

IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES

GRENADA

IN THE HIGH COURT OF JUSTICE

CLAIM NO. GDAHCV 2012/ 0207

BETWEEN:

BARRINGTON TELESFORD

Claimant

AND

THE ATTORNEY GENERAL

Defendant

Appearances:

Ms.Celia Edwards, QC, for the Claimant
Mr. A. Olowu, for the Defendant

2013: July 19

JUDGMENT

- [1] **Persad J:** The claimant in this matter filed a fixed date claim form on 1st June 2012 seeking a Declaration that the continued trial of the matter was contrary to the Constitution and a breach of section 8 and 2 (e) thereof. The Claimant has also sought an order from the High Court quashing an indictment filed against the claimant relative to a charge of arson.
- [2] The question that arises in this matter relates to the issue of forum, in particular, whether it is necessary for a person charged and indicted for a criminal offence before the High Court, to file a constitutional motion in the civil court to

seek relief under the Constitution relative to his fair trial rights in the matter upon which he is already indicted and before the High Court.

- [3] It is necessary to appreciate the factual background to this matter in order to understand how the question of forum arises.

The claimant in these proceedings was charged with unlawfully and intentionally setting fire to a dwelling house along with other persons on Saturday 24th of April 2004.

- [4] A preliminary inquiry was commenced sometime in July 2004 and continued until February 2010. On or about 29th March 2010, he was committed to stand trial.

- [5] By 23rd April 2010 the claimant was indicted for the offence of arson. The matter came up before the High Court on a number of occasions, without being fixed for trial and on or about the 1st June 2012 the claimant filed proceedings before the civil court alleging that his right to a fair trial within a reasonable time had been infringed.

- [6] As a consequence of the filing of this action, the proceedings before the High Court (criminal division) have been adjourned pending determination of the constitutional motion.

- [7] This court on being seized with the papers raised the question of whether it was necessary and or appropriate for the Claimant in the particular circumstances of this case to raise these issues before the civil courts as opposed to raising the question of breach of constitutional rights before the trial judge in the criminal courts.

The right to a fair trial within a reasonable time

- [8] Section 8 (1) of the Constitution of Grenada provides that:
- “if any person is charged with a criminal offence, then, unless the charges are withdrawn the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.”
- [9] There can be no doubt that if a person believes that his constitutional rights have been infringed or are likely to be infringed, that person is entitled to move the High Court for relief. The question that arises in this particular case is whether it is necessary and or appropriate, for a person who is charged and already indicted before the High Court to then initiate proceedings in the civil jurisdiction for relief.
- [10] The first question that needs to be resolved is whether the trial judge sitting in a criminal court is able to deal with constitutional issues that arise in the course of a criminal trial. In this particular case, the claimant was seeking appropriate orders from the court if the court found that his constitutional rights to have a fair trial within a reasonable time had been infringed.

Can alleged breaches of an individual's rights under the Constitution be determined by the Criminal Trial Court?

- [11] Section 16 of the Constitution of Grenada provides as follows:-
- 16 (1) If any person alleges that any of the 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 a contravention in relation to the detained person), 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.

(2) The High Court shall have original jurisdiction –

1. to hear and determine any application made by any person in pursuance of subsection (1) of this section ;
and
2. 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 or 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 :

[12] It is clear from the section cited above that a Judge of the High Court has the jurisdiction to deal with matters of constitutional redress. The relevant provisions of the Constitution does not seek to distinguish between the High Court in its civil or criminal jurisdiction.

[13] There exist a number of cases that support the proposition that a judge sitting in the High Court criminal division is entitled to deal with matters of constitutional relief.

[14] In the case of Allie Mohammed v The State 53 WIR 444, the Judicial Committee of the Privy Council had cause to review a judge's discretion to admit a confession statement where defense counsel had suggested that the confession should be excluded on the basis that was obtained breach of the applicant's constitutional rights.

[15] From the case it is clear that the fact that there has been a breach of such constitutional right is a cogent factor militating in favour of the exclusion of the confession. Nevertheless, although it would generally not be right to admit a

confession where the police have deliberately frustrated a suspect's constitutional rights, the judge has a discretion as to the admission of the confession statement and must perform a balancing exercise in the context of all the circumstances of the case.

- [16] In the case of **R v Lewis Alexander** Case No. 133 of 2006¹, Madam Justice Clare Henry sitting in the High Court of Grenada, criminal division, had cause to declare that section 183A and 183B of the Criminal Code was unconstitutional. Similarly, Mr. Justice Belle in **Callistus Bernard & 13 others v R** Case No. 19/84 (Resentencing Hearing)² in the course of his sentencing hearing took into consideration breaches of the applicant's constitutional rights when determining an appropriate sentence in that matter.
- [17] The approach of the High Court in Bernard Coard matter is consistent with the approach by the Privy Council in the case of **Boolell v. The State (Mauritius)** [2006] UKPC 46 (16th October 2006) where that court has ruled that where an individual's constitutional rights have been infringed the sentencing court would be entitled to take that breach into account in fixing an appropriate sentence, in some cases imposing a non custodial sentence in appropriate circumstances.
- [18] In the case of **R v Flowers** 2000 57 WIR 310, the appellant was charged with capital murder in April 1991. At his trial in December 1992, the jury disagreed and a retrial was ordered. A second trial was held in September and October 1994, and the jury again disagreed and a retrial was ordered. At a third trial (in January 1997) the appellant was convicted of capital murder and sentenced to death. Some of the delay between the first and second trials and between the second and third trials was attributable to the delay of defence counsel in requesting the transcripts of the aborted proceedings.

¹ Delivered on November 5th 2007

² Delivered on 25th July 2007

[19] The appellant applied for leave to appeal against his conviction in May 1998, and his application was dismissed by the Court of Appeal in July 1998. The appellant did not submit either at his trial or before the Court of Appeal that his constitutional right to a fair trial within a reasonable time (s 20 (1) of the Constitution of Jamaica) had been infringed by reason of the delays in the proceedings instituted against him, or that the proceedings constituted oppression. Special leave to appeal to the Privy Council was granted in February 1999 and the Board heard the appeal in July 2000.

[20] The Privy Council declined to grant relief on the question of delay since neither the breach of the appellant's constitutional right to a fair trial within a reasonable time nor his claim that the proceedings were oppressive or an abuse of process had been raised in the courts of Jamaica, accordingly the Privy Council was reluctant to accede to such a plea raised for the first time before it.

[21] What is material is that this decision seems to suggest that it was open to the applicant to raise the question of a breach of his constitutional right before the trial court.

[22] Having regard to the authorities mentioned above it seems clear that a judge sitting in the High Court criminal division is well entitled to resolve breaches of constitutional rights relative to the criminal trial process without having to bring separate proceedings in the civil courts for constitutional relief.

Application of principles to this case

[23] Three reasons may be advanced for the Order that this Court has decided to make.

- [24] As a starting principle it seems clear that any individual who wishes to raise an issue as to whether his constitutional right to a fair trial within a reasonable time has been infringed is entitled to seek relief in the High Court.
- [25] In determining the appropriate forum regard must be had to the stage of the proceedings when the decision is made to challenge the constitutionality of the process.
- [26] Certainly if the criminal proceedings have not yet come before the High Court Assizes, then it would be sensible to initiate any challenge to the constitutionality of the process by way of constitutional motion filed in the civil courts.
- [27] Where, however, the criminal proceedings are in existence before the High Court, it seems as a matter of common sense that the trial judge has the necessary jurisdiction to deal with any constitutional issues that may arise once they relate to questions of fair trial.
- [28] Secondly, in the course of the submissions by the parties on this issue, the Court enquired of Ms. Edwards, QC, whether in the event that the Court was not minded to find in her favour would the Claimant be seeking to make submissions before the trial judge and raise common law application for a stay of the indictment on the basis of delay.
- [29] Ms. Edwards confirmed that such an application would be made before the criminal trial court if this court was not minded to find a constitutional breach. This is significant since it is well accepted that a person charged with a criminal offence, who has been affected by delay may seek relief under the Constitution, under the common law or both.
- [30] Both applications are very different and the considerations that the court will have regard to in granting relief will depend on the particular application. Common law

applications for stays on the basis of delay are applications that are to be determined by the trial judge who will in exercising its discretion will have regard to the weapons in the trial judge's arsenal to ensure a fair trial. Different considerations apply in an application under the Constitution on the question of liability.

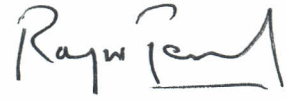
[31] In this particular case the Applicant wishes to assert that his constitutional right to a fair trial has been infringed by the inordinate delay in the conduct of the criminal proceedings. It would seem that since the Claimant also intends to raise issues relative to delay under the common law the best use of judicial resources would be achieved by the criminal trial judge considering both applications together.

[32] Finally, since there seems to be an emerging line of authority that seems to suggest that even if the court finds a breach of a constitutional right in cases of delay the nature of the remedy may vary in accordance with the gravity of the breach. It does not follow that merely because there has been breach of the reasonable time requirement that the prosecution must necessarily come to an end. In appropriate cases the Court would have to address its mind to the question of whether a fair trial can be had. An illuminating analysis on this area of the law on this area was recently explored in **Gibson v Attorney General of Barbados** (2010) 76 WIR 137. Accordingly the court may choose to fashion a remedy to meet the breach which may fall short of stopping the case.

[33] Having regard to the reasons outlined above, the court will make the following order:

That the proceedings and issues raised in GDAHC 207/2012 are hereby transferred pursuant to this court's powers under Part 26.1 of the CPR to Court No. 1 to be heard and determined by the presiding judge who is

dealing with the criminal proceedings involving this Claimant.

A handwritten signature in black ink, appearing to read 'Rajiv Persad', with a stylized flourish at the end.

Rajiv Persad
High Court Judge