EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANUHCRAP2009/0009

BETWEEN:

RASHID A. PIGOTT

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal [Ag.]
The Hon. Mr. Paul Webster, QC	Justice of Appeal [Ag.]

Appearances:

The Appellant in person
Mr. Anthony Armstrong, Director of Public Prosecutions and
Ms. Shannon Jones for the Respondent

2014: July 8;
2015: April 13.

Appeal against conviction and sentence – Building breaking and larceny – Record of appeal received by appellant over 4 years after notice of appeal filed – Appeal heard only after appellant had completely served custodial sentence – Whether delay inordinate – Whether appellant's constitutional right to a fair hearing within a reasonable time as guaranteed by s. 15(1) of Antigua and Barbuda Constitution Order 1981 breached – If appellant's constitutional right was breached, whether quashing conviction is appropriate remedy – Whether wrong in law and as a matter of procedure to raise in Court of Appeal for first time as ground of appeal that constitutional right breached – Whether issue ought to have first been raised in High Court in accordance with s. 18(1) of Constitution

The appellant was convicted of the offence of building breaking and larceny on 11th June 2009. On 26th June 2009, he was sentenced to 5 years imprisonment. On 1st July 2009, he filed a notice of appeal against both his conviction and sentence and on 3rd July 2014, he was granted leave to enlarge his grounds of appeal. The additional 2 grounds of appeal filed could be summarised as: the appellant's constitutional right to a fair hearing within a reasonable time as guaranteed by section 15(1) of the Antigua and Barbuda

Constitution Order 1981 ("the Constitution") was breached by the State failing to ensure that his appeal against his conviction and sentence was heard within a reasonable time and before he had finished serving his sentence.

At the hearing of the appeal, the appellant, during the course of his submissions, indicated to the Court that he did not wish to pursue his original grounds of appeal but rather, wished to rely solely on the constitutional ground of appeal. In support of this ground, the appellant contended that having been convicted on 11th June 2009 and sentenced on 26th June 2009, he had filed his appeal in a timely manner, on 1st July 2009. However, due to inordinate delay by the administrative officials, preparation of the record of appeal was not completed until sometime in October 2013. The appellant received a copy of the record more than 1 year after he had completed serving his term of imprisonment. The appellant further contended that he did not in any way contribute to the delay in the hearing of the appeal. The relief sought by the appellant was that his conviction be quashed.

The prosecution argued that there was no breach of the appellant's constitutional right, and that the 3 calendar years which the appellant spent in prison was a relatively short time for preparation of the record of appeal to be completed, having regard to the circumstances in Antigua and Barbuda where there is a backlog of pending appeals. The prosecution further submitted that the appellant was wrong in law and as a matter of procedure, to raise in the Court of Appeal, for the first time as a ground of appeal, that his constitutional right to a fair hearing within a reasonable time had been breached. The appellant ought to have raised this issue in the High Court in accordance with section 18(1) of the Constitution.

Held: dismissing the appeal against conviction and sentence, affirming the appellant's conviction and sentence, and making a declaration that the inordinate delay in the preparation of the record of appeal constituted an infringement of the appellant's constitutional right to a fair trial within a reasonable time as guaranteed by section 15(1) of the Constitution of Antigua and Barbuda, that:

1. Section 18 of the Constitution of Antigua and Barbuda does not make it mandatory for a person contending that his/her constitutional rights have been infringed to seek redress in a separate action before the High Court. The right to seek redress under section 18 in the High Court is without prejudice to any other action that is lawfully available to an aggrieved person. It is an alternative remedy. Where there is inordinate delay in the trial of an accused person, the issue of infringement of his/her constitutional right to a fair hearing within a reasonable time guaranteed under section 15(1) of the Constitution may be raised at the criminal trial. Similarly, where there is inordinate delay between conviction and the hearing of the appeal it may be raised in the Court of Appeal as a ground of appeal against both conviction and sentence.

   Chokolingo v Attorney-General (1980) 32 WIR 354 considered; **Ramesh Lawrence Maharaj v Attorney-General of Trinidad and Tobago (No. 2)** (1978) 30 WIR 310 considered; **Alfred Flowers v The Queen** [2000] UKPC 41 applied; **Melanie Tapper v Director of Public Prosecutions** [2012] UKPC 26

applied; **Hassen Eid-En Rummun v The State of Mauritius** [2013] UKPC 6 applied.

2. In determining whether there has been an inordinate delay in affording a person charged with or convicted of a criminal offence a fair hearing (such as would constitute an infringement of section 15(1) of the Constitution), the factors to be considered are: (i) the complexity of the case; (ii) the conduct of the accused/appellant; and (iii) the conduct of the administrative and judicial authorities. The present case was not unduly complex, and the delay in the hearing of the appeal was due solely to the record of appeal not being prepared in a timely manner, which had nothing to do with the appellant. The administrative and judicial authorities were solely responsible for the preparation of the record of appeal, and no explanation was provided for the delay in its preparation. In the circumstances, the delay of over 4 years to prepare the record of appeal was inordinate, and was sufficient to constitute an infringement of the appellant's rights under section 15(1) of the Constitution.

   Prakash Boolell v The State [2006] UKPC 46 applied; **Joseph Stewart Celine v The State of Mauritius** [2012] UKPC 32 applied.

3. The appellant having abandoned his original grounds of appeal against his conviction and sentence, no issue arose concerning the fairness of the trial or the safety of his conviction. It would not be appropriate to set aside the appellant's conviction absent these issues and solely on the basis that there was inordinate delay between the period of the conviction and the hearing of the appeal. Further, it would not be appropriate to make an order for monetary compensation where a conviction is affirmed. Accordingly, the most appropriate order would be a declaration that the appellant's constitutional right to a fair trial within a reasonable time guaranteed by section 15(1) of the Constitution has been infringed.

   Attorney General's Reference (No. 2 of 2001) [2004] 2 AC 72 applied; **Haroon Rashid Elaheebocus v The State of Mauritius** [2009] UKPC 7 applied; **Prakash Boolell v The State** [2006] UKPC 46 applied; **Gangasing Aubeeluck v The State of Mauritius** [2010] UKPC 13 applied.

JUDGMENT

[1] **THOM JA [AG]**: The appellant, Rashid Pigott, was, on 11th June 2009, convicted of the offence of building breaking and larceny. A sentencing hearing was held on 26th June 2009 and he was sentenced to 5 years imprisonment. On 1st July 2009, he filed a notice of appeal against both his conviction and sentence. On the date of the hearing of this appeal, the appellant had already completed serving the 5 year term of imprisonment. He was released from prison on 6th October

2012.

[2] At the trial, the case for the prosecution was that between 24th and 26th December 2005, the business premises of Leeward Islands Hurricane Protection ("LIHP") was broken into and several tools and electronic equipment were stolen. On 3rd May 2006, while employees of LIHP were working in the village of Willikies, one of the employees saw a young man, Mr. Beunel Luke, with what appeared to be an electric saw that was stolen from LIHP. The matter was reported to the police. The saw was identified by the owner of LIHP, Mr. Terry, as his property.

[3] Mr. Luke produced a receipt which showed that he had purchased the saw from the appellant. A search was conducted of the appellant's business place and his vehicle and several items the property of LIHP were found. The police also recovered at the appellant's business place the duplicate of the receipt of the saw sold to Mr. Luke. Both receipts were admitted as exhibits. Several of the other stolen items were found at the appellant's parents' home at Fitches Creek. Many of the items were purchased by Mr. Terry from Canada. The items were not available in Antigua and Barbuda. The prosecution relied on the doctrine of recent possession to prove its case.

[4] The appellant gave sworn testimony and called two witnesses. He denied that he committed any offence. He admitted selling a saw to Mr. Luke but claimed that he had purchased the saw from a customer. Further, the items taken from his business place and his truck were items that he had purchased to resell. The items taken from his parents' home belonged to his parents. He claimed had never seen the majority of the items which the prosecution exhibited. He knew nothing about them. They were not the items taken from his business place, his truck or his parents' home.

[5] The appellant appealed his conviction on several grounds. These grounds have been succinctly summarised by the learned Director of Public Prosecutions ("DPP") and I adopt his summary. They are as follows:

(1) The appellant was tried and convicted on an invalid indictment which he was given short notice of and this was prejudicial to him.

(2) The learned trial judge erred when he allowed the prosecution to adduce inadmissible evidence to include physical and documentary evidence. This resulted in a miscarriage of justice.

(3) The learned trial judge erred when he dismissed the appellant's application to quash the indictment and/or to dismiss the case against the appellant on the footing that he was not given timely notice of the trial.

(4) The learned trial judge erred when he disallowed certain evidence to be adduced by the appellant and his witnesses.

(5) The learned trial judge erred when he disallowed the appellant to directly examine his witnesses during examination in chief. The learned trial judge also erred when he questioned the witnesses for the defence.

(6) The learned trial judge erred when he denied the appellant the right to make a closing address to the jury.

(7) The learned trial judge erred in law in directing the jury on the doctrine of recent possession and on sections 30(a) and 37(1) of the Larceny Act, Cap. 241.

(8) The learned trial judge erred in law in directing the jury on the burden and standard of proof.

[6] On 3rd July 2014, the appellant was granted leave to enlarge his grounds of appeal as set out in his application dated 7th March 2014. The two grounds outlined in his application can be consolidated into a single ground, being, that his constitutional right to a fair hearing within a reasonable time as guaranteed by

section 15(1) of the **Antigua and Barbuda Constitution Order 1981** ("the Constitution") was breached by the State failing to ensure that his appeal against his conviction and sentence was heard within a reasonable time and before the expiration of his sentence.

[7] At the hearing of the appeal during the course of the submissions, the appellant intimated that he did not wish to pursue his original grounds of appeal, but rather, he would rely on the constitutional ground. The learned DPP had conceded that grounds 6 and 7 were meritorious, but urged the court that having regard to the overwhelming and compelling evidence against the appellant the Court should apply the proviso and dismiss the appeal. I agree that there was no merit in the original grounds other than grounds 6 and 7. I also agree with those submissions of the learned DPP.

[8] In support of this constitutional ground, the appellant contends that having been convicted on 11th June 2009 and sentenced on 26th June 2009; he filed his appeal in a timely manner on 1st July 2009. Due to inordinate delay by the administrative officials, preparation of the record of appeal was not completed until sometime in October 2013. He received a copy on 6th November 2013, more than 1 year after he had completed serving his term of imprisonment. The late production of the record was also contrary to section 54(1) of the **Eastern Caribbean Supreme Court Act**.[1]

[9] The appellant contends further that he did not in any way contribute to the delay in the hearing of the appeal. At all times he pursued his appeal. He sought stays of execution of the sentence and bail pending appeal. The breach of his constitutional right has resulted in irreparable harm and prejudice to him as he was required to serve the 5 year term of imprisonment without the opportunity to argue his appeal.

[10] The relief sought by the appellant is that his conviction be quashed.

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[1] Cap. 143, Revised Laws of Antigua and Barbuda 1992.

[11] The learned DPP, in response, submitted that there was no breach of the appellant's constitutional right. The sentence of 5 years imprisonment was a relatively short sentence, since, when computed in accordance with the Prison Rules, it amounted to a mere three calendar years. That period, the learned DPP contends, was a relatively short time for preparation of the record of appeal to be completed having regard to the circumstances in Antigua and Barbuda, where there is a backlog of pending appeals. The appellant was not denied due process; his application for stay of execution was considered by this Court and dismissed on 15th January 2010.

[12] The learned DPP, in further written submissions of 12th September 2014, which were served on the appellant, submitted that the appellant was wrong in law and as a matter of procedure, to raise in the Court of Appeal for the first time as a ground of appeal that his constitutional right to a fair hearing within an reasonable time had been breached. The appellant ought to have raised this issue in the High Court in accordance with section 18(1) of the Constitution. In support of this proposition, the learned Director of Public Prosecutions relied on the cases of **Chokolingo v Attorney-General**;[2] and **Ramesh Lawrence Maharaj v Attorney-General of Trinidad and Tobago (No. 2)**.[3]

[13] The learned DPP further submitted that the Court should dismiss the appeal, affirm the conviction and sentence and remit the constitutional issue to the constitutional court for it to make a determination of the issue.

[14] At the conclusion of the submissions, the Court directed that a chronology of the events be filed by the learned DPP and a copy be served on the appellant. This direction was complied with. The chronology filed revealed the following:

(a) The offence was committed between 24th and 26th December 2005.

(b) The appellant was arrested and charged on 6th May 2006 and released

[2] (1980) 32 WIR 354 per Lord Diplock at p. 359.
[3] (1978) 30 WIR 310.

on bail.

(c) At the conclusion of the Preliminary Inquiry he was committed to stand trial in 2008.

(d) The trial commenced on 9th June 2009 and concluded with his conviction on 11th June 2009. Sentencing was adjourned to 26th June 2009 to allow for preparation of a probation report. The appellant was sentenced on 26th June 2009 to 5 years imprisonment.

(e) On 1st July 2009, the appellant filed a notice of appeal against his conviction and sentence. Between July 2009 and March 2010 motions filed by the appellant for recusal of the judge, stay of execution and bail pending appeal were dismissed.

(f) On 6th October 2012, the appellant was released from prison having served the sentence of 5 years.

(g) At the sitting of the Court of Appeal in Antigua and Barbuda on 30th October 2012, case management directions were issued including a direction to the Register of the Court to cause the transcript of the proceedings to be prepared on or before 17th December 2012. Hearing of the appeal was adjourned to the next sitting of the Court of Appeal in Antigua and Barbuda during the week of 25th February 2013.

(h) Hearing of the appeal was traversed from 25th February 2013 to 25th June 2013 and to 25th November 2013 since the record of appeal was not completed.

(i) The record of appeal was completed on 23rd October 2013. The Office of the Director of Public Prosecutions received a copy on 29th October 2013 and the appellant received a copy on 6th November 2013.

(j) On 11th November 2013 at case management, it was indicated that the

appellant was not ready to proceed with the hearing of the appeal since he had only recently received the record of appeal.

(k) On 26th November 2013, during the sitting of the Court of Appeal, directions were issued for the hearing of the appeal which was adjourned to 10th March 2014, that date being the next scheduled date for the sitting of the Court of Appeal in Antigua and Barbuda.

(l) On 27th February 2014, the appellant's application filed on 10th January 2014, for extension of time to file submissions was dismissed.

(m) On 7th March 2014, the appellant made an application for extension of time to file additional grounds of appeal (the constitutional ground) and submissions. The application was granted on 3rd July 2014. The grounds and submissions were deemed properly filed.

(n) The appeal was heard on 8th July 2014.

Issues

[15] Two issues arise for determination. Firstly, whether the delay in hearing the appeal resulted in a breach of the appellant's constitutional right under section 15(1) of the Constitution.

[16] Secondly, if there was a breach of the appellant's constitutional right, whether quashing the conviction is the appropriate remedy.

Whether Breach Of Constitutional Right

[17] I will deal first with the issue of jurisdiction raised by the learned DPP. He relied on sections 18(1) and 18(2) of the Constitution and the cases of **Maharaj v Attorney-General (No.2)** and **Chokolingo v Attorney-General** for the proposition that the Court of Appeal being an appellate court and not a court of original jurisdiction, it would be unlawful for the Court of Appeal to determine the issue whether there was a breach of a constitutional right when the issue

has not first been determined by the High Court, the High Court being the court of original jurisdiction.

[18] In my view, neither section 18 nor the cases of **Maharaj v Attorney-General (No.2)** and **Chokolingo v Attorney-General** support the proposition of the learned DPP.

[19] In **Maharaj v Attorney-General (No.2)** the appellant was found guilty of contempt and sentenced to seven days imprisonment. In doing so, the learned judge failed to inform the appellant of the particulars of the offence. The appellant successfully challenged this decision before the Privy Council in **Maharaj v The Attorney General (No. 1)**. The appellant subsequently instituted proceedings in the High Court pursuant to section 6(1) of the Constitution of Trinidad and Tobago 1962.

[20] The issue was whether the failure of the learned judge to observe the rules of natural justice amounted to a deprivation of the appellant's liberty otherwise than by due process of law in contravention of section 1(a) of the Constitution and whether the High Court in its original jurisdiction under section 6(2) could grant a remedy for such breach. While the Privy Council found that the appellant's claim fell within the original jurisdiction of the High Court under section 6(2), no principle was established in this case which prohibited a person who contends that his constitutional right has been infringed from making the allegation during the course of his trial or as a ground of appeal. Indeed the court expressed a view to the contrary, as follows:

> "… even a failure by a judge to observe one of the fundamental rules of natural justice does not bring the case within s 6 unless it has resulted, is resulting or is likely to result, in a person being deprived of life, liberty, security of the person or enjoyment of property. It is only in the case of imprisonment or corporal punishment undergone before an appeal can be heard that the consequences of the judgment or order cannot be put right on an appeal to an appellate court. It is true that instead of, or even as well as, pursuing the ordinary course of appealing directly to an appellate court, a party to legal proceedings who alleges that a fundamental rule of natural justice has been infringed in the course of the determination of his case, could in theory seek collateral relief in an application to the High

> Court under s6(1), with a further right of appeal to the Court of Appeal under s6(4). The High Court, however, has ample powers, both inherent and under s6(2), to prevent its process being misused in this way; for example, it could stay the proceedings under s6(1) until an appeal against the judgment or order complained of had been disposed of."[4]

[21] In **Chokolingo v Attorney-General**, the appellant at his trial for contempt of court conceded that his actions amounted to contempt of court and he was sentenced to 21 days in prison. The appellant did not seek leave of the Privy Council to appeal the decision of the learned judge (there was no appeal to the Court of Appeal from committal by the High Court for contempt). Rather, approximately two and a half years later he instituted proceedings in the High Court under section 6(1) of the Constitution of Trinidad and Tobago in which he sought a declaration that the committal order was in breach of section 1(a) since at the time of his trial, scandalising the court, was no longer capable of amounting to criminal contempt of court in Trinidad and Tobago.

[22] Both the Court of Appeal and the Privy Council found that even if the judge had erred, the error being one of substantive law it did not constitute an infringement of the appellant's constitutional rights under section 1(a). At page 359 (the passage relied on by the DPP) the Privy Council stated:

> "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 to 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

[4] Ramesh Lawrence Maharaj v Attorney- General of Trinidad and Tobago (No. 2) (1978) 30 WIR 310 at 321.

jurisdiction, the High Court. To give Chapter I 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."[5]

This passage does not support the argument of the learned DPP.

Section 18

[23] Sections 18(1) and 18(2) of the Constitution reads as follows:

> "**18.** (1) If any person alleges that any of the provisions of sections 3 to 17 (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 that is lawfully available, that person (or that other person) may apply to the High Court for redress.
>
> (2) The High Court shall have original jurisdiction–
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> (a) to hear and determine any application made by any person in pursuance of subsection (1) of this section; and
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> (b) to determine any question arising in the case of any person that is referred to it in pursuance of subsection (3) of this section
>
> and may make such declaration 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 3 to 17 (inclusive) of this Constitution:
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> Provided that the High Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.
>
> (3) If in any proceedings in any court (other than the Court of Appeal, the High Court or a court-martial) any question arises as to the contravention of any of the provisions of sections 3 to 17 (inclusive) of this Constitution, the person presiding in that court may, and shall if any party to the proceedings so requests, refer the question to the High Court unless, in his opinion, the raising of the question is merely frivolous or vexatious."

[5] Chokolingo v Attorney-General (1980) 32 WIR 354 at 359.

[24] Section 18 does not make it mandatory for a person contending that his/her constitutional rights have been infringed to seek redress in a separate action before the High Court.

[25] The right to seek redress under section 18 in the High Court is without prejudice to any other action that is lawfully available to an aggrieved person. It is an alternative remedy.

[26] Where there is inordinate delay in the trial of an accused person, the issue of infringement of his/her constitutional right to a fair hearing within a reasonable time guaranteed under section 15(1) of the Constitution may be raised at the criminal trial. Similarly, where there is inordinate delay between conviction and the hearing of the appeal it may be raised in the Court of Appeal as a ground of appeal against both conviction and sentence. Indeed section 18(3) embraces this approach.

[27] The effect of section 18(3) is that the Court of Appeal, the High Court and also a court-martial can determine issues of contravention of any of the constitutional rights outlined in sections 3-17 where those issues arise in proceedings before the court. It is only where the issue arises in other courts such as the Magistrates' Court then the court is required to refer the matter to the High Court if a party makes such a request. It must be noted that even in such circumstances the magistrate is given a discretion not to refer the matter if the magistrate is of the opinion that the issue is frivolous or vexatious. The magistrate also has a discretion whether to refer the matter to the High Court where no request is made by any of the parties.

[28] The issue of whether delay in the trial of accused persons and/or post-conviction delay constitute an infringement of the constitutional right provisions of section 15(1) and similar provisions in the constitutions of other Commonwealth countries has been considered and determined by the Privy

Council on a number of occasions including in the cases of **Alfred Flowers v The Queen**;[6] **Prakash Boolell v The State**;[7] **Haroon Rashid Elaheebocus v The State of Mauritius**;[8] **Gangasing Aubeeluck v The State of Mauritius**;[9] **Melanie Tapper v Director of Public Prosecutions**;[10] and **Hassen Eid-En Rummun v The State of Mauritius**.[11] In these cases the issue was raised either at the trial, as a ground of appeal, or in some instances for the first time before the Privy Council.

[29] In the case of **Flowers v The Queen**, the appellant was convicted of murder at his third trial, the two earlier trials having resulted in a hung jury. The third trial took place almost four years after the offence was committed. The issue of breach of his constitutional right as a result of the delay, under section 20 (1) of the Jamaican Constitution which is in similar terms to section 15 (1) of the Constitution of Antigua and Barbuda was not raised at the third trial or before the Court of Appeal. The issue was first raised in submissions before the Privy Council. While the Privy Council expressed some concern that the issue was not raised in the lower courts, the Court nonetheless heard and considered the merits of the argument.

[30] In **Melanie Tapper**, the appellant and one Mr. McKenzie were charged jointly and severally on several counts of fraud. They were both convicted on 29th May 2003 and the appellant was sentenced to 18 months imprisonment with hard labour. The record of the proceedings in the Magistrates' Court was received by the Court of Appeal almost four years after their conviction. The record of appeal should have been transmitted by the clerk within 14 days of the conviction in accordance with section 299 of the Judicature (Resident Magistrates) Act. Mr. McKenzie raised the issue of delay in his supplemental grounds of appeal. The appellant did not. At the hearing, the Court of Appeal

[6] [2000] UKPC 41.
[7] [2006] UKPC 46.
[8] [2009] UKPC 7.
[9] [2010] UKPC 13.
[10] [2012] UKPC 26
[11] [2013] UKPC 6.

heard arguments on behalf of both the appellant and Mr. McKenzie that the inordinate delay between conviction and the hearing of the appeal constituted a breach of their constitutional rights under section 20(1) and reduced the appellant's sentence to 12 months imprisonment suspended for 12 months. The appellant's appeal to the Privy Council was dismissed since the court found no basis to interfere with the exercise of the discretion of the Court of Appeal.

[31] More recently, in **Hassen Eid-En Rummun v The State of Mauritius**, the appellant was found guilty almost ten years after the offence was committed and sentenced to four years imprisonment. The issue of delay was raised before the Court of Appeal but apparently submissions were not made in relation to his constitutional rights under section 10, which is in similar terms to section 15 of the Antigua and Barbuda Constitution. The issue was therefore not addressed by the Supreme Court. On appeal, the Privy Council found this to be most unfortunate. Lord Kerr, in delivering the judgment of the Board stated at paragraph 7:

> "In cases such as the present involving substantial delay, the Board considers that it is the duty of the sentencing court, whether or not the matter has been raised on behalf of a defendant or appellant, to examine the possibility of a breach of that person's constitutional rights in order to decide whether any such breach should have an effect on the disposal of the case."

[32] And further, at paragraphs 11 and 12:

> "11. The Board considers that the magistrate ought to have addressed the question of delay in the context of the constitutional guarantee to a fair trial within a reasonable time. …
>
> "12. Likewise, the matter should have been directly addressed by the Supreme Court. It should have been considered whether a declaration ought to be made that the appellant's section 10(1) rights had been breached. Instead the Supreme Court also dismissed this factor, saying:
>
> > 'As rightly pointed out by learned counsel for the respondent, public interest demanded that the delay in disposal of the case should not be a factor for the reduction of sentence on account of the nature and gravity of the case.'"

[33] In all of the above cases the contention of breach of the appellants' constitutional rights was raised and determined in the proceedings before the Court. No separate proceedings were instituted before the High Court.

[34] If the argument of the learned DPP is correct, it would lead to the consequence that a person such as the appellant, the hearing of whose appeal has been delayed for several years would be required to conduct two separate sets of proceedings involving the same matter, pursue his appeal to the Court of Appeal and possibly an appeal to the Privy Council and another set of proceedings in the High Court with a possibility of an appeal to the Court of Appeal and Privy Council. In my view, that is not a correct interpretation of section 18. In the words of Lord Diplock in **Chokolingo v Attorney-General**, to give section 18 of the Constitution of Antigua and Barbuda an interpretation which would lead to this result would be quite irrational and subversive of the rule of law which it is a declared purpose of the Constitution to enshrine.[12] In view of the above, I find the submission of the learned DPP to be unmeritorious.

Delay

[35] The appellant contends that the delay of 4 years between his conviction and sentence and the hearing of the appeal was inordinate and amounts to an infringement of his constitutional right under section 15(1).

Section 15(1) reads:

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

[36] It is well settled that the constitutional guarantee to a trial within a reasonable time extends to the post-conviction period.[13]

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[12] At p. 359.

[13] See Melanie Tapper v Director of Public Prosecutions [2012] UKPC 26.

[37] In determining whether there was inordinate delay such as would constitute an infringement of section 15(1), the legal authorities such as **Boolell v The State**; and **Joseph Stewart Celine v The State of Mauritius**,[14] have identified the following as factors to be considered being, (i) the complexity of the case, (ii) the conduct of the appellant and (iii) the conduct of the administrative and judicial authorities.

[38] An examination of the record shows the case at trial was not an unduly complex case, rather it was a straightforward case of breaking and entering in which the prosecution relied on the doctrine of recent possession. The trial lasted 3 days during which 11 witnesses testified. The transcript of the trial is not voluminous. It totalled a mere 385 pages. In my view, this is not a factor which can excuse or explain the delay.

[39] In relation to the conduct of the appellant, it has not been suggested that the appellant was in any way responsible for the delay. The chronology shows that after his conviction the appellant made applications for stay of proceedings and bail. However, none of these applications contributed in any way to the delay. The delay in the hearing of the appeal was due solely to the record of appeal not being prepared in a timely manner. The appellant had no part to play in the preparation of the record of appeal.

[40] The administrative and the judicial authorities were solely responsible for the preparation of the record. No explanation has been given why preparation of a record of appeal of a mere 385 pages took almost four years to be completed. It is acknowledged that there are a growing number of appeals emanating from the State of Antigua and Barbuda which has undoubtedly impacted the preparation of records of appeal. Nevertheless, this cannot justify an inordinate delay in the preparation of the record. It is incumbent on the State to provide adequate resources including an appropriate number of properly trained personnel to ensure that the wheels of justice roll with alacrity.

[14] [2012] UKPC 32.

[41] In all the circumstances, the delay of over 4 years was inordinate. This inordinate delay in my opinion constituted an infringement of the appellant's rights under section 15(1) of the Constitution. Cases such as **Attorney General's Reference (No. 2 of 2001)**[15] and **Aubeeluck v The State of Mauritius**, establish that inordinate delay will constitute a breach of the Section 15 right whether or not the person has been prejudiced by the delay.

Remedy

[42] The remaining issue is what remedy should be afforded the appellant.

[43] Section 18 of the Constitution gives the court a wide discretion to provide a remedy which it considers appropriate. What is an appropriate remedy would depend on the circumstances of the case.

[44] The principle emanating from cases such as **Attorney General's Reference (No. 2 of 2001)**; **Elaheebocus v The State of Mauritius**, **Boolell v The State**; and **Aubeeluck v The State of Mauritius** is that a breach of provisions as contained in section 15(1) would not automatically result in a conviction being quashed where save for the breach the conviction was sound. In **Attorney General's Reference (No. 2 of 2001)**, Lord Bingham of Cornhill, delivering the judgment of the House of Lords, stated:

> "If, through the action or inaction of a public authority, a criminal charge is not determined at a hearing within a reasonable time, there is necessarily a breach of the defendant's Convention right under article 6(1). For such breach there must be afforded such remedy as may (section 8(1)) be just and appropriate or (in Convention terms) effective, just and proportionate. The appropriate remedy will depend on the nature of the breach and all the circumstances, including particularly the stage of the proceedings at which the breach is established. If the breach is established before the hearing, the appropriate remedy may be a public acknowledgement of the breach, action to expedite the hearing to the greatest extent practicable and perhaps, if the defendant is in custody, his release on bail. It will not be appropriate to stay or dismiss the proceedings unless (a) there can no longer be a fair hearing or (b) it would otherwise be unfair to try the defendant. The public interest in the final determination of criminal charges

[15] [2004] 2 AC 72.

requires that such a charge should not be stayed or dismissed if any lesser remedy will be just and proportionate in all the circumstances. The prosecutor and the court do not act incompatibly with the defendant's Convention right in continuing to prosecute or entertain proceedings after a breach is established in a case where neither of conditions (a) or (b) is met, since the breach consists in the delay which has accrued and not in the prospective hearing. If the breach of the reasonable time requirement is established retrospectively, after there has been a hearing, the appropriate remedy may be a public acknowledgement of the breach, a reduction in the penalty imposed on a convicted defendant or the payment of compensation to an acquitted defendant. Unless (a) the hearing was unfair or (b) it was unfair to try the defendant at all, it will not be appropriate to quash any conviction. Again, in any case where neither of conditions (a) or (b) applies, the prosecutor and the court do not act incompatibly with the defendant's Convention right in prosecuting or entertaining the proceedings but only in failing to procure a hearing within a reasonable time."[16]

[45] In the extant appeal, the appellant abandoned his original grounds of appeal against his conviction and sentence therefore no issue arises as to the fairness of the trial, or the safety of the conviction. The appellant relies solely on the issue of delay to have his conviction quashed. Absent the issue of unfairness of the trial or safety of the conviction, it would not be appropriate to set aside the conviction solely on the basis that there was inordinate delay between the period of the conviction and the hearing of the appeal. The appellant was convicted of building breaking and larceny of a large quantity of goods the value of which exceeds $200,000.00. This type of offence is very prevalent in Antigua and Barbuda. The evidence against the appellant at trial was overwhelming. It would also not be appropriate to make an order for monetary compensation where a conviction is affirmed. The appellant having already served the sentence imposed it is not now possible to vary the sentence. More importantly, having regard to all of the circumstances of this case, the sentence of 5 years imprisonment was not excessive. The maximum sentence for the offence of building breaking and larceny is 7 years.

[46] In view of the circumstances of this case, I am of the opinion that a declaration that the appellant's constitutional right has been infringed would be the most

[16] At para. 24.

appropriate order to make.

[47] In conclusion, the appeal against conviction and sentence is dismissed. The conviction and sentence are affirmed. It is hereby declared that the inordinate delay in the preparation of the record of appeal of four years constituted an infringement of the appellant's constitutional right to a fair trial within a reasonable time guaranteed by section 15(1) of the Constitution of Antigua and Barbuda.

Gertel Thom
Justice of Appeal

I concur.

Davidson Kelvin Baptiste
Justice of Appeal

I concur.

Paul Webster, QC
Justice of Appeal [Ag.]