BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Criminal Appeal No 7 of 2011

Between

CARLOS CLIFTON NILES **Appellant**

-AND-

HER MAJESTY THE QUEEN **Respondent**

Before the Honourable Sir Marston Gibson K.A., Chief Justice; the Honourable Madam Justice Sandra P. Mason; and the Honourable Kaye C. Goodridge, Justices of Appeal

2015: February 10
March 18 and 31
July 9

Mr. Mohia Ma'at for the Appellant
Mr. Elwood Watts for the Respondent

DECISION

GIBSON CJ:

Introduction

[1] I have had the invaluable advantage of reading in draft the judgment of her Ladyship Hon. Kaye Goodridge, Justice of Appeal, and I concur in the result. However, I write separately to give a more detailed look at the

underlying facts as detailed in the transcripts of this matter. The appellant, Carlos Clifton Niles, was charged that, on 1 November 2008, he destroyed by fire the dwelling house belonging to Mildred Carmichael, ("MC") contrary to **ss. 3** and **5** of the ***Criminal Damage Act, Cap. 113B*** of the ***Laws of Barbados***. On 7 October he was convicted of arson and sentenced to 15 years imprisonment. This appeal ensued.

[2] The appellant filed two grounds of appeal, namely (1) that the learned trial judge failed to adjourn the matter to allow him adequate legal representation and/or to prepare his defence; and (2) that the verdict was unsafe and unsatisfactory.

Factual and Procedural Background

[3] The appellant refers only to pages 5, 9 and 10 in the trial record but it is my judgment that there needs to be a fuller examination of the entire trial record to get a true flavour of what actually transpired before the Trial Judge. The trial began on 29 September 2010. Immediately after the arraignment, the Trial Judge informed the appellant of his entitlement to jury challenges, and asked him if he had any concerns with the jury, to which he replied "Not at all, ma'am." Asked if he was satisfied, he replied "Yes, ma'am."

[4] The Judge then read out to the jury the names of the 12 witnesses in the case and asked the jury to select a foreman. She, thereafter, asked the jurors to

withdraw in the custody of marshals. The following exchange then occurred at pp. 5-7:

> THE COURT: Yes, Mr. Niles
> THE ACCUSED: Morning, m'am.
> THE COURT: Good morning. I see you have your envelope there, I suppose that has in all your papers, you haven't yet opened them but the case is about to start and I wanted to know if you had any questions or queries you want - - you had for the Court, at this point.
> THE ACCUSED: You had told me that I was supposed to be here on the 18th October, so this is all a surprise to me this morning when you tell me I had to do it today
> THE COURT: Well, the 18th October is a call day, a general call day.
> THE ACCUSED: Okay
> THE COURT: And this matter, as we know, was always going to come off for trial in this session. When cases fall through, we bring up cases, so - -
> THE ACCUSED: I was just curious, ma'am, there is no issue. I was just curious why - -
> THE COURT: You were curious?
> THE ACCUSED: Yes. Just that it is a surprise to be here this morning.
> THE COURT: It should not be a surprise because you are indicted for an offence, since what? 2010, but this is a matter that's been going on for a little while, 2008, and we are getting through our cases.
> THE ACCUSED: Yes, ma'am.
> THE COURT: So that is what happens.
> THE ACCUSED: No problem, ma'am.
> THE COURT: Good. So you have your depositions, do you not?
> THE ACCUSED: Yes, ma'am.
> THE COURT: And you are, essentially - - You have your paper and pen, and so on?
> THE ACCUSED: Yes, ma'am.
> THE COURT: You have your pen and paper?
> THE ACCUSED: Yes, ma'am.
> THE COURT: And your indictment.
> Now, there are some oral statements, Mr. Hurley, would you take us to those?
> You have your Indictment there, right? The indictment with the list of witnesses at the back.
> THE ACCUSED: Yes, ma'am.
> THE COURT: Well, the Crown will be calling - - you know how the court goes. Mr. Hurley is going to open his case and he is going to call his witnesses. The witnesses at the back of the indictment. There are 12 witnesses in this case.
> THE ACCUSED: I am familiar with the process, ma'am.

[5] The Trial Judge immediately warned the appellant, at p. 7, that he was not "to let the jury know about any familiarity with this process or let them know that you have, if you do, any previous convictions or any pending matters before the courts, anywhere." She continued that "in your questioning and in any of the comments or addresses that you are making, please do not mention to the jury or alert them that you have any priors or pending matters before any courts, whether this or other courts, anywhere. Yes?" The appellant replied, "Yes, ma'am, I don't."

[6] During the Trial Judge's explanation of the procedure for calling witnesses, the following exchange occurred at pp. 9 - 10:

> THE COURT: So in the meantime, Mr. Hurley is going to be calling the nine witnesses listed on the back of the indictment, which are the Crown's witnesses.
> Now, Mr. Hurley, would you also mention to me the particular witness where these orals are? And I want to ask him certain questions about those.
> MR. HURLEY: The first oral is on page 16 of the evidence of Philmore - -
> THE COURT: Please turn to page 16 of your indictment, Mr. Niles. It's a blue page.
> THE ACCUSED: I know, ma'am.
> THE COURT: Page 16.
> THE ACCUSED: Yes, ma'am.
> THE COURT: It's on the other side, I think. Turn over. That's page 16?
> THE ACCUSED: *I have a problem with my eyes because I don't have my glasses, ma'am.*
> THE COURT: Where are your glasses?
> THE ACCUSED: They're home and they are essentially broken. I asked my aunt to get them, she's sickly, no one is available to bring them to me.
> THE COURT: *You have a problem reading now*?
> THE ACCUSED: *I can read but a little blurry so I just need a little time*.

[Emphasis added]

[7] It soon became obvious that the appellant's reading was not his real complaint as was made clear in the following discussion, at pp. 11- 13:

> THE COURT: Do you know the procedure now? If you do not agree that what is here is what you said, are there any of these orals that you will be objecting to?
> THE ACCUSED: *I don't think so, ma'am. It is just the way that the officers put, describe the way I speak, it is not the way I speak though, "ent", "em", and "ain't" and all that, and "she" and "that". I don't really speak in that manner.*
> THE COURT: Well, I don't know if - -
> THE ACCUSED: It's got a slang to it - -
> THE COURT: So you are objecting to the bad language or the bad English?
> THE ACCUSED: The bad English.
> THE COURT: The bad English?
> . . .
> THE ACCUSED: I never said it like that. . .
> THE COURT: If that is your point.
> THE ACCUSED: It's like, I ent - - I ent know nothing 'bout no fire" I would never have said that. I would have said, "I don't know anything about any fire."
> . . .
> THE ACCUSED: *They're portraying me like as illiterate or something*.
> THE COURT: That is one type of objection you can make. That is really not really, I mean - -
> THE ACCUSED: *It's not a big significance but I just want to point it out*.

[Emphasis added]

[8] Later, at pp. 14-15, when the Trial Judge asked the appellant whether he had made a statement that "I ent know nothing about burning no house," he replied "I never said that." The Trial Judge asked "but did you, in effect, say it in good English", and the appellant replied "Yes." The Trial Judge rephrased the question and asked, "I do not know anything about burning any house," to which the appellant replied: "Yes, I did say that." He then told the Trial Judge that "[t]he written format is totally different." Later, he

told the Trial Judge that "I don't want to hold up the matter with that trivial stuff. . .I just wanted the Court to be aware of it. That's all."

[9] Apart from this colloquy with the Court, there is no reference in the trial record to the appellant ever requesting an adjournment or objecting to the commencement and continuation of the trial. It is also clear that the appellant had no objection to the admission of the written statements other than his discomfort at being portrayed "as illiterate or something."

[10] At pp. 17-18 of the Trial Record, the Trial Judge cautioned the appellant that "[t]hat statement is going to go into evidence" and asked that "[i]f you have any objections to anything that's in there. You didn't say anything or you agree with it, you can say that you consent to it going in but if you don't want it to go in you will tell me why." The appellant replied: "I have no problem with it going in." The Trial Judge again cautioned the appellant in the following exchange:

> THE COURT: So you understand then, how we are going?
> THE ACCUSED: Yes, ma'am.
> THE COURT: Any questions.
> THE ACCUSED: No, ma'am.
> THE COURT: Good. And as I cautioned you earlier, do not bring out anything about priors or previous, or pending matter or anything that is prejudicial; to the jurors.
> MR. HURLEY: Yes, My Lady, that would include the fact that he is a deportee from the United States.
> THE COURT: He's where?
> MR. HURLEY: Deportee, from the United States.
> THE ACCUSED: That statement is totally irrelevant to this case.

> THE COURT: Well, I agree. I completely agree but Mr. Hurley is being careful. He's being careful, and don't' forget, the jurors who would decide anything are not here.
> THE ACCUSED: Yes. Ma'am.
> THE COURT: And it does not mean anything to me. We all know that people of all types come before the courts.
> THE ACCUSED: Yes, Ma'am.
> THE COURT: All right. It doesn't mean anything to me that you are a deportee. It doesn't matter to me. I am not the one who has to decide anything.
> THE ACCUSED: It's not even a true statement anyhow.
> THE COURT: All right. So fair enough. So please do not let any such things come out in the presence of the jury." Thank you very much, Mr. Hurley, I think we can proceed.
> MR. HURLEY: Yes, My Lady.
> THE COURT: Mr. Niles, we can proceed?
> THE ACCUSED: Yes, ma'am.

[11] The appellant actively participated in the trial. During her evidence in-chief, MC testified that she moved out of the house after an argument with the appellant and went to live at her sister who lived on the same road. MC stated that the appellant had asked her sister's daughter if she (MC) was there and had told the sister's daughter that if MC did not come back to the house, he was going to "F. . .up" the house. Thereupon, the appellant stated: "I object Your Honour, that is hearsay. This is hearsay." The Trial Judge said: "Yes, you are correct", and asked MC, "who did he speak to", to which she replied, "my sister's daughter. . ." The Trial Judge ruled: "The objection is sustained." The appellant responded: "Thank you, ma'am."

[12] During the appellant's cross-examination of MC, he questioned her regarding the ownership of the personal items which were destroyed. MC

told him that there was a TV which belonged to him and she was about to give a list of all the items destroyed when the appellant told the Trial Judge that he "didn't ask her for a list of things." On being asked by the Judge if he wanted MC to finish the list, the appellant replied: "She can forget it. The point in issue that some of the stuff was mine, and the stuff that I destroyed was mine." He further stated that he "ha[d] no knowledge of other things" to which MC wished to refer and told the Trial Judge that he did not want MC to finish answering the question. The Trial Judge commented: "So we have a half answered question then where we interrupted a list of things that she was giving. All right. Next question."

[13] The appellant also asked MC whether she had hired a carpenter to do work on the house on the day in question and inquired whether she had told the police that she had left someone at the property. MC answered that she had not. He also queried whether her son was able to get into the house without a key. MC answered no, but she indicated that the appellant had showed her how to get into the house without a key through a door with louvres which could be pushed up even when the door was locked. The appellant objected "[b]ecause that door doesn't have any louvres in it."

[14] The next witness was MC's sister, Hazel, who explained that she lived close to MC. The prosecutor asked her how long it would take for her to get to

MC's house and she replied that she could not answer that since it depended on whether she was in a hurry or was walking slow. She noted that if she had stopped to talk with someone, it could take her 20 minutes. The following exchange then occurred:

> Q. Suppose you didn't stop to talk with anybody. Suppose you left your house and walked to Mildred's house- -
> THE ACCUSED: Object, Your Honour. I am going to object.
> The witness has already said that she doesn't how exactly how long it would take. The prosecutor is trying to lead the witness.
> THE COURT: Yes, Mr. Hurley.
> THE ACCUSED: She already explained she doesn't know and he is still insisting, ma'am.
> THE COURT: All right. Sustained. Go ahead, Mr. Hurley. Move on.

[15] The main evidence against the appellant was the testimony of Police Constable Richard Bailey ("PC Bailey") and that of Errol Bradshaw. PC Bailey, who was attached to the Forensic Scenes of Crime Unit located at Central Station, testified that, on Saturday 1 November 2008, as a result of a report of a burglary at MC's residence, he went to the residence at Browne's Gap, Hothersal Turning. On arrival there at 2:00 p.m., he observed that the residence was secured and no one was at home. He then observed a gentleman coming from the rear of the residence. He described the gentleman as five feet, six inches tall with a low haircut, thick eyebrows, mustache and beard. The man was barebacked, wearing a three-quarter jeans pants and holding what appeared to be a red shirt n his hand. As the man got close to him, he asked the man if this was MC's address but the

man, who was looking in his direction, did not answer and walked past him towards Hothersal Turning.

[16] PC Bailey walked towards the house and knocked but there was no answer. He spoke to a neighbour who directed him to MC's sister, Hazel, who got into the vehicle which Bailey was driving and she drove with them back to the residence. There, PC Bailey stated, he noticed a lot of smoke coming from the front section of MC's residence and observed a man with a garden hose trying to put out the fire.

[17] The prosecutor, acknowledging that PC Bailey was not an expert, then asked PC Bailey whether it was "possible to set the scene for fire, so to speak, set it up that the fire doesn't actually erupt or whatever until minutes later?" The Trial Judge immediately stated: "I won't allow him to answer the question unless you can establish that he is some sort of expert." The appellant added: "I object to that anyway", and the Trial Judge stated that the question "seem[ed] to be hypothetical." The objection was sustained and the question disallowed.

[18] Errol Bradshaw, an Island Constable and Justice of the Peace, lived next door to MC and had known her for over 40 years. He had also known the appellant for about six years since the appellant "was living at [MC] and he was [MC's] boyfriend." Bradshaw testified that, at about 2:10 p.m., on

Saturday 1 November 2008, he was at the side of his house which faced MC's house when he saw fire and black smoke coming from MC's house. Then he saw "Mr. Carlos" exiting from the side door and told him: "You mean you now burn down the lady's house." Bradshaw noticed that "a ball of smoke and fire went up in the air and the house was on fire." He said that he could see the door and that he had a clear view of the appellant from a distance of about 20 feet. He recalled that the appellant was barebacked, wore a three-quarter length jeans pants and cream boots, and was carrying a red shirt in his hand. The appellant walked swiftly down the gap.

[19] The appellant cross-examined Bradshaw as to how long he was standing at the side of the house. Bradshaw estimated that from about five minutes to 2:00 for over an hour, he had stood by the side of the house. Asked by the appellant if he had seen anyone else, Bradshaw replied that "[o]nly my one was at the side of the house." He added that "I only saw him", meaning the appellant, after 2:00 o'clock. Bradshaw testified that he had not seen anyone else and had not seen the appellant and a police officer together. He stated that the officer was not there when the appellant came out of the house.

[20] The appellant sought an explanation from Bradshaw as to how Officer Bailey testified that he was at the scene at 2 o'clock and that the house was not on fire until he returned later, and that Bradshaw testified that had seen

the house on fire at 2 o'clock. Bradshaw responded that when the police vehicle came up, the house was not burning at that time and he had told the officer to go 'round the corner by MC's sister. The appellant put it to Bradshaw that he had just said that he had seen no one and that he had not seen the appellant, to which Bradshaw replied: "I saw you, ma'am. I saw you. I saw you and I will never tell a lie on you. I saw you."

[21] In light of what the appellant perceived as a discrepancy between the testimony of PC Bailey and that of Bradshaw, the appellant applied to the Court to recall PC Bailey. In his explanation to the Trial Judge, he stated that PC Bailey testified that he saw the appellant walk past him and leave the scene, and that both PC Bailey and Bradshaw said that they saw him at 2 o'clock at the scene, and yet neither one saw the other. The appellant also noted that while Bradshaw saw a ball of fire, PC Bailey did not.

[22] The Trial Judge ruled, at p. 164 of the Trial Record, that "i]t is relevant to this man's defence that the timeline be clearly established and I think that it is in the interest of justice that that be done." On recall, PC Bailey testified, in answer to the appellant's questions, that sometime about 2:00 p.m., he saw the appellant walk past him and he (PC Bailey) went to the house, knocked, and said good afternoon but got no answer. He then stepped back into the road and saw the gentleman who lived opposite the house. The

appellant has already passed him and walked towards Hothersal Turning Main Road. PC Bailey was then directed to the home of MC's sister. He said that it took him about two minutes to get to the sister's house and a total of nine to 10 minutes to get back to the scene. He no longer saw the appellant at that time.

[23] After the Crown closed its case, the appellant gave an unsworn statement from the dock. He stated that he was told on the day in question that the police were looking for him and he assumed that it had to do with a prior incident where he had gone to his and MC's workplace and her co-workers had run from him in fear. He also called three witnesses "just to verify some of what I just told this Court and the jury." They all testified that they had seen the appellant sometime between 10:00 a.m. and 12:30 a.m., but not afterwards. The appellant rested his case.

[24] The appellant gave a closing address to the Trial Judge and jury, pointing out discrepancies between the deposition testimony of one witness and the witness' testimony in the trial transcripts. He concluded his address by stating to the jury that the forensic expert opined that:

> 'the fire started in the area of the living room . . . he is not able to state a cause with any scientific certainty. A cause without any scientific certainty. Now arson is a crime and I am charged with arson. Arson is also a cause, in this case, it is a cause. Mr. Philmore Hall, officer Philmore Hall arrested me and charged me with that cause, action (sic). And the forensic states that they cannot determine the cause, so there is no cause, there should be no

> action. I therefore hope that you will take all of this, this chain of evidence and find me not guilty.'

The Contentions

[25] Mr. Ma'at for the appellant candidly conceded that Ground 2 which states that the verdict was unsafe and unsatisfactory is, in fact, parasitic on the success of Ground 1 and there is, in reality, only one ground of appeal. The gravamen of that ground was that the Trial Judge's failure to adjourn the matter was a violation of **section 18(2)(c)** of the ***Barbados Constitution*****.** In support of his contention, Mr. Ma'at referred to the trial transcript at page 5, lines 15-17, page 9, lines 23-25, and page 10, lines 1-7, and cited in support the Privy Council decision in ***Brown v Stott [2003] 1 AC 681, 708*** (*per* ***Lord Steyn***) and this Court's decision in ***Willoughby, Reeves and Goddard v R, (1996) 54 WIR 57*** ("***Willoughby, Reeves and Goddard***"). The Crown contends that neither the ***Constitution***, the cases cited nor the pages in the trial transcript provide any basis for the appeal.

Discussion

[26] Initially I must note that the decision in ***Brown v Stott [2003] 1 AC 681, 708*** is not relevant to any of the issues in this case. That case concerned the question whether **section 172 (2)(a)** of the ***UK Road Traffic Act*** was incompatible with a defendant's right to a fair hearing under ***article 6(1)*** of the ***European Convention for the Protection of Human Rights*** insofar as

section 172 compelled a person suspected of driving while intoxicated both to answer whether she had been driving a car *and* to provide a breath sample for analysis. The Privy Council answered the question in the negative. What was really at stake in ***Brown*** were the privilege against self-incrimination and the right to silence, and therefore the observations of ***Lord Steyn*** at p. 708 must be understood within the context of a discussion of those rights and the specific provisions of the legislation and Convention, neither of which is applicable here.

[27] **Section 18(1)** of the ***Constitution*** provides, so far as pertinent, that "[i]f any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law." **Section 18(2)(c)** provides that "every person who is charged with a criminal offence ---….. shall be given adequate time and facilities for the preparation of his defence." This section was discussed at length in the Caribbean Court of Justice ("CCJ") decision in ***Frank Errol Gibson v AG, [2010] CCJ 3 (AJ)***. There, the issue was whether the "facilities" provision in **section 18(2)(c)** required the State, at its own expense, to provide for the services of an expert (a forensic odontologist), where the only evidence against him was an

alleged bite mark on the body of the victim with whose murder he was charged. The Crown alleged that the bite mark was left by him.

[28] The CCJ observed that, while there was no constitutional requirement in all cases to provide such expert services, the case would be "better assessed in the context of his right to a fair trial." (see, ***Gibson v R***, at para. 34). The CCJ continued that "[a] court may only make such an order (providing for the services of a State-funded expert) if, *after a careful examination of the facts* of the particular case the court considered that a fair trial required it" (para. 36), and their Honours noted that "[w]here the complaint [that the appellant was deprived of a fair trial] is successfully made after a trial has concluded an appellate court is obliged to quash any conviction arising from the hearing." (see, para. 35; emphasis added).

[29] **Section 18(2)(c)** of the ***Constitution*** was applied by this Court in ***Willoughby, Reeves and Goddard***, *supra*, a decision cited by the appellant. The three appellants in that case were convicted on 29 April 1994 of robbery with aggravation. ***Willoughby*** had a previous conviction for armed robbery and was sentenced to 15 years' imprisonment. ***Reeves*** also had a previous conviction for being found in possession of implements of house breaking and he too was sentenced to 15 years' imprisonment. ***Goddard*** had no previous convictions and was sentenced to 10 years' imprisonment. The

appellants were sentenced on 4 May 1994 and on the following day, each of them completed forms giving notice that he wished to appeal against his conviction and/or sentence on the ground, among others, that the trial judge had failed to grant an adjournment to enable him to review the depositions. Counsel for ***Willoughby*** and ***Goddard*** contended that the Trial Judge erred in law by failing to grant an adjournment to permit him to study the depositions and prepare his defence. In his argument before this Court, counsel submitted that there was a breach of **section 18(2)(c)** of the ***Constitution***.

[30] In their sworn affidavits, ***Willoughby*** and ***Goddard*** each deposed that the first time he saw the notes of evidence from the preliminary inquiry was on the morning of the trial in the High Court when the notes were given to him. Each indicated that he had asked the trial judge for an adjournment to study the depositions but the judge denied the request and the trial commenced. Each also stated that he heard evidence at the preliminary inquiry but did not remember much of it by the time of the trial and that there were a number of occasions during the trial when he was confused about the issues. Moreover, each swore that he had been told at the magistrate's court that he would be given a copy of the depositions and had been awaiting the depositions to allow him to prepare his defence. Appellant ***Goddard*** added

that, while on bail, he visited the offices of the Law Courts to get his depositions on many occasions but was always told that they were not ready.

[31] ***Sir Denys Williams, CJ*** observed, at pp. 58-59:

> 'It is in our view noteworthy that from the beginning all three prisoners were claiming that they unsuccessfully sought an adjournment for the purpose of reviewing the depositions. Two have sworn that they were given copies of the depositions on the morning of the trial by Insp. Corbin and this has not been contradicted. It seems likely that the third prisoner would have been given his copy at the same time. It is our view that in all the circumstances the safe course is to quash the convictions and set aside the sentences.'

[32] What is clear from ***Willoughby, Reeves and Goddard*** is that the appellants had clearly requested, and had been denied, an adjournment after only recently having received their depositions from the preliminary inquiries. This is to be contrasted with the case at bar.

[33] While the CCJ decision in ***Frank Errol Gibson*** does not apply directly to this case, I believe, however, that the dicta referred to above in that decision case, requiring "a careful examination of the facts of" each case of an alleged deprivation of a fair trial, provides a guidepost as to the procedure to be adopted in reviewing such claims. It is for that reason that I have set out, in perhaps more detail than may be required, the relevant portions of the trial transcript, including the pages referred to by Mr. Ma'at. The transcript reveals that the appellant was fully engaged in representing himself at the

trial (cf., **section 18(2)(d)** of the ***Constitution*** – right to defend himself before the court in person or by a legal representative of his choice).

[34] It is clear that at no point did the appellant ever seek an adjournment or make it known to the Trial Judge that he needed time to prepare. Indeed, he came into the Court with his envelope containing all his papers, and his closing argument pointed to discrepancies between deposition testimony and alleged contradictions at trial, something that could not happen if he had not read the depositions. His only concern, indeed his real concern, was that his statement as produced by the police witness was written in a way which depicted him "as illiterate."

[35] He conducted cross-examination of key witnesses and made evidentiary objections, several of which the Trial Judge sustained. Dissatisfied with the testimony of one of the police witnesses in cross-examination, PC Bailey, the appellant successfully applied to the Trial Judge for the right to recall the officer whom he cross-examined again. Moreover, he called three witnesses and made an unsworn statement from the dock. Finally, the appellant also made an address to the jury in which he challenged the findings of the forensic expert as to the cause of the fire. The appellant's defence at trial did not suffer from a lack of preparation time or the absence of a fair trial.

[36] In the Privy Council decision in ***Kemrajh Harrikissoon v AG***, ***(1979) 31 WIR 348, 349 f-h, Lord Diplock***, delivering the opinion of the Board opined as follows:

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

[37] ***Harrikissoon*** concerned the right of a public officer in Trinidad and Tobago not to be transferred where the public officer did not avail himself of a remedy provided by legislation but sought redress under the Bill of Rights provisions of the Trinidad and Tobago Constitution. But the *dicta* of ***Lord Diplock*** apply with equal vigour to cases seeking appellate review by this Court of the action taken by a Trial Judge, alleging violation of the Constitution, where no request was made of the Judge which permitted her the opportunity to cure her alleged "failure". Such applications risk reducing our highest law to the level of the banal and the mundane.

[38] On these facts, there is no basis for the appellant's contention that he was deprived of his constitutional right to a fair trial. The contention therefore fails. The appeal is dismissed, and the conviction and sentence affirmed.

Chief Justice

GOODRIDGE JA:

Introduction

[39] This is an appeal against conviction. On 29 September 2010 the appellant appeared before the High Court charged with arson, contrary to **sections 3** and **5** of the ***Criminal Damage Act, Cap. 113B.*** At the conclusion of the trial, the jury returned a verdict of guilty and the appellant was sentenced to 15 years imprisonment.

Background

[40] The case for the prosecution was as follows. The appellant and the complainant met sometime in 2003 while they were both employed at Discovery Bay Hotel in St. James. They became friends and that friendship evolved into an intimate relationship which led to them living together in a house at Browne's Gap, Hothersal Turning, St. Michael.

[41] At some time during the month of August 2008, the relationship deteriorated and the complainant moved out of the house and went to reside in her house which she had inherited from her parents and which was situated in the same area. Shortly afterwards, the appellant moved in with his aunt who lived at Weston, St James. There was still communication between the parties and the appellant tried to regain the affections of the complainant. However, as far as the complainant was concerned, the relationship was over.

[42] On 1 November 2008, just before 1 o'clock in the afternoon, the appellant arrived at the hotel uninvited and the complainant, who believed that he had come to attack her, sought refuge in the office. The police were summoned and they took the complainant to the Holetown Police Station. The appellant went on his way.

[43] While at the station, the complainant was informed that her house was on fire. On arrival at the scene, she discovered that the house had been destroyed. The fire had occurred around 10 minutes after 2 o'clock in the afternoon. Investigations were carried out by the police. The appellant was arrested and subsequently charged with the offence of arson.

[44] The witness Errol Bradshaw, who lived on the other side of the road from the complainant's house, testified that he had known the appellant for over six years before the incident, and that he had seen the appellant come out of

the house and shortly thereafter he noticed fire and smoke coming from the house.

[45] Another witness, PC Bailey, testified that he had gone to the house to speak to the complainant about a burglary which had been reported previously but no one was at home. Sometime around 2 o'clock in the afternoon as he was going to speak with the complainant's sister, he saw a man near to the house walking towards him. As he made his way back to the house, he realised that it was on fire. He identified the appellant at an identification parade as the man he had seen near the house.

[46] The appellant gave an unsworn statement and called three witnesses in his defence. He raised an alibi defence. In his statement, the appellant spoke in great detail about his movements on the day in question. He said that he had gone to the hotel in order to speak with the complainant but she ran away from him. He left the premises and went to his aunt's home. He spoke to a neighbour for a while and then went to a shop in the area of the fish market at Weston, St. James where he learnt that the police were looking for him. He was arrested at the fish market sometime around 2.30 in the afternoon.

[47] The defence witnesses all testified that they had seen the appellant during the morning period on the day in question but they admitted that they had

not seen him after 12 o'clock and had no idea as to his whereabouts after that time.

The Grounds of Appeal

[48] The appellant has appealed his conviction on two grounds which are interrelated and can be dealt with together. We set out below the grounds, the submissions of counsel and our discussion of the same.

Ground 1

[49] On this ground it is alleged that the "Learned Trial Judge failed to adjourn the matter to allow the accused adequate legal representation and or to prepare his defence".

Ground 2

[50] It is alleged that "the verdict was unsafe and unsatisfactory".

The Submissions of Counsel

[51] Mr. Ma'at submitted that the constitutional rights of an accused must be accorded the highest priority throughout the course of his trial, especially given the fact that the accused was unrepresented by an attorney-at-law. Counsel referred to certain excerpts from the trial record and submitted that when the appellant, as an unrepresented accused as he then was, indicated to the trial judge that he was surprised to be at court on 29 September 2010 to start his trial, the judge should have adjourned the matter instead of

proceeding since he had been informed that his trial would take place on 18 October 2010.

[52] Counsel further submitted that the appellant's rights under **section 18 (2) (c)** of the ***Constitution*** were therefore infringed when the judge failed to adjourn the matter. The infringement resulted in the verdict being unsafe and unsatisfactory and the conviction should therefore be quashed. Mr. Ma'at relied on ***Brown v Scott [2003] 1 AC 681 (Brown)*** and ***Willoughby, Reeves and Goddard v R (1996) 54 WIR 57 (Willoughby)*** to support his contention.

[53] In response, Mr. Watts submitted that a careful reading of the record would reveal that from the sequence of events as they transpired, the appellant had no difficulty with the matter proceeding. First, the appellant was just "surprised" to be there that morning but he indicated that he had no problem. Second, when the appellant raised the issue of the absence of his spectacles and the judge inquired whether he had a problem reading "now" the appellant replied "I can read but a little blurry so I just need a little time" and the trial judge accommodated him. Third, the trial judge satisfied herself that the appellant was capable of functioning and the trial continued without complaint. Fourth, the appellant made no application for an adjournment.

[54] Mr. Watts further submitted that the record is "bountiful" with examples of the judge assisting the appellant throughout the hearing of the matter and

there is nothing in the record which indicated that the appellant needed the court to give him an adjournment. Counsel concluded his submissions by contending that there was no merit in either ground of appeal.

Discussion

[55] We begin our consideration of the issue in this case by examining the relevant provisions of the ***Constitution***.

[56] **Chapter III** of the ***Constitution*** provides for the protection of the fundamental rights and freedoms of the individual, namely -

> (a) life, liberty and security of the person;
>
> (b) protection for the privacy of his home and other property and from deprivation of property without compensation;
>
> (c) the protection of the law; and
>
> (d) freedom of conscience, of expression and of assembly and association.

Of course these rights are subject to such limitations as are designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

[57] In particular, **section 18** is concerned with protecting the rights of persons charged with criminal offences. This section provides, inter alia:

> "18.(1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.
>
> (2) Every person who is charged with a criminal offence -

> (a) shall be presumed to be innocent until he is proved or has pleaded guilty;
>
> (b) shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence charged;
>
> (c) shall be given adequate time and facilities for the preparation of his defence;
>
> (d) shall be permitted to defend himself before the court in person or by a legal representative of his own choice;
>
> (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) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge,
>
> and except with his consent, the trial shall not take place in his absence unless he so conducts himself as to render the proceedings in his presence impracticable and the court has ordered the trial to proceed in his absence."

[58] This constitutional right to a fair hearing has engaged the attention of courts at the highest level. In ***Brown***, the Privy Council was concerned with interpreting the right to a fair trial under article 6 of the ***European Convention for the Protection of Human Rights and Fundamental Freedoms*** which provides that "in the determination of any criminal charge every person is entitled to a fair hearing". ***Lord Steyn*** said at page 708**:**

> "The present case is concerned with … a fair trial…But even in respect of this basic guarantee, there is a balance to be observed. First, it is well settled that the public interest may be taken into account in deciding what the right to a fair trial requires in a particular context…Secondly, once it has

> been determined that the guarantee of a fair trial has been breached, it is never possible to justify such breach by reference to the public interest or on any other ground. This is to be contrasted with cases where a trial has been affected by irregularities not amounting to denial of a fair trial. In such cases it is fair that a court of appeal should have the power, even when faced by the fact of irregularities in the trial procedure, to dismiss the appeal if in the view of the court of appeal the defendant's guilt is plain and beyond any doubt. However, it is a grave conclusion that a defendant has not had the substance of a fair trial. It means that the administration of justice has entirely failed. Subject to the possible exercise of a power to order a retrial where appropriate such a conviction can never be allowed to stand."

[59] In ***Randall (Barry) v R (2002) 60 WIR 103 (Randall)*** a case where the conduct of the prosecuting counsel was one of the matters of complaint, ***Lord Bingham*** stated at para 28:

> "[T]he right of a criminal defendant to a fair trial is absolute. There will come a point when the departure from good practice is so gross, or so persistent, or so prejudicial, or so irremediable that an appellate court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe, however strong the grounds for believing the defendant to be guilty. The right to a fair trial is one to be enjoyed by the guilty as well as the innocent, for a defendant is presumed to be innocent until proved to be otherwise in a fairly conducted trial."

[60] This Court followed the guidance of the Privy Council as to what constitutes a fair trial in ***Lewis v R Criminal Appeal No. 2 of 2005,*** where the critical issue for the Court's determination was whether that appellant was afforded a fair hearing of his case. The Court having considered ***Brown, Randall*** and other authorities stated at para [27]:

> "The authorities make it clear that a criminal defendant has an absolute right to a fair trial, guaranteed as a fundamental right under the ***Constitution***. It will generally be an inadequate response to an allegation that the defendant has not had a fair trial for a respondent to contend that the evidence was conclusive against the defendant and that therefore the defendant's conviction was safe and satisfactory, unless there has been a thorough

> enquiry into the issue of fairness. It follows that where the trial is unfair, the conviction should be set aside on the ground that it is unsafe or unsatisfactory."

[61] The Court concluded at para [29]:

> "…the cumulative effect of the matters raised in the appeal taken together as a whole was to deprive the appellant of a fair hearing, interpreted in accordance with the ***Constitution***, such as to render the verdict unsafe and unsatisfactory."

The conviction was quashed and a retrial ordered.

[62] It is clear from the foregoing that every person charged with a criminal offence has an absolute right to a fair trial. This does not however mean a perfect trial. There will be cases where a trial is unfair and the conviction must be set aside. There will be other cases which are affected by some irregularity not amounting to denial of a fair trial. In such instances an appeal will be dismissed if the Court is of the opinion that the defendant's guilt is plain and beyond doubt.

[63] The appellant's complaint is that there was a breach of his right to be given "adequate time and facilities for the preparation of his defence". It is therefore necessary to examine the circumstances of this case in order to determine whether there was a breach of the appellant' constitutional rights.

[64] We consider it useful at this point to set out those parts of the record which are the subject of complaint in their entirety. At page 5 line 7 to page 6 line

10 of the record the judge had this exchange with the appellant after the jury had withdrawn:

> "THE COURT: Good morning. I see you have your envelope there, I suppose that has in all your papers, you haven't yet opened them but the case is about to start and I wanted to know if you had any questions or queries you want - you had for the court, at this point.
>
> THE ACCUSED: Ma'am, I am just wondering. You told me that -
>
> THE COURT: Speak into the microphone, and slowly.
>
> THE ACCUSED: You told me that I was supposed to be here on the 18th October, so this is all a surprise to me this morning when you tell me that I had to do it today.
>
> THE COURT: Well, the 18th October is a call day, a general call day.
>
> THE ACCUSED: Okay.
>
> THE COURT: And this, matter, as we know, was always going to come off for trial in this session. When cases fall through, we bring up cases, so --
>
> THE ACCUSED: I was just curious, ma'am, there is no issue. I just was curious why --
>
> THE COURT: You were curious?
>
> THE ACCUSED: Yes. Just that it's a surprise to be here this morning.
>
> THE COURT: It should not be a surprise because you are indicted for an offence, since what? 2010, but this is a matter that's been going for a little while, 2008, and we are getting through our cases.
>
> THE ACCUSED: Yes, ma'am.
>
> THE COURT: So that is what happens.
>
> THE ACCUSED: No problem, ma'am."

[65] Thereafter the appellant confirmed that he had his depositions and his pen and paper with him. When the judge informed him as to the manner in

which the trial would proceed, the appellant stated that he was "familiar with the process".

[66] The record also indicates that when the judge sought to ascertain the position of the appellant in relation to the oral statements which he allegedly gave to the police officers and requested him to turn to a particular page in the depositions where the first oral statement appeared, the following ensued from page 9 line 21 to page 10 line 12 of the record:

> "THE COURT: It's on the other side, I think. Turn over. That's page 16?
>
> THE ACCUSED: I have a problem with my eyes because I don't have my glasses, ma'am.
>
> THE COURT: Where are your glasses?
>
> THE ACCUSED: They're home and they are essentially broken. I asked my aunt to get them, she's sickly, no one is available to bring them to me, ma'am, so.
>
> THE COURT: You have a problem reading now?
>
> THE ACCUSED: I can read but a little blurry so I just need a little time.
>
> THE COURT: Oh. All right.
> THE ACCUSED: Yeah, I got page 16, ma'am.
>
> THE COURT: Pardon?
>
> THE ACCUSED: I can see it there.
>
> THE COURT: You're seeing 16.
>
> THE ACCUSED: It is there."

[67] It must also be noted that when the judge inquired from the appellant as to whether he would be objecting to the oral statements, the appellant informed

the judge that, while he had no difficulty with the statements, his concern related to the fact that he did not speak “bad English”, and the officers, by recording the statements in the manner in which they did, were portraying him as illiterate.

[68] The gravemen of counsel's submission is that the appellant’s constitutional rights were infringed when the trial judge failed to pose this question to the appellant: "Are you prepared to conduct your trial today, as opposed to the 18th October, or do you need more time to prepare yourself?” in circumstances where the appellant expressed his surprise at his matter being heard at an earlier date. Mr. Ma'at cited ***Willoughby*** in support of his contention.

[69] In ***Willoughby*** the appellants, who were charged with aggravated burglary, only received their depositions on the morning of the trial and sought an adjournment so that they could study them. The trial judge refused the application for adjournment. The appellants were convicted. On appeal, the Court held that the refusal of the adjournment infringed the appellants' right to a fair trial under the ***Constitution***, in that there was a breach of their right to be given adequate time and facilities for the preparation of their defence. The convictions were quashed.

[70] In our view, the facts in ***Willoughby*** can be distinguished from those in this case. While it is accepted that the matter was heard at an earlier date, the record does not support the contention that the appellant was not allowed adequate time to prepare his defence.

[71] There is nothing in the record which suggests that the appellant had any difficulty with the trial proceeding on 29 September 2010, or that justice required that an adjournment was necessary in the circumstances. Despite the appellant expressing surprise, it is clear he had no objection to the matter being heard and that he was in a position to proceed at that time.

[72] Our examination of the record also shows that the appellant had prepared for his trial. This is borne out by the following matters:

> (i) the appellant was equipped with his depositions, pen and paper and had had the opportunity to study the depositions and make notes;
>
> (ii) the prosecution's witnesses were subjected to extensive and probing cross-examination which elicited conflicting evidence from key prosecution witnesses;
>
> (iii) the appellant successfully objected to leading questions posed by the prosecutor during the testimony of the complainant and her sister;
>
> (iv) having noted a material discrepancy in the evidence of Errol Bradshaw and PC Bailey as to the time the appellant was observed in the area of the house, the appellant requested the recall of PC Bailey, which was granted by the trial judge.

[73] All of the above have led us to conclude that the appellant was in possession of the relevant papers in sufficient time to allow him to adequately prepare for his trial and he was so prepared when the matter commenced. Indeed,

the appellant, whose defence was that of alibi, called three witnesses during the preliminary inquiry in the Magistrate's Court, and those witnesses gave evidence during the trial. The judge ensured that the appellant received all the assistance required to put his case to the jury and this included assistance in putting questions. In our view, the appellant suffered no prejudice in the circumstances. He received a fair trial. We are therefore not persuaded that the appellant's rights under **section 18 (2) (c**) of the ***Constitution*** were breached and hold that there is no merit in ground one.

[74] As for ground 2, having carefully considered the circumstances under which the trial took place, we have asked ourselves "whether we are content to let the matter stand as it is, or whether there is not some lurking doubt in our minds which makes us wonder whether an injustice has been done" - per ***Widgery LJ*** in ***R v Cooper (1969) 53 Cr App R 82*** at page 86. There is no lurking doubt in our minds. We hold that the appellant received a fair trial. We are unable to agree with counsel that the verdict was unsafe or unsatisfactory and that this Court ought to exercise its power under **section 4(a)** of the ***Criminal Appeal Act, Cap. 113A*** to set aside the conviction. Ground 2 cannot be sustained.

Disposal

[75] The appeal is dismissed. The conviction and sentence are affirmed.

Justice of Appeal

Justice of Appeal