IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BELIZE

CCJ Appeal No. BZCR2017/004
BZ Criminal Appeal No. 15 of 2012

BETWEEN

THE QUEEN **APPELLANT**

AND

GILBERT HENRY **RESPONDENT**

Before The Honourables **Mr. Justice Adrian Saunders**
Mr. Justice Jacob Wit
Mr. Justice David Hayton
Mr. Justice Winston Anderson
Mme. Justice Maureen Rajnauth-Lee

Appearances:

Ms. Cheryl-Lynn Vidal, SC and Mrs. Shanice Lovell for the Appellant.

Mr. Kevin L. Arthurs for the Respondent.

JUDGMENT
of
The Honourable Justices Saunders, Wit, Hayton, Anderson and Rajnauth-Lee

Delivered by
The Honourable Mr. Justice Anderson
on the 10th day of July 2018

Introduction

[1] Mr Gilbert Henry was convicted in the Supreme Court of Belize in July 2012 of the indictable offence of Causing Dangerous Harm and sentenced to five years imprisonment. His appeal was heard almost five years afterwards, on 14 March 2017. Eight days later, on 22 March, an order was delivered orally by the Court of Appeal dismissing the appeal and affirming Mr Henry's conviction and sentence. The court added that its reasons, decisions and orders would follow. A written judgment was ultimately delivered on 16 June 2017, in which the Court of Appeal allowed the appeal and quashed the conviction on the basis that the trial had not conformed with section 21 of the Juries Act. The written judgment did not mention or otherwise allude to the earlier oral decision which had dismissed the appeal. In the period between that oral decision and the written judgment no steps were taken to draw up and formally record what was orally stated.

[2] By Notice of Application dated 28 July 2017, the Director of Public Prosecutions ("the Director") sought special leave from this Court to appeal the written judgment of 16 June 2017. The proposed appeal argued that, having delivered the oral decision, the court became *functus officio* and therefore had no jurisdiction to deliver the subsequent contrary written decision. It was also proposed that the trial had, in fact, conformed with the Juries Act. We granted special leave on 17 November 2017. For reasons having to do with difficulty in procuring legal representation for Mr Henry, there was a delay of some seven months in our proceedings resulting in the appeal being heard on 18 June 2018.

[3] In parenthesis, it is to be emphasised that having served his sentence, whichever way this appeal is decided, there is no risk to the liberty of Mr Henry. He does retain an interest in these proceedings because they could result in the reinstatement of his conviction. There is also a contention that the delay and other irregularities in the trial may have breached his constitutional rights. His attorney, Mr Kevin Arthurs, seeks to protect those interests. The Director continues to prosecute this appeal on the basis that it raises significant issues of procedure that could impact all appeals heard before the court below and all criminal trials to be conducted before the Supreme Court.

Trial in the Supreme Court

[4] Mr Henry was charged on 14 September 2008 with attempted murder after he stabbed Mr Ellis Taibo following an altercation between them earlier that day in a bar in Esperanza Village, Belize. Mr Henry himself reported the incident to the police at the San Ignacio

Police Station and handed over a pocket knife used in the stabbing. In his oral statement he said that after the altercation in the bar he ran after Mr Taibo and "jucke" him because Mr Taibo threatened to kill him. A caution statement was then taken by police officers and witnessed by a Justice of the Peace.

[5] The trial began on 27 June 2012. The trial judge was Gonzalez J. There was a suggestion that this almost four years delay may have been due partly or entirely to Mr Henry's efforts to obtain legal representation after the death of his original lawyer but there was no mention of this in the transcript. What is clear is that in the end Mr Henry represented himself when Gonzalez J insisted on the commencement of the trial. Mr Henry objected to both the oral and caution statements claiming that he was intoxicated at the time he gave them. A *voir dire* was held. The judge ruled the caution statement admissible finding that it had been made by the accused of his own free will, free from any threat, oppression or undue influence. In addressing the jury, Mr Henry said he stabbed Mr Taibo in self-defence, "because I thought he was going to come back. That is it."[1]

[6] On 5 July 2012, the jury retired to consider their verdict. They deliberated for two hours and twenty-six minutes, and then asked for further directions. There is no record in the transcript of what those directions were. Nor, extraordinarily and regrettably, was there any record of the trial judge's summing up. The jury then retired again and deliberated for a further eight minutes before returning with a verdict of not guilty of attempted murder but guilty of Causing Dangerous Harm contrary to section 82 of the Criminal Code Act, which carries a maximum sentence of twenty years imprisonment. On 9 July 2012 Mr Henry was sentenced to five years imprisonment.

Court of Appeal

[7] Mr Henry appealed his conviction and sentence on 18 July 2012. The sole ground of the appeal was that he was not properly represented at trial as his lawyer had died and the trial judge nevertheless ordered the continuation of the trial. Three additional grounds were later added by his new attorney, Mr. Arthurs, on 7 October 2016. These were:

(a) denial of a right to a fair trial in a reasonable time by reason of the delay in having the appeal heard since the appeal was part of the trial process;

[1] Page 283 of the CCJ Record of Appeal.

(b) the absence of a complete transcript in a case where issues of self-defence were raised, particularly the absence of the summing up and the absence of proper procedures to rebuild the record further denied the right to a fair trial; and

(c) that because of the delay and deprivation of his right to a fair trial within a reasonable time, Mr Henry was not afforded the right to, and application of the principles of, remission.

Oral judgment

[8] The appeal was heard on 14 March 2017 and judgment reserved to a date to be announced. On 14 March 2017 the Registrar announced that the oral decision would be handed down on 24 March 2017 and this date was subsequently brought forward to 22 March 2017. On that date, the Court of Appeal comprising Justices of Appeal Awich, Hafiz-Bertram and Ducille delivered an oral judgment dismissing the appeal and affirming Mr Henry's conviction and sentence. Awich JA stated:

> "Our decision is as follows: The Appeal is dismissed; the conviction for the offence of Causing Dangerous Harm contrary to the section of the Criminal Code charged in the second count is affirmed; and three, the sentence of five years below is affirmed…. The reasons and decisions and orders shall be given on a date to be notified by the Registrar."

Written Judgment

[9] Ducille JA delivered the written judgment on 16 June 2017. No mention was made of the earlier oral judgment. In the written judgment Mr Henry's appeal was allowed. The trial was declared a nullity on the basis that the jury had failed to deliberate for the statutorily required time of two hours as mandated by Section 21(2) of the Juries Act. That section provides that:

> "For the trial of the issue in every criminal case in which the accused person is arraigned for an offence not punishable with death, the jury shall consist of nine persons and that jury may, on or after the expiration of two hours from the time when it retired to consider its verdict, return a verdict whenever it is agreed in the proportion of eight to one or seven to two and that verdict when so delivered shall have the same effect as if the whole jury had concurred therein."

[10] The court noted the case of *Christian Neal v The Queen*,[2] in which Awich JA held that historically sections 21(1) and (2) were interpreted as mandatory. The court then cited several Belizean cases to support its declaration that the trial had to be rendered a nullity

[2] *Criminal Case Appeal No. 14 of 2014.*

due to the failure to adhere to the strict time limit.[3] The court also cited the case of *R v Raymond Failey,*[4] which considered the question of when a case was 'finally and definitely left to the jury.' In that case, it was held that the case was left on the occasion of the second and final retirement. The Court of Appeal applied that rationale to the instant matter and considered that the jury had only retired for eight minutes after the case was finally left to them on their second retirement.[5] In its view, this fell far short of the statutory two-hour requirement and the trial had to be declared a nullity.

[11] Additionally, the Court of Appeal opined, *obiter*, that the provisions of section 6(2) of the Constitution were violated due to the delay and other irregularities amounting to a denial of a fair hearing within a reasonable time. The court agreed with Mr. Arthurs that 'reasonable time relates not only to the time by which a trial should commence but also the time by which it should end and judgment rendered.' The court then considered delay in the context of *Boolell v The State*[6] and *Dyer v Watson.*[7] Those authorities require a consideration of the complexity of the case, the conduct of the defendant and the manner in which the case was dealt with by the administrative and judicial authorities. The court considered the allegation that most of the delay was caused by the absence of a complete transcript and the absence of proper procedures to rebuild the record (a fact not disputed by the Director). There were obvious gaps, missing pages and paragraphs in the transcript. The court also considered that the issue of self-defence was a material issue which should have been the subject of a careful direction to the jury and held that it cannot be assumed that the trial judge gave proper directions on self-defence especially given the other irregularities in the trial. These included the trial judge's failure to inform Mr Henry of his rights at the end of the case for the prosecution on the *voir dire*, and the failure to indicate whether the verdict was unanimous or by a majority of the jurors.

[12] The court held that there could be no question of a retrial, that the appeal would be allowed, Mr Henry's conviction quashed, and his sentence set aside. As Mr Henry had already served his sentence, the court declined to address the issue of remission.

[3] See *Christian Neal v The Queen*, Criminal Case Appeal No. 14 of 2014; *Cecil Gill v The Queen*, Criminal Case Appeal No.1 of 2003; *Stanley Coleman v The Queen*, Criminal Case Appeal No.6 of 2004; *Kent Francis v The Queen*, Criminal Case Appeal No. 25 of 2006.
[4] (1975) 13 J.L.R 39.
[5] Page 284 of the CCJ Record of Appeal states that the jury first retired at 11:31 am and returned at 1:57 for directions (first retirement – 2 hours 26 minutes/146 minutes). The jury then retired at 2:02 pm and returned with the verdict at 2:10 pm (second retirement).
[6] [2006] UKPC 46.
[7] [2004] 1 AC 379.

Appeal to the CCJ

[13] The Director advanced five grounds of appeal before this Court. She argued that the Court of Appeal erred in: (i) delivering a written judgment which overturned its earlier oral decision; (ii) its interpretation of section 21 of the Juries Act; (iii) declaring that the trial was a nullity because the jury failed to deliberate for two hours; (iv) rendering an opinion on a ground of appeal that had been abandoned during the course of the hearing and on which the Director was expressly told no oral submissions in reply were necessary; and (v) deciding that the relief for delay in the hearing of the appeal was the quashing of the conviction. These grounds are considered *seriatim*.

Oral decision overturned by subsequent written judgment

[14] Ground 1 of the appeal was framed by the Director as asserting that: "*the Court of Appeal erred in law in delivering an oral decision of the Court on the 22nd day of March 2017 dismissing the appeal of the respondent and affirming his conviction and sentence but then delivering a written judgement of the Court on the 16th day of June 2017 allowing the appeal of the respondent and quashing the conviction and sentence."*

[15] The Director submitted that the Court of Appeal was *functus officio* when it delivered its oral judgment on 22 March 2017 so that it had no jurisdiction to reverse itself in the written judgment delivered on 16 June 2017. The oral decision was immediately binding: *Edmund et al v The State;*[8] *Rambarran et al v The Queen;*[9] and *Re Barrell Enterprises and others.*[10] The Director accepted, in general, that the court was entitled to arrive at a different decision during the preparation of the written judgment or that an appeal could be reopened in the interests of justice but argued that there were no new developments in this case to justify such a course and that the oral decision should therefore not have been changed.

[16] Mr Arthurs responded that Ground 1 was answerable by reference to the court's inherent jurisdiction, the facts of the proceedings, and constitutional law. There was an effective distinction to be drawn between an unperfected judgment and a perfected judgment. A judge who recognized that his or her decision was affected by a serious error could reopen the judgment or order prior to it being recorded or perfected. Here the order was not perfected or entered before the written decision of 16 June 2017. Mr Arthurs was critical

[8] TT 2007 CA 39.
[9] BB 2015 CA 5.
[10] [1972] 3 All ER 631.

of the Director's position that there must be a new development in the case in order for the court to arrive at a different decision. In his view, that position excludes scenarios where the court on its motion or its own cognizance identifies an error or issue which, if remained unrepaired, would cause a serious injustice, and exercises its discretion to not hear the parties on the point. The jurisdiction to re-open a judgment was wide where 'a judgment…has apparently miscarried… [where there is] a misapprehension as to the facts or the law': *Autodesk Inc. v Dyason (No. 2).*[11] This jurisdiction is not diluted if the judge does not explicitly give an account of his or her decision to reconsider.

[17] In analysing this issue, the Court begins from the widely accepted principle that there must be finality to litigation. Judicial decisions must confer certainty and stability. People who are affected need to know where they stand. They must be able to order their affairs in the sure knowledge that the word of the court is the final word on their legal rights and responsibilities. However, a second principle is equally uncontroversial. The principle of finality cannot be applied in an unyielding manner if that application results in injustice. This is particularly so in criminal proceedings where the liberty or even the life of an individual may be at stake. It is thus settled law that a court has an inherent power to even reopen a criminal appeal to ensure that justice is done. Thus, both principles are required to ensure public confidence in the administration of justice.

[18] The first principle above, namely the finality and binding effect of an orally delivered decision, was applied in the 19th Century case of *Re Risca Coal & Iron Co., Ex parte Hookey,*[12] to oral decisions. Lord Westbury LC said:

> "The theory of judicial procedure is that the cogent and binding effect of the order begins immediately from the time when the order is pronounced by the lips of the judge and if that could be done physically which legally is supposed to be done, and which one would desire to be done if it were possible, every order would be completed on the spot, written out by the judicial officer and in curia before the court rises, and delivered to the parties. That is the unquestionable theory of judicial procedure, and in conformity with that theory that is the time when the order is made, for the two words must be considered as equivalent and capable of being substituted one for the other. The mere defining of the words of the court by writing and reducing them into a form in which they can be evidence is a ministerial operation which, according to the true theory, succeeds the delivery of the order by the judge, and must be in point of fact nothing in the world more than the physical embodiment on the spot by the court of the words which the judge has used."[13]

[11] (1993) 176 CLR 300.
[12] (1862) 4 De G. F. & J. 456.
[13] ibid, p. 460.

[19] *Re Risca Coal* was applied by the Court of Appeal of Barbados in *Rambarran et al v The Queen*[14] to hold that it was *functus officio* upon pronouncement of its decision that the statutory requirement for the filing of an application for leave to appeal had not been satisfied. The court therefore held it had no jurisdiction to entertain applications for extension of time to file the appeals. On appeal to this Court we found[15] that the Court of Appeal was wrong to hold that it had no jurisdiction to grant an extension of time, but our decision did not comment or touch upon the underlying principles of whether the oral order was effective from the moment of its pronouncement.

[20] In *Edmund v The State,*[16] the Trinidad and Tobago Court of Appeal was of the view that the delivery of its oral judgment at the end of the hearing of the appeal was immediately binding. Having made the order, the court considered itself *functus officio*. This was also the view of Russell LJ in *Re Barrell Enterprises and others*[17] but with an important qualification. The learned Lord Justice was of the view that when oral judgments have been given, either in a court of first instance or on appeal, "the successful party ought, *save in the most exceptional circumstances* to be able to assume that the judgment is a valid and effective one."[18] (emphasis added).

[21] *Re Barrell Enterprises* thus affirmed the principle of finality of oral judgments but left the door open to the reopening of such judgments in exceptional circumstances. Subsequent cases affirmed that exception and extended the power to alter the order to a time even after the judgment has been recorded or perfected. In either case, it has been said, a court could change a decision if it was satisfied that there would be a real injustice if the order was to stand. In *Kho Jabing v Public Prosecutor*[19] the Court of Appeal of Singapore, stated that in exceptional cases a court should have the power to review its previous decisions where it is necessary to correct a miscarriage of justice. The civil case of *Re L v B (children) (care proceedings: power to revise judgment)*[20] adopted similar principles. In that case, the judge had changed her decision between the delivery of the oral judgment in December and the sealing of the order in February. It was held that a judge was entitled to reverse her decision at any time before her order was drawn up and

[14] BB 2015 CA 5.
[15] [2016] CCJ 2 (AJ).
[16] TT 2007 CA 39.
[17] [1972] 3 All ER 631.
[18] ibid., p.636.
[19] [2016] SGCA 21, especially p. 1-2
[20] [2013] 2 All ER 294.

perfected. In exercising that jurisdiction, the judge was not bound to look for exceptional circumstances. A carefully considered change of mind could be sufficient and every case depended upon its particular circumstances. Lady Hale SCJ did go on to state that, though there need not be exceptional circumstances, a relevant factor in deciding whether the jurisdiction should be exercised must be whether "any party has acted upon the decision to his detriment, especially in a case where it is expected that they may do so before the order is formally drawn up."

[22] Two years later, in *R v Yasain,*[21] the English Court of Appeal highlighted the ways in which an appeal court should exercise the power to review its own decision. The court stated that there was power to re-open an appeal if: (i) on a proper analysis, the previous order was a nullity; or (ii) a defect in the procedure might have led to some real injustice. In so holding the court drew on principles from the civil jurisdiction particularly the case of *Taylor v Lawrence.*[22] In the court's view, "there was no basis for any distinction between the Civil Division and the Criminal Division as to the principles applicable to the jurisdiction under the implicit powers of an appellate court to correct procedural errors."[23] The court was convinced that the case before it was:

> "…an exceptional case, as there was no basis in fact on which this court should have quashed the sentence; what had happened was a rare coincidence of circumstances—carelessness on the part of the transcriber, a failure by the prosecution to check the position, and a failure to check with the Crown Court at Harrow and the judge before accepting (1) that an experienced trial judge had passed a significant consecutive sentence on a defendant when the jury had not convicted that defendant and (2) that the record of the Crown Court which properly recorded the verdict and sentence were in error."

[23] These authorities suggest that the following principles are applicable:

(a) An oral decision or order made by a judge is normally binding from the moment it is delivered. It has legal force and parties are entitled to rely upon it. In criminal cases, where an appellant is a convicted person and the court announces that the appeal is allowed the consequences are that the conviction is quashed, the sentence is set aside, and the appellant is discharged. If the court orders the appeal dismissed, the result is that the conviction and sentence are affirmed. It therefore goes without saying that the judicial officer must be entirely certain before making the oral order.

[21] [2015] 3 WLR 1571.
[22] [2002] 2 All ER 353.
[23] Though a recommendation was made that the Criminal Procedure Rules Committee should formulate a rule similar to that set out in CPR 52.17, to clarify the application of these principles in the Criminal Division.

If there is any uncertainty or doubt as to the decision, the judge should reserve judgment;

(b) The court retains a residual jurisdiction to vary its earlier decision until the order of the court is recorded or otherwise perfected. That jurisdiction is exercisable on narrowly defined principles. There must be exceptional circumstances warranting its exercise. A relevant factor in deciding whether the jurisdiction should be exercised is whether any party has acted upon it to his or her detriment, especially in a case where it is expected that he or she may do so before the order is formally drawn up. The court should normally invite submissions (which may be written submissions) from the parties affected by the earlier decision and should in its subsequent decision, refer to the earlier decision and explain its reasons for varying or overturning it; and

(c) The court is *functus officio* once the order has been recorded or otherwise perfected. Thereafter remedy for errors in the judicial process lies in the appellate process.

[24] In the present case, the orders were not recorded or perfected at the time the oral judgment was delivered on 22 March 2017. Rule 23 of the Court of Appeal Rules directs that the Registrar of the Court of Appeal should notify the Registrar of the court below of the final determination in the appeal. The Rule directs as follows:

> "23. (1) The Registrar, at the final determination of an appeal, shall notify in such manner as he thinks most convenient to the Registrar of the Court below, the decision of the Court in relation thereto and also any orders or directions made or given by the Court in relation to such appeal or any matter connected therewith.
>
> (2) The Registrar of the Court below shall on receiving the notification referred to in this rule, enter the particulars thereof on the records of such Court."

[25] At the end of the proceedings before the Court of Appeal in which Mr Henry's appeal was dismissed and his sentence confirmed, Awich JA indicated that the "reasons and decisions *and orders"* would be given at a later date "to be notified by the Registrar". The entry on the records after notification of the orders flowing from the oral decision (and the subsequent written decision) was made by the Registrar on 28 July 2017. It follows from the principles outlined above that having given its oral decision on 22 March, the Court of Appeal on delivering its written judgment on 16 June 2017, retained a residual jurisdiction, exercisable on narrow grounds, to vary or overturn that decision. In accordance with those principles, the court should have explained the reason for its *volte face* in the subsequent written decision. Regrettably, there was also no indication that

consideration was given to inviting submissions from the parties affected by the overturning of the earlier decision. These were significant procedural lapses by the court. Notwithstanding these lapses, the subsequent written judgment, given as it was *before* the perfection of the earlier oral order, must be treated as having displaced that order, if there were exceptional grounds justifying the giving of the subsequent judgment. It is for this Court now to examine the soundness of the substantive ground given by the court for that written decision, namely, that non-compliance with section 21 of the Juries Act rendered the trial a nullity, to decide whether the written judgment should stand.

Section 21 of the Juries Act

[26] The Director formulated two grounds of appeal in relation to Section 21 of the Juries Act. First, she argued that the "*Court of Appeal erred in law in its interpretation of section 21 of the Juries Act in so far as it interpreted the section as requiring every jury sworn in a criminal case for an offence not punishable with death to deliberate for a minimum of 2 hours before being able to render a verdict, whether unanimously or by a majority*." And second, that the "*Court of Appeal erred in law in declaring the trial of the Respondent at the Supreme Court a nullity, in its written judgment as a result of the alleged failure of the jury to deliberate for the period of two hours."*

[27] At the hearing before us Mr Arthurs acknowledged that these propositions were unimpeachable. Section 21 plainly provides that in criminal trials for an offence not punishable by death, "the jury shall consist of nine persons and that the jury may, on or after the expiration of two hours" return a majority verdict. There is no requirement that deliberation must or even should last for two hours where the verdict is unanimous. The Court of Appeal was therefore in error in its interpretation of section 21(2) of the Juries Act in so far as it interpreted the section as dealing with the rendering of all verdicts by the jury: *R v Raymond Failey*. There is no foundation for the view that once a jury has retired to consider a verdict, it cannot deliver that verdict unless 2 hours have elapsed. Section 21 does not debar a jury from returning a unanimous verdict at any time after it has retired to deliberate.

[28] The Court of Appeal assumed, as a matter of fact, that in this case the jury's verdict was by a majority. Admittedly, it was not clear from the record whether the verdict was unanimous or by a majority. The events of 5 July 2012, the day on which the summation, deliberation and verdict all took place, is captured on one page of the trial transcript which

bears no indication of the nature of the verdict. The court stated that "there is definite indication that there was non-compliance with the Juries Act Cap. 128", before making the following pronouncement in paragraph [22] of its judgment:

> "Applying that rationale to this case, the jury retired for only eight minutes after the case was finally left to them on their second retirement. This falls far short of the statutory requirement and the trial is accordingly declared a nullity."

[29] In making this declaration the court erred. It should have only made such a finding if (a) it was clear that there was non-compliance with the Act or (b) no clarity concerning this compliance could possibly be obtained. The fact that the court was unclear on the point is evidenced by the following exchange between the Director and Awich JA[24]:

> MADAM DIRECTOR: My Lord, this will be plain in relation to this issue. First of all it depends on the nature of the directions that were sought by the jury. If they were directions in relation to law then on the ordinary circumstances as in the case I believe ***Cecil Gill*** then the time begins to run again, but it also depends on whether or not majority verdict is returned because in relation to say for instance murder to manslaughter there must be - - to ordinary offences they must deliberate for at least two hours before they can return a majority verdict. This is not a majority verdict. We do not have an indication here but then when the judge is sentencing he says the jury of nine of your peers found you guilty on the alternative charge of dangerous harm which is usually the signal that - -
> AWICH JA: No, if you can look at that give us the details of your submission this afternoon. It appears to me that ***Coleman*** seems to say just at the time. In both those cases it was majority decision.
> MADAM DIRECTOR: Right. This is why I am making the distinction here, My Lord, because a jury can come back after one minute with a verdict if it is they are unanimous on that verdict. And this appears to have been a unanimous decision so that even if the time started to run again at 2:02 within eight minutes they could have come back out with a unanimous decision.
> AWICH JA: Yes, if it is majority.
> MADAM DIRECTOR: If it is majority that will be a difficulty they will have to depending on the directions go back again and then - -
> AZWICH JA: And in this case we don't know whether it was majority or unanimous.
> MADAM DIRECTOR: I'm saying that it's indication from what the judge is saying when he is about to sentence is that it was a unanimous decision. He says the jury of nine of your peers. It's usually a different - -
> AWICH JA: I have read that but I'm not sure whether that is unequivocal. I have read that. He says the jury of nine of your peers but I'm not sure whether that is unequivocal.
> DUCILLE JA: Nine of the nine.
> MADAM DIRECTOR: Right, usually it is a majority verdict which will say seven of the nine of your peers had said so and so. That's usually what is said.
> AWICH JA: This is not quite usually. The record is not quite the usual one too.

[24] Pages 367 - 370 of the CCJ Record of Appeal.

[30] It is evident that at all material times, the Director was of the view that the verdict was in fact unanimous. In the exchanges reproduced above, she alluded to the fact that the trial transcript revealed this at the sentencing of Mr Henry. The trial judge had stated: "Mr. Henry, the Jury of 9 of your peers found you guilty on the alternative charge of Dangerous Harm on Tuesday of two weeks, and today it is my duty to pass sentence on you."[25] Further, after the court had risen and prior to the delivery of the oral judgment, the Director's office obtained proof of the unanimity of the verdict through notes taken by Ms Sheiniza Smith, an attorney attached to the Director's office and who deposed to this fact in an affidavit. The Supreme Court File Entry of Verdict dated 9 July 2012, eventually provided by the Deputy Registrar, also demonstrated that the verdict was unanimous. The confirmation of the unanimity of the verdict was brought to the attention of the Registrar who reported that the court did not consider this information "necessary."

[31] There was, therefore, a substantial body of evidence to support the contention that the verdict was in fact unanimous. There was no requirement for the jury to have deliberated for two hours. From this it follows that the court's use of its residual jurisdiction to reverse its oral judgment for non-compliance with section 21 of the Juries Act was plainly wrong in this case.

Abandonment of constitutional grounds of appeal

[32] The Director argued that the Court of Appeal erred in law in rendering an opinion on a ground of appeal that was abandoned by Mr Henry during the hearing and on which the Director was expressly told that no oral submissions in reply were necessary. Relatedly, she argued that the Court of Appeal erred in law in finding that the relief for the delay in the hearing of the appeal was the quashing of the conviction and the setting aside of the sentence particularly in circumstances in which the delay "was a result of the Court process itself."

[33] It appears that, after promptings by two judges on the panel that the grounds of appeal relating to constitutional matters should have been raised in the Supreme Court, Mr Arthurs agreed and abandoned those grounds. As such, the Director only addressed the ground relating to the absence of a complete transcript and was not heard at all on the

[25] Page 286 of the CCJ Record of Appeal.

constitutional issues. Despite this, the Court of Appeal framed one of the issues in this way:

> "The first [issue] is whether the provisions of section 6(2) of the Constitution require a conviction to be quashed in a case where there has been a delay of almost nine years from the date the Appellant was arrested to the present date, the delay has not been occasioned by the Appellant, and there have been significant administrative and judicial irregularities and disorganization."

[34] The Director submitted that the court erred in resting its conclusion on this ground as it has been abandoned by Mr Arthurs. More pertinently, perhaps, she also submitted that the court erred in concluding that in cases where unreasonable delay has been demonstrated, a conviction should be quashed. Although this finding was not determinative of the appeal, the Director argued that it was a significant finding that will affect other appeals and requested that this Court addresses it.

[35] The Court of Appeal made it clear that the issue of delay was not the basis on which the appeal was determined, although interestingly, that discussion formed the bulk of the written judgment. At paragraph [6], the court stated:

> "Although we answer the second question in the affirmative and this is instantly dispositive of this appeal, we mention at this time that we are constrained to discuss the first issue in some depth in order to make our concerns known, and to state in the clearest terms that such a situation as occurred in this case is never acceptable."

[36] We accept the contention of the Director that parties should be given an opportunity to address the court on issues which will be the subject of a decision or comment by the court. Elementary principles of natural justice dictate that this must be so. The suggestion by Mr Arthurs that both parties had made written submissions on the issue of delay is not a sufficient answer given the customary practices in the adversarial system as normally practised in these courts.

[37] The reasoning from the finding of a constitutional breach to the remedy of vacating the conviction, pronounced by the Court of Appeal, is also problematic. We unhesitatingly accept that there were significant irregularities both during and following the trial of Mr Henry, mostly resulting from poor administrative practices of the judicial system. Almost everything that could have gone wrong, went wrong. There was some four years delay between charge and trial. There was no complete clarity on what took place at trial because, crucially, the transcript was incomplete and silent on significant aspects. There was no indication of whether Mr Henry had been advised of his rights on the conclusion

of the case for the prosecution. There was no record of the judge's summing up, particularly his treatment of the issue of self-defence. There was no clear information on whether the jury's verdict was unanimous or by majority. The delay of five years in the hearing of the appeal was entirely unsatisfactory. It must be unsatisfactory for a convict to serve his entire sentence before his appeal is heard and decided. Such delay renders the right of appeal more an illusion than a right. As the appellate process is undoubtedly part of the trial, such a delay constitutes an infringement of the constitutional right to a fair trial within a reasonable time.

[38] Bearing these irregularities in mind, the Court of Appeal pronounced:

> "23. In any event and in light of all the above, we conclude that the provisions of section 6 (2) of the Constitution have been violated in this case, the delay and other irregularities amounting to a denial of a fair hearing within a reasonable time. Had it not been for the fact that we have just declared the trial a nullity, we would be constrained to allow the appeal and set aside the conviction."

[39] Insofar as the court held or opined that a breach of section 6 (2) must ineluctably result in the allowing of the appeal and the setting aside of the conviction, we must disagree. This Court has addressed the issue of remedies for breach of the constitutional right to a fair trial within a reasonable time. In *Frank Errol Gibson v The Attorney General*[26] there had been a delay of some 29 months before the commencement of the preliminary inquiry. The State neither explained this delay nor disputed the finding that it was unreasonable. The thrust of the State's argument was that there ought not to be any award of damages or an order made permanently staying or dismissing the charge as relief for the admitted breach. The question which this Court considered, therefore, was what should the appropriate remedy be when there is a breach of the reasonable time guarantee. It is worth quoting *in extenso* from what we said on that occasion[27]:

> "[60]…In answering this question a court must weigh the competing interests of the public and those of the accused and apply principles of proportionality. One starts with the premise that the Executive Branch of Government has a constitutional responsibility to allocate sufficient resources to ensure that the reasonable time guarantee has real and not just symbolic meaning. A governmental failure to allocate adequate resources, or for that matter inefficiencies within the justice sector, could not excuse clear breaches of the guarantee.

[26] [2010] 3 CCJ (AJ).
[27] Ibid, [60] – [63].

> [61] When devising an appropriate remedy, a court must consider all the circumstances of the particular case, especially the stage of the proceedings at which it is determined that there has been a breach. In particular the court should pay special attention to the steps, if any, taken by the accused to complain about the delay since, as was pointed out by Powell J of the US Supreme Court in *Barker v Wingo*, delay is not an uncommon defence tactic.
>
> [62] A permanent stay or dismissal of the charge cannot be regarded as the inevitable or even the normal remedy for cases of unreasonable delay where a fair trial is still possible. Quite apart from prejudicing the operation of section 13(3), to so hold, as some other jurisdictions have done, would create too great a risk of unnecessarily placing trial courts in the uncomfortable position of having to choose between equally undesirable alternatives, namely: to permit a possibly dangerous criminal to avoid being tried or else to raise to an unacceptably high level the threshold for deeming unreasonable obviously inordinate delay. Having an inevitable permanent stay or dismissal of the charge as the single sanction for breach of the reasonable time guarantee may well reward the guilty, who escape being brought to justice, even as it does little or nothing for the innocent who cannot regain the time they have lost suffering under a cloud of suspicion or worse, being remanded in custody. We accept the view of the Inter-American Court of Human Rights that "the State's duty to wholly serve the purposes of justice prevails over the guarantee of reasonable time". The fundamental objective of the reasonable time guarantee is not to permit accused persons to escape trial but to prevent them from remaining in limbo for a protracted period and to ensure that there is efficient disposition of pending charges. The guarantee is an incentive to the State to provide a criminal justice system where trials are heard in a timely manner.
>
> [63] But equally, we do not agree that a mere breach of the reasonable time guarantee could never yield a permanent stay or dismissal of the charge and that instead such relief should be reserved only for instances where the trial will be unfair or the accused can show prejudice. As previously indicated at [42], section 24(1) of the Constitution affords the court flexibility, power and a wide discretion in fashioning a remedy that is just and effective taking into account the public interest and the rights and freedoms of others. No conceivable remedy, including a permanent stay or dismissal, ought to be removed from the range of measures at the disposal of the court if the relief in question will prove to be appropriate. Given the high level of public interest in the determination of very serious crimes, however, it will only be in exceptional circumstances that a person accused of such a crime will be able to obtain the remedy of a permanent stay or dismissal for the breach only of the reasonable time guarantee. Of course, such a remedy will be readily granted in cases where the delay has rendered it impossible to hold a fair trial."

[40] Similarly, in *Vishnu Bridgelall v Hardat Harisprashad*[28] this Court considered the appropriate remedy for breach of the constitutional right to a fair trial within a reasonable time. We said:[29]

[28] [2017] 8 CCJ (AJ).
[29] ibid, [41] – [42].

> [41] The issue now is what redress do we consider appropriate to remedy this breach? Bridgelall has already served 30 months of concurrent five-year sentences. He would have been eligible for remission in respect of 24 of those months. He has already served, at the very least, one half of his sentence and has gotten on with his life. He is currently in Canada and, according to what we have been told, under doctor's orders that it is inadvisable for him to travel.
>
> [42] The Constitution does not circumscribe the nature or extent of the redress the judiciary is entitled to afford a litigant whose fundamental rights have been breached. Instead, the court is required to "make such orders, issue such writs and give such directions as it may consider appropriate". In criminal cases where a constitutional issue is raised, "courts make orders that span an impressive variety." These have ranged from the setting aside of a conviction to the quashing of a death sentence. The court is principally concerned with fashioning a remedy that is effective given the unique features of the particular case. In this light, we consider that the appropriate remedy in this matter would be to stay any further action against Bridgelall with respect to the enforcement of the imposed prison sentence arising out of these proceedings and we so order. Bridgelall must pay his fines, if he has not already done so, but given the undue delay during the appeal process, he should not go back to prison however justified that would have been if no such delay had occurred."

[41] It follows from these pronouncements that not all infringements of the constitutional right to a fair trial within a reasonable must necessarily result in the allowing of the appeal and the quashing of the conviction. Indeed, this remedy is, as we have said, "exceptional"; the emphasis is on fashioning a remedy, "that is effective given the unique features of the particular case". Remedies for breach may be a declaration, an award of damages, stay of prosecution, quashing of conviction, or a combination of these or some other or others. Everything depends upon the circumstances. In this case, a most pertinent circumstance is compelling evidence against Mr Henry. There was overwhelming evidence that he had stabbed Mr Taibo. He admitted his actions and handed over the instrument with which he had inflicted the stabbing. His caution statement was taken by police officers and witnessed by a Justice of the Peace. There was no credible evidence that he had not given the statement of his own free will. Indeed, the evidence was that he had done just that. The directions from the judge on the issue of self-defence and the delay in the hearing of his appeal could in no way detract from his actions, and his guilt as found by the jury. Mr Henry served the five-year sentence imposed for the offence. Indeed, having not made a claim for constitutional relief at the trial, the claim should not have been entertained at the Court of Appeal for the first time. Strictly speaking, therefore, the issue of remedy for any breach of the reasonable time guarantee does not arise.

Conclusion

[42] For the foregoing reasons, we conclude that the Court of Appeal erred:

(a) in delivering a written judgment on 16 June 2017 which overturned its earlier oral judgment rendered on 22 March 2017;

(b) in finding that there was non-compliance with section 21 of the Juries Act; and

(c) insofar as it held or implied that a breach of the constitutional right to a fair trial within a reasonable time necessarily results in the quashing of the underlying conviction.

Disposal

[43] The following are the declarations and orders of the Court:

(a) The appeal is allowed;

(b) The oral decision rendered by the Court of Appeal on 22 March 2017 is restored;

(c) The conviction of Mr Henry for the indictable offence of Causing Dangerous Harm, and his sentence of five years imprisonment, are reinstated;

(d) Mr Henry, having served this sentence, is not amenable to further incarceration or other sanction in respect of this offence;

(e) There shall be no order as to costs.

/s/ A. Saunders

The Hon Mr Justice A. Saunders

/s/ J. Wit

The Hon Mr Justice J Wit

/s/ D. Hayton

The Hon Mr Justice D Hayton

/s/ W. Anderson

The Hon Mr Justice W Anderson

/s/ M. Rajnauth-Lee

The Mme Justice M Rajnauth-Lee