial.

The claimant is granted liberty to apply for such relief as might become necessary arising out of such discussions and further disclosure.

[31] It is ordered as follows:

1. The claimant's application for an order that the State provide the necessary funds for a DNA expert is dismissed.
2. The claimant's application for an order staying the proceedings until a DNA expert is appointed is dismissed.
3. There is no order as to costs.

[32] I wish to thank all counsel for their submissions and for their forbearance in the intervening period since the hearing and the delivery of this decision, which was unavoidable.

A handwritten signature in blue ink, appearing to read "Esco L. Henry", is positioned above a horizontal dotted line.

Esco L. Henry
HIGH COURT JUDGE (Ag.)