BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No 0915 of 2016

BETWEEN

ANDREW LOVELL **CLAIMANT**

AND

THE ATTORNEY GENERAL **DEFENDANT**

Before the Hon Mr Justice Alrick Scott, Judge of the High Court (Acting).

Date of Decision: 7th December 2018.

Mr Bryan Weekes for the claimant.

Mr Jared Richards for the defendant.

DECISION

Introduction

[1] The claimant was convicted of manslaughter following a trial in the High Court. He exhausted all of his appeals, but failed in his attempts to set aside the conviction. The claimant now states that his counsel, at the trial, committed an error during the hearing and the trial judge did not intervene. He contends that the error renders the conviction unsafe and the hearing unfair. He seeks to challenge the conviction by way of a constitutional motion. He wants a declaration that his rights to protection of the law and a fair hearing guaranteed by sections 11 and 18 of the Constitution of Barbados were infringed. He asks for an order of certiorari to quash the conviction for manslaughter and an order of mandamus ordering the claimant's release from prison.

[2] The hearing of the action was on 25th September 2018. Elaborate and very helpful written submissions were before me. Counsel for the claimant was excited that the issues raised in this action are novel. He could find no precedent in the Commonwealth where a conviction was challenged by way of a constitutional motion after all rights of appeal had been exhausted. In my view, the issues raised in the action are of doubtful novelty. There is a sufficient body of case law upon which the issues raised in the action could be resolved. And that body of case law is decidedly against a constitutional action being used as a weapon to attack a criminal conviction. That is to be done by way of a criminal appeal.

[3] After a brief hearing, I dismissed the claim with reasons to follows. I considered then, as articulated below, that a person whose charge has been finally determined by a verdict of acquittal or conviction is not a person "charged with a criminal offence" to whom section 18(1) of the Constitution applies. Further, that the claimant is seeking a substantive review of his conviction in the nature of a criminal appeal, while section 18 of the Constitution seeks to secure a number of procedural safeguards. Also, that the claim is barred by *res judicata* and is an abuse of the process of the court.

[4] As promised, my reasons now follow.

The Background

[5] The claimant was charged with murder. He was tried in the High Court, and on 12th March 2008, he was convicted of manslaughter. He was sentenced to 22 years imprisonment. The claimant appealed against his conviction and sentence to the Court of Appeal. He had new counsel then. The Court of Appeal, on 23rd October 2013, dismissed the appeal against both the conviction and the sentence.

[6] Following the unsuccessful appeal to the Court of Appeal, on 15th May 2014, the claimant applied to the Caribbean Court of Justice (the "CCJ"), among other

things, for special leave to appeal against his conviction and sentence. He was, on that occasion, again represented by different counsel. On 8th December 2014, the application for special leave was dismissed for want of prosecution.

[7] After some delay, on 10th November 2015, the claimant filed three applications before the CCJ. These were, an application to extend the time to apply for special leave, an application for special leave to appeal against conviction and sentence, and an application for special leave to appeal as a poor person. The CCJ dismissed the applications. He then turned to the High Court for a review of the criminal proceedings by way of a constitutional motion, which came before me.

[8] The claimant's grievance is that at his trial, the prosecution relied on his oral admissions and a written statement which he dictated and two police officers recorded. During the *voir dire*, the officers gave varying evidence as to how a correction was made to the date which appeared on the statement. One officer said that he spotted the error and had the claimant initial the change. The other officer stated that it was the claimant who noticed the error and asked that it be corrected. The officers were cross-examined rigorously on the matter. Despite the discrepancy on how the correction came to be made, the Judge held that the confession was admissible.

[9] Upon resumption of the trial, one of the police officers gave evidence before the jury which was inconsistent with the evidence which he gave during the *voir dire.* Counsel for the claimant did not cross-examine the officer on the inconsistency. The present counsel for the claimant states that the Judge did not pick up the difference between the evidence given on the *voir dire* and on the resumption of the trial. The claimant was convicted of manslaughter on a majority verdict. On appeal to the Court of Appeal against conviction and sentence, the claimant did not raise the issue of the inconsistent evidence

given during the *voir dire* and on the resumption of the trial as a ground of appeal. The claimant now says that his then counsel's failure to cross-examine the police officers on the inconsistent evidence given on the *voir dire* and on the resumption of the trial (the "new ground"), rendered his conviction unsafe and the trial unfair. Therefore, his conviction should be quashed.

Right to Fair Hearing

[10] The claimant's case is that his right to a fair hearing, guaranteed by section 18(1) of the Constitution, has been infringed. He submitted that the provisions of the Constitution for the protection of human rights should be interpreted liberally, as I understand it, to give new or expanded rights and remedies. He argued too that the word "fair" must be given a wide and purposive meaning. I accept, as stated by Lord Wilberforce in *Minister of Home Affairs v Fisher* [1980] AC 319, 328, that constitutional provisions directed at protecting human rights "….. call for a generous interpretation avoiding what has been called the "austerity of tabulated legalism"**,** suitable to give to individuals the full measure of the fundamental rights and freedoms referred to...*"*. Lord Bingham in *Hinds v Attorney General and Another* (1999) 59 WIR 75 ("*Hinds v AG*"), para [15], was of the view that constitutions should be given a dynamic interpretation:

> "The Constitution is to be read not as an immutable historical document but as a living instrument, reflecting the values of the people of Barbados as they gradually change over time. But the courts, including this Board as the final court of appeal of Barbados, must give effect to its terms."

[11] Constitutions are to be interpreted and applied in a manner that renders fundamental rights and freedoms effective and practical. This long-held and continuing approach to the interpretation of conventions and constitutions on human rights and fundamental freedoms finds expression in the decision of the European Court of Human Rights in *Demir and another v Turkey* [2009] IRLR 766, para 66:

> "Since the Convention is first and foremost a system for the protection of human rights, the Court must interpret and apply it in a manner which renders its rights practical and effective,

> not theoretical and illusory. The Convention must also be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions ……..”

[12] The right to a fair hearing or fair trial is of some antiquity. The authors of *Halsbury's Laws of England, Rights and Freedoms* (Volume 88A (2018))/4, para 308, trace the right back to the Magna Carter and canonical jurists. But of course, in more recent years, fair hearing rights have been expanded by case law and have found expression in constitutional charters and conventions such as the European Convention for the Protection of Human Rights and Fundamental Freedoms (the “European Convention”) and the International Covenant on Civil and Political Rights (“ICCPR”). The authors of *Halsbury’s Laws of England*, mentioned in this paragraph, write, para 308:

> “It has been observed that the fair-trial principles embodied in the European Convention on Human Rights have long been recognised in the common law, but that the Convention, and Article 6 in particular, now provides for a more structured approach to the right.”

[13] In many respects, the fair trial rights under international conventions and constitutional charters are, in substance, similar. Indeed, Williams JA, in *Alexander v The Queen* (Criminal Appeal No 14 of 2007, unreported) Barb CA, observed that the United Nations Universal Declaration of Human Rights inspired the European Convention, which in turn influenced the fundamental rights provisions in the Barbados Constitution. The right to a fair hearing, as enshrined in the Barbados Constitution and in conventions, such as the European Convention, Article 6, and the ICCPR, do not set out exhaustively, the attributes of a fair hearing. They set out, in broad terms, some of the principles of a fair hearing: see *Attorney General and Others v Joseph and Boyce* (2006) 69 WIR 104 (“*Joseph and Boyce*”), para [60]; and *Dietrich v R* [1993] 3 LRC 272, 280. And it appears, as observed by Mason CJ and McHugh J, in the last-mentioned case, p 280, that no court has attempted to enumerate comprehensively every attribute of a fair trial.

[14] Section 18(1) of the Constitution of Barbados enshrines the right to a fair hearing as follows:

> "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."

[15] The CCJ, in *Gibson* v. *Attorney General* (2010) 76 WIR 137, para [54], interpreted section 18(1) of the Constitution as creating three different and free-standing rights, namely, a hearing that is "(a) fair, (b) before an independent and impartial tribunal established by law, and (c) held within a reasonable time."

[16] Section 18(2) sets out some of the basic minimum or component rights to a fair hearing as follows:

> "(2) Every person who is charged with a criminal offence -
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> (a) shall be presumed to be innocent until he is proved or has pleaded guilty;
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> (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;
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> (c) shall be given adequate time and facilities for the preparation of his defence;
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> (d) shall be permitted to defend himself before the court in person or by a legal representative of his own choice;
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> (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
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> (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."

[17] The statutory language of section 18(1) of the Constitution cannot be ignored. The protected rights to a fair hearing under section 18(1) and the constituent rights to a fair hearing under section 18(2) apply, specifically to a person who is "charged with a criminal offence". At one end of the spectrum is identifying the moment when a person is "charged with a criminal offence", and at the other end is determining when a person is no longer "charged with a criminal offence" within the meaning of the two subsections.

[18] The right to a fair hearing extends to the full course of the criminal trial: see *X7 v Australian Crime Commission* [2013] HCA 29; 248 CLR 92, para 38. An appeal is part of the trial process. The courts of appeal play a critical role in making sure that trials are fair and that convictions are safe and satisfactory, that there has been no material irregularity, and that the conviction is not wrong. A person ceases to be "charged with a criminal offence" when there has been a final verdict of conviction or acquittal. A person whose charge has been finally determined, is no longer or is not a person "charged with a criminal offence" and entitled to the protection under section 18(1): see *Moreira v Portugal* (No. 2) (2017) 43 BHRC 312, paras 60-61. Therefore, when the claimant exhausted his appeals, resulting in a final determination of guilt, he also exhausted his right to a fair hearing guaranteed by section 18(1) of the Constitution in relation to that charge. The claimant is not now a person "charged with a criminal offence", when his charge has already been finally determined. A person may have other constitutional rights after the criminal charge has been determined by a final verdict of conviction or acquittal, such as under section 18(5) of the Constitution. Also, a person who has been sentenced to death, and has exhausted all rights of appeal, is still entitled to

protection of the law under section 11(c) of the Constitution, as explained in *Joseph and Boyce*. But the person who has exhausted all appeals, resulting with a final determination of his conviction, does not have a right under either subsection (1) or subsection (2) of section 18 of the Constitution as a person "charged with a criminal offence".

[19] Section 18(1) does not give the High Court the power to reopen criminal proceedings after all appeals have been exhausted, and a conviction is final. Under the Constitution of Barbados, a post-appeal review of a criminal conviction is removed from the sphere of the judiciary and placed in the hands of the executive by way of the prerogative of mercy under section 78 of the Constitution of Barbados. In *R v Secretary of State for the Home Department, ex parte Bentley* [1993] 4 LRC 15, 28, the court described the prerogative of mercy as "…. a constitutional safeguard against mistakes" beyond any final appeal permitted by the law. The CCJ, in *Joseph and Boyce*, held that the exercise of the prerogative power under section 78 of the Constitution is reviewable and not as sacred as was suggested in *De Freitas v Benny* (1975) 27 WIR 318. This reinforces the importance of the prerogative of mercy as a safeguard against errors after all appeals have been exhausted by a convicted person. My view is that the claimant's legal rights under section 18(1) have ended, and that any post-appeal rights to a review of his conviction or to any mercy he seeks, if he is entitled to any, must now be under section 78 of the Constitution.

[20] There is force in the argument that the principle of finality of judgments ought not to be applied with the same stringency in criminal proceedings as in civil proceedings. There may be cases where it may be justified to reopen criminal proceedings after a final verdict of conviction; for example, where the discovery of new evidence casts serious doubt on the person's guilt or suggests a miscarriage of justice. The United Kingdom ("UK") has provided, by way of legislation, a judicial approach to post-appeal reviews of criminal convictions.

This was done by the Criminal Appeal Act 1995, which established the Criminal Cases Review Commission to investigate alleged miscarriages of justice post-conviction and post-appeal. The review provided for under the Criminal Appeal Act 1995, is by an appellate court. That approach may very well be making two very important points: first, an indication that post-appeal reviews for miscarriages of justice or irregularities are best left to Parliament to work out the rights and boundaries in a comprehensive way, and secondly, that such post-appeal reviews, when provided for by Parliament, are more appropriately done by an appellate court. But certainly, in my view, it is outside of the powers of the High Court of Barbados to reopen criminal proceedings post-appeal to correct alleged miscarriages of justice.

Nature of Right to Fair Hearing

[21] The claimant in his written submissions and in oral argument, asked the High Court to review the hearing and hold the conviction as unsafe on the evidence before the jury. The claimant argued that the error was a material irregularity in the course of the trial which rendered the conviction unsafe and resulted in a miscarriage of justice. He contended too that the error resulted in an unjust verdict. And because of these, the hearing was not fair. Therefore, argued counsel, the conviction should be set aside or quashed.

[22] The claimant argued that section 24 of the Constitution gives the High Court original jurisdiction to deal with matters where fundamental rights and freedoms are breached. He stated that the court's jurisdiction under section 24 is fettered only by the proviso to section 24(2) of the Constitution. Indeed, subsections (1) and (2) of section 24 of the Constitution confer wide powers on the court to grant constitutional relief where the right to it has been established. But section 24 of the Constitution is not the unblinkered unruly horse on the run that the claimant wishes to make it. As explained by de la Bastide PCCJ and Saunders JCCJ, in *Joseph and Boyce*, para [59],

> "…… the jurisdiction conferred by section 24 on the High Court to adjudicate allegations that any particular right has been, is being or is likely to be contravened and to fashion appropriate remedies for any contravention or likely contravention that it finds, is limited to cases which involve a contravention of one or other of the detailed sections."

There must be some right or freedom contravened for the court to intervene and grant relief under section 24. Therefore, to succeed, the claimant must show that some guaranteed fair trial right, as set out in section 18(2), or at common law or in some convention to which Barbados is a signatory, has been infringed. Counsel for the claimant has not been able to point to any protected fair trial right which has been infringed.

[23] Counsel for the defendant argued that the claimant is asking the High Court to review the criminal proceedings for the substantive fairness of the conviction, which is outside of the protected rights under section 18(1) of the Constitution. He contended that the right to a fair hearing under section 18(1) of the Constitution guarantees procedural fairness, not substantive fairness. He relied on the decision in *Maharaj v Attorney General (No 2)* (1978) 30 WIR 310 ("*Maharaj v AG*"). I agree with counsel for the defendant.

[24] Section 3 of the Criminal Appeal Act Cap 113A (the "**CAA**") gives a convicted person a right of appeal. It specifies when leave to appeal is required and when an appeal may be made without leave. Section 4 of the CAA specifies three grounds on which an appeal may be allowed. These are where the Court of Appeal is of the opinion: (a) that the verdict is unsafe or unsatisfactory, or (b) that the judgment of the court of trial is a wrong decision on any question of law, or (c) that there was a material irregularity in the course of the trial. By section 4(2) of the CAA, notwithstanding that the point raised in an appeal is decided in favour of the appellant, the Court of Appeal may yet dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

[25] From the above sections of the CAA, unsafe or unsatisfactory or wrongful convictions, or convictions tainted with a material irregularity are established or

proved through the appeals' process. Where such is proved or established, the Court of Appeal may, subject to subsection 4(2), quash the conviction. That jurisdiction is given to the Court of Appeal, not the High Court. The same grounds of review upon which the claimant seeks to impugn the conviction and trial process in this constitutional action are the same upon which the Court of Appeal may allow an appeal against conviction. What the claimant is asking the High Court to do is indistinguishable from the function and power of the Court of Appeal under sections 3 and 4 of the CAA. In substance, the claimant is asking the High Court to act as a court of second instance, and to exercise powers substantially the same as given to the Court of Appeal under the CAA. The High Court is not a court of criminal appeal or a court of second instance for matters determined in the criminal division of the High Court. The civil division of the High Court has no jurisdiction to review or rule on a conviction found in its criminal division. The High Court cannot do that through a constitutional motion.

[26] The Privy Council has repeatedly said that the constitutional right to a fair hearing cannot be used as an alternative means to challenge a criminal conviction: see *Maharaj v AG*; *Chokolingo v Attorney General* (1980) 32 WIR 354 ("*Chokolingo v AG*"); and *Hinds v AG.* Lord Diplock, in *Maharaj v AG*, was clear that a judgment which is wrong and liable to be set aside on appeal does not amount to a contravention of any human right or fundamental freedom. That position is understandable. Otherwise, a person convicted of a criminal offence would have open to him, as an alternative or additional means, a right to challenge his conviction by way of a constitutional motion. And where would it end? Human justice, as so often observed, is not perfect. What is sought to be achieved is a fair hearing. Lord Diplock, in *Maharaj v AG*, p 321, captured it as follows:

> "In the first place, no human right or fundamental freedom recognised by Chapter I of the Constitution is contravened by a judgment or order that is wrong and liable to be set aside on appeal for an error of fact or substantive law, even where the

> error has resulted in a person's serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. When there is no higher court to appeal to then none can say that there was error. The fundamental human right is not to a legal system that is infallible but to one that is fair. It is only errors in procedure that are capable of constituting infringements of the rights protected by s 1 (*a*), and no mere irregularity in procedure is enough, even though it goes to jurisdiction; the error must amount to a failure to observe one of the fundamental rules of natural justice. Their Lordships do not believe that this can be anything but a very rare event."

[27] The Privy Council returned to the issue in the later case of *Chokolingo v AG.* The Board, in applying its earlier decision in *Maharaj v AG*, went further in identifying the danger inherent in permitting convictions to be challenged by way of constitutional motions. At p 359, the Board wrote:

> "Acceptance of the applicant's argument would have the consequence that in every criminal case in which a person who had been convicted alleged that the judge had made any error of substantive law as to the necessary characteristics of the offence, there would be parallel remedies available to him; one by appeal to the Court of Appeal, the other by originating application under section 6(1) of the Constitution to the High Court with further rights of appeal to the Court of Appeal and to the Judicial Committee. These parallel remedies would be also cumulative ……. The convicted person having exercised unsuccessfully his right of appeal to a higher court, the Court of Appeal, he could nevertheless launch a collateral attack (it may be years later) upon a judgment that the Court of Appeal had upheld, by making an application for redress under section 6(1) to a court of co-ordinate jurisdiction, the High Court. To give Chapter I of the Constitution an interpretation which would lead to this result would, in their Lordships' view, be quite irrational and subversive of the rule of law which it is a declared purpose of the Constitution to enshrine."

[28] It is that danger which is present here. The claimant has already exhausted all appeals against his conviction. Were section 18(1) or section 24(1) to be interpreted and applied as suggested by counsel for the claimant, the claimant would now have a right, after exhausting all appeals, to a review by the High Court against his conviction, with rights of appeal to the Court of Appeal and then to the CCJ. That must be a legal absurdity. It would be an unwise use of

the court's limited resources. There would be the risk of inconsistent decisions. It would sound the death knell to the fundamental principle that there must be finality to litigation. The floodgates would be flung wide open to repeated litigation in criminal proceedings. Already counsel for the claimant has indicated to this Court that he intends to return to the CCJ to argue the point which he thinks the CCJ did not hear him on or did not fully hear him on.

[29] In the even later case of *Hinds v. AG,* the Board, para [24], reiterated emphatically that

> "…… a claim for constitutional relief does not ordinarily offer an alternative means of challenging a conviction or a judicial decision, nor an additional means where such a challenge, based on constitutional grounds, has been made and rejected. The appellant's complaint was one to be pursued by way of appeal against conviction, as it was; his appeal having failed, the Barbadian courts were right to hold that he could not try again in fresh proceedings based on s 24."

[30] Counsel for the claimant sought to distinguish *Hinds v AG* on the basis that, in *Hinds v. AG,* the claimant did not exhaust his appeal rights, while in this case, the claimant had exhausted his appeal rights. It is a false distinction. Lord Bingham's last statement sets a general principle, which is applicable whether the appeal rights were exhausted or not, that constitutional relief is not an alternative means to challenge a criminal conviction.

[31] To permit constitutional provisions to be used as a substitute for or alternative to an appeal from a conviction, or generally to attack a criminal conviction, would be to permit a misuse and abuse of section 24(1) and would lead to its diminution. It is an observation made by the Board in *Harrikissoon v Attorney General* (1979) 31 WIR 348. The Board was then addressing the use of motions for constitutional redress to seek review of administrative action. The

observation made in that case is apposite here, and the facts of this case compel my repeating it. Lord Diplock observed, p 349, that:

> "The right to apply to the High Court under …… 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**."**

See also *Attorney General v Aban* (1995) 48 WIR 111.

[32] The proviso to section 24(2) of the Constitution provides that the court is not to exercise its power under the subsection if the court is "satisfied that adequate means of redress are or have been available to the person concerned under any other law". The proviso enables the court to frustrate attempts at the misuse and diminution of section 24(2) of the Constitution. This applies where there is a right to appeal, and the person has availed himself of it or failed to avail himself of it. Ackner LJ, who delivered the judgment of the Board in *Smithfield Foods Ltd v Attorney General* (1992) 40 WIR 61, 65, was in agreement with the High Court and Court of Appeal of Barbados **"……** that the proviso to section 24(2) of the Constitution is designed, inter alia, to remove from the ambit of the section, cases in which relief by way of an appeal to a higher court is available."

[33] Sections 3 and 4 of the CAA provide an adequate means of redress for a person convicted of a criminal offence. The claimant availed himself of that means of redress. He suffered no injustice. On that basis, in addition to the reasons given above, constitutional redress could and should be refused.

Protection of the Law

[34] I address the alleged infringement of section 11(c) for completeness. Section 11(c) of the Constitution grants to individuals the fundamental right to "the protection of the law". The claimant alleged in the claim form that his right to protection of the law was infringed about March 2008 during the trial. In the written submissions, counsel for the claimant suggested that the Court must explore the boundaries of the right to protection of the law under section 11(c) of the Constitution. He noted that the CCJ in *Joseph and Boyce* held that section 11 of the Constitution gives the citizens of Barbados substantive rights. Counsel himself did not explore the boundaries of the right under section 11(c) for the benefit of the Court. The arguments for the claimant centered on breach of the right to a fair hearing under section 18.

[35] In *Joseph and Boyce*, de la Bastide PCCJ and Saunders JCCJ, explored, extensively, the nature and extent of the right to protection of the law under section 11(c) of the Constitution. They concluded that the right under section 11(c) is broad and pervasive: see para [60]. Further, that the court's power to enforce the right to protection of the law, and to grant a remedy for its breach, is not limited to contraventions of section 18 of the Constitution. They concluded too that procedural fairness is an elementary principle permeating the right to protection of the law: see para [64]. The President and Saunders JCCJ accepted Lord Millett's adumbration of the meaning of the word "law" in the phrase "due process of law" as applicable to the phrase "protection of the law" under section 11(c) of the Constitution. Therefore, Lord Millett's explanation of the expression "due process of law" in *Thomas v Baptiste* (1998) 54 WIR 387, would apply to the expression "protection of the law". So too would Justice Phillips' exposition of the nature and content of the expression "due process of law" in *Lassalle v Attorney General* (1971) 18 WIR 379.

[36] In *Nervais v R; Severin v R* (2018) 92 WIR 178, the CCJ revisited the question of the nature of the rights granted under section 11 of the Constitution of Barbados, including the rights granted under section 11(c) in relation to section

18 of the Constitution. Byron PCCJ, who delivered the majority decision of the Court (Byron PCCJ, and Saunders, Wit, Hayton, Rajnauth-Lee and Barrow JJCCJ), confirmed that section 11(c) grants protected rights separate and distinct from section 18: see para [32]. He observed that section 11 is separately enforceable and that the right to a fair trial is an element of protection of the law: see paras [42] and [49]. The President considered the ambit of the rights granted by section 11(c) and concluded, para [45]:

> "The right to protection of the law is the same as due process which connotes procedural fairness which invokes the concept of the rule of law. Protection of the law is therefore one of the underlying core elements of the rule of law which is inherent to the Constitution. It affords every person, including convicted killers, adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power."

[37] I cannot fathom, in the absence of counsel's arguments, the manner in which the claimant's right to protection of the law was infringed about March 2008. The claimant has not alleged that he was not accorded procedural fairness, or that there was a breach of the principles of natural justice. Nor has he made any claim of "irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power". Given the nature and content of the right under section 11(c) of the Constitution, as discussed in *Joseph and Boyce* and *Nervais v R; Severin v R*, it seems to me that the claimant's less than bare-bones contention that his right to protection of the law was infringed, is certain to fail on the facts before me.

Relitigation

[38] The claimant's complaint now before the High Court is the same which was before the CCJ on the second special leave application. Paragraph [22] of the CCJ's decision in *Andrew Lovell v The Queen* [2016] CCJ 6 (AJ) makes this evident. It provides:

> "The first additional ground was that because of the contradictory evidence given by the police officers on the *voir dire* as to the date of the accused's confession statement and the accused's challenge to the voluntariness of the statement, the judge should have excluded the confession statement and declared a mistrial if necessary."

[39] The claimant contends that the new ground "…. was not considered substantively by the Caribbean Court of Justice on a second application for special leave to appeal out of time."

[40] Counsel for the defendant submitted that even though the CCJ considered the application an abuse of the process of the court, the CCJ nevertheless, out of deference to counsel for the claimant, considered the new ground, and made a ruling on it. Further, that the CCJ concluded that the new ground did not result in any miscarriage of justice, and that the CCJ's decision is final. He concluded that the new ground now raised before the High Court is barred by *res judicata* and may be struck out for abuse of process. *Res judicata* and abuse of process are companion defences in response to repeated litigation.

Res Judicata

[41] The CCJ, in *Sooknanan v The Medical Council of Guyana* [2014] CCJ 8 (AJ), para [5], observed that the doctrine of *res judicata*

> "… is an ancient legal principle going back to the Roman and Canon law (if not to the Greek Law and the Old Testament) that a matter which has been decided by a competent tribunal cannot be re-litigated when certain conditions have been met. Only then can it be said that the matter is res judicata (pro veritate accipitur)."

There is now a considerable body of case law built up on the doctrine.

[42] *Res judicata* is part of the law of estoppel. The doctrine is based on a number of policy considerations. There are two main policy grounds which undergird

the doctrine. These are that there should be an end or finality to litigation, and that no man should be vexed twice for the same set of circumstances. The doctrine also finds justification in two other policy grounds: first, in preventing the risk of inconsistent decisions, and secondly, upon the avoidance of duplicative litigation, and the wasted costs and time which result from the same.

[43] There are two forms of estoppel covered by the term *res judicata*. These are cause of action estoppel and issue estoppel. The two estoppels share some common features. The parties or their privies must be the same to the litigation in both types of estoppel. The central difference between the two is that, with cause of action estoppel, the causes of action in the different sets of proceedings must be the same, whereas, with issue estoppel, the issues in the different sets of proceedings must be the same. The modern English leading cases on the doctrine are *Arnold v National Westminster Bank plc [1991] 2 AC 93*, and *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly known as Contour Aerospace Ltd)* [2013] UKSC 46. Those cases provide an insightful analysis of the two forms of estoppel. In *Arnold v National Westminster Bank plc*, pp 104 and 105 respectively, Lord Keith defined cause of action estoppel and issue estoppel as follows:

> "…… Cause of action estoppel arises where the cause of action in the later proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless fraud or collusion is alleged, such as to justify setting aside the earlier judgment. The discovery of new factual matter which could not have been found out by reasonable diligence for use in the earlier proceedings does not, according to the law of England, permit the latter to be re-opened."
>
> "Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue."

[44] Lord Sumption, in the later case of *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly known as Contour Aerospace Ltd)* [2013] UKSC 46, para [22], summarised the principles pronounced in *Arnold's* case as follows:

> "Arnold is accordingly authority for the following propositions:
>
> (1) Cause of action estoppel is absolute in relation to all points which had to be and were decided in order to establish the existence or non-existence of a cause of action.
>
> (2) Cause of action estoppel also bars the raising in subsequent proceedings of points essential to the existence or non-existence of a cause of action which were not decided because they were not raised in the earlier proceedings, if they could with reasonable diligence and should in all the circumstances have been raised.
>
> (3) Except in special circumstances where this would cause injustice, issue estoppel bars the raising in subsequent proceedings of points which (i) were not raised in the earlier proceedings or (ii) were raised but unsuccessfully. If the relevant point was not raised, the bar will usually be absolute if it could with reasonable diligence and should in all the circumstances have been raised."

[45] It is a requirement that the decision is final for the doctrine to apply: see *Sooknanan v The Medical Council of Guyana* [2014] CCJ 18. A judgment or decision is final where it is dispositive of the entire case, leaving only execution of the judgment or decision by some means of enforcement: see *Robinson v First Citizen Bank (Barbados) Limited*, (Civil Appeal No 15 of 2016, unreported) Barb CA. It is final notwithstanding that it may be open to appeal. This is explained by the authors of *Halsbury's Laws of England, Civil Procedure (Volume 12A (2015),* para 1593, thus:

> "When the word 'final' is used with reference to a judgment, it does not mean a judgment which is not open to appeal but merely a judgment which is 'final' as opposed to 'interim'. A judgment which purports finally to determine rights is nonetheless effective for the purposes of creating an estoppel because it is liable to be reversed on appeal, or because an appeal is pending, or because the judgment includes an order for damages to be assessed and inquiries or accounts have to be taken for the purpose of such assessment."

[46] In *Hinds v AG*, the Board accepted, without elaboration, the argument for the defendant that the claimant's action was barred because of *res judicata*: see paras [23]-[24]. In *Hinds v AG*, as is the case here, a criminal conviction was challenged by way of a constitutional motion alleging breach of the right to a fair hearing. *Prima facie*, the doctrine would apply here once the issue which was before the CCJ is the same issue now raised before the High Court.

[47] Accordingly, an examination of the decision of the CCJ in *Lovell v The Queen* is required to determine whether the present action is barred by *res judicata*. In their decision, Nelson, Wit and Hayton JJCCJ, after considering two other grounds raised on the application for special leave, addressed the new ground as follows:

> "[25] The third submission related to the failure to cross-examine the police officers as to the inconsistencies in their evidence as to the date of the statement and as to who discovered the error in the confession statement. This point formed the basis of a submission that counsel who conducted the application before the first panel was incompetent. It was contended that the first panel's criticism that little or no information was provided to enable the court to assess the merits of the application suggested that counsel then appearing for the Applicant was incompetent.
>
> [26] It is clear that the credibility of the police officers was a major issue before the jury. The then counsel for the Applicant could have cross-examined the police officers as to the alterations of the date on the confession statement but he chose not to do so. Where deliberate tactical decisions are made by counsel as to the cross-examination of a witness, there is nothing unfair and there is no miscarriage of justice in holding the accused to such decisions of counsel properly instructed. At the end of the day the issue was as to the credibility of the officers turned upon the totality of the evidence. The jury clearly rejected the submission that the statements were fabricated and believed the officers. This proposed argument does not suggest any miscarriage of justice."

[48] I do not think that much needs to be said. The new ground now before the High Court, is the same which was before the CCJ on the second special leave application. The CCJ considered and decided the new ground on its merits. The matter now before the High Court was the subject of a final judgment. There is no court beyond the CCJ to whom the claimant may appeal. The new ground before the High Court is barred by *res judicata*.

Abuse of Process – Repeated Litigation

[49] Counsel for the defendant further argued that the present action is an abuse of the process of the court.

[50] The court has inherent jurisdiction to prevent an abuse of its process by repeated litigation. It is an important and powerful weapon in the court's armoury in response to repeated litigation. The court's residual power to strike out for abuse of its process is an extraordinary remedy. The court is not bound by some of the constraints and strictures of the *res judicata* doctrine. The court's power to bar or strike out a claim for abuse of process is in addition to, and wider than the power to bar a claim based on *res judicata*. Thus, the court may yet strike out an action for abuse of process where the case for *res judicata* is not established. The court can use its power to strike out for an abuse of the process of the court whenever relitigation is a misuse of the process of the court which would be manifestly unfair to a party, or the action involves unjust harassment or oppression, or the relitigation would likely bring the administration of justice into disrepute. The circumstances where the court may strike out an action as an abuse of the process of the court are varied, but include where the subsequent proceedings amount to a duplication of proceedings or a collateral attack on an earlier decision.

[51] The power to strike out for abuse of the process of the court is of common law origin. However, it has now been embodied in the Supreme Court (Civil Procedure) Rules 2008, rule 26.3(3)(a). Striking out for abuse of the process

of the court under the inherent jurisdiction of the court or under a rule involves an exercise of the court's discretion. It is a flexible ground for striking out. The House of Lords, in *Johnson v Gore Wood* [2001] 2 WLR 72, extensively considered the ground of striking out for abuse of the process of the court, and the distinction between that and *res judicata*, and stated the court's approach to striking out for abuse of the process of the court thus, p 90:

> "The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus, while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

[52] The policies which inform the *res judicata* principle, similarly support the use of the court's inherent jurisdiction to prevent relitigation of proceedings and issues on the basis of abuse of the process of the court: see *Johnson v Gore Wood* [2001] 2 WLR 72, 90.

[53] Like the issue of *res judicata*, it is necessary to turn to the judgment of the CCJ to determine whether the action should be struck out as an abuse of the process of the court. The CCJ took the view that the new ground of appeal, which was not before the Court of Appeal, could have been argued before the Court of Appeal. The CCJ held that it would be an abuse of the process of the court to allow the new ground to be argued at a second special leave application. The CCJ's judgment on the point is as follows:

> "[19] Before the present panel of this Court the Applicant sought to raise "grounds of appeal not argued before the Court of Appeal." A party must, in the interests of the administration of justice, bring forward its whole case in proceedings before the court and not serve up its menu of grounds and arguments piecemeal before several courts in the hope that eventually the court will find a particular course more appetizing: see *Henderson v Henderson* as explained in *Johnson v Gore Wood* by Lord Bingham of Cornhill and *Edwards v A.G.* In the instant applications the proposed new grounds of appeal including the one relying on the incompetence of counsel are in effect a rehash of the grounds of appeal rejected by both the trial judge and the Court of Appeal.
>
> [20] The Applicant had every opportunity to put his case through his previous counsel who is said to have been associated with senior counsel. In such circumstances the Applicant should have placed his whole case before the first panel. The Court therefore holds that in special leave proceedings of the same kind as those which the first panel considered, the Applicant cannot re-litigate the grounds which were before the first panel and the Court of Appeal. Further, we hold that on the facts of this case the new grounds now being advanced are matters which should have been placed before the first panel. It would be an abuse of process to allow them to be advanced at a second special leave application."

[54] I have already concluded above that the new ground before the High Court is the same which was decided by the CCJ. I think it is an abuse of the process of the court, for the same reasons given by the CCJ, to now bring the present action in the High Court. The claimant seems to compound the abuse, by relitigating an issue which has previously been regarded as an abuse of the process of the court.

Disposal

[55] For the reasons given above, the claimant's claim for constitutional relief is dismissed.

ALRICK SCOTT
JUDGE OF THE HIGH COURT (Acting)