BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Appeal No. 8 of 2007

BETWEEN:

THE ATTORNEY- GENERAL ***Appellant***

AND

FRANK ERROL GIBSON ***Respondent***

BEFORE: The Hon. Frederick L.A. Waterman, CHB, The Hon. Peter D.H. Williams and The Hon. Sandra P. Mason, Justices of Appeal.

2009: 11, 12 and 13 February; 12 and 13 May and 15 December

Mr. Wayne A. Clarke and Ms. Deidre Gay for the Appellant

Mr. Larry A. C. Smith, Mr. Ajamu N. K. Boardi and Mrs. Miriam D. White for the Respondent

JUDGMENT

PETER WILLIAMS JA

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I. INTRODUCTION

[1] Frank Errol Gibson ("Gibson"), the respondent, was charged with murder over seven years ago. He has not yet been tried. At the start of his trial he objected to the prosecution's expert dental witness; he wished to be provided with the facilities of an expert forensic odontologist. He has been trying to have the Attorney-General, the appellant, provide one as his constitutional right for over three years. The Attorney-General has offered to pay a modest sum for the services of an expert. He brought a motion for a declaration, *inter alia*, that he had a constitutional right to be provided with the financial resources by the state to facilitate the acquisition of the services of an expert forensic odontologist. ***Blackman J*** granted the declaration and ordered the state to pay for the expert witness(es). He further ordered that the trial take place by a fixed date. Although there was no stay of execution of the Order it was not complied with. The Attorney-General appealed. The appeal raises important constitutional issues as to the nature of the state's obligation to provide facilities to an accused person in the context of the legitimate requirements of a fair trial.

II. BACKGROUND

[2] The events leading up to the appeal have to be recounted in some detail for reasons which will become apparent in the judgment. Between 15 and 16 January 2002 Francine Bolden was murdered in the parish of St. John. On 23 January 2002 Gibson was charged with her murder and remanded in custody. Two and a half years elapsed before evidence was first taken on 9 July 2004 in the preliminary inquiry, according to the affidavit of the magistrate. Nine months later, on 14 March 2005, Gibson was committed to stand trial.

[3] Dr. Victor Eastmond, a registered dental practitioner, gave evidence for the prosecution at the preliminary inquiry. He stated that he had done some training in forensic odontology; he was accepted as an expert witness. The record of appeal does not contain the evidence of Dr. Eastmond given at the preliminary inquiry or any detailed information on the case. It was not made clear by the applicant precisely on what matter the opinion of a defence odontologist was sought. However, the letter dated 3 October 2006 (quoted at paragraph [9] below) from the appellant to Mr. Larry Smith makes reference to "bite marks on the arm of the accused" and our understanding is that the issue is whether or not those bite marks matched the dentition of the deceased.

[4] On 14 July 2005, the trial came on for hearing before ***Inniss J*** when evidence was led by the prosecution. However, Mr. Michael Lashley, counsel for Gibson, objected to Dr. Eastmond giving evidence as an expert because of his lack of qualifications in odontology. The judge thereafter stopped the trial and traversed it to the October Assizes; but it appears to have been further traversed as it did not come up for hearing again until 6 February 2006.

[5] On 13 January 2006, Mr. Smith wrote to Mr. Charles Leacock Q.C., the Director of Public Prosecutions ("DPP"), referring to Mr. Lashley's recent discussion with the DPP in which the DPP was informed that the defendant was seeking the services of a forensic odontologist to assist in the preparation of his defence. Mr. Smith in his letter requested copies of all radiographs and models taken and done by Dr. Eastmond. The letter further alerted the DPP to the possible need to have the odontologist present to give evidence at the trial on behalf of the defendant and in that event to have his fees and expenses paid. In the circumstances, on 6 February 2006 an adjournment of the trial was requested to a later date. According to Gibson's affidavit, Mr. Smith informed the court that the defendant required the services of the odontologist at the expense of the State because he was in no financial position to pay for such services himself. The DPP responded the same day by facsimile transmission stating that there was no objection to Dr. Eastmond providing the copies as requested and the DPP copied his letter to Dr. Eastmond.

[6] On 6 February 2006, the hearing was adjourned by ***Blackman J*** without objection. On 22 February 2006, Mr. Smith wrote to the appellant, who by section 72(1) of the Constitution was expressly "assigned the functions of principal legal adviser to the Government". The letter was as follows:

> "Attention: The Hon. Mr. Dale D. Marshall M.P.
>
> I, in association with Mr. Michael Lashley M.P. act on behalf of Mr. Frank Gibson the accused in the matter at caption.
>
> The Crown, in presenting its case at the preliminary inquiry of this matter, adduced evidence in the area of forensic odontology against Mr. Gibson. As at the date hereof, Mr. Lashley and I have been unable to adequately prepare *(sic)* Mr. Gibson a defence since he has been unable to avail himself of the services of a forensic odontologist to review the Crown's forensic odontology evidence. Mr. Lashley and I are of the view that the acquisition of the services of a forensic odontologist to review the Crown's evidence and prepare for trial is necessary in this matter.
>
> However, this matter is being funded by the Community Legal Services Commission (Legal Aid), since Mr. Gibson is unable to afford to pay for legal services. As such, in order to obtain the services of a forensic odontologist, Mr. Gibson will require financial assistance. A check with personnel at Legal Aid, and a review of the relevant legislation has indicated that the funding necessary to acquire these services for Mr. Gibson is not provided for by Legal Aid.
>
> In our submission, the justice of this case, particularly being of a capital nature, requires that Mr. Gibson be afforded all that is necessary in order to properly defend himself.
>
> In these circumstances, a request is hereby made for the funding necessary to acquire the services of a forensic odontologist to be paid for by the Government of Barbados.

I look forward to hearing from you."

[7] There was no reply to the letter and on 9 May 2006 Mr. Smith wrote another letter as follows:

"Attention: The Hon. Mr. Dale D. Marshall M.P.

I refer to my letter dated February 22, 2006 with respect to the captioned matter.

As at the date hereof, I am yet to receive a response to the request on behalf of Mr. Frank Gibson made in my letter under reference on behalf of Frank Gibson for the Crown to pay for the services of a Forensic Odontologist to assist him in the preparation of his defence.

Mr. Gibson is presently on remand at Her Majesty's Prison located at Harrison's Point, St. Lucy awaiting trial. The commencement of his trial has been hampered by his inability to acquire the services of a Forensic Odontologist. In the circumstances, both Mr. Michael Lashley M.P., Attorney-at-Law and I are willing to meet with you at a time convenient to you to discuss a way forward in this matter.

I look forward to hearing from you at your soonest."

[8] There was again no reply to the letter and on 6 September 2006 Mr. Smith wrote a third letter as follows:

"Attention: The Hon. Mr. Dale D. Marshall Q.C.,M.P.

I refer to my letters dated February 22 and May 9, 2006 with respect to the captioned matter and to which I am yet to receive a reply.

As indicated in my letters under reference, in order for Mr. Frank Gibson to adequately prepare his defence he requires the facility of the services of a Forensic Odontologist to be afforded him, pursuant to section 18 (c) of the Barbados Constitution.

This matter is now one of the utmost urgency, since Mr. Gibson remains on remand and this matter [is] in abeyance. In the circumstances, both Mr. Lashley and I remain amenable to meeting with you at a time which is convenient for you to discuss a way forward in this matter.

I look forward to hearing from you at your soonest."

[9] On 3 October 2006, the Permanent Secretary in the appellant's office replied to the above letter as

follows:

> "In reference to your letter of September 6, 2006 on the matter indicated above. I wish to inform you that this Office will meet the cost of BDS $2,000 for the services of a Forensic Odontologist to review the evidence of the Prosecution, namely the report of Dr. Eastmond, models of dentures of the deceased and photograph *(sic)* of bite marks on the arm of the accused. It is expected that any reports obtained for this purpose must be made available both to the Crown and Defence.
>
> I wish to apologise for the delay in responding to your query, which was occasioned by matters beyond our control.
>
> I would be grateful if you would indicate where payment should be made and in what form."

[10] The correspondence between Mr. Smith and the appellant therefore reveals that Mr. Smith requested as his client's constitutional right the services of a forensic odontologist to review the prosecution's evidence and to assist in the preparation of the defence. No specific sum of money was requested. The appellant did not deny the constitutional basis of the respondent's claim to funding for the expert. The appellant acknowledged its constitutional obligation but offered merely a n *ex gratia* payment of $2,000 for the services of a forensic odontologist to review the prosecution's evidence and to report. The sum offered does not appear to have been related to any information on the cost of providing adequate facilities for the respondent in terms of his request.

[11] At the Plea and Directions hearing in September 2006, the date of trial of the case was fixed for 17 October 2006. The appellant makes a point of the fact that at the hearing Gibson did not request the assistance of a forensic expert.

III. PROCEEDINGS AND ORDER

[12] On 12 October 2006, Gibson as applicant filed an originating motion against the Attorney-General and the Director of Public Prosecutions as respondents pursuant to sections 11, 13 and 18 of the Constitution seeking enforcement of those protection provisions and constitutional redress under section 24. An affidavit sworn by Gibson in support of the motion and a Certificate of Urgency were also filed. In view of the fact that the motion had been filed on 12 October, Gibson's trial did not come on for hearing on 17 October. O n 6 November 2006, it was ordered by consent: that the applicant was to have leave to amend the motion, that the trial was not to proceed pending the determination of the motion and that the DPP was to have leave to withdraw from taking any further part in the proceedings. The application was heard by ***Blackman J*** over a number of days in November 2006 and on 2 February 2007 he gave his decision.

[13] On 8 December 2006, a Re-Amended Notice of Motion was filed; this document is referred to hereinafter as the "Notice of Motion". The applicant sought the relief which is summarised as

follows:

1. A Declaration that pursuant to section 18(2)(c) of the Constitution the applicant has a right to be provided with **the financial and other relevant resources** by the Crown, to facilitate the acquisition of the services of **an expert** in the field of forensic odontology **and other relevant expert witnesses of his choosing** ('the facilities'), to enable him to adequately prepare his defence of the charge of murder. (Emphasis added.)

2. (a) A further Declaration that pursuant to section 18(2)(c) of the Constitution the applicant had a right to be provided with the facilities by the Crown within a reasonable time prior to the preliminary inquiry.

   (b) A further Declaration that pursuant to section 18(2)(c) of the Constitution the applicant has a right to be provided with the facilities by the Crown within a reasonable time prior to the trial of the charge.

3. A further Declaration that the failure of the Crown to provide the applicant with the facilities prior to the hearing of the preliminary inquiry into the charge was unconstitutional.

4. A further Declaration that the failure of the Crown to provide the applicant with the facilities prior to the trial of the charge at the July 2005 Assizes was unconstitutional.

5. A Declaration that the failure of the Crown to provide the applicant with the facilities is unconstitutional and/or in breach of the protection of law guaranteed by the provision(s) of *inter alia,* section(s) 11 and/or 13 of the Constitution.

6. A Declaration that pursuant to section 18(2)(e) of the Constitution the applicant is entitled to be provided with **the financial and other relevant resources** to obtain the attendance of **an expert** in the field of forensic odontology **and other relevant expert witnesses**. (Emphasis added.)

7. A Declaration that there was an excessive delay between the time the applicant was arrested and charged with the murder of Francine Bolden and the commencement of the Preliminary Inquiry into the charge and that such delay was oppressive and in breach of the applicant's rights to:

   (a) a fair hearing within a reasonable time as guaranteed by section 18(1) of the Constitution, and/or

   (b) life, liberty and security of the person as guaranteed by section 11 of the Constitution, and/or

   (c) be brought before the court as soon as is practicable and if not tried within a reasonable time, then, to be released either unconditionally or upon reasonable conditions as guaranteed by section 13(3)(b) of the Constitution.

8. A Declaration that any trial of the applicant of the charge without first providing him with the facilities within a reasonable time prior to any such trial and/or without facilitating his obtaining the attendance of the witnesses to testify on his behalf before the Court would constitute a breach of the applicant's right to a fair hearing as guaranteed by section 18(1) of the Constitution.

9. An Order that the facilities be provided to the applicant by the Crown, within a reasonable time prior to the trial.

10. An interim Order staying the trial until the facilities are provided by the Crown.

11. An Order that the trial of the charge be permanently stayed or that the charge be dismissed.

12. An Order that the Crown pay to the applicant damages for breach of his constitutional rights.

13. All such Orders, Writs and directions as may be necessary.

14. An Order that the costs of and occasioned by this application be the applicant's in any event.

[14] The judge identified at paragraph [11] of the judgment three principal matters for determination. We reproduce those matters and append thereto for easy reference the decision of the judge.

1. Whether the applicant is entitled to be provided, at the expense of the Crown, with the financial and other relevant resources to obtain the attendance of an expert in the field of forensic odontology and other relevant expert witnesses, to testify on his behalf before the court on the same conditions as those which apply to witnesses called by the prosecution.

   Decision: Yes at paragraph [48] (and [49] and [80]) of the judgment.

2. Whether the passage of approximately twenty-nine (29) months between the applicant being charged and the start of the preliminary inquiry constitutes excessive delay amounting to a breach of the applicant's right to a fair hearing within a reasonable time as guaranteed by section 18(1) of the Constitution of Barbados.

   Decision: Yes at paragraph [72] (and [49] and [80]) of the judgment***.***

3. Whether compensation should be awarded to the applicant, should it be found that his constitutional rights have been breached.

Decision: No at paragraph [79] of the judgment.

We discuss below the matters dealt with by the judge in the context of the issues in the appeal.

[15] ***Blackman J*** gave his decision on 2 February 2007. The Order filed on 14 December 2007 does not represent accurately what the judge ordered in his judgment. The order in the judgment closely followed the application. It is therefore necessary to refer only to the application and state the numbered paragraphs of the application on which orders were made by the judge in favour of the applicant. By a combination of paragraphs [48], [49], [72] and [80] of the judgment, the relief sought in paragraphs numbered 1 to 9 of the motion was granted. It may be noted that the applicant sought "an expert in the field of forensic odontology and other relevant expert witnesses of his choosing", which the judge granted. However, in paragraph [48] of the judgment, reference is made only to "an expert in the field of forensic odontology" and "for such witness to testify". We mention this discrepancy because odontology evidence is often supported by other scientific evidence such as DNA evidence. The judge gave the parties liberty to apply for directions under paragraph 13 of the motion and under paragraph 14 awarded the applicant his costs certified fit for two attorneys-at-law.

[16] The judge also ordered the applicant to be released on bail pending his trial and that the same take place no later than 30 June 2007: paragraphs [79] and [80] of the judgment. He had been on bail for ten months when, as his counsel put it, "something happened". At the time of the hearing before this Court the applicant was therefore again in custody.

[17] The judge made no order in favour of the applicant under the following: paragraph 10, requesting a stay of the trial, paragraph 11, requesting a permanent stay or dismissal of the charge and paragraph 12, claiming damages. Applications were made to stay execution of the judgment and for leave to appeal. The judge refused both applications: paragraph 7 of Mr. Clarke's affidavit filed on 28 February 2007.

[18] To summarise, the judge held that the applicant had a constitutional right to be provided with the financial resources by the Crown to facilitate the acquisition of the services of an expert in the field of forensic odontology and other relevant expert witnesses of his choosing. He further held that the delay in completing the preliminary inquiry was excessive and breached the applicant's constitutional right to a fair hearing within a reasonable time, but that the appropriate remedy for this breach was to fix an early date for trial and to release the applicant on bail pending his trial.

IV. APPEAL AND CROSS-APPEAL

(a) Notice of Appeal

[19] On 14 May 2007, the Attorney-General filed a Notice of Appeal pursuant to leave granted by this Court on 30 April 2007 when the costs of the application were ordered to be the costs in the appeal. There was no application to the Court for a stay of execution. The appellant does not complain of all the declarations and orders made by the judge. We again refer to the application; the declarations complained of are those under the paragraphs numbered 1, 2, 6, 8, 9 and 14 (incorrectly numbered as 10 in the notice). In essence the appellant's main challenge to the judgment is the judge's holding that the respondent has a constitutional right to be provided with financial resources by the state to be afforded the facilities of an expert odontologist. The appellant's position is that the respondent has no constitutional right to "funding" by the state for such facility. The appellant therefore seeks clarification from this Court as to what are the limits of the state's constitutional obligation to provide facilities to a defendant in a criminal case. The appellant also challenges the declaration that failure to provide such facilities to the respondent would constitute a breach of his constitutional right to a fair hearing.

[20] The grounds of appeal relevant to the issues to be determined in the appeal can be summarised as follows:

1. The judge acted unreasonably or irregularly in the exercise of his discretion by granting a right to a financial benefit, constitutional funding, to the respondent contrary to section 18(2) of the Constitution.

2. The right to be provided with financial and other relevant resources by the appellant pursuant to section 18(2)(e) of the Constitution to facilitate the acquisition of the services of an expert in the field of forensic odontology and other relevant expert witnesses of his own choosing infringes and/or conflicts with the doctrine of the separation of powers.

3. The judge erred in law when he acted in the absence of evidence of a factual matrix on which a finding or assumption of fact could reasonably be based justifying the costs and attendance of an expert in the field of forensic odontology or any other expert witness in circumstances where the respondent failed to 'enter' evidence of materiality.

4. No evidence was advanced by the respondent demonstrating that a failure on the part of the appellant to provide facilities or to facilitate the obtaining of witnesses on his behalf would constitute a breach of a right to a fair hearing guaranteed by section 18(1) of the Constitution.

(b) Respondent's Notice

[21] At the first hearing of the appeal on 11 February 2009, the Court granted leave to the respondent, with no objection on the part of the appellant, to file out of time a Respondent's Notice. The Notice

was to contend by way of cross-appeal that the judge was wrong in not awarding damages to the respondent for breach of his constitutional right to a fair hearing within a reasonable time. The Notice asked that the Court make an award of damages to the respondent for the said breach.

[22] On 12 May 2009 at the resumed hearing of the appeal, the respondent raised two further issues in an amended Respondent's Notice: first, that the charge should be permanently stayed and secondly, that the respondent's rights were further infringed by the delay in processing the appeal. The appellant objected to the new issues being heard and leave was refused to argue them.

(c) Issues in the appeal and cross-appeal and decision on them

[23] The following issues in the appeal and cross-appeal arise for discussion and resolution. We have appended to each issue our decision in summary form.

1. Whether the applicant: (i) shall be given facilities in the form of an expert in the field of forensic odontology for the preparation of his defence pursuant to section 18(2)(c) of the Constitution; (ii) shall be afforded facilities to examine witnesses called by the prosecution and to obtain the attendance in the form of the said expert and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution pursuant to section 18(2)(e) of the Constitution; (iii) shall be entitled to have these facilities funded by the State as a constitutional right and (iv) shall be entitled to have those facilities provided as of right without any terms or conditions being imposed by the State or alternatively upon what terms and conditions.

Decision: **The judge was correct to grant declaratory relief under section 18(2)(c) and (e) to confirm the applicant's entitlement to facilities in the form of an expert witness. However, there was no constitutional basis to order the State to fund the expenses for the expert. The judge was correct to hold that the applicant was not obliged to disclose the expert's report to the Crown.**

2. Whether a trial of the applicant without first providing him with the facilities within a reasonable time prior to such trial or without facilitating his obtaining the attendance of witnesses to testify on his behalf would constitute a breach of his right to a fair hearing as guaranteed by section 18(1) of the Constitution.

Decision: **In view of the Court's declaration of the respondent's rights under the Constitution, we do not envisage a trial without the appellant being afforded facilities. Further, the appropriate time to consider whether there can be a fair trial is immediately before the trial takes place based on the**

relevant factors at the time.

3. Whether constitutional redress in the form of compensation should be awarded to the applicant for breach of his constitutional right to a fair hearing within a reasonable time.

Decision: **The judge was correct not to award compensation.**

V. ISSUE ONE – WHETHER THERE IS A CONSTITU- TIONAL RIGHT TO FUNDED FACILITIES

(a) ***The meaning of " facilities"***

[24] "Facilities" are defined in dictionaries as resources or equipment, amenities or services that are provided for a particular purpose that enable something to be done. They provide the opportunity or favourable conditions for the easy performance of something, especially the physical means or equipment required in order to do something.

[25] No dispute arises as to the meaning and ambit of the word "facilities" used in the Constitution. Reference to "facilities" is made in two paragraphs, *(c)* and *(e)* of section 18(2). They provide examples of the constituent rights that are required in the context of section 18(1) of the Constitution for the overriding objective of "a fair hearing within a reasonable time by an independent and impartial court". Section 18(1) and (2) reads as follows:

> "18. (1) If any person is charged with a criminal offence, then, unless it 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 -
>
> *(a)* ...
>
> *(b)* ...
>
> *(c)* shall be **given adequate** time and **facilities for the preparation of his defence**;
>
> *(d)* ...
>
> *(e)* shall be **afforded facilities to examine** in person or by his legal

representative 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 behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and

(f) …" (Emphasis added.)

There is no definition of "facilities" in the Constitution. The reference in paragraph *(c)* is to adequate "facilities" generally for the preparation of the defence of the person charged. The reference in paragraph *(e)* is to "facilities" specifically in relation to witnesses; for example, to examine expert witnesses called by the prosecution and to obtain the attendance of expert witnesses for the defence. There is a positive duty on the state to provide the facilities. However, the obligation of the state is limited; the facilities must relate to the preparation of the defence and are confined to those that are "adequate".

[26] There is no provision in the Constitution in relation to who should pay for the facilities referred to in paragraphs *(c)* and *(e)* of section 18(2). In contrast, it is stated specifically that a person charged "shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial": paragraph *(f)* of section 18(2). With regard to legal representation, it is stated specifically that a defendant shall not be entitled to "legal representation at public expense": section 18(12). In view of fact that the Constitution is silent as to payment for the facilities, Mr. Smith suggested that the dictionary meaning of the word "afford" connotes some financial obligation. However, in the absence of specific provisions, we cannot read into the words "given" and "afforded" a financial obligation on the state to pay for the facilities. It is in order for the Constitution to be declaratory of the right, but to make no provision for funding, which is then properly left to legislative enactment and executive implementation.

[27] Paragraphs similar to *(c)* and *(e)* of section 18(2) of the Constitution of Barbados are to be found in section 20(6)(b) and (d) of the Constitution of Jamaica. Counsel for the respondent cited the case of the Court of Appeal of Jamaica, ***R. v. Bidwell*** *(unreported, 26 June 1991),* which was referred to with approval by the Privy Council in ***Franklyn and Vincent v. R. (1993) 42 WIR 262*** at 271. ***Forte JA*** in ***Bidwell*** stated at pages 8 and 9:

> "In my view, facilities must relate to anything that will be required by the accused in order to aid him in getting his defence ready to answer the charge, for example, if he is in custody, the facility to communicate with and to interview his witnesses. The use of the word "facility" in another paragraph of the same subsection in our view demonstrates that the word is used in the sense of affording "an opportunity" for the relevant matters dealt with in the paragraph…In its ordinary meaning to be found in the Concise Oxford Dictionary the word "facility" is defined (inter alia) as "unimpeded opportunity (give facilities for action or doing)". This confirms the opinion that as used in section 20(6)(b) the word places a right in an accused person to be given adequate opportunity to prepare his defence and ties in with the context of the examples already outlined."

[28] Traditionally, the right of a defendant to be given adequate facilities for the preparation of his defence has meant in this jurisdiction little more than providing him with all relevant documents and with equipment for note-taking, such as pen and paper: ***Cumberbatch (Glyne) v. R. (2004) 67 WIR 48*** at paras. [14] and [18]. Nevertheless, with the advance of technology and scientific evidence, it is obvious that the facilities that a defendant may require to prepare his defence will constitute novel and ever increasing services. For example, it has been held by the English Court of Appeal that a prisoner unrepresented by counsel was entitled to the provision of computer facilities by the prison authorities to properly represent himself: ***R. (on the application of Ponting) v. Governor of HM Prisons Whitemore [2002] EWCA Civ 224 (22 February 2002)***. ***Clarke LJ*** said at para. 74:

> "While I would not go so far as to hold that we have advanced to a stage where access to IT facilities is a precondition of having unimpeded access to the courts, it does seem to me that there are likely to be a significant number of prisoners in respect of whom it can properly be said that without such facilities they are at a sufficient disadvantage vis a vis the other party to litigation such that there is inequality of arms between them. It struck me during the course of the argument that there is much to be said for the proposition that a prisoner…is seriously disadvantaged if he can only use a pencil, biro or pen while his opponent is equipped with a battery of word processors."

[29] Section 18(2)*(c)* of the Constitution mirrors Article 6(3)(b) of the European Convention on Human Rights. ***Clayton and Tomlinson*** on "***The Law of Human Rights***", Second Edition (2009) in commenting on Article 6(3)(b) of the Convention state:

> "11.490 The right to adequate facilities means that the accused must have the opportunity to organize his defence appropriately, with the view to enabling him to put all relevant arguments before the trial court…to achieve equality of arms between the prosecution and the defence, a principle also considered an element of fairness under the general fair trial guarantee."

[30] The general editors, ***Lester***, ***Pannick*** and ***Herberg***, of "***Human Rights Law and Practice***", Third Edition (2009) state:

> "4.6.68 The requirement to afford adequate facilities for the preparation of the defence case creates…a positive obligation to adopt appropriate measures to place the defence in a position of parity with the prosecution."

[31] In support of the above quotation the editors cite ***Jespers v. Belgium (1981) 27 DR 61***, a decision of the European Commission of Human Rights (ECHR) on Article 6(3)(b) in which the Commission stated:

> "55. Article 6, paragraph 3 (b) states that everyone charged with a criminal offence has the right to have adequate *time* and *facilities* for the preparation of his defence. In the present application the problem is one of "facilities", not of "time".

As regards the interpretation of the term "*facilities*", the Commission notes firstly that in any criminal proceedings brought by a state authority, the prosecution has at its disposal, to back the accusation, facilities deriving from its powers of investigation supported by judicial and police machinery with considerable technical resources and means of coercion. It is in order to establish equality, as far as possible, between the prosecution and the defence that national legislation in most countries entrusts the preliminary investigation to a member of the judiciary…

56. In particular, the Commission takes the view that the "*facilities"* which everyone charged with a criminal offence should enjoy include the opportunity to acquaint himself, for the purposes of preparing his defence, with the results of investigations carried out throughout the proceedings…

57. In the above-mentioned provision, the word "*facilities"* (French "facilities") is qualified by the adjective "adequate" (French "nécessaire"). Despite the slight difference in meaning between the adjective in the French text and the one in the English text it is clear that the facilities which must be granted to the accused are restricted to those which assist or may assist him in the preparation of his defence.

58. In short, Article 6, paragraph 3 (b) recognises the right of the accused to have at his disposal, for the purposes of exonerating himself or of obtaining a reduction in his sentence, all relevant elements that have been or could be collected by the competent authorities."

[32] We should also mention that Barbados has acceded to the International Covenant on Civil and Political Rights, 1966 and ratified the American Convention on Human Rights, 1969 which contain very similar provisions to section 18(2)*(c)* and *(e)* of the Constitution. Barbados is therefore under an international obligation to comply with the provisions to which it has subscribed. Article 14 of the Covenant provides that:

"14. 3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

…

(b) To have adequate time and facilities for the preparation of his defence…

…

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him…"

Article 8 of the Convention, Right to a Fair Trial, provides that:

"8. Every person accused of a criminal offence has the right…with full equality, to the following minimum guarantees:

…

(c) adequate time and means for the preparation of his defence; …

...

(f) the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts; ..."

(b) Facilities to call expert witnesses

[33] The issue that particularly engaged the attention of the Court in this case is the respondent's claim to be entitled to call expert defence witnesses under the same conditions as prosecution witnesses. Mr. Smith in his oral submissions put it in this way:

> "The facility is not so much the evidence, but the facility is in the person of the expert. In other words, the expert's abilities, the expert's expertise, the expert's knowledge become the facilities or part of the facilities that are available to the person charged criminally."

[34] The affinity of the wording in this respect between the Constitution and the European Convention was highlighted by ***Margaret DeMerieux*** in her book, ***"Fundamental Rights in Commonwealth Caribbean Constitutions"*** (1992) at page 371, where she stated:

> "The phrase 'under the same conditions as the prosecution' embodies a principle known as 'equality of arms' in the jurisprudence of the ECHR. The West Indian clauses derive from Art. 6(3)(d) of the convention, in which the identical phrase appears."

[35] ***Professor DeMerieux*** referred to a Guyana Court of Appeal decision, ***The State v. Cleveland Clarke (1976) 22 WIR 249***, in which the Court considered a similar provision under the Guyana Constitution for "facilities" of witnesses. ***Crane JA*** said at page 252:

> "Accordingly, it is the constitutional right of every person who is charged with a criminal offence to be afforded such facilities as would enable him to obtain the attendance of witnesses for examination on his behalf before the court, and he must be at no disadvantage because he is to have the self-same conditions as those applying to prosecution witnesses.
>
> We understand the word 'afforded' in art. 10(2) (e) to be employed in its ordinary dictionary connotation, *viz.,* 'to yield the means, able to bear the expense of, furnish, or supply'. (See the New Elizabethan Dictionary.) So, clearly, if the accused is to be 'afforded facilities', it is evident the court is in duty bound to furnish or supply those facilities"

[36] The wording of the Constitution of Jamaica with regard to the provision of facilities for defence witnesses is similar to that contained in the Constitution of Barbados except that the Constitution of Jamaica expressly makes the attendance of witnesses "subject to the payment of their reasonable expenses" by the person charged whereas the Constitution of Barbados is silent as to payment. ***Dr. Lloyd G. Barnett*** commented on the Jamaican section in his book, ***"The Constitutional Law of Jamaica"*** (1977) at page 403 as follows:

> "An accused person must be afforded facilities to cross-examine in person or by his legal representative the witnesses called by the prosecution and be allowed to examine his own witnesses in the same manner as is permitted to the prosecution. He must be **afforded facilities to obtain the attendance of the witnesses provided that he pays their reasonable expenses**. Furthermore he must be permitted to have (and in this case without being required to pay the costs) the assistance of an interpreter if he cannot understand the English language. The latter provision may be contrasted with the right to obtain the services of a legal practitioner or **the attendance of witnesses where the State is under no obligation to meet the expenses**. The additional protection is given in the case of an interpreter because if the accused is unable to understand the language in which the court conducts its business he will be unable to follow the proceedings and to put forward his defence in an adequate manner. It seems however that in many cases the handicap of not being able to secure legal representation or the attendance of material witnesses might be almost as vital as the absence of an interpreter." (Emphasis added.)

[37] There is statutory provision in this jurisdiction for the payment of witnesses, but there is no financial provision for obtaining expert reports and witnesses from abroad. The Witnesses and Interpreters (Payment) Act, Cap. 119 commenced on 11 May 1891 but does not cover the situation under discussion. Dr. Barnett referred in a footnote to the Witnesses' Expenses Act, Cap 415 of Jamaica, which commenced on 21 June 1924 and under which a witness for an accused person could be paid his expenses from public funds if the court of trial certified that the attendance of such witness was "in the interest of public justice". The Constitution will very often require legislation and/or executive action to give effect to its provisions. This fact puts an obligation on the state to update existing legislation enacted prior to the Constitution or to enact new legislation to give effect to the fundamental rights enshrined in the Constitution. It is highly desirable that institutional arrangements should be put in place by the establishment of an independent statutory body to provide financial assistance in appropriate cases to the defence for adequate facilities.

(c) Factual basis of the need for an expert

[38] It was one of the appellant's grounds of appeal that the judge "acted in the absence of evidence or a factual matrix on which a finding or assumption of fact could reasonably be based justifying the cost and attendance of an expert in the field of forensic odontology" (paragraph [21], No. 3 above). Mr. Clarke in his written submissions stated that an indigent defendant must positively indicate that an expert would be of assistance to the defence and that denial of expert assistance may result in an unfair trial.

[39] On 13 October 2006, the respondent in his affidavit in support of the application put on record evidence of the need for an odontologist, as follows:

> "5. During the inquiry Dr. Victor Eastmond gave evidence on behalf of the prosecution. During his evidence he stated *inter alia*, that he was a registered dental practitioner and had some training in forensic odontology. He was accepted as an expert.
>
> 6. I am informed and verily believe that the nature and kind of evidence given by Dr.

Eastmond falls within the discipline of dentistry known as forensic odontology.

7. In order for my Attorneys-at-law to adequately prepare my defence in respect of the charge, particularly as it relates to evidence given at the inquiry, which I anticipate will be the evidence he will in all likelihood give at the trial in respect of the charge, I require the services of a duly certified and qualified expert in the field of forensic odontology.

8. The trial in respect of the charge first came on for hearing…when as a result of an objection by Mr. Lashley to Dr. Eastmond being qualified to give evidence as an expert… the trial was stopped and traversed to the next Assizes."

The judge was entitled to proceed on the basis of the respondent's unchallenged affidavit evidence.

[40] Mr. Smith in his affidavit filed on 11 January 2007 exhibited the curricula vitae of three forensic odontologists based in the United Kingdom with estimates of their fees and expenses associated with acquiring their services. It is however correct that there was limited information provided as to the need for a defence odontologist. It is surprising that the only reference in the record to the significance of the expert evidence is a mention in the letter dated 3 October 2006 from the appellant to Mr. Smith to "models of dentures of the deceased and photograph *(sic)* of bite marks on the arm of the accused" (paragraph [9] above). It is reasonable to conclude that the prosecution is relying on the bite marks found on the respondent to be those of the deceased. In the circumstances, based on the information before the Court and the fact that the appellant has offered a sum of $2,000 to pay for a defence report, we cannot accept the appellant's submission that there is not sufficient evidence to show that a forensic expert is material to the defence. The burden of proof lies on the applicant to make out a case for constitutional redress on a balance of probability taking into account the constitutional significance of the matter. We are satisfied that the respondent discharged this burden.

[41] We should add that forensic dentistry or forensic odontology is concerned with the proper handling, examination and evaluation of dental evidence, which is presented to the court. The evidence that may be derived from teeth includes bite marks left on the victim (by the attacker), or on the perpetrator (from the victim of an attack) or on an object found at the crime scene. Bite mark analysis is a highly complex and controversial subject and it is sufficient to say for the purpose of this judgment that the respondent may be at a disadvantage if he is unable to obtain expert help in dealing with the evidence of the prosecution.

(d) Clyde Anderson Grazette

[42] The High Court case of ***Grazette v. Attorney-General and Director of Public Prosecutions***, ***High Court Suit No. 2016 of 2006***, unreported decision of 30 January 2007, raised the identical issues as those in the instant case; yet they were resolved differently. Grazette, like Gibson, was

charged with murder. Grazette sought funding for a DNA expert witness. On 8 November 2007, he brought a constitutional application a month after that filed by Gibson and in similar terms. The application was against both the Attorney-General and the Director of Public Prosecutions ("DPP"). The DPP (unlike in Gibson) remained a party to the proceedings. ***Sir David Simmons CJ*** dismissed the application, but nevertheless determined that there was merit in the part of the motion in which the applicant "claimed a right to be provided with the facilities, that is to say, the financial and other relevant resources, by the Crown, to facilitate the acquisition of the services of an expert in the field of forensic DNA": para. [20] of the decision. He adjourned the matter to 14 November 2006 "to provide time for the parties to reach an agreement which might allow an overseas expert time to come to Barbados and give evidence on behalf of the defence" and on that date a consent order was made "that the Crown should provide funds to cover the airline, professional fees and hotel accommodation for [an] expert to come to Barbados for the purpose of giving expert evidence on behalf of the defence": para. [2] of the decision.

[43] The reasons for decision in the ***Grazette*** case were given three days before those in the ***Gibson*** case. Grazette received funding for his expert DNA witness; he was tried and convicted of murder on 21 November 2007; his appeal was dismissed by the Court of Appeal on 18 September 2008; and his further appeal to the Caribbean Court of Justice was dismissed on 3 April 2009, except that he was given special leave to challenge on appeal the mandatory death sentence passed on him. Gibson, on the other hand is still awaiting trial pending the final resolution of his constitutional application.

[44] In the circumstances, we would commend the approach adopted in ***Grazette*** of inviting the Crown to afford reasonable facilities to the defendant in terms of an expert witness. However, we should not leave that case without making two comments. First, it is inappropriate that the "final details and terms on which the Crown may provide assistance should be negotiated between the attorneys-at-law for the prosecution and the defence": para. [39] of the decision. The expert should be facilitated independently of the prosecutor's office. It would be undesirable under our Constitution to have one branch of the state prosecuting the citizen and the same branch making a determination in relation to the financial requirements for the citizen's defence.

[45] Secondly, it was stated in ***Grazette*** that "it goes without saying that the information received from an overseas expert witness should be exchanged with the Crown in a timely manner": para. [39] of the decision. This was an issue in the instant appeal because ***Blackman J*** expressly held, contrary to the appellant's letter of 3 October 2006, which stated that "it is expected" that any reports would be made available to the Crown, that the Crown was not entitled to a copy of any report as a consequence of funding. The judge stated at para. [49] of the decision:

> "It is axiomatic that the burden of proof rests on the Crown and there is no duty or obligation on an accused person to aid the Crown even in circumstances where the Crown is the paymaster."

[46] The above statement represents the correct legal position, which is stated in ***Criminal Evidence, Fifth Edition*** (2004) by ***Richard May*** and ***Stephen Powles*** at para. 18-08 (d), as follows:

> "At common law the defence was under no obligation to disclose any part of its case before trial. This rule was based on principles relating to the right of silence, the privilege against self-incrimination and the duty of the prosecution to prove its case. However, inroads were made by statute upon this rule. As a result, the defence were obliged to disclose: (i) evidence of alibi; (ii) expert evidence; and (iii) the nature of the defence in cases of serious or complex fraud."

Since the above passage was written, further extensive statutory inroads have been made in England into the defence's obligation to disclose in relation to expert evidence in criminal proceedings: see ***Disclosure in Criminal Proceedings*** (2009) by ***David Corker*** and ***Stephen Parkinson***.

[47] However, there are no such statutory provisions in this jurisdiction placing an obligation on the defence to make disclosure, except in relation to an alibi (section 158 of the Evidence Act, Cap. 121) and in response to certain questions in the Practice Direction Re: Plea and Directions Hearings, No. 1 of 2003. Whereas it is now generally accepted that some defence disclosure is desirable in a criminal trial, there has to be a statutory basis for a defendant to be compelled to disclose a defence expert's report.

(e) The separation of powers

[48] The appellant concedes that an expert witness is a facility that falls within the definition of paragraphs *(c)* and *(e)* of section 18(2) of the Constitution. However, the appellant strongly challenges any interpretation of the Constitution which requires the state to fund an expert and submits that the court should not order the state to pay the expenses of the expert. The judge took the view that there was no point in making the declaration without an order for payment. Obviously, if the respondent, as an indigent defendant, has a constitutional right to facilities which include an expert but there is no constitutional provision for payment, the constitutional right would be "barren of substance" to use the judge's words. Nevertheless, in our judgment this dilemma can be resolved by a careful consideration and application of the doctrine of the separation of powers.

[49] Enshrined in the Constitution itself is the doctrine of the separation of powers between the legislative, executive and judicial functions of the state: ***Hinds v. R. [1977] A.C. 195 PC,*** Lord Diplock at page 212. ***Professor Albert Fiadjoe*** in his book, "***Commonwealth Caribbean Public Law***", ***Third Edition*** (2008) at page 172 to 173 highlights a passage from the judgment of ***Saunders J*** (now JCCJ) in ***Benjamin et al v. Minister of Information and Broadcasting et al,*** Suit No 56 of 1997, decided on 7 January 1998, in the High Court of Anguilla, where he explained the interrelation of the three powers as follows:

> "Our democracy rests on three fundamental pillars, the legislative, executive and the

judicial. All must keep within the bounds of the Constitution…

Within their constitutional parameters the legislature and the executive are responsible for enacting and implementing such policy measures as in their wisdom they consider to be most appropriate for the people. The judiciary has to be careful that it too does not stray from its function and usurp the authority and role reserved for the other two pillars.

I reiterate that there is a fine line which the court must tread in these circumstances. On the one hand it must protect the citizens and guarantee them the rights and freedoms which the Constitution proclaims. On the other hand the court should not intrude into the preserve of the other branches of the State.

For our democracy to operate effectively, it has been said that it is necessary that a certain comity should exist between the three branches. Each should respect the role and function of the other. The court is subject to and must enforce laws passed by Parliament that are *intra vires* the Constitution. **The executive should respect and obey the decisions and accept the intimations of the court. If this comity does not exist, then the wheels of democracy would not turn smoothly**. A jarring and dangerous note will resonate from them…**One expects that after the courts have ruled the Government would act responsibly and do what is right**." (Emphasis added.)

[50] The structure of our democratic government is analogous to a triangular pyramid. At the apex of the pyramid is the Constitution, which is the supreme law. At the base of the pyramid are the legislature, the executive and the judiciary. However, it is well recognised that the three organs of government do not operate in watertight compartments; the functions of the three are interrelated and reflect the manner in which they interact in practice. It is for the courts to determine the demarcation of the various functions based on an interpretation of the Constitution.

[51] ***Lord Hoffmann*** clearly explained the role of the courts in the demarcation of the functions of the three organs of government in ***R. (ProLife Alliance) v. British Broadcasting Corporation [2003] 2 WLR 1403 HL*** at 1422, where he said:

"75 …In a society based on the rule of law and the separation of powers, it is necessary to decide which branch of government has in any particular instance the decision-making power and what the legal limits of that power are. That is a question of law and must therefore be decided by the courts.

76. This means that the courts themselves often have to decide the limits of their own decision-making power. That is inevitable. But it does not mean that their allocation of decision-making power to the other branches of government is a matter of courtesy or deference. The principles upon which the decision-making powers are allocated are principles of law. The courts are the independent branch of government and the legislature and executive are, directly and indirectly respectively, the elected branches of government. Independence makes the courts more suited to deciding some kinds of questions and being elected makes the legislature or executive more suited to deciding others. The allocation of these decision-making responsibilities is based upon recognised principles. **The principle that the independence of the courts is necessary for a proper decision of disputed legal rights or claims of violation of human rights is a legal principle**…On the other hand, the principle that majority approval is necessary

for a proper decision on policy or allocation of resources is also a legal principle. Likewise, when a court decides that a decision is within the proper competence of the legislature or executive, it is not showing deference. It is deciding the law." (Emphasis added.)

[52] ***Lord Hoffmann*** speaking extra-judicially had earlier warned of the judiciary's need for caution in imposing financial obligations on the executive, in the absence of statutory provisions. He said in ***The COMBAR Lecture 2001: Separation of Powers [2002] JR 137*** at para. 26:

> "Decisions which will have impact on public expenditure are therefore one area in which the separation of powers requires the courts to tread carefully."

[53] It is the appellant's contention that there is no right given in the Constitution to be provided with financial resources to facilitate the acquisition of the services of an expert. Further, such a right "infringes and/or conflicts with the doctrine of the separation of powers" (paragraph [20], No. 2 above). We agree that there is merit in Mr. Clarke's submissions on this point.

(f) The form of the Order

[54] We hold, in agreement with the judge, that the respondent is entitled to a declaration pursuant to section 18(2)*(c)* and *(e)* of the Constitution. The appellant has not seriously contested the respondent's entitlement to facilities by way of a forensic odontologist expert and made an offer of a fixed sum to fund an expert report. However, the respondent regards this offer as inadequate. The respondent is entitled to adequate facilities; the determination of which is left failing agreement by the parties to the court. The issue before this Court is whether the respondent has a constitutional right to have the services of an expert funded by the financial resources of the state and whether it was appropriate for the High Court to make a mandatory order to that effect. We hold, in agreement with counsel for the appellant, that the respondent has no such constitutional right and is not entitled to a mandatory order for funding. In any event the terms of the order made by the judge were too wide and general; they imposed an open-ended funding obligation upon the state.

[55] It will generally not be appropriate for the court to make a mandatory order for the executive to carry out a constitutional function. This principle is illustrated most clearly from cases dealing with the enforcement of socio-economic rights provided for in some constitutions. For example, the Constitution of Ireland 1937 provides that where "in exceptional cases" parents "fail in their duty towards their children, the State as guardian of the common good, shall by appropriate means endeavor to supply the place of the parents *(sic)*". In ***T.D. v. Minister of Education, Attorney General et al [2001] 4 IR 259***, a High Court judge granted a mandatory injunction directing the Minister of Education to implement forthwith a policy which had already been formulated to deal with the problem of disadvantaged children in need of accommodation and treatment. However, on appeal, the Supreme Court of Ireland held that insofar as the order of the High Court purported to force the executive branch of government to implement a particular policy, the High Court had acted

in breach of the doctrine of the separation of powers. ***Keene CJ*** said at page 287:

> "I am satisfied that the granting of an order of this nature is inconsistent with the distribution of powers between the legislative, executive and judicial arms of government mandated by the Constitution. It follows that, as a matter of principle, it should not have been granted by the trial judge, however much one may sympathise with his obvious concern and exasperation at the manner in which this problem had been addressed at the legislative and executive level. It is of fundamental importance that each of the organs of government should not only carry out the duties imposed on it by the Constitution but should recognise…that the Constitution also defines the boundaries within which they are confined in carrying out their functions."

VI. ISSUE TWO – DENIAL OF FACILITIES AND THE RIGHT TO A FAIR HEARING

[56] The court makes a constitutional declaration on the assumption that the executive will faithfully comply with and carry it into effect. ***Saunders J*** in ***Benjamin*** expected that after the courts had ruled that the government would have acted responsibly and done what was right. ***Lord Hoffmann*** in the COMBAR lecture explained the obligation of the executive in relation to the authority of the court when he stated at para. 14:

> "Of course **the courts** have no direct means of **enforcing** the judgments by which they declare that an executive or legislative act…is **an infringement of the rights of an individual**. They **rely entirely upon the moral authority possessed by a court in a society which respects the law**. But respect for the law is in part based upon respect for the courts in their role as interpreters of the law. This makes it all the more important for the courts to show caution in their interpretation of the limits which human rights impose upon the powers of democratic institutions. The courts should not, under cover of the interpretation of the human rights of the individual, make decisions about what the general public interest requires…Once this happens, we have government by the judges rather than government by the people." (Emphasis added.)

[57] We must in the special circumstances of this case allow the executive to comply with and carry into effect the Court's declaration. The judiciary must treat the executive as a responsible body which in a democratic society will abide by the rule of law. It is important for all of the state's organs to perform their functions in such a manner as to give life to the spirit of the Constitution.

[58] In view of the Court's declaration of the respondent's rights under the Constitution, we do not envisage for the reasons already advanced that there will be a trial without the appellant being afforded facilities. Further, the appropriate time to consider whether there can be a fair trial is immediately before the trial takes place based on the relevant factors at the time and not in this appeal.

VII. ISSUE THREE – REDRESS FOR BREACH OF CONSTITUTIONAL RIGHTS

(a) Section 24 of the Constitution

[59] Chapter III of the Constitution makes provision for the protection of fundamental rights and freedoms in sections 12 to 23. Section 24 is directed at the enforcement of these entrenched rights and freedoms by way of an application to the High Court "for redress":

> "24. (2) The High Court shall have original jurisdiction –
>
> *(a)* to hear and determine any application made by any person in pursuance of subsection (1); and
>
> *(b)* …
>
> and may make such 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 12 to 23."

Section 13(4) of the Constitution provides separately that:

> "13. (4) Any person who is unlawfully arrested or detained by any other person shall be entitled to **compensation** therefor from that other person." (Emphasis added.)

It may be noted that there is no reference in either section to "damages" but a reference is made in section 13(4) to "compensation". The word "compensation" rather than "damages" is the appropriate term to use for a monetary sum awarded for a breach of a constitutional right.

[60] The redress that the applicant sought in the Notice of Motion included damages for breach of his constitutional rights and such orders and directions as may be necessary and appropriate. The applicant gave no evidence in his affidavit in support of his claim for damages. In this appeal, his sole complaint in respect of the relief granted by the judge is that the judge failed to award damages for breach of his constitutional right to a fair hearing within a reasonable time. In the submissions made before us no evidential basis was put forward to justify monetary compensation to the respondent. It is necessary to repeat that the applicant's claim was essentially for a funded expert witness to enable him to properly defend a serious charge; the judge granted the claim unconditionally. The judge also found that the delay had been "excessive" and that "his right to a fair hearing in a reasonable time" had been denied. However, the judge was of the view that the applicant could still get a fair hearing in spite of the 29 month delay in disposing of the preliminary inquiry. He therefore ordered the hearing by a fixed date and granted redress by releasing the applicant from custody on bail.

[61] We should record that the respondent did file a summons on 4 June 2008 to dismiss the appeal, a year having elapsed since the notice of appeal was filed. The summons was withdrawn and costs awarded to the respondent on the appellant's undertaking to obtain a date for the hearing of the

appeal.

[62] A defendant in a criminal case should have an interest in having a hearing of his case within a reasonable time. However, the ultimate responsibility rests with the prosecution to ensure a hearing within a reasonable time. In this context, it is worth quoting the observation of the Supreme Court of New Zealand which considered section 25(b) of the New Zealand Bill of Rights Act 1990 which guarantees to everyone who is charged with an offence "the right to be tried without undue delay". In ***R v. Williams [2009] 2 NZLR 750*** at 751 the Court stated:

> "Whether there has been undue delay in a particular case is a function of time, cause and circumstance. Undue in this context is synonymous with unjustifiable. An accused may acquiesce in the delay, whether in the expectation that it will make the task of the prosecution more difficult or because it defers the day of reckoning. There is no obligation on any accused to progress matters towards trial, nor *(sic)* to protest about delay; the obligation is on the prosecution to ensure trial without undue delay. Whether delay is attributable to the courts or to the prosecution is irrelevant to the determination of the question of excessive delay, but may be relevant in assessing the validity of any explanation for the delay and (if necessary) what remedy should be granted."

(b) Compensation

[63] It was Mr. Smith's submission that the redress did not go far enough and that the applicant was entitled to an award of damages. The ambit of section 24 especially in respect of an award of compensation has not been explored in any depth in this jurisdiction. However, there is binding authority on this Court emanating from the Privy Council which throws some light on the current approach to the assessment of compensation for breach of a constitutional right. ***Inniss v. Attorney General of Saint Christopher and Nevis (2008) 73 WIR 187*** was a case in which the Privy Council held that there was a "flagrant breach" of the appellant's constitutional right, which "the executive chose to ignore because it was an obstacle to the appellant's removal from her post quickly" (para. [28]) and upheld the trial judge's award of damages. ***Lord Hope of Craighead*** said at para. [24]:

> "The principles on which damages for breaches of constitutional rights are to be assessed are not greatly developed…But sufficient guidance is available from judgments that the Board has given, and their Lordships have been assisted also by observations by the judges of the New Zealand Supreme Court in *Taunoa v A-G* [2007] 5 LRC 680."

We therefore consider and set out a summary of the authorities on this topic in an effort to determine whether the judge should have granted the applicant additional relief by an award of compensation.

[64] The most recent and authoritative statement on the award of constitutional compensation was made by the Privy Council in a case of assault, unlawful arrest and detention by a police officer in Trinidad and Tobago in which the applicant was awarded compensation under section 14 of the Constitution for breach of his constitutional rights: ***Attorney-General v. Siewchand Ramanoop***

(2005) 66 WIR 334. ***Lord Nicholls of Birkenhead*** stated:

> "[17] Their lordships view the matter as follows. Section 14 recognises and affirms the court's power to award remedies for contravention of Chapter 1 rights and freedoms. This jurisdiction is an integral part of the protection which Chapter 1 of the Constitution confers on the citizens of Trinidad and Tobago . It is an essential element in the protection intended to be afforded by the Constitution against misuse of State power. Section 14 presupposes that, by exercise of this jurisdiction, the court will be able to afford the wronged citizen effective relief in respect of the State's violation of a constitutional right. This jurisdiction is separate from and additional to ('without prejudice to') all other remedial jurisdiction of the court.
>
> [18] When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. **If the person wronged has suffered damage, the court may reward him compensation**. The comparable common-law measure of damages will often be a useful guide in assessing **the amount of this compensation**. But this measure is no more than a guide, because **the award of compensation** under s 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law. (Emphasis added.)
>
> [19] **An award of compensation** will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. All the elements have a place in this additional award. 'Redress' in s 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions 'punitive damages' or 'exemplary damages' are better avoided as descriptions of this type of additional award. (Emhasis added.)
>
> [20] For these reasons their lordships are unable to accept the Attorney-General's basic submission that a monetary award under s 14 is confined to an award of compensatory damages in the traditional sense".

From the above it is clear that "the person wronged" must have "suffered damage" in order to be entitled to an award of compensation.

[65] ***Ramanoop*** was applied in ***Merson v. Cartwright and Another (2005) 67 WIR 17 PC***, a case in which the appellant had been verbally and physically abused by police officers. ***Ramanoop*** was followed in ***Fraser v. Judicial and Legal Services Commission and another (2008) 73 WIR 175 PC***, in which a magistrate was removed from office in breach of his constitutional rights and awarded compensation. ***Ramanoop*** was also considered in ***Inniss***, a case of the removal from office of a registrar and magistrate in flagrant breach of the Constitution and for which she was awarded compensation. The paragraphs from ***Ramanoop*** referred to above were also quoted in

the recent case of ***Takitota v. The Attorney General and others (Bahamas) [2009] UKPC 12*** (18 March 2009). In that case a Japanese national was awarded substantial damages for his unlawful detention for over eight years in a Bahamas prison.

[66] ***Ramanoop*** was also applied in ***Alphie Subiah v. The Attorney General of Trinidad and Tobago [2008] UKPC 47*** (3 November 2008), a case in which a public transport official was awarded damages for assault, abuse and detention. ***Lord Bingham of Cornhill*** said at para. 11:

> "The Constitution is of fundamental importance…Those who suffer violations of their constitutional rights may apply to the court for redress, the jurisdiction to grant which is an essential element in the protection intended to be afforded by the Constitution against the misuse of power by the state or its agents. Such redress may, in some cases, be afforded by public judicial recognition of the constitutional right and its violation. But ordinarily… constitutional redress will include an award of damages to compensate the victim. **Such compensation** will be assessed on ordinary principles as settled in the local jurisdiction, taking account of all the relevant facts and circumstances of the particular case and the particular victim. Thus **the sum assessed as compensation** will take account of whatever aggravating features there may be in the case, although it is not necessary and not usually desirable…for the allowance for aggravated damages to be separately identified. **Having identified an appropriate sum** (if any) **to be awarded as compensation**, the court must then ask itself whether an award of that sum affords the victim adequate redress or whether an additional award should be made to vindicate the victim's constitutional right." (Emphasis added.)

[67] However, a Privy Council decision from Trinidad and Tobago in which their Lordships declined to grant constitutional redress beyond a declaration was ***Independent Publishing Co. Ltd. v. Attorney-General and another (2004) 65 WIR 338*** at para. [76]. In that case it was declared that the right to free expression should not thereafter be contravened by non-publication orders made in excess of the court's jurisdiction.

[68] We are satisfied that in the instant case the judge decided correctly not to award compensation to the applicant. The applicant suffered no damage. He was lawfully detained and not abused. The focus of his application was for an expert witness at his trial. The redress granted by the judge was tailored to the primary relief sought in the application; the provision of an expert witness. The judge properly followed the guidance given in the Privy Council case of ***Prakash Boolell v. The State (Mauritius) (2006) 26 BHRC 552, [2006] UKPC 46*** (16 October 2006). The case quoted with approval the statement in ***Attorney General's Reference (No. 2 of 2001) [2004] 2 AC 72*** made by ***Lord Bingham of Cornhill*** at para. 24:

> "If the breach is established before the hearing, the appropriate remedy may be a public acknowledgment 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."

[69] We therefore hold, in agreement with the judge, that at the date of his decision he properly exercised his discretion not to award compensation to the appellant, but to order that the appellant be facilitated with the expert witness and tried within the stipulated time pending which he be

released on bail.

(c) Stay or dismissal of proceedings

[70] It was part of the applicant's motion that the charge be permanently stayed or dismissed (paragraph [14] above at No. 11). The judge made no order on this part of the application (paragraph [18] above). However, Mr. Smith did take some responsibility for the fact that the matter was not fully canvassed before the judge. He therefore tried to resurrect the matter before this Court. It is for this reason that we should state clearly the legal position on a stay or dismissal of the charge.

[71] It has been recognised that section 18(1) of the Constitution contains three separate guarantees: (i) a right to a fair hearing; (ii) within a reasonable time; and (iii) by an independent and impartial court. However, these guarantees have been interpreted as three elements of one embracing whole. Thus a breach of the reasonable time guarantee will not automatically make the trial or the impending trial unfair. This was definitively decided by the House of Lords in ***A-G's Reference (No. 2 of 2001)*** where the right to a fair trial was described as "the core right" (para. 10). The Privy Council in ***Boolell*** adopted the above position.

[72] ***Boolell*** endorsed the further statement of ***Lord Bingham*** at para. 24 of ***A-G's Reference (No. 2 of 2001)*** as follows:

> "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 requires that such a charge should not be stayed or dismissed if any lesser remedy will be just and proportionate in all the circumstances."

[73] The most serious crime possible was committed against Francine Bolden. Murder is "a crime which has long been regarded with peculiar abhorrence": per ***Lord Bingham*** in ***R. v. Lichniak [2003] 1 A.C. 903*** at para. 14. Justice demands that the respondent, having been charged and indicted for murder, should be tried for the same. If he is innocent, he should be acquitted. If, on the other hand, he is guilty, he should be convicted. The delay, regrettable as it is, should not be used by him as justification for failure to try to establish his innocence at a trial. Persons charged with serious crime must be tried; they cannot expect to avoid a trial by, in some cases, contributing to the delay of their trial.

VIII. DISPOSAL

(a) General comments

[74] Since criminal trials depend more on expert scientific evidence, the demand for funding to procure that evidence will place a growing financial obligation on the state. Such evidence is being sought even as part of the sentencing process. In a recent Privy Council appeal from St. Vincent, the

convicted murderer had sought at the sentencing hearing to adduce additional evidence in the form of a psychiatric report and neuropsychology reports but without success because of the lack of funding available to an indigent defendant to obtain them. However, the Privy Council did not express any opinion on this ground of appeal in the light of the fact that the appeal was resolved on other grounds in favour of the appellant whose sentence of death was substituted by one of life imprisonment: ***Trimmingham v. R. (St. Vincent and the Grenadines) [2009] UKPC 25*** (22 June 2009) at paras. 19 and 24.

[75] We have not found it important to refer to the American constitutional cases discussed in the judgment of ***Blackman J*** and those cited by Mr. Smith. It seems to us that an assessment of the relevance of the cases to this jurisdiction requires a good understanding of the manner in which the institutions of the United States of America are structured and the role that the courts play in constitutional adjudication. We nevertheless appreciate the industry expended in producing these cases but do not consider it necessary to undertake the extensive examination which they would entail.

[76] ***Blackman J*** in his judgment has made a worthy contribution to the developing jurisprudence on the fundamental rights and freedoms of the individual provided for in the Constitution. In addition to his helpful judgment, we have had the benefit of written and oral submissions of a high standard from both Mr. Clarke and Mr. Smith. They have also provided us with extensive authorities which have enabled us to resolve the issues.

(b) **Costs**

[77] During the hearing of the appeal the Court expressed its concern about the costs implications of the appeal whatever the result. However, it was made clear to us that the appellant required a definitive determination of the constitutional issues raised in the appeal. The Court has a wide discretion on the award of costs (Rules of the Supreme Court, 1982, Order 62, Rule 1(1)) and the guiding principle is that the order for costs should give "a just result" (***Denning LJ*** in ***Chell Engineering Ltd. v. United Tool and Engineering Co. Ltd. [1950] 1 All E.R. 378*** at 383). Although the appellant has been successful on the "funding" point in relation to the form of the Order, the judgment of ***Blackman J*** remains essentially intact. In the special circumstances of this case and in the light of its constitutional importance, the respondent should not be deprived of all of his costs. We therefore confirm the Order made for costs in the High Court but would limit the costs of the respondent in this Court in a similar manner as ***Blackman J*** did by allowing costs for only three days of hearing taking into account that the appellant was partially successful and that the respondent's cross-appeal on compensation was unsuccessful. The respondent is also entitled to his costs for the two applications pending the hearing of the appeal referred to in paragraphs [19] and [61] above. We would make our Order subject to any written submissions as to costs which the parties may wish to file within 21 days of the date of this judgment for our further consideration, failing which our Order becomes absolute.

(c) Order

[78] We set out the Order that we consider to be the correct response to the appeal as follows:

1. A declaration that pursuant to section 18(2)*(c)* and *(e)* of the Constitution the applicant/ respondent shall be given adequate facilities for the preparation of his defence and be afforded facilities to examine in person or by his legal representative 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 behalf before the court on the same conditions as those applying to witnesses called by the prosecution.

2. A declaration that section 18(2)*(c)* and *(e)* of the Constitution gives the applicant/ respondent no constitutional right to be provided with financial resources to obtain the attendance of an expert in the field of forensic odontology and other expert witnesses.

3. That the respondent have his costs against the appellant, here and in the court below, certified fit for two attorneys-at-law to be agreed or taxed in terms of paragraph [77] above.

The respondent's trial should have taken place long ago and in accordance with ***Blackman J's*** Order more than two years ago. It follows that the matter should be treated as one of extreme urgency.

Justice of Appeal

Justice of Appeal Justice of Appeal