IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

SLUHCV 2011/0479

BETWEEN:

URBAN ST. BRICE

Claimant

and

THE ATTORNEY GENERAL OF SAINT LUCIA

Defendant

Appearances:
Mr. Martinus Francois for the Claimant
Mr. Dwight Lay for the Defendant.

2012: February 13th, 20th;
2012: July 26th

JUDGMENT

[1] WILKINSON, J.: The Claimant on May 6th 2011, filed his originating motion and therein sought the following relief:

1. A declaration of a permanent stay of proceedings and/or that the charge against the Claimant be dismissed on the ground that in all the circumstances of this case, the Claimant will not be afforded a fair hearing within a reasonable time as guaranteed to him by virtue of section 8 (1) of the said Saint Lucia Constitution Order 1978.

2. Further or in the alternative a declaration of a permanent stay of proceedings and/or that the charge against the Claimant be dismissed on the ground that the matters complained

of are contrary to section 8(2)(a) of the said Saint Lucia Constitution Order 1978 which guarantees to the Claimant the right to be presumed to be innocent until he is proved or has pleaded guilty.

3. Further or in the alternative a declaration of a permanent stay of proceedings and/or that the charge against the Claimant be dismissed on the ground that the matters complained of are contrary to section 5 of the said Saint Lucia Constitution Order 1978 which guarantees to the Claimant the right not to be subjected to torture or to inhuman or degrading punishment or other treatment.

4. Further or in the alternative a declaration of a permanent stay of proceedings and/or that the charge against the Claimant be dismissed on the ground that matters complained of are contrary to section 3(1) and (5) of the said Saint Lucia Constitution Order 1978.

5. A declaration that the matters complained of are oppressive, arbitrary and unconstitutional and the Claimant is entitled to damages, including compensatory, aggravated and exemplary damages to be assessed by this Honourable Court.

6. Any further or other order or direction as the Court may deem necessary or proper in order to vindicate the constitutional rights of the Claimant as enshrined and guaranteed to him by virtue of sections 2 – 15 of the said Saint Lucia Constitution Order 1978.

7. Costs.

[2] Counsel thereafter in the originating motion followed the relief sought with: "THE GROUNDS OF THIS ORIGINATING MOTION ARE AS FOLLOWS: …" The originating motion was drawn up in the style of a notice of application. As the Court understands CPR 2000 rule 56.7 (1) and (2) the format should be by way of a fixed date claim - Form 3 but with the heading "Originating Motion". Nevertheless, several cases including that of the Court say that inaccuracies of this nature ought not to be a hindrance to the Claimant's case – see Hannigan v. Hannigan[1] and Grenada Building and Loan Association v. Grenada Co-operative Bank Limited[2]

[3] The matters set out as "grounds" in the originating motion were except for a few minor cosmetic changes identical in layout and content to the paragraphs in the Claimant's affidavit filed on even date in support of the originating motion. For this reason the Court will not cite at this juncture.

[1] [2000] 2 FCR 650, CA
[2] GDAHCV 2009/0122 para. 14.

[4] On a point of procedure, this Court has repeatedly stated that an affidavit is not the place for deponents to record legal argument or make any kind of submissions, it is only for stating facts. Counsel and Parties are once again referred to CPR 2000 Part 30 rule 30.3. Having regard to the provisions of the rule, the Court will ignore any matters in the affidavits which do not comply with the rule.

[5] The Parties agreed between themselves that there would be no cross-examination of the evidence presented on the affidavits. There was no rebuttal affidavit from the Claimant to the matters deposed to in the Defendant's affidavit and which conflicted with some matters in his affidavit. Further Counsel for the Claimant during the trial said that the Claimant accepted all the facts as laid out in the affidavit for the Defendant. This notwithstanding, it's the Claimant's duty to set out all the facts on which he relies to support his case.

[6] The issues:

1. Whether the Claimant ought to have exercised his common law rights before the trial Judge including the filing of appeals against any decision of that Court and having failed to do so his originating motion is an abuse of process.

2. Should the Court find that there has not been has an abuse of process whether the Claimant has deduced sufficient evidence to show, that the State delayed his trial, and as a result of that delay his stated constitutional rights have been contravened and or were likely to be contravened.

The Claimant's evidence:-

[7] The Claimant deposed that he has been detained at the Bordelais Correctional Facility from November 6th 2002, for the alleged murder of Dwain Andrews and that he has been tried five times on the same charge and is now awaiting a sixth trial which was fixed to commence on May 11th 2011.

[8] The first trial commenced on November 10th 2005, and ended in a mistrial when the Claimant's Counsel brought to the Court's attention that a member of the jury was speaking to the police while the trial was already in progress. A mistrial was declared and retrial ordered.

[9] The second trial commenced on February 17th 2006. A juror, Ms. Ellen Saltibus, who sat on the first trial was allowed to sit on the second trial. Counsel for the Claimant objected to this but the Court overruled the objection. At the end of closing arguments and before the trial Judge had summed up the case, the Claimant was sent back to the Bordelais Correctional Facility for nine (9) days. During this time the jurors were not sequested. Upon being brought back to court the Claimant was convicted of the charge and sentenced.

[10] The Claimant appealed his conviction and sentence. The appeal was heard on June 18th 2007, and the decision was delivered on November 3rd 2007[3]. The conviction was overturned by the Court of Appeal and it was left to the discretion of the Director of Public Prosecutions whether to re-try or discharge the Claimant. A decision was made by the Director of Public Prosecutions to re-try the Claimant and a date for the third trial was fixed almost one year later.

[11] The third trial commenced on October 14th 2008. During the trial the Claimant was informed that the Star Newspaper and the Voice Newspaper published matters about the trial in their weekend editions before the verdict was reached and as result of these publications a mistrial was ordered by the Court. At that time, the Judge said to the Claimant: "To my knowledge, I cannot recall anyone who has been tried so many times on the same matter, and I would do some research on it." A retrial was ordered.

[12] The fourth trial commenced on November 7th 2009, however, before it could get on the way Counsel for the Claimant made an application that the case be dismissed because of its "injustice" to the Claimant. The application was denied and thereupon Counsel asked to be removed from the case but this too was denied. Just before the selection of the jurors, Counsel for the Claimant asked for an adjournment to the following day for the reason that he was "ill-disposed". The Court denied the request. It was observed that one of the jurors who had sat on one of the previous panels was a member of the present panel, Counsel informed the Court. The Court questioned the juror about the allegation against him, he denied the allegation. When Counsel went through the notes of the previous trials, he discovered that the juror in question was the foreman at the first

[3] The copy of the court of appeal decision Criminal Appeal No.4 of 2006 Urban St. Brice v. The Queen shows a delivery date of October 29th 2007.

trial. After the panel of the jurors was settled a witness was called by the Crown. Counsel for the Claimant did not cross-examine the witness and he did not show up at the trial the next day but sent a medical report. Once again a mistrial was ordered.

[13] The Claimant deposed that he has been through four (4) trials and one (1) appeal which amounted in effect to five trials; that in terms of jurors this was equivalent to sixty-four (64) jurors, with twelve (12) jurors sitting per trial and two on stand-by. The sixth trial which was set to begin on May 11th 2011, brought the total to seventy-eight (78) jurors altogether, over a period of eight (8) years and six (6) months and during all this time he was on remand without bail.

The Defendant's evidence:-

[14] The evidence for the Defendant was received on affidavit deposed to by the Director of Public Prosecutions.

[15] The Director of Public Prosecutions deposed that on October 22nd 2002, Mr. Dwain Andrew was shot and killed at Bois D'Orange in the Quarter of Gros Islet. On November 13th 2002, the Claimant was charged with the murder of Mr. Andrew. On March 21st 2005, the Claimant was committed to stand trial for the offence of murder and was indicted for murder by indictment dated March 21st 2005.

[16] On November 9th 2005, the Claimant's trial commenced before Justice Albert Redhead. After the second day the Claimant's Counsel at the time, Mr. Marcus Foster stated to the court that a police officer had given two (2) of the jurors a ride to court and on this basis the Claimant applied for a mistrial. A mistrial was declared and a retrial was ordered. The case was adjourned to January 24th 2006.

[17] On January 24th 2006, when the matter came on for trial Mr. Foster was not available and the case was adjourned to February 6th 2006. When the matter came on for hearing on February 6th 2006, it was fixed on February 20th 2006, for trial. At the conclusion of the trial the Claimant was convicted for the murder of Mr. Dwain Andrew and his sentencing hearing was fixed for March 17th 2006. At March 17th 2006, the pre-sentencing report having not been received by the Court, the sentencing hearing was adjourned to April 7th 2006, and on that date the Claimant was sentenced to life imprisonment.

[18] The Claimant appealed his conviction and sentence. His appeal was mainly on the ground that the trial Judge had misdirected the jury on the issue of identification. In relation to his sentence the Claimant contended inter alia that the trial Judge had failed to take any or any proper approach in determining whether, and what, if any period of incarceration was required in the case having regard to the sentencing provisions in section 1097 of the Criminal Code. The appeal was heard on June 18th 2007, and on October 29th 2007, judgment was delivered quashing both the conviction and sentence. A retrial was ordered subject to the discretion of the Director of Public Prosecution to institute and undertake same.

[19] During May 2008, the matter was listed for trial but was traversed to the September 2008, session. On September 22nd 2008, when the matter came up for hearing it was adjourned to October 7th 2008 for trial. On the 2nd day of trial, Mr. Foster made a submission about reports being in the local press on issues raised in a ***voire dire*** and which publication was likely to prejudice the Claimant and the outcome of the trial. The Claimant's Counsel submissions were upheld, a mistrial declared and a retrial was ordered. The retrial was adjourned to March 2009.

[20] When the trial came on March 2nd 2009, Mr. Foster did not appear and the trial was adjourned to March 4th 2009. When the matter came on again on March 4th 2009, Mr. Foster did not appear but Counsel, Mr. Danny Francis appeared holding papers for him and said to the Court that Mr. Foster was ill. The trial was adjourned to March 30th 2009, and the Judge stated that he intended to appoint new Counsel to represent the Claimant.

[21] When the trial came on March 30th 2009, Counsel Mr. Shawn Innocent appeared and said that he had only been appointed by the State the previous Friday to represent the Claimant and as such he required some time to raise a point in limine. Mr. Innocent was given time to file his submissions and the Crown was given until March 31st 2009, to file and serve written submissions on the point in limine. The trial was adjourned to April 1st 2009.

[22] On April 1st 2009, the trial was adjourned to April 7th 2009, for oral submissions, the oral submissions on a stay of proceedings occurred on that date. The matter was then adjourned to April 20th 2009. On April 20th 2009, it was adjourned to April 27th 2009, for ruling. On April 27th 2009, there was a further adjournment to June 2nd 2009.

[23] On June 2nd 2009, Mr. Innocent informed the Court that he had not yet received the transcripts of the previous trial or a formal letter of appointment authorising him to represent the Claimant. The Court ruled that since the letter of appointment had yet to be issued the trial would have to be postponed pending the outcome of any applications to be made. The matter was adjourned to June 10th 2009, for trial.

[24] On June 10th 2009, the Court ordered that the Claimant be supplied with transcripts of the previous hearings at the expense of the State and the matter was adjourned to June 29th 2009, for trial. On June 29th 2009, the matter was adjourned to July 13th 2009.

[25] On July 13th 2009, Mr. Innocent was present, the Crown acknowledged receipt of an application to quash the indictment and was given until the following day to respond. The matter was adjourned to July 14th 2009. On July 14th 2009, the matter was adjourned to July 15th 2009, for hearing of submissions on the application to quash the indictment. On July 15th 2009, the hearing occurred and the matter was adjourned to July 27th 2009, for ruling.

[26] On July 27th 2009, Mr. Innocent was absent and the matter was adjourned to July 30th 2009 for ruling.

[27] On July 30th 2009, with all Counsel and the Claimant present, the Court ruled that the application to quash the indictment was denied. Due to the Court's summer vacation, the matter was adjourned to September 21st 2009.

[28] On September 21st 2009, the matter was adjourned to November 9th 2009, for trial. On November 9th 2009, Mr. Innocent was absent, and it was reported that he was ill. The trial was adjourned to November 24th 2009.

[29] On November 29th 2009, Mr. Innocent was absent and Counsel Mr. Dasreane Greene informed the Court that Mr. Innocent was ill. The trial was adjourned to December 7th 2009.

[30] On December 7th 2009, Counsel for all Parties being present, the trial commenced and the jury was empanelled, and asked to return at 9:00 a.m. on December 8th 2009. On December 8th 2009,

when the matter was called Mr. Innocent did not appear and the trial was stood down to 2:00 p.m. for him to appear. When the trial came on at 2:00 p.m. Mr. Innocent submitted that he was unable to continue due to the delays. The Crown responded that it had been present on all occasions when the matter came on, and that on the previous four (4) occasions when the matter came on, the Crown was ready to proceed while Mr. Innocent had either not appeared and or was not ready to proceed. The Court ruled that the trial should proceed. The first witness was sworn and gave evidence. Mr. Innocent declined to cross-examine the witness and indicated that he was ill. The matter was adjourned to December 9th 2009.

[31] On December 9th 2009, when the trial came on for continued hearing Mr. Innocent did not appear. The matter was stood down to 11.00a.m. Court resumed at 11.25 a.m. and up to after roll call of the jury, there was still no appearance of Mr. Innocent. Efforts were made to contact Mr. Innocent but they proved futile. The Court adjourned the matter to give Mr. Innocent an opportunity to appear.

[32] The matter came on December 10th 2009. There was a roll call of the jury. Mr. Innocent did not appear. The Judge discharged the Jury, ordered a new trial, adjourned the hearing to December 16th 2009. The Judge indicated the Court's intention to appoint new Counsel for the Claimant.

[33] On March 1st 2010, Counsel Mr. Leon Gokool and Mrs. Andra-Gokool Foster appeared for the Claimant. Mr. Gokool stated to the Court that he wished to resolve some pre-trial issues. The matter was adjourned to March 2nd 2010.

[34] On March 2nd 2010, Mr. Gokool informed the Court that the defence was not ready to proceed with the trial as they had yet to receive the transcripts of the previous hearings.

[35] On March 15th 2010, when the matter came on Mr. Gokool told the Court that the transcripts requested were yet to be received so as to enable him to prepare his pre-trial application. The matter was adjourned to April 14th 2010, for report and fixture.

[36] On April 14th 2010, the matter was adjourned to May 4th 2010, for report on the transcripts.

[37] On May 4th 2010, the matter was adjourned to June 2nd 2010, and it was ordered that the pre-trial application be filed on or before May 26th 2010.

[38] On June 2nd 2010, the matter was adjourned to June 4th 2010, for hearing of the pre-trial application.

[39] On June 4th 2010, the matter was adjourned to June 9th 2010, for hearing of the pre-trial application.

[40] On June 9th 2010, the pre-trial application was heard and the trial was adjourned to June 22nd 2010, for ruling.

[41] On June 22nd 2010, Counsel Mr. Gokool did not appear and the matter was adjourned to June 29th 2010, for the ruling. On June 29th 2010, the Court ruled that the application for stay of the indictment was refused and adjourned to July 13th 2010, for case management conference.

[42] On July 13th 2010, the matter was adjourned to October 5th 2010, for trial.

[43] On October 5th 2010, Counsel, Mr. Gokool informed the Court that he intended to apply for a psychiatric evaluation of the Claimant and on that day he also filed another application seeking to exclude certain evidence. As a result of Counsel's statements and action the matter was adjourned to October 12th 2010, for case management.

[44] On October 12th 2010, the matter was adjourned to October 27th 2010, for Counsel, Mr. Gokool to file consolidated submissions and for further case management.

[45] On October 27th 2010, Counsel Mr. Gokool made an application for an order for psychiatric assessment of the Claimant and sought based on the Claimant's impecuniosity that the assessment should be at the expense of the State. The Court ruled that there was nothing to indicate that the Claimant was mentally ill and unfit to stand trial. The Crown informed the Court on that day that the Crown was ready to proceed with the trial but Mr. Gokool indicated that he desired written responses to the applications filed on behalf of the Claimant before the matter could proceed to trial. As a consequence of Mr. Gokool's requests, the matter was adjourned to November 9th 2010, for further case management.

[46] When the matter came up for case management on November 9th 2010, Mr.Gokool raised issues

relating to disclosure. This resulted in an adjournment to November 24th 2010. The Court did not sit on November 24th 2010, and the matter was rescheduled to November 25th 2010.

[47] On November 25th 2010, the matter was adjourned to December 8th 2010, for case management.

[48] On December 8th 2010, the Claimant was present but Mr. Gokool was absent due to illness. Due to Mr. Gokool's absence the matter was adjourned to December 16th 2010, for case management.

[49] On December 16th 2010, Counsel Mr. Gokool appeared together with Counsel Mrs. Andra Gokool-Foster. He apologized for not filing the consolidated pre-trial applications as required by the Court and requested a short adjournment to January 21st 2011. His request was granted.

[50] On January 21st 2011, Mr. Gokool filed another application to exclude evidence and the matter was adjourned to February 10th 2011, for the Court to hear his submission on that application.

[51] On February 10th 2011, Mr. Gokool did not appear. The matter was further adjourned to March 14th 2011.

[52] The matter next came on for hearing on May 10th 2011, neither Mr. Gokool nor Mrs. Andra Gokool-Foster appeared for the Claimant but instead Mr. Martinus Francois appeared. He informed the Court that he had filed a constitutional motion and that it had a trial date of July 21st 2011[4]. The matter was fixed for July 26th 2011, for report.

[53] The Defendant denied that the Claimant has been tried five (5) times and was now awaiting a sixth trial.

[54] The Defendant stated that the jurors in the second trial had been sequested. Further, the Claimant's statements relating to Ms. Ellen Saltibus and those attributed to the trial judge were irrelevant since they did not introduce any facts to substantiate any of his claims that provisions of the Constitution had been or were likely to be contravened.

[55] The Defendant denied that the third trial commenced on October 14th 2008.

[4] Counsel was mistaken. A fixed date claim on filing is given a date for first hearing at which time there would be case management and not a trial as suggested.

Law:

[56] The Claimant rests his case solely on the issue of delay and he says that as a result of this delay his constitutional rights have been contravened. The State says the Claimant's claim is an abuse of process and pursuant to the Claimant's common law right the application for a stay ought to have been brought in the criminal trial and the ruling there appealed if the Claimant was dissatisfied with it. Counsel for the Claimant while rebutting the application of the common law principle to Saint Lucia did not point the Court to any Saint Lucian authority refuting the Defendant's Counsel submission on the application of the common law.

[57] The Claimant's originating motion was filed pursuant to CPR 2000 Part 56 and rule 56.1 (1)(a) et seq. states that the Claimant filing such a motion must provide:

> "(4) The affidavit must state –
>
> (a) …
>
> (e) the facts on which the claim is based;…"

[58] The fundamental provisions of the Constitution which the Claimant alleges have been or are likely to be contravened are:

> " 3 (1) A person shall not be deprived of his personal liberty save as may be authorized by law in any of the following cases, that is to say:-
>
> (a)…
>
> (b) in execution of the order of the High Court or the Court of Appeal punishing him for contempt of the High Court or the Court of Appeal or another court or tribunal…,
>
> (e) upon a reasonable suspicion of his having committed, or being about to commit, a criminal offence under any law.
>
> (5) If any person arrested or detained as mentioned in subsection 3(b) of this section is not tried within a reasonable time, then without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial, and such conditions may include bail so long as it is not excessive.
>
> 5. No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.
>
> 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 office –

(a) shall be presumed to be innocent until he is proved or has pleaded guilty;…

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 –

(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."(My emphasis)

[59] Looking at the first issue, there is a line of authorities by which the Court must be guided. Lord Diplock in Kemrajh Harrikissoon v. Attorney General[5] is a good starting point, he had this to say:

"The notion that whenever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6 (1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom."(My emphasis)

[5] (1979) 31 WIR 348

[60] At Grenada following Harrikissoon[6], in the Attorney General of Grenada v. Selwyn Aban[7] Singh J.A had this to say:

> "The issues disclosed in the affidavits refer to (1) Wrongful Detention (2) False Imprisonment and (3) Detinue. They are all torts for which the Common Law provides adequate means of redress and to invoke the special constitutional rights to redress under s.16, he has to show something more than a mere grievance emanating from the ordinary common law torts. He has to show some sort of emergency or urgency in his situation or something else whereby it can be said that the ordinary common law suit would not provide adequate means of redress. If this is not shown then he ought not to invoke s.16 and any attempt on his part to do so may amount to a misuse of his rights under that provision of the Constitution… I therefore regard the approach by the respondent to the Court under s.16 of the Constitution to be a misuse of that provision. To rule otherwise would be to allow this provision of the Constitution to be used as a general substitute for the normal procedures for invoking judicial control of administrative action. Such would be an abuse of s.16 of the Constitution and would cause a diminution in its value.[8]" (My emphasis)

[61] In the more recent case of Sharma v. Brown-Antoine and others[9] the position that the common law provides a first avenue to assert a Claimant's right and that it ought to be used was once again confirmed. Baroness Hale of Richmond, Lord Carwell and Lord Mance said:

> " 31. The possibility of a challenge to the prosecutorial decision, and the apparent inevitability of full investigation in the course of any criminal proceedings into the background to the decision to prosecute, are in our view features central to the resolution of the present appeal. They could properly be raised in the criminal proceedings, either in the course of an application to stay those proceedings on the ground of abuse of process or in any substantive trial. Like Lord Bingham and Lord Walker, we are not persuaded that the Chief Justice's complaint could not properly be resolved within the criminal process. It is clear that the criminal courts could have the power to restrain the further pursuit of any criminal proceedings against the Chief Justice if he could on the balance of probabilities show that their pursuit constitutes an abuse of process of the court: cf R v. Horseferry Road Magistrates' Court, Ex p Bennett [1994] 1 AC 42, where Lord Griffiths … explained the rationale in the following passage, at pp 61-62"
>
> 'If the Court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accepts a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behavior that threatens either basic human rights or the rule

[6] Ibid.
[7] Civil Appeal No. 3 of 1993.
[8] Ibid p.9.
[9] [2006] UK [2006] UKPC 57

of law. My Lords, I have no doubt that the judiciary should accept this responsibility in the field of criminal law…' "

[62] In Richard Hinds v. (1) The Attorney General and (2) The Superintendent of Glendairy Prison[10] Lord Bingham of Cornhill reminded us of Lord Diplock's statement in Chokolingo v. Attorney-General of Trinidad and Tobago [1981] 1 WLR 106 page 111 – 112 where he said:

> "Acceptance of the applicant's argument would have the consequence that in every criminal case, in which a person who had been convicted alleged that the judge had made any error of substantive law as to the necessary characteristics of the offence, there would be parallel remedies available to him: one by appeal to the Court of Appeal, the other by originating application under section 6 (1) of the Constitution to the High Court with further rights of appeal to the Court of Appeal and to the Judicial Committee. These parallel remedies would be also cumulative since the right to apply for redress under section 6(1) is stated to be "without prejudice to any other action with respect to the same matter which is lawfully available". The convicted person having exercised unsuccessfully his right of appeal to a higher court, the Court of Appeal, he could nevertheless launch a collateral attack (it may be years later) upon a judgment that the Court of Appeal had upheld, by making an application for redress under section 6(1) to a court of co-ordinate jurisdiction, the High Court. To give to Chapter 1 of the Constitution an interpretation which would lead to this result would in their Lordships' view be quite irrational and subversive of the rule of law which it is a declared purpose of the Constitution to enshrine."

And Lord Bingham of Cornhill added:

> "24. ... It would be undesirable to stifle or inhibit the grant of constitutional relief in cases where a claim to such relief is established and such relief is unavailable or not readily available through the ordinary avenue of appeal. As it is a living, so must the constitution be an effective, instrument. <u>But Lord Diplock's salutary warning remains pertinent: a claim for constitutional relief does not ordinarily offer an alternative means of challenging a conviction or a judicial decision, nor an additional means where such a challenge, base on constitutional grounds, has been made and rejected. The appellant's complaint was one to be pursued by way of appeal against conviction, as it was: his appeal having failed, the Barbadian courts were right to hold that he could not try again in fresh proceedings based on section 24.</u>" (My emphasis)

[63] In considering the second issue the Court has found Trevor Nathanial Pennerman Fisher v. The Minister of Public Safety and Immigration et al[11] to be helpful. There Lord Goff of Chieveley had this to say:

[10] Privy Council Appeal No. 28. Of 2000.
[11] Privy Council Appeal No. 53 of 1997.

"It is apparent that under the Constitution, pre-trial and post-trial conviction delay enable the accused or convicted man to invoke rights of a different nature. Pre-trial delay may, under the Constitution, enable the accused man to attack the trial process itself and his attack, if successful can have the effect that he will not be convicted of the charge. Post-conviction delay is not, however, concern with the validity of the trial process. It presupposes the existence of a valid conviction, and the attack of the convicted man is directed to the punishment to which he has been sentenced following that conviction… It follows that a man who relies upon pre-trial delay should direct his complaint to the trial process, his purpose being to prevent his conviction; whereas, in a death sentence case, a man who relies on post-conviction delay should direct his complaint to the inhumanity of carrying out his punishment after the delay which has occurred since his conviction." (My emphasis)

[64] The case of Curtis Charles and others v. The State[12] is also helpful on the issue of infringement of constitutional rights brought about by delay. Lord Slynn of Hadley said:

"… In Director of Public Prosecutions v. Tokai [1996] A.C. 856 however, the Board stressed that where a complaint was made of undue delay before trial the rules of the common law and the procedures of the criminal courts of Trinidad and Tobago were usually sufficient to secure the fairness of the trial since one of the powers of the judge was to stay proceedings if he felt that to allow them to continue would be unfair. If he did not stay the proceedings it was his duty to direct the jury as to any matter arising from the delay which was favourable to the defence.

In Attorney-General's Reference (No.1of 1990) [1992] 1 Q.B 630 the Court of Appeal of England stressed that a stay on the grounds of delay was to be imposed only in exceptional circumstances. Lord Land C.J. at page 643 - 644 said:

'In principle, therefore, even where the delay can be said to be unjustifiable, the imposition of a permanent stay should be the exception rather than the rule. Still more rare should be cases where a stay can properly be imposed in the absence of any fault on the part of the complainant or prosecution. Delay due merely to the complexity of the case or contributed to by the actions of the defendant himself should never be the foundation for a stay… no stay should be imposed unless the defendant shows on the balance of probabilities that owing to the delay he will suffer serious prejudice to the extent that no fair trial can be held: in other words the continuance of the prosecution amounts to a misuse of the process of the court.' … If a trial is allowed to proceed after a long delay it is important that the accused should be given such assistance as is reasonably within the power of the court and the prosecution to deal with difficulties caused by the delay and that the jury should be given a sufficiently firm and clear direction as to such difficulties caused by the delay." (My emphasis).

[12] Privy Council Appeal No. 33 of 1998. P.4

[65] From Frank Errol Gibson v. The Attorney General[13] this Court thinks it worthwhile to quote Saunders J on the issue of the constitutional rights which could be possibly be infringed by delay.

He said:

" [54] Section 18(1)[14] gives three different and free-standing rights to any person who is charge with a criminal offence. These rights correspond to separate obligations imposed by the Constitution on the State. For every accused person whose charge has not been withdrawn the State is obliged to afford a hearing that is (a) fair;(b) before an independent and impartial tribunal established by law; and (c) held within a reasonable time.

[55] The fulfillment by the State of each of these obligations is fundamental to the criminal justice system and the obligations referred to at (a) and (b) are irreducible. Thus, if a trial is not likely to be or has not been fair, then, as stated earlier, the breach vitiates the trial process. Similarly, a court will not sanction a trial before a tribunal whose characteristics threaten to or actually fall short of basic requirements of independence and impartiality. Redress for an infringement of either of these rights cannot be limited by any overriding public interest in part because, unless the charge is altogether withdrawn or dismissed, it will normally be possible to convene a new trial on conditions that are fair or to hold one before a proper tribunal as the case may be. It is possible, so to speak, to re-set the clock so as to grant the accused the full measure of the right in question.

[56] This is not the case when the reasonable time guarantee has been breached. Once there has been excessive delay in trying an accused, a court may issue orders aimed at expediting the trial or provide some form of relief to the accused but there is nothing that the court can do to remedy the breach that has occurred in a way that will undo the past delay and its effects on the accused and the society. It is not possible to wipe the slate clean and revert to the status quo ante.

[57] Section 13(3)[15]gives a clear indication that a trial held after an unreasonable time is not necessarily fatally compromised merely on account of delay, at least certainly not in relation to a person who has been in custody. That sub-section provides, inter alia, that if the accused is in custody and he has not been tried within a reasonable time he must be released either unconditionally or upon reasonable conditions "to ensure that he appears at a later date for trial.." The reasonable time guarantee therefore differs from the other two guarantees of section 18(1) in two important respects. Firstly, in the case of the other two guarantees, remedial action can be taken which will effectively cure the breach. This is not possible in the case of the reasonable time guarantee as one cannot turn the clock back. Secondly, while the breach of the other two guarantees automatically vitiates the trial, the Constitution itself clearly suggests that breach of the reasonable time guarantee does not necessarily prevent a valid trial being held.

[13] [2010] CCJ 3 (AJ)
[14] Section 8(1) of the Saint Lucia Constitution
[15] Section 3(5) of the Saint Lucia Constitution.

[58] A finding that there has indeed been unreasonable delay in bringing the accused to trial must be made on a case by case basis. It cannot be reached by applying a mathematical formula although the mere lapse of inordinate time will raise a presumption, rebuttable by the State, that there has been undue delay. Before making a finding the court must consider, in addition to the length of the delay, such factors as the complexity of the case, the reasons for the delay and specifically the conduct both of the accused and of the State. An accused who is the cause and not the victim of delay will understandably have some difficulty in establishing that his trial is not being heard within a reasonable time. One must not lose sight of the fact, however, that it is the responsibility of the State to bring an accused person to trial and to ensure that the justice system is not manipulated by the accused for his own ends. Even where an accused person causes or contributes to the

delay, a time could eventually be reached where a court may be obliged to conclude that notwithstanding the conduct of the accused the overall delay has been too great to resist a finding that there has been a breach of the guarantee…

[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 possible 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. 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. (My emphasis)

[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, a 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."

Findings:-

[66] It is not to be doubted that the retrial of the Claimant for the murder of Mr. Dwain Andrew has indeed taken some time to come to finality. Prior to the trial of which conviction and sentence were successfully appealed the Court observes that this case started in an era when preliminary

inquiries were held before a Magistrate, a system which in itself saw matters taking considerable time before reaching the high court.

[67] Looking at the first issue, it appears to the Court that all of the authorities cited say firstly, that at common law the Claimant in his criminal trial has a right to seek a stay of proceedings where he feels there has been an abuse of process, secondly, that he ought to exercise his common law right first before his trial judge and exhaust his appeals in the criminal court, thirdly, that it is only in extreme and urgent circumstances can a constitutional motion be filed while the trial is ongoing, fourthly, they caution the Court against allowing itself under the guise of a constitutional motion from being used as an appellate Court and fifthly, the Court has a discretion whether or not to allow a constitutional motion.

[68] The Court has observed that more than one Counsel for the Claimant did make an application for a stay but could not find within the Claimant's affidavit a single statement as to why appeals were not filed against the trial Judge's various rulings.

[69] Against the background that pursuant to section 16(2) of the Constitution, it is solely at the Court's discretion that the originating motion can be pursued, then looking at the facts and having regard to the submissions of Counsel for the Claimant, the Claimant has not shown this Court any reason as to why he has not pursued the application in his originating motion before the trial judge in his criminal case and or appealed any of the decisions of the trial judge. The Court believes that this is a proper case for the Court to decline to exercise its jurisdiction given under section 16(2) of the Constitution. The originating motion will be struck out.

[70] Should the Court be wrong in thinking that the originating motion ought to be struck out, the Court turns now to the issue of delay.

[71] This Court is of the view that any question of delay on the part of the State has to be measured against all the surrounding circumstances existing to support the Court and against the amount of work cast upon the sole Judge sitting in the Criminal Court. The Court is not alone in this view as in Curtis Charles and others v. The State[16] Lord Slynn of Hadley had this to say:

> "However, it would be wrong to apply conditions and practices in England in this matter to cases in Trinidad and Tobago. Their Lordships have fully in their mind the powerful

[16] Privy Council Appeal No. 33 of 1998.

> statement of Bernard C.J. in the Court of Appeal in Krishendath Sinanan v. The State (1992) 44 W.I.R. 359 at pp 364-5 as to the difficulties faced by the courts of Trinidad and Tobago at that time … Their Lordships accept his view 'that claims to delay cannot be looked at in vacuo but must bear relation to local conditions and circumstances and the public interest.' "

[72] According to a report compiled by the Ministry of Home Affairs and National Security the statistics on crime for the period January 2010 to June 2010, show all types of crimes are on the increase at Saint Lucia[17]. This is indeed a pattern throughout the Eastern Caribbean as is seen by the number of matters coming on before the Courts. At Saint Lucia there is a single Judge sitting year round in the criminal court. Under the relatively new dispensation of the Criminal Procedure Rules 2008, this Judge is required to case manage all indictable matters from initial hearings through to trials, and including the conducting of the equivalent of the old style preliminary inquiries on paper, the sufficiency hearings. Against this background, the Court had posed the question to Counsel for the Claimant as to whether it was his view that other fixtures should be removed from the Court's list to accommodate the Claimant's trial. He responded that he "would come to that in awhile", but never did.

[73] Relying on the authorities, the Court is also cognizant that there ought not to be automatically assumed that because a mathematically calculated period of time has elapsed that a fair trial is not possible in the circumstances of the Claimant.

[74] The Court adopts from Bell v. Director of Public Prosecution and Another[18] which itself adopted the categories from Barker v. Wingo[19], the very helpful formulation for examining delay and that being examination of the facts under four categories: (a) length of delay, (b) the reasons given by the Prosecution to justify the delay, (c) the responsibility of the accused for asserting his rights, and (d) prejudice to the accused.

Length of delay

[75] It is a fact that since November 13th 2002, the Claimant was charged for the murder of Dwain Andrew and indicted approximately two years and six months later, May 21st 2005. A trial

[17] This report was provided to the Court and cited in SLUHCV 2010/0497 Ausbert Regis, Commissioner of Police v. Attorney General of Saint Lucia.
[18] (1983) 32 WIR 317.
[19] 407 U.S 514 (1972) 531-532.

concluded with a conviction at February 20th 2006, and the sentence and conviction were appealed. The appeal judgment was delivered at October 29th 2007.

[76] Between indictment at March 21st 2005, and conviction at February 20th 2006, the trial came on three times. It was adjourned by the Court on one occasion, once more because the Claimant's Counsel Mr. Foster failed to appear, and once because of the juror's indiscretion in taking a ride with a police officer.

[77] Post the appeal and setting for retrial then according to the evidence of the Director of Public Prosecutions, and whose evidence the Claimant accepts, the matter came on for hearing between October 14th 2008 and May 10th 2011, a staggering thirty-three times. On ten occasions Counsel for the Claimant failed to appear and tendered no excuse to the trial judge. On three occasions, the various Counsel for the Claimant informed the Court through the appearance of other Counsel that the reason he was absent was because he was unwell. Counsel for the Claimant on ten occasions sought an adjournment to file described various applications and in most instances never did so before resumption of the trial but rather sought further a adjournment on the morning of the trial. On three occasions, the matter was adjourned because the transcript was not available. On one occasion a retrial was ordered because of publication in the press while the trial was sub judice (there was no evidence that either Party was responsible). On seven occasions when the matter came on the Court it appears adjourned the matter to fix particular dates for hearing applications.

[78] There were multiple changes in Counsel for the Claimant. The Court believes that this was a serious cause of delay as each Counsel sought to bring an application or multiple applications on almost every occasion when the trial was to commence. In some instances there was a repeat in the nature of the application instead of filing an appeal against the ruling. There is no doubt that the Claimant was entitled to bring the applications, however, the Court believes that with some forethought the multiple applications could all have been brought on at the same time if Counsel had done some case management.

[79] The Court observes that there has been no negligence deposed to against the State.

[80] There was no evidence from the Claimant that on any occasion when the matter came on that the State was not ready to proceed.

The reasons given by the Prosecution to justify the delay

[81] The evidence is that at all times the State was ready to proceed with the trial. While this may have been so, there were other matters which arose which the Court believes should fall under this category although not strictly the responsibility of the Defendant.

[82] The Court is prepared to attribute to the State the delay without excuse in securing Mr. Innocent's letter of appointment from the State.

[83] There were also two requests for transcripts that necessitated three adjournments. What was not clear to the Court was whether Mr. Gokool was looking for the transcript ordered by Mr. Innocent, or another transcript which would include the appearances and absences of Mr. Innocent. There was no excuse tendered by the Defendant for the delay in obtaining the transcripts.

The responsibility of the accused for asserting his rights

[84] It appears to the Court that the Claimant had competent Counsel and indeed there were multiple applications made or proposed to be made on his behalf. Therefore the Claimant did seek to assert his rights, however, in some instances his Counsel did not follow through on his applications nor appeal rulings delivered.

[85] The Claimant never gave any reasons for the change of Counsel save for Mr. Innocent who indicated to the Court that he was appointed by the State. No reason given for the departure of Mr. Foster and Mr. Gokool.

Prejudice to the accused.

[86] Assessment here seeks to determine whether the Claimant is being subjected to oppressive pre-trial incarceration, to minimize the anxiety and concern of the Claimant, and to prevent the possibility of the Claimant's defence being impaired. As the Court has assessed the matter of delay, it can been seen that the Claimant's continued pre-trial incarceration does not in this Court's opinion rest with the State. The Court therefore cannot find that there has been prejudice to the accused.

[87] On weighing the evidence under the four categories, the evidence bears out that the greater responsibility for the delay in getting the trial concluded was triggered by the Claimant's Counsel.

This being so, it is not necessary for the Court to examine whether any of the Claimant's constitutional rights have been contravened.

[88] The Claimant having failed to make out a case for bringing the originating motion and secondly, he having failed to prove that delay in his trial rest with the State, the originating motion will be struck out.

[89] The Court as always is extremely grateful to Counsel for their assistance.

[90] The Court's order:

1. The originating motion is struck out.

Rosalyn E. Wilkinson
High Court Judge