EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(CIVIL)

CLAIM NO. 166B OF 2013

IN THE MATTER OF THE VIRGIN ISLANDS CONSTITUTION ORDER, 2007
AND
IN THE MATTER OF AN APPLICATION BY ANDDRE PENN FOR REDRESS PURSUANT TO SECTION 31 OF THE SAID CONSTITUTION ORDER FOR CONTRAVENTIONS OF SECTON 16 THEREOF IN RELATON TO HIM

BETWEEN:

ANDRE PENN

CLAIMANT

AND

1. THE DIRECTOR OF PUBLIC PROSECUTIONS OF THE VIRGIN ISLANDS

2. THE ATTORNEY GENERAL

DEFENDANTS

Appearances:

Mr Courtenay McVay Griffiths QC. And Michael Faye QC and Mr. for the Claimant
Mr. Wayne Rajbansie, Mr. Valston Graham, and Angel Flax Solomon for the First Defendant

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2013: July 25th

JUDGMENT

[1] ELLIS J: By Originating Motion filed on 14th June 2013 the Claimant seeks redress under section 31 of the Virgin Islands Constitution Order (the Constitution) for contravention of his fundamental rights under

section 16 (2) (a), (b), (c), (d) and (g) and section 16 (8) of the Constitution as well as under Article 6 of the European Convention of Human Rights.

[2] The Claimant seeks the following relief:

i. A declaration that his fundamental rights under section 16 (2) (a) of the Constitution to be presumed to be innocent until he is proven guilty according to law has been contravened and negated by the extensive, detailed and continuous coverage of his arrest, trial sentencing and appeal.

ii. A declaration that his rights under section 16 (2) (b) of the Constitution to be informed promptly as prescribed by law and in detail of the nature of the offences charged have been contravened by the failure of the prosecution to follow the legal procedure for retrial ordered by the Court of Appeal.

iii. A declaration that his rights under section 16 (2) (c) of the Constitution have been and are likely to be contravened.

iv. A declaration that his rights under section 16 (2) (d) of the Constitution are likely to be contravened.

v. A declaration that his rights under section 16 (2) (g) of the Constitution have been and are likely to be contravened by the extensive, detailed and continuous coverage of his arrest, trial sentencing and appeal thereby negating his fundamental right to trial by jury.

vi. A declaration that in all the circumstances of Claimant's case, it is unconstitutional, oppressive and inconsistent with the interest of justice to retry him on 2nd July 2013 or at all.

vii. An order for compensation and costs under section 16 (8) of the Constitution in respect of his first trial and appeal given that his convictions were quashed by the Court of Appeal on 17th January 2012.

viii. Further and other relief as the Court deems fit.

[3] The Originating Motion is supported by two affidavits of the Claimant. The first affidavit filed on 14th June 2013, opens with the general factual and historic background of the matter. It then goes on to set out the evidence relied on by the Claimant in support of his claims for relief. In the Claimant's second affidavit filed on 18th July 2013, he, *inter alia* deposes matters which would have occurred since the filing of his first affidavit.

[4] Two affidavits in response have been filed on behalf of the Director of Public Prosecution. The first affidavit of Kendolph Bobb, Detective Constable of the Royal Virgin Island Police Force and the investigating officer in the criminal matter involving the Claimant was filed on 11th July 2013. The second affidavit of Kendolph Bobb was filed on 19th July 2013 and in it he responds to the second affidavit of Claimant filed on 18th July 2013.

[5] During the course of the hearing that Counsel for the Claimant indicated that he would also seek to rely on the provisions of section 16 (7) of the Constitution which provides that

> Every person who has been convicted by a court of a criminal offence shall have the right—
>
> (a) to receive free of charge a copy of his or her conviction record and any sentence imposed as a consequence thereof; and
> (b) to appeal to a superior court against the conviction or the sentence or both as may be prescribed by law.

[6] Counsel for the Claimant also indicated that the Claimant would no longer seek to pursue the claim for compensation and costs under section 16 (8) of the Constitution in respect of his first trial and appeal.

[7] In addition to advancing oral arguments, both sides filed skeleton submissions together with authorities. Having reviewed the written submissions of both Defendants and having listened to the oral submissions of the Claimant as well as Counsel for the Defendants, the Court is satisfied for the reasons which are set out below that the Originating Motion and the evidence filed in support do not establish an infringement of his fundamental rights under section 16 of the Constitution.

General

[8] It is settled law that a Claimant who seeks to claim breach of constitutional provisions must show on the face of the pleadings the nature of the alleged violation or contravention that is being asserted.[1] In order to succeed in his claim for relief under section 31 of the Constitution, the Claimant would therefore have to establish a violation or threat of violation of his rights under the relevant subsection of section 16 of the Constitution which provides that:

[1] Operation Dismantle v The Queen (1985) 1 SCR 441 and Amerally and Bentham v Attorney General (1978) 25 WIR 272

(1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

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

(a) be presumed to be innocent until he or she is proved guilty according to law;

(b) be informed promptly, as prescribed by law, in a language that he or she understands and in detail, of the nature of the offence charged;

(c) be given adequate time and opportunity for the preparation of his or her defence;

(d) be permitted to defend himself or herself before the court in person or, at his or her own expense, by a legal practitioner of his or her own choice or where he or she is unable to afford to retain a legal practitioner and the interests of justice so require, by a legal practitioner at the public expense provided through an established public legal aid scheme as prescribed by law;

(e) be entitled to examine in person or by his or her legal practitioner the witnesses called by the prosecution before the court, and to obtain the attendance and carry out the examination of witnesses to testify on his or her behalf before the court on the same conditions as those applying to witnesses called by the prosecution;

(f) be permitted to have without payment the assistance of an interpreter if he or she cannot understand or speak the language used at the trial of the charge; and

(g) when charged on indictment in the High Court, have the right to trial by jury, and except with that person's own consent the trial shall not take place in his or her absence, unless he or she so behaves in the court as to render the continuance of the proceedings in his or her presence impracticable and the court has ordered him or her to be removed and the trial to proceed in his or her absence.

(8) When a person has, by a final decision of a court, been convicted of a criminal offence and, subsequently, the conviction has been quashed, or that person has been pardoned, on the ground that a newly-disclosed fact shows that there has been a miscarriage of justice, he or she shall be compensated out of public funds for any punishment that he or she has suffered as a result of the conviction unless it is proved that the non-disclosure in time of that fact was wholly or partly his or her fault.

[9] The Claimant's pleadings must therefore not only allege but provide cogent evidence that the said constitutional provisions have been and are likely to be contravened in relation to him by the decisions, actions or inactions of the Defendants. Counsel for the Claimant sought to advance his under case six (6) main heads of challenge. These are considered in turn below:

Failure to comply with the Law and Practice on Retrials

[10] The Claimant submitted that there are no provisions in the Territory governing retrials following a quashing of a conviction on appeal to a court of appeal. In the premises he contended that the criminal law, practice and procedure of the superior courts of England would apply. He relies on the statutory provisions of sections 7 and 8 of the United Kingdom Criminal Appeal Act 1968 as amended which provides as follows:

> 7- Power to order retrial
>
> (1) Where the Court of Appeal allow an appeal against conviction and it appears to the Court that the interests of justice so require, they may order the appellant to be retried.
>
> (2) A person shall not under this section be ordered to be retried for any offence other than—
>
> > (a) the offence of which he was convicted at the original trial and in respect of which his appeal is allowed as mentioned in subsection (1) above;
> >
> > (b) an offence of which he could have been convicted at the original trial on an indictment for the first-mentioned offence; or
> >
> > (c) an offence charged in an alternative count of the indictment in respect of which the jury were discharged from giving a verdict in consequence of convicting him of the first-mentioned offence.
>
> 8- Supplementary provisions as to retrial
>
> (1) A person who is to be retried for an offence in pursuance of an order under section 7 of this Act shall be tried on a fresh indictment preferred by direction of the Court of Appeal, but after the end of two months from the date of the order for his retrial he may not be arraigned on an indictment preferred in pursuance of such a direction unless the Court of Appeal give leave.
>
> (1A) Where a person has been ordered to be retried but may not be arraigned without leave, he may apply to the Court of Appeal to set aside the order for retrial and to direct the court of trial to enter a judgment and verdict of acquittal of the offence for which he was ordered to be retried.
>
> (1B) On an application under subsection (1) or (1A) above the Court of Appeal shall have power—
> (a) to grant leave to arraign; or

(b) to set aside the order for retrial and direct the entry of a judgment and verdict of acquittal, but shall not give leave to arraign unless they are satisfied—

(i) that the prosecution has acted with all due expedition; and

(ii) that there is a good and sufficient cause for a retrial in spite of the lapse of time since the order under section 7 of this Act was made.

[11] Counsel for the Claimant submitted that these UK provisions apply by virtue of section 48 of the Criminal Procedure Act which provides that:

> "All other matters of procedure, not herein nor in any other Act expressly provided for, shall be regulated, as to the admission thereof, by the law of England, and the practice of the Superior Court of criminal law on England."

[12] In this case the Court of Appeal ordered a retrial on 17th January 2012 so that the two month period prescribed by the UK Criminal Appeal Act would have expired on 17th March 2012. It is the Claimant's contention that the jurisdiction for extending the time for the prosecution to commence a retrial following the expiration of the prescribed time limit lies exclusively with the Court of Appeal and not the High Court. He therefore submitted that following March 2012, any further steps taken to retry him would have to be taken pursuant to the further directions of the Court of Appeal following an application by the Director of Public Prosecutions.

[13] No such application having being made, he submitted (1) that the extant indictment would immediately be deemed to be null and void and (2) the trial judge would have no jurisdiction to retry the Claimant pursuant to the void indictment.

[14] Moreover, if as in this case, the Claimant has been arraigned outside the prescribed time limit, then section 8 (1A) of the UK Criminal Appeal Act prescribes that he may apply to the Court of Appeal to set aside the order for retrial and to direct the court of trial to enter a judgment and verdict of acquittal of the offence for which he was ordered to be retried.

[15] At paragraph 36 of his skeleton argument, the Claimant advises that he has in fact lodged such an application in the Court of Appeal on 5th July 2013. During the hearing of this matter, his counsel

advised the Court that this matter remains extant and is to be considered by the Court of Appeal that very afternoon at 3.00 p.m.

[16] The Director of Public Prosecutions (DPP) trenchantly opposed this contention. He submitted firstly that section 48 of the Criminal Procedure Act (the Act) has no application in the current proceedings. He argued that section 48 falls within Part VI of the Act which deals with evidence, attendance of witnesses, amendment and judgments etc. He submitted that it would have no application when dealing with the procedure to be adopted on a retrial ordered by an appellate court.

[17] In the premises, he submitted that the only applicable law regulating retrials in the Territory is that set out in set section 35 – 37 of the West Indies Associated States Supreme Court Virgin Islands) Act (the Supreme Court Act). The Supreme Court Act does not require the DPP to issue a fresh indictment neither does it mandate or impose a time limit by which accused must be arraigned following the order for retrial.

[18] In the premises, he submitted that the Claimant cannot seek to rely on the provisions of UK Criminal Appeal Act. It follows that the indictment lodged in January 2012 would be valid and subsisting and that the Claimant's arraignment on 8th July 2013 would be equally so.

[19] The Claimant asks this Court to make a determination that the UK Criminal Appeal Act applies in the British Virgins Islands by virtue of section 48 of the Criminal Procedure Act. Bearing in mind that this very issue is also before the Court of Appeal which the Claimant's submits has the appropriate jurisdiction to determine this issue, this Court has some difficulty in discerning the practical utility of maintaining this ground of challenge before the Constitutional Court. In the Court's view (in so far as this ground of challenge is concerned) this would amount to parallel or concurrent litigation in which the constitutional court would be required to consider the same facts and issues which are pending before the appellate court (apparently sitting in its original jurisdiction).

[20] In the Court's view, this offends the overriding objective which demands that parties avoid duplication of proceedings and re litigation of issues which have already been decided in another forum. That the Claimant sought to advance these arguments in concurrent proceedings and in circumstances where

two courts could hear the same dispute and yet reach inconsistent decisions amounts in the Court's view to an abuse of process which ought not to be countenanced. [2]

[21] In any event, having considered the submissions of both sides, the Court is satisfied that this is not the appropriate forum for the ventilation of this submission. A litigant who seeks to invoke the Court's jurisdiction under the Constitution must advance a case which demonstrates a breach of his fundamental rights. Where, as in this case, the Claimant argues that procedurally, criminal proceedings are irregular or null and void on the basis advanced by the Claimant, this would not in the Court's view gives rise to a constitutional claim. Here, the Claimant does not contend that he has been deprived a right to a fair trial. Rather he contends that he should and cannot be tried at all because the DPP has failed to comply with the procedural mechanics which would enable him to retry the Claimant, so that the entire criminal proceedings should be vitiated. In the Court's view this is a matter which should properly be dealt with in the context of the criminal trial and by the relevant trial judge who would be best placed to resolve these procedural issues within the criminal process.

[22] Moreover, the Court notes that even if it accepts (which it does not) that section 8 of the UK Criminal Appeal Act applies in the circumstances, there would be an alternative source of redress available to the Claimant under Act which would have necessitated him making an application before the Court of Appeal. This would in the circumstances have meant that he would have run afoul of section 31 (3) of the Constitution in that he would not have availed himself of the adequate and alternative means of redress available to him.[3]:

[23] The Court is guided by ratio of Lord Nicholls in delivering the judgment of the Privy Council in The Attorney-General of Trinidad and Tobago v. Siewchand Ramanoop No. 13 of 2004 where he stated at paragraphs 25 and 26 as follows:

> "25. In other words, where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature which at least arguably indicates that the means of legal redress otherwise available would

[2] See Postscript note below and Judgment of Court of Appeal in BVIHCRAP 2013/007 dated 22nd and 23rd July, 2013
[3] Harrikissoon Attorney-General of Trinidad and Tobago [1980] A.C. 265; Jaroo v. Attorney-General of Trinidad and Tobago [2002] 2 W.L.R.; and The Attorney-General of Trinidad and Tobago v. Siewchand Ramanoop No. 13 of 2004

not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse of the Court's process. A typical but by no means exclusive example of a special feature would be a case where there has been an arbitrary use of State power.

26. That said, Their Lordships hasten to add the need for the Courts to be vigilant in preventing abuse of constitutional redress where acting in good faith they believe the circumstances of their case contain a feature which renders it appropriate for them to seek such redress rather than rely simply on alternative remedies available to them. Taken at its best, therefore, the Court is of the view that this ground of challenge would be unsustainable in any event."

Failure to Provide the Claimant with a copy of the Indictment

[24] The Claimant contends that his rights under section 16 (2) (b) have been infringed because the Prosecution has failed to provide him with a copy of a fresh indictment on the retrial. In his second affidavit, the Claimant indicates that on 15th July 2013, he was served with a copy of the indictment which had been filed on 27th January 2012. This service occurred after he was arraigned on 8th July 2013 (essentially 8 days after the retrial had commenced) and after the first hearing in these proceedings. He states that he has never seen this document prior to that date and despite repeated requests for the same.

[25] Counsel for Claimant submitted that it is not possible for him to obtain a fair trial in circumstances where he would have been arraigned without having had sight of the indictment. He indicated that the fact that arraignment had occurred on the basis of the charges which had been advanced in the original indictment and which had not changed and which would have been orally conveyed to him, would not be sufficient for these purposes and would still amount to a breach of his fundamental rights under section 16 (2) (b) of the Constitution.

[26] Although the Director of Public Prosecutions contended that he is under no obligation to proffer a fresh indictment in respect of the retrial of the Claimant, he advised the Court that in fact a fresh indictment was properly filed by his office on 27th January 2012. The DPP however, submitted that the

Prosecution is under no obligation to effect service of the indictment on an accused. He referred the Court to section 15 and 16 of the Indictment Act which provide as follows:

> 15. - "Every person committed for trial shall be tried on an indictment filed by the Attorney General (*now the DPP)*: Provided that nothing in this section shall affect the right of the Attorney General to file criminal information.
>
> 16. – (1) Subject to the provisions hereafter in this section contained, every indictment shall be filed in the Registry of the High Court five days at least before the day of the trial of the accused person charged in the indictment.
>
> (2) The Registrar shall, four days at least before the day of trial, deliver or cause to be delivered to the keeper of the prison to which the accused person has been committed to await his trial, or to which he would in due course have been so committed if he had been admitted to bail, a certified copy of the indictment, and the copy shall be given by keeper to the accused person forthwith, if he is in custody, or when he applies for it, if he is on bail.
>
> (3) Whenever the keeper of a prison delivers a copy of indictment to an accused person has hall notify the Registrar of the fact and any such notification purporting to be signed by the keeper shall be prima facie proof of the fact that a copy aforesaid was delivered to the accused person and at the time and on the date mentioned therein.
>
> (4) –
>
> (5) Notwithstanding the foregoing provisions of this section, an indictment may be filed at any time before the first day of the sitting of Court, but in such event, the accused person shall be entitled to apply to the Court for a postponement of the trial to another sitting of the Court on the ground that he has not had sufficient time to prepare his defence.

[27] Rule 13 of the Indictment Rules further provides that:

> "It shall be the duty of the registrar to supply the accused person upon request a copy of the indictment free of charge.

[28] The DPP also relied on the judgement in R v Dickson[4]. In that case the accused was charged with having committed certain robberies on September 2. Six days before trial his solicitors received a copy

[4] [1969] 1 All ER 729 at page 731 and see Vol. 10 Halsbury's laws of England (3rd Edition) 382 at para. 691

of the indictment and became aware that the accused was to be tried on further charges of having committed certain robberies on September 16. He was acquitted on the former charges but convicted on the latter. Due to the short notice he had been unable to call certain witnesses who, if believed, would have established an alibi for him as to September 16.

[29] Phillmore LJ in delivering the judgment of the Court of Appeal held that:

> "Where additional charges are levied against an accused based on fresh facts which were not the subject of the committal, the police ought to see the accused as soon as it is decided to formulate these fresh charges and caution him, so that he can, if he wishes, make a statement and is at least warned that these charges are impending. Furthermore, it is important that those engaged in the defence should maintain close touch with the court in order that they may obtain a copy of the indictment (to which they are entitled as of right free of charge) as soon as it is signed and at the earliest possible moment to enable the defence to be prepared."

[30] The ratio in this judgment mirrors the position which is currently reflected in the Rule 14 of the UK Criminal Procedure Rules which provides that-

> "(1) The prosecutor must serve a draft indictment on the Crown Court officer not more than 28 days after—
>
> (a) service on the defendant and on the Crown Court officer of copies of the documents containing the evidence on which the charge or charges are based, in a case where the defendant is sent for trial;
>
> (b) a High Court judge gives permission to serve a draft indictment;
>
> (c) the Court of Appeal orders a retrial; or
>
> (d) the committal or transfer of the defendant for trial.
>
> (2) The Crown Court may extend the time limit, even after it has expired.
>
> (3) Unless the Crown Court otherwise directs, the court officer must—
>
> (a) sign, and add the date of receipt on, the indictment; and
>
> (b) serve a copy of the indictment on all parties."

[31] The Court has considered all of submissions made in respect of this ground and finds that those of the DPP are more persuasive. There is a clear statutory procedure which generally regulates the procedure by which the accused person is to be supplied with a copy of the relevant indictment

preferred against him. Both in the UK and in the BVI this engages the Court's Office and imposes an obligation on the Registrar to provide the accused with a copy of the indictment free of charge when requested.

[32] In this case there is no indication that the Claimant made any such request to the Registrar or that he was denied a copy of the same. What he contends is that the DPP was obliged to provide him as a matter of course with a copy of the indictment. Counsel for Claimant was however obliged to concede that there is no law in the BVI which imposes this specific obligation on the Prosecution. He contended instead that this is obligation is a natural incident of section 16 (2) (b) of the Constitution which mandated that an accused "be *informed promptly, **as prescribed by law**, in a language that he or she understands and in detail of the nature of the offence charged*."

[33] While the Court accepts that the Claimant has a right to be promptly informed in detail of the nature of the offence charged, in the Court's view, the Claimant's interest under section 16 (2) (b) of the Constitution and incidentally under Article 6 of the ECHR are sufficiently protected by the current statutory provisions regulating the supply of the indictment to an accused under the Registrar's good offices.

[34] The Court is also satisfied that in any event little or no prejudice would have been suffered by the Claimant. The uncontroverted evidence before this Court is that the Claimant would have been served with a copy of the indictment with the Crown Submissions on 21st June 2013 prior to his arraignment and prior to the belts and braces service which appears to have been undertaken by the office of the DPP on 15th July 2013.[5] In addition, it is not denied that the indictment filed on 27th January 2013 is an exact replica of the amended indictment which obtained in the previous criminal proceedings and that this fact would have been conveyed to the Claimant and would be well known by him. The DPP also submitted that there has been full disclosure by the Prosecution in this case over period of time. This began with at the preliminary inquiry, throughout the first trial and at the appeal level. There being no new charges or evidence against the Claimant, the DPP submitted that the Claimant cannot contend that he is unaware of the charges and of the case against him.

[35] The Court finds that there is general merit in the DPP's contention.

[5] Paragraph 13 of the Affidavit of Kendolph Bobb

[36] Moreover, where the Claimant contends that he is not been afforded adequate time to prepare his defence because of the late notice of the indictment, the Court is of the view that this would not in any event nullify criminal proceedings where it is open for him to seek an adjournment of the proceedings on the ground that he has not had sufficient time to prepare his defence.

[37] Where a claimant alleges that he did not have adequate time and facilities for the preparation of his defence and where there is no evidence that neither he nor his counsel have ever requested more time for the preparation of the defence, then in the Court's view, no constitutional violation could be made out.

Failure to Provide the Claimant with the copy of the transcripts of the hearing before the Court of Appeal

[38] The Claimant next contends that he has not been provided with a copy of the transcript of the proceedings before the Court of Appeal on the 17th January 2012. He submitted that this is critical because it would have allowed him to properly and adequately prepare his defence for his retrial allowing him to properly prepare for cross examination. He further submitted that this would also provide clarity on the Court of Appeal's ruling and findings and enable the DPP to exercise the powers under section 59 of the Constitution.

[39] Counsel for the Claimant confirmed (1) that the ruling of the Court of Appeal was rendered orally and not in a written judgement. (2) the Claimant was present throughout the proceedings before the Court of Appeal and perhaps most importantly (3) the Claimant was represented by Counsel throughout those proceedings. In spite of these factors Counsel for the Claimant contends that he is entitled to the transcripts of the proceedings and that in circumstances where he has not been so provided despite his repeated requests for the same, he submitted that his fundamental rights under section 16 of the Constitution have been violated and that his retrial would be unjust and oppressive and contrary to the interests of justice.

[40] In support of this contention the Claimant relied on section 16 (7) (a) of the Constitution provides that:

> "Every person who has been convicted by a court of a criminal offence shall have the right—

(a) to receive free of charge a copy of his or her conviction record and any sentence imposed as a consequence thereof; and

[41] Counsel for the Claimant submitted that when a broad and purposive interpretation is applied, the language of that section must also extend to a decision made by a superior court following an appeal against conviction and sentence.

[42] Not surprisingly the DPP disagrees with this contention. He pointed out that the relevant section of the Constitution relied on by the Claimant does not in any way assist him. He submitted that section 16 (7) is intended to facilitate a convicted person in launching a potential appeal from conviction and sentence. Where the Court of Appeal quashes a conviction, he submitted that the Constitution creates no right to a transcript under the Constitution. He noted that in this case the Claimant was not convicted of a criminal offence so that there is record of conviction or sentence which can to be obtained.

[43] The Court is persuaded by the DPP's arguments and can find no basis upon which construe the section in the wider terms advanced by Counsel for the Claimant.

[44] Further, even if the Court accepts the un-traversed evidence of the Claimant that he has made repeated requests for the transcript of proceedings before the Court of Appeal, the Court does not accept that there is any obligation on the part of the Prosecution to ensure that he is provided with a copy of the transcripts before the appellate court.

[45] One of the fundamental rules of the adversarial trial is that the Prosecutor must provide the defence with all the documents and other materials that will be introduced into evidence to prove the guilt of the accused. In this regard a system of disclosure determines that the accused or his defence team is granted access to the documents, records, etc. necessary for the preparation of his or her defence. Such access is to ensure the advance knowledge of the prosecutorial case and the right to disclosure of evidence which favours the defence case. The Claimant does not contend that there has been any breach of the Prosecution's obligations in that regard. Rather, he seeks to enlarge the DPP's obligations to include the provision of transcripts of appellate proceedings without any real basis or authority.

[46] Further, the Claimant has failed to demonstrate to the Court to the relevant degree of proof or at all that the unavailability of those transcripts has the potential to infringe his fundamental rights under section 16 of the Constitution or would impact on his ability to adequately conduct his defence. The Claimant's bare and unsupported and particularised assertions are set out at paragraphs 4 – 6 of his second affidavit in which he contends:

> *"I … have been severely handicapped and prejudiced in preparing for my retrial as well as in instructing attorneys."*
>
> *"The unfairness and prejudice to me is clear, results in a severe disadvantage to me and makes my retrial unjust and oppressive and contrary to the interest of justice and breach of the Constitution."*
>
> *"The failure of the Crown to provide the transcripts deprives me and indeed all concerned of knowing the basis of the Court of Appeal's decision."*
>
> *"Having the transcripts would have assisted me in knowing the precise charges I would meet and would have assured the public of the overturning of the convictions. This is of special and particular importance in this case which has had unprecedented and sustained high public interest and media coverage…"*

[47] Contrary to the Claimant's indication the prejudice and unfairness which he alleges is not at all "clear" to the Court. Without any substantive evidence and assistance from the Claimant, the Court is unable to appreciate how his fundamental rights under section 16 of the Constitution have been violated and further how his retrial would in the circumstances be unjust, oppressive and contrary to the interest of justice.

[48] What is however clear that is the entirety of the Claimant's application before this Court demonstrates that he has a very real and sound appreciation of the basis of the Court of Appeal decision.[6] This appreciation is apparently shared by the Prosecution who have expressed no reservations on the matter.

[6] Page 4 paragraph 5 and 6 of the Claimant's Originating Motion ; paragraph 21 of his First Affidavit filed 14th June 2013

[49] Further the Court has some difficulty in discerning how the transcripts could in any event assist the Claimant in knowing the precise charges he would meet in the criminal trial or would allow him to properly prepare for cross examination. It seems to the Court that the relevant charges would be set out in the relevant indictment which would be freely available to the Claimant and that cross examination would have to be based on the evidence in the case.

[50] Finally, bearing in mind that the Claimant would not be tried in the court of public opinion; the Court has some difficulty in discerning the utility of the public being advised of the basis of the Court of Appeal's decision.

Failure to permit Claimant to be legally represented

[51] The Claimant has also contended that his rights under section 16 (2) (d) are likely to be contravened. The Originating Motion does not advance any grounds in support of this contention; neither does the Claimant's first affidavit filed on 14th June 2013. However, in the Claimant's second affidavit filed on 18th July 2018, he provides details of the efforts made to secure legal counsel to represent him in the criminal proceedings. The Claimant alleges that this has not been a painless task and that for one reason or another he has experienced difficulty in retaining local legal counsel in the criminal matter.

[52] Essentially the Claimant's case is that he has finally managed to secure the services of Dr. Henry Brown QC and John Benjamin QC two imminent criminal law practitioners who practice outside the jurisdiction. By letter dated 22nd July 2013 they have unfortunately indicated their unavailability to conduct the trial prior to the October 2013 and have asked that the matter be traversed to the next assizes to facilitate their appearance.

[53] Counsel for the Claimant submitted that it is widely publicised that the learned Judge in the criminal proceedings has indicated that he will proceed with the trial during the current assizes in the absence of the Claimant's counsel. The Claimant's evidence in paragraphs 21 – 25 of his second affidavit also supports this. It is on this basis that the Claimant submits that it is likely that he will be denied legal representation of his own choosing.

[54] The Court sees no merit in this submission.

[55] The Claimant does not contend that the Prosecution or the DPP seeks to deprive him of Counsel; neither does he allege that the State has failed to provide him with representation through an established public aid scheme. Indeed his contention is that he has in fact retained the legal services of competent overseas counsel who are willing to assist him in his defence. Save for the bare indication that such representation is likely to be quite expensive there is no indication that such expense will be pejorative and would warrant intervention by the State. From all indications the Claimant is clearly comfortable with undertaking those expenses since he has made no application for assistance by the State.

[56] How then is the fundamental right under section 16 (2) (d) engaged? The simple contention is that where the trial judge in seeking to manage the trial process refused or intends to refuse to grant a further adjournment of the trial on the basis of unavailability of counsel then this would amount to an infringement of the Claimant's fundamental right to counsel of his choice.

[57] Can it be rightly said that the Claimant has been denied the right to fair hearing by the refusal of the trial court to adjourn his trial or traverse the same to the next assizes?

[58] There is no doubt whatsoever that the question of granting an adjournment in a case on trial is a matter of the trial Judge's discretion. In exercising such discretion the court must consider all the circumstances of the case in ensuring that the discretion is exercised judicially and judiciously. In exercising its discretion no case can be authority for the other, because that in effect would be an end to the discretion. The Court is not bound to grant an adjournment simply because a party has asked for it.

[59] When a case has been fixed for hearing, the trial court must ensure that the case is heard unless a party applying for an adjournment shows sufficient reason why the case must be adjourned or traversed by placing sufficient material before the court upon which it can exercise its discretion. Otherwise an adjournment of a case fixed for hearing would mean further delay to other litigants who might otherwise have had their cases heard.

[60] In applying these principles to the case at bar, this Court must therefore consider the evidence which has been advanced in support of this ground. The Court of Appeal ordered this retrial in January 2012.

As at that date the Claimant would have been on notice that he would need to retain legal counsel to represent him in the criminal proceedings. When the matter came up for hearing in early July 2013, the Claimant indicated that he was represented by Counsel who was at that time unavailable. He therefore sought to have the trial traversed to the October 2013 assizes.

[61] Very little evidence is offered by the Claimant as to what material was placed before the court and what factors would therefore have been taken into account by the Court in the exercise its discretion matter. There is therefore no proper basis upon which the Court could conclude that the trial court exercised its discretion injudiciously in considering the Claimant's application. Indeed the Claimant has failed to put before this Court any evidence of the learned judge's reasoning or decision save for a reported excerpt from the local press headline "*Justice Redhead vows to start Andre Penn's trial on Monday with or without a lawyer*."

[62] However, during the course of his submissions, the Director of Public Prosecutions helpfully recounted the chronological background which detailed repeated adjournments at the instance of the Claimant most of which seemed to centre on the availability of Counsel. If the Claimant's evidence is to be accepted, it is apparent that he was expressly warned by the learned Judge and put on notice of the need for diligence in securing available counsel.

[63] Apart from the fact that the Claimant had well over one year to retain and instruct counsel in the matter, it is apparent that this criminal trial had already been traversed from a previous assize and that significant delays have followed which are largely at the Claimant's instance. Unfortunately there appears to be no end in sight. This is gleaned from the letter dated 22nd July 2013 from John Benjamin QC and addressed to the trial judge in the criminal matter, the Hon. Mr Justice Redhead in which Mr Benjamin personally attempts to explain his unavailability and asks for an adjournment of the matter to the October assizes. This letter was presented to this Court during the course of this hearing but had apparently not made its way to the attention of the trial judge!

[64] Ultimately, every judge in every trial be it criminal and civil, has an overriding duty to ensure the trial is fair. A fair trial is the only trial a judge can judicially conduct. This duty is inherent in the rule of law and the judicial process. Having regard to the evidence in this case, the Court cannot conclude that the purported or intended position adopted by the trial judge in the criminal matter demonstrates a

infringement or a likely infringement of the Claimant's right to counsel. It is the view of this Court that the Claimant has in no way demonstrated that he is entitled to the relief claimed.

Adverse Pre-trial Publicity

[65] The Claimant also submitted that extensive, detailed and continuous media coverage of his arrest, trial and appeal also negated his fundamental right under section 16 (2) (a) of the Constitution. He contends that the pervasive coverage coupled with his personal profile in the small community amd the limited jury pool available within the Territory all substantially erode the right to a fair trial by jury as granted and guaranteed to him under section 16 (2) (g) such that it would be oppressive and inconsistent with the interests of justice to retry him at all.

[66] It is apparent that the Claimant in an application for a stay of the criminal proceedings filed on the 30th March 2012 complained of adverse and prejudicial publicity which he submitted would cloud the minds of the potential jurors in his case and make it impossible for him to have a fair trial.

[67] This application, made on the basis of a potential abuse of process, was determined on 25th July 2012 in a judgment by Redhead J in which he concluded that:

> "….I do not recall or was shown anything in the newspaper reports or articles which could be regarded as irresponsible publication by way of an attack on the personal character of the applicant…." [7]

> "Having regard to that I have said above I see no exceptional circumstances of any circumstances in this matter in which I should order a permanent or temporary stay to the applicant to stand his trial." [8]

[68] On 5th October 2012 the DPP issued a Press Advisory in which he *inter alia* cautioned the press against publication of any material which is likely to prejudice this trial and to restrict online blogging comments and discussions on the internet. Counsel for the Claimant submitted that in spite of this

[7] Paragraph 68 of the Judgment R v Andre Penn, Criminal Case 31 of 2009
[8] Paragraph 71 of the Judgment R v Andre Penn, Criminal Case 31 of 2009

Advisory, there has been fresh and adverse publicity amounting to serious unfairness and which is likely to prejudice the jury against the Claimant.

[69] The Claimant also submitted that the proceedings on 2nd and 8th July 2013 the learned Redhead J made statements in the presence of "*the entire array of jurors and members of the media which has been reported widely*" to the effect that *"I was trying to make a fool of the Court, that I was constantly seeking to have the case adjourned and using delaying tactics*."

[70] He submitted that constant posting in online newspapers of picture of the Claimant in handcuffs connotes and constantly suggests to the public that he is guilty even before he is proven so to be in a court of law. He further submitted that in this case a balance has to be struck between the interests of the community on the one hand and the injustice and oppression to the Claimant. He suggested that in his case the balance has tipped too far and cannot be brought back into balance. He contended further that this taint or prejudice could not be cured by the trial judge employing the measures which were alluded to in paragraph 49 of the judgment.[9]

[71] Generally the Court found that this ground of challenge was advanced with a decided lack of enthusiasm. The Court's attention was directed to a total of twelve press articles which were exhibited to the second affidavit of the Claimant. Counsel for the Claimant did not point to any particular excerpt of these articles which could be a cause for concern save for the most recent news report printed from the online media house virginislandsnewsonline.com in which the headline reads "Penn continues efforts to "manipulate" HC – Justice Redhead. Judge rejects application by Penn to have trial adjourned to next assizes." Counsel for the Claimant submitted that this is the most recent and telling example of the adverse publicity which stands to undermine the Claimant's right to a fair trial.

[72] Having reviewed the relevant news clippings which were exhibited by the Claimant and having considered the plethora of judicial authorities in this area, the Court has no reservations in rejecting this contention. The Court agrees with the DPP that the Claimant failed to discharge the heavy onus required to establish his claim for relief under this ground of challenge.

[9] Counsel asked the Court to note that his instructions were that at the Claimant's arraignment none of these measures were in fact employed in the impanelling of the original jury on 8th July 2013.

[73] The DPP has quite rightly conceded that from his arrest to the present day, the press have reported on the criminal proceedings. It is clear that members of the press also have guaranteed rights under the Constitution which protect their rights to report on criminal trials. Indeed the Court entirely agrees with Lawton J in R v Kray [10] that it would not be in the public interest if newspapers were to desist from reporting on criminal trials.

[74] Having said this, the Court does accept that this right must be exercised prudently and responsibly in a manner which would not prejudice an accused's ability to obtain a fair trial by an independent and impartial tribunal.

[75] In the case at bar the press articles complained of essentially contain factual accounts of the legal proceedings in Court. Having reviewed the articles in question, the Court cannot accept the cynical view advanced by the Claimant that these accounts or reports of the efforts made by him to adjourn the trial and the observations by the learned trial judge in considering those applications or indeed the photos of him in handcuffs would lead a potential juror to conclude that he is without more guilty of the very serious charges lodged against him where they have not had the opportunity of observing the witnesses, have not heard the evidence in the case and have not had the benefit of directions of the trial judge. Like the courts in Jamaica and Trinidad and the United Kingdom, this Court has much confidence in the discerning, intelligent and pragmatic residents in the Virgin Islands who may be called upon to serve as jurors. In the Court's view the new reports which were relied on by the Claimant could not "in the ordinary way produce a case of probable bias against jurors who would be impanelled at the later criminal trial."[11]

[76] The Claimant cannot in any event seek merely to rely on the fact that the matter has been published or that he is well known in the small society. In order to establish infringement of his right to a fair trial he must in accordance with clear judicial authority demonstrate that there has been or is likely to be a failure to afford him a fair hearing by an independent and impartial tribunal. It is not sufficient for him to "establish that there has been adverse publicity which is likely to have a prejudicial effect on the minds of potential jurors. [He] must go further and establish prejudice is so widespread and so indelibly

[10] R v Kray (1969) 53 Cr. App. R. 412
[11] R v Kray at pages 414 - 415

impressed on the minds of potential jurors that it is unlikely that a jury unaffected by it can be obtained." [12]

[77] Other than the cursory and bare reference to the 12 published news articles, the Claimant has done nothing more to advance his case. Rather he asks the Court to infer from DPP's decision to issue the Press Advisory that there was in fact a substantial risk of infringement under section 16 of the Constitution. The Court is persuaded by the arguments of the learned DPP that his decision to issue the advisory cannot *without more* advance or buttress the Claimant's case. The laudable precaution employed by the DPP would in the Court's view only add to and enhance the protections which would already have been afforded to the Claimant under the Constitution.

[78] The Court is also satisfied that if necessary, these protections could be further buttressed by the common law remedial measures referred to by Lord Diplock at page 304 of the judgement in Grant v DPP. Any lingering concerns which the Claimant may have would in the Court's view, best be addressed in the context of the criminal trial where the trial judge would have available to him all of the options at common law which would ensure that the Claimant receives a fair trial.

[79] The Court is advised that a new jury would need to be impanelled consequent upon the discharge of the jury impanelled on 8th July 2013. These are matters which will no doubt fall to be considered by the relevant trial judge in the criminal proceedings when the next round of the selection commences, assuming that this issue continues to be a matter of concern for the Claimant.

Oppressive conduct of the Prosecution

[80] Finally, the Claimant contends that the prosecution in this case has through its actions and inactions contravened the rights guaranteed to him under section 16 of the Constitution. The Claimant alleges that the personal connection between one of the prosecuting attorneys and the family of the virtual complainant is prejudicial to him because that prosecutor handled the selection of the jury in the retrial. Thus general contention is referenced at paragraph 37 of the Claimant's Second affidavit.

[12] Grant v DPP (1981)30 WIR 246; Nankisson Boodram v Attorney General and Another, (1994) 47 WIR 459

[81] At the commencement of this hearing the DPP indicated that he would wish to make an application to have paragraph 37 of the second affidavit of the Claimant struck off as being irrelevant and scandalous and vexatious. In support of this application he contended that this issue had been raised in correspondence with Claimant in June 2013 and had been definitively routed in a letter dated 19th June 2013 in which he summarily dismissed the Claimant's allegations as improper and scandalous and in which he reminded him that as DPP, he has the sole responsibility to appoint prosecutors in all matters before the criminal courts.

[82] The Court declined to grant the DPP's application on the basis that such an allegation would not be scandalous if it is relevant to the issues which are to be determined. Millington v Loring (1881) 6 QBD 190 at 196; Christie v Christie (1873) LR 8 Ch. App. 499 at 503. The Court indicated that it would permit the Claimant to prove the bare contention that the alleged bias of the prosecuting attorney would have the potential to impact the fairness of his trial.

[83] Unfortunately, this did not materialise during the course of the hearing.

[84] In the current action, the Claimant asks the Court to conclude that the general conduct of the prosecution have been oppressive and inconsistent with the interest of justice. Regardless of how this is supported, there is no doubt that it could have wide ranging implications, not only for the professional reputations involved but for the criminal process which has been instituted pursuant to a constitutional remit. Any party inviting a court to grant the kind of relief claimed by the Claimant assumes a considerable burden. He must, in the Court's judgment, establish on primary facts that there is sufficient basis for granting the relief sought. Having reviewed the evidence before the Court and the submissions made by Counsel both orally and in writing, the Court cannot conclude that the evidence in this case in any way approaches the threshold necessary to obtain the relief sought by the Claimant.

[85] Given these conclusions, the Court is satisfied that on the way the Claimant has chosen to advance his case that no infringement of his rights under section 16 of the Constitution could be said to have been made out. The Court finds that he is not entitled to any of the relief claimed and will therefore dismiss the Originating Motion.

COSTS

[86] CPR 56.13(6) provides that no order for costs may be made against an applicant for an administrative order unless the Court considers that the applicant has acted unreasonably in making the application or his conduct was in some way worthy of censure in bringing it. This case does not fall within that matrix.

[87] It is therefore ordered as follows:

i. The Claimant's Originating Motion is dismissed.

ii. No order as to costs.

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Vicki Ann Ellis
High Court Judge

Postscript

During the writing of the judgement the Court was advised that the Court of Appeal had provided a written judgement in which the learned Acting Chief Justice considered the Claimant's application filed on 9th July 2013 in which he sought an order quashing the retrial and the entry of a verdict of acquittal on the ground that the prosecution had failed to comply with the applicable law practice and procedure in the Virgin Islands in respect of retrials. The law and practice relied on by the Claimant is that set out in section 8 of the UK Criminal Appeal Act 1968 which he contended applies by virtue of section 48 of the Virgin Islands Criminal Procedure Act.

It is understood that the Court dismissed the Application for stay of the criminal trial as well as the injunction sought.