

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**

**HIGH COURT**

**CIVIL DIVISION**

**No. CV 1190 of 2018**

**BETWEEN:**

**TROY ANDERSON GREENE**

**CLAIMANT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTION**

**FIRST DEFENDANT**

**ATTORNEY-GENERAL**

**SECOND DEFENDANT**

*Before Dr. the Honourable Justice Olson DeC. Alleyne, Judge of the High Court*

**Date of Decision: 30 April 2019**

**Lalu Hanuman for the Claimant.**

**Ms. Jennifer Small in association with Cherisse Whitehall-Small for the Defendant.**

### **DECISION**

#### **INTRODUCTION**

[1] The claimant is an inmate of Dodd's Prison. On 10 June 2010 he was sentenced by Worrell J to 13 years imprisonment on a charge of aggravated burglary. He received lesser sentences in respect of a number of other offences. By way of a Fixed Date Claim Form filed on 7 September 2018, he

now asserts that “the sentence manifestly violated Chapter 3 of the Barbados Constitution, in particular Articles 13; 18 and 22”. At the core of his claim is an averment that in arriving at his sentence, the trial judge did not take into account the time he had spent on remand. He seeks (i) “[a] declaration that the ... sentence be amended to reflect time spent on remand”; and (ii) “[d]amages for a denial of Constitutional Rights”.

## **THE APPLICATION**

[2] On 1 February 2019, the defendants filed a notice of application seeking to have the claim “struck out and/or dismissed”. The substantive grounds of the application are that:

1. The Claimant’s application is an abuse of process, as the proper procedure for redress against his sentence is to appeal to the Court of Appeal.
11. The Claimant was entitled to file an appeal against the decision of the High Court in respect of his sentencing and failed to do so. The Claimant therefore should not be permitted to circumvent the correct procedure by engaging the Constitutional process in order to appeal the decision against sentencing.
111. A court of equal and / or similar jurisdiction does not have the jurisdiction to amend a sentence once handed down. The power to amend a sentence is properly the function of the Court of Appeal. This Court therefore has no jurisdiction in this matter.
- 1V. There has been no breach of the Claimant’s rights under the Constitution and therefore the Claimant is not entitled to the redress sought.

## **THE ISSUES**

[3] Both parties filed written submissions and made brief oral submissions. The grounds of the defendants' application and the supporting and opposing submissions give rise to the following issues:

1. Does this Court have power to amend a sentence imposed in a criminal case and, in any event, does the Court have jurisdiction to hear this claim?
2. If this Court has jurisdiction to hear the claim, must it refuse to exercise that jurisdiction?
3. Does the Claimant's claim form and supporting affidavit disclose any reasonable ground for bringing the claim?

## **THE EVIDENCE**

[4] The defendants filed an affidavit in support of the application. Its most significant feature was the production of the transcript of the sentencing phase of the claimant's criminal trial. I shall make reference to portions of that document as the need arises.

## **THE CONSTITUTIONAL AND STATUTORY PROVISIONS**

[5] Two sets of provisions feature in the submissions and discussion which follow in respect of jurisdiction. The first is *section 24 of the Constitution of Barbados* ("*the Constitution*") from which is derived the Court's power to entertain applications for redress for breaches of the fundamental rights and freedoms enshrined in the Constitution. It is in these terms:

**24.** (1) Subject to the provisions of subsection (6), if any person alleges that any of the provisions of sections 12 to 23 has been, or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction – (a) to hear and determine any application made by any person in pursuance of subsection (1); and (b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3), and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 12 to 23:

Provided that the High Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law.

[6] The other provisions are contained in the *Supreme Court of Judicature Act Cap 117A (“SCOJA”)* and the *Criminal Appeals Act Cap 113A*. They establish the jurisdiction of the Court of Appeal to hear criminal appeals. I will detail the relevant provisions of these statutes later.

## **JURISDICTION**

[7] The second ground of the defendant’s application raises an issue of jurisdiction. Logically, I ought to consider it first. As set out on the application, the defendant asserts that this Court has no power to amend a sentence and, therefore, has no jurisdiction in this matter. However, Ms.

Small did not address this ground of the application discretely in her submissions. The thrust of her contention was that the Court should decline to exercise its jurisdiction under *section 24(2)* of *the Constitution*.

[8] *Section 24(1)* of *the Constitution* allows that where a person alleges that any of the provisions of *sections 12* to *23* has been or is likely to be infringed in relation to him, he may apply to the High Court for redress. *Section 24(2)(a)* confers the High Court with original jurisdiction to hear and determine applications made pursuant to *section 24(1)*. Conjunctively, this provision vests the Court with wide powers to make “such orders, issue such writs and give such directions as it may consider necessary to enforce and secure any of the provisions of *sections 12* to *23*.”

[9] The claimant has asserted that his rights under *sections 13, 18* and *22* of *the Constitution* have been infringed. Though not expressly seeking declaratory orders to that effect, his claim is predicated on that assertion. Apart from asking this Court to amend his sentence, he also seeks damages “for a denial of Constitutional rights”. His claim falls within *section 24(1)* of the constitution and as such, it invokes the adjudicative powers granted to the Court by *section 24(2)*.

[10] Therefore, whether or not this Court has power to amend the sentence is not definitive of its jurisdiction in this matter. In her submissions, Ms. Small

referred to *sections 56(1) and (2) of SCOJA* and *section 3* of the *Criminal Appeals Act* to demonstrate that the power to review and vary sentences is vested in the Court of Appeal. That this is so is not in doubt. *Sections 56(1) and (2) of SCOJA* read:

56. (1) The *Criminal Appeal Act* applies for the purposes of appeals to the Court of Appeal against convictions before or sentences passed by, the High Court in the exercise of its criminal jurisdiction.

(2) The Court of Appeal has full power to determine in accordance with the *Criminal Appeal Act*, any questions necessary to be determined for the purpose of doing justice in the case before the Court.

[11] *Section 3(1)* of the *Criminal Appeal Act* allows for an appeal as of right to the Court of Appeal against a conviction. *Section 3(3)(c)* provides that an appeal to the Court of Appeal “is with the leave of the Court” when it is an appeal against “... the sentence passed on conviction, not being a sentence specifically fixed by law.” *Section 14* empowers the Court of Appeal, on an appeal against conviction or sentence, to quash the sentence and substitute what it considers to be the correct sentence, if it thinks that a different sentence should have been passed.

[12] Procedurally, *section 19(1)(a)* of the *Criminal Appeal Act* provides that notice of an application for leave to appeal against sentence, other than against a sentence of death, should be given “within 21 days of the date on which the

sentence was passed”. *Section 20* provides that the Court of Appeal may “at any time” extend the time for giving notice of an application for leave to appeal.

- [13] Ordinarily, the High Court has no jurisdiction to vary a criminal sentence. However, *section 24(2)* of *the Constitution* confers wide powers of redress on the High Court. These appear to be sufficiently ample to allow a court in the exercise of its constitutional jurisdiction to order or direct that a person be released from prison on a date prior to that which would otherwise apply. The power to make an award of damages has not been questioned.

#### **CAN THE CONSTITUTIONAL JURISDICTION BE EXERCISED?**

- [14] It seems to me, therefore, that the real jurisdictional issue is whether the Court can exercise the jurisdiction granted it by *section 24(2)*. This question arises because the closing lines of that subsection preclude the exercise of the jurisdiction granted by the subsection, if the Court is satisfied that adequate means of legal redress are, or have been available, to an applicant. The words encapsulating this restraint are commonly referred to as “the proviso”.
- [15] Ms. Small submitted that the claim is an abuse of process. She urged that the claimant is seeing to invoke the Court’s constitutional jurisdiction as a means of appealing his sentence. She submitted that, if dissatisfied with the sentence, he ought to have appealed to the Court of Appeal; and that he had given no

explanation as to why he had not done so, or shown that anything precluded him from doing so. Counsel urged that there are no special or extraordinary circumstances which justify a circumvention of the appellate process. She cited *Sonson v The Attorney General and another SLUHCV 2005/0695*; *Attorney-General of Grenada v Aban (1995) 48 WIR 111*; and *Harrikissoon v Attorney General of Trinidad and Tobago (1980) AC 265* in support of her submissions.

[16] In turning to these authorities, I must point out that none of them involved the application of a proviso that imposes a mandatory restraint on the exercise of the court's jurisdiction. *Harrikissoon* was an appeal from the Court of Appeal of Trinidad and Tobago. It concerned a complaint by the appellant that he had been unlawfully transferred by the Teaching Service Commission from one post to another. The relevant section of the constitution contained no proviso. The Privy Council considered that his constitutional rights and freedoms were not implicated by the act complained of. Nonetheless, it commenced its decision with this comment at *page 268 letter B*:

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 to 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.

- [17] It is evident that the Board assumed that courts have an inherent jurisdiction to decline the exercise of the constitutional jurisdiction where an application is frivolous or vexatious or otherwise an abuse of process. Later confirmation of this is to be found in *Maharaj (No 2) [1979] A.C. 385* and *Independent Publishing Co Ltd v the Attorney General of Trinidad and Tobago [2005] 1 LRC 222*. Both cases arose out of Trinidad and Tobago.
- [18] In *Maharaj*, at *page 400*, Lord Diplock referred to the court's "... ample powers, both inherent and under *section 6 (2)*, to prevent its process being misused". He was reflecting on a hypothetical scenario where, rather than pursue an appeal, a litigant opts to bring a constitutional motion where he alleges that there was a breach of a fundamental rule of natural justice in a trial.
- [19] In *Independent Publishing Co Ltd*, at *paragraph 76*, the Privy Council opined that the authorities establish that a constitutional motion will only be dismissed by reference to some other available remedy "when a constitutional

motion is properly to be regarded as an abuse of the court's process". *At paragraph 75*, the Court referred to *Harrikisson* and a passage found at *paragraph 53* in *Observer Publications Ltd v Matthew [2001] 4 LRC 288*, a decision of the Board on an appeal from Antigua. In that passage, Lord Cooke opined that "[f]rivolous, vexatious or contrived invocations of the facility of constitutional redress are certainly to be repelled".

[20] This brings me to *Sonson*, a decision of the High Court of St. Lucia. Like the proviso in *section 18(2)* of Constitution of Antigua and Barbuda, that in *section 16(2)* of the constitution of St. Lucia is expressed in discretionary terms. The latter provides that the court "**may** decline to exercise its powers" Mason J, as she then was, exercised her discretion against the claimant who had sought constitutional redress after being shot by the police while in their custody. Prior to filing his constitutional motion, he had filed a private law action, apparently out of time, which he subsequently withdrew. In declining jurisdiction, Mason J held that adequate means of redress were available to the claimant and it would be permitting an abuse of process to allow him to come by way of a constitutional motion.

[21] Mason J cited *Aban* in the course of her decision in *Sonson*. In the former case, on an appeal from the High Court of Grenada, the Court of Appeal of the Eastern Caribbean States held that the respondent could not seek

constitutional redress where a common law action was available to him, unless he could show that there was some emergency, urgency or other thing which made that alternative remedy inadequate. Again, the court was concerned with a proviso that imposed a discretionary restraint. As the court noted at *page 114*, “[t]he proviso to section 16 envisages a discretion to be exercised by the judge upon an application of the principles of justice”.

[22] The mandatory restraint contained in *section 24(2) of the Constitution* was observed in *Smithfield Food Ltd. v The Attorney-General (1992) 40 WIR 61*, a case that was cited, at *page 114*, in *Aban*. There, the court provided an excellent summary of *Smithfield Food Ltd* and acknowledged the distinction between the Grenada proviso and that in Barbados. It stated:

In *Smithfield Foods Ltd* ... a case from the Barbados Court of Appeal that reached Her Majesty's Privy Council, the appellant instead of appealing from an order for a stay of execution and for security for costs made by the High Court of Barbados, sought redress under section 24 of the Barbados Constitution. That section of the Constitution contained a proviso that is not dissimilar to the proviso to section 16 of the Grenada Constitution except that, whereas the Grenada Constitution gives a discretion to the judge to decline to exercise the court's powers under section 16(2), the proviso in the Barbados Constitution made it mandatory in the Barbados court to decline to exercise the said powers if it was satisfied that adequate means of redress were or had been available. In that case the Privy Council agreed with the Barbados Court of Appeal and the High Court that the process of appeal provided adequate redress and that the motion was to stand dismissed.

[23] Delivering the decision of the Board in *Smithfield Foods Ltd.*, Lord Ackner concluded, at *page 65, letter f* “... that the proviso to section 24(2) ... 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”. Earlier, at *page 65, letters a to b*, Lord Ackner discounted the idea that the fact that an appeal may only lie with leave is a sufficient excuse for not pursuing the alternative redress. He stated that “[the appellant] must first seek to avail itself of the means of redress before it can be in a position to contend, if at all, that the means are inadequate”.

[24] Generally, collateral attacks on criminal proceedings are not entertained by courts. The point is made in this way by *Francis Alexis* in *Changing Caribbean Constitutions 2nd ed* at *paragraph 9.44*:

The Courts do not favour a constitutional application being used to launch a collateral attack on criminal proceedings where this is not appropriate. The reference (sic) is that challenges regarding criminal proceedings be taken in them, rather than a parallel constitutional case be brought in relation to such a challenge [*Ameerally v A-G* (1978) 25 WIR 272; *Warner v A-G* (1996) 54 WIR 145]. There are, however, exceptions, as where the matter might be raised only in constitutional proceedings ...

[25] In *Hinds v The Attorney General & Ors. [2002] AC 854*, the Privy Council opined that, ordinarily, a claim for constitutional relief does not offer an alternative means of challenging a conviction or a judicial decision. Delivering the decision of the Board, Lord Bingham stated, at *paragraph 24*:

It would be undesirable to stifle or inhibit the grant of constitutional relief in cases where a claim to such relief is established and such relief is unavailable or not readily available through the ordinary avenue of appeal. As it is a living, so must the constitution be an effective, instrument. But Lord Diplock's salutary warning remains pertinent: a claim for constitutional relief does not ordinarily offer an alternative means of challenging a conviction or a judicial decision ....

[26] *Hinds* was referred to by the Board in *Independent Publishing Co Ltd*. Citing that case and *Forbes v The Attorney General 60 WIR 462*, at *paragraphs 89 and 90*, the Board considered the authorities to be clear on the point that “[c]onvicted persons cannot in the ordinary way, even if ultimately successful on appeal, seek constitutional relief in respect of their time in prison”.

[27] At paragraph 4 of his affidavit, the claimant deposed that he had petitioned the Privy Council for “a remission of sentence, as regards the said twenty-months”. His evidence is that the petition was lodged on 18 March 2013 and since rejected. He deposed further that he was left with no option but to bring a constitutional motion, as he was “well out of time for appealing”.

[28] In light of the established machinery for appealing against sentence, the principles espoused in the authorities examined, and the mandatory nature of the proviso in section 24(2), this would seem to be a case in which the pursuit of constitutional relief must be barred. The claimant did not avail himself of the opportunity to seek leave to appeal against his sentence in the statutory period that was available to him to do so. The fact that an appeal against

sentence only lies with the leave of the Court of Appeal does not render that form of redress inadequate. He can advance no such argument where he has not even made an application for leave. *Smithfield* is good law on that point. Even now he may seek leave to file an application for leave to appeal out of time. *Section 20* of the *Criminal Appeal Act* affords him that right. Far be it from me to comment on the prospects of success of such an application.

[29] Mr. Hanuman submitted that there are a number of reasons why the constitutional claim should be entertained. He prayed in aid *Part 1* of the *Supreme Court (Civil Procedure) Rules 2008* (the *CPR*) in submitting that the Court should adopt a just outcome. He noted that most of the cases cited by Ms. Small pre-dated the *CPR* and its written enshrinement on our procedural landscape of the overriding objective of dealing with cases justly.

[30] *CPR 1.1* provides that the overriding objective of the *CPR* is to enable the court to deal with cases justly. *CPR 1.1(2)* lists a number of objectives that, “as far as is practicable” are included in dealing justly with a case. *CPR 1.2* enjoins the Court to seek to give effect to the overriding objective when interpreting *the CPR* or exercising any powers under them. None of that obtains here. The issue here is whether the proviso in *section 24(2)* of *the Constitution* bars the claimant’s application for constitutional redress.

[31] This is not to suggest that in resolving the issue before it, the Court should proceed without regard to what the justice of the case requires. Justice according to law must be an overarching objective of our legal system. The proviso precludes the Court from exercising its powers under *section 24(2)* if satisfied that there are, or were, alternative and adequate means of legal redress available to an applicant. It is by a careful consideration of whether the test of exclusion is satisfied that a court will ensure that justice is done.

[32] Mr Hanuman made two distinct submissions which appeared to question the availability of the appeal process and its adequacy. First, he submitted that the claimant was self-represented; and that the transcript does not show that the trial judge informed him of his right to appeal. He urged that the trial judge was obliged to do so. This submission might have been more engaging had Counsel referred to authorities in respect of the proposition that there is such a duty on a trial judge, and discussed the implications, if any, of the maxim that ignorance of the law is no excuse.

[33] Nonetheless, there are two short answers to this submission. The first is that the claimant does not allege that he was unaware of his entitlement with respect to an appeal. He provides no evidence to this effect, neither is it pleaded as part of the basis of his claim. His sole contention is that the trial

judge did not take into account the period spent on remand. There is, therefore, a disconnect between the pleaded case and this submission.

[34] Secondly, and more fundamentally, for the bar to operate, *section 24(2)* requires that adequate means of redress be or have been “available to the person concerned under any other law”. The appellate process was available to the claimant under the provisions of the *Criminal Appeal Act*. Ignorance on his part as to its availability does not mean that it was not available to him. A bald plea of ignorance cannot be taken to be enough to justify intervention. To hold otherwise would be to allow persons to claim unawareness of the availability of the alternative redress, even if he, or she, really knew of its availability.

[35] Counsel’s second submission was that, in any event, an appeal against sentence offers no satisfactory redress. He stated that an appeal could take as many as five years to be heard and that this places an appellant at risk of having his period in prison lengthened proportionately. I understood him to say that the Court of Appeal has a discretion as to how the time spent awaiting the hearing of the appeal should be treated; and that it could order any sentence to run from the date of the hearing of the appeal.

[36] I find no merit in that submission. Seemingly, it is based on an assumption that where a significant period of time elapses before an appeal is heard, the

Court of Appeal could arbitrarily determine that any sentence should run from the time of the appeal. That is not so. *Section 33* of the *Criminal Appeal Act Cap* regulates the computation and commencement of sentences on the hearing of an appeal against sentence. It is in these terms:

**33.** (1) The time during which an appellant pending the determination of his appeal is not detained in custody does not count as part of any term of imprisonment.

(2) Subject to subsection (3), 6 weeks of the time during which an appellant is in custody pending the determination of his appeal or the whole of that time if less than 6 weeks does not count as part of any term of imprisonment under his sentence.

(3) Subsection (2) does not apply where leave to appeal is granted or any certificate mentioned in subsection (2) of section 3 has been given for the purpose of the appeal.

(4) In any other case, the Court may direct that no part of the time referred to in subsection (2) or such part thereof as that Court thinks fit, whether shorter or longer than 6 weeks, shall be disregarded as mentioned in that subsection.

(5) Subject to subsections (1) to (4), the term of any sentence passed by the Court in substitution for a sentence passed on the appellant in the proceedings from which the appeal is brought begins, unless that Court otherwise directs, to run from the time when it would have begun to run if the sentence were passed in those proceedings; and references in this section to any sentence to which the appellant is for the time being subject shall be construed accordingly.

[37] It is clear from those provisions that the Court of Appeal has a discretion to determine how a sentence should be computed and the time from which it should run. The starting position under *section 33(5)* is that a sentence runs

from the time it would have begun to run if it were passed in the trial proceedings. The Court's power to direct otherwise cannot be exercised capriciously.

[38] In *Ali v The State (2005) 67 WIR 309*, an appeal from the Court of Appeal of Trinidad and Tobago, the Privy Council had to determine the approach to be taken to credit for time spent in custody pending an appeal. Notably, the Trinidad provisions provided, in effect, that sentence should run from the date of the determination of the appeal, unless the court directed otherwise. In a statement of principle that appears to be equally applicable in this jurisdiction, the Board stated, at *paragraph 16*:

... an appellate court must start with the statutory injunction regarding loss of time. It should consider in each case in the light of the relevant facts whether to exercise its discretion to backdate the sentence and, if so, for what length of time. Appellate courts are entitled to exercise their discretion in the manner which they think appropriate, provided it is consistently exercised and in accordance with proper principle.

[39] The Board continued, at *paragraph 17*, by commenting that “the making of orders backdating sentences to the date of conviction should not be restricted to exceptional cases”. After indicating that, in exercising its discretion, the appellate court ought not to take account of the heinousness of the offence, the prisoner's lack of remorse, the leniency of the sentence, the prisoner's

record, or his conduct since conviction, “except in so far as it may show his state of mind in applying for leave to appeal”, the Board continued:

... any decision by which it is determined that there should be loss of time should be proportionate, that is to say it should impose a penalty for bringing or persisting with a frivolous application which fairly reflects the need to discourage wasting the court's time without inflicting an unfairly long extension of imprisonment upon the applicant. Their lordships do not wish to be prescriptive about the appropriate length of loss of time orders, which is a matter for each appellate court in each individual case. They consider, however, that they should be made with regard to the abuse which they are designed to curb and would not expect them to exceed a few weeks in the large majority of cases.

[40] These principles were applied by the Board in *Dookee v The State [2013] 1 LRC 468* on an appeal from Mauritius, a jurisdiction with legislation like that considered in *Ali*. The cases demonstrate that appellate courts cannot act arbitrarily when considering the exercise of a discretion as to the date from which a sentence should run. Mr. Hanuman produced no empirical data to show that the Court of Appeal acts whimsically in this respect and, in any event, an appellant who is aggrieved by a decision of the Court of Appeal may appeal to the Caribbean Court of Justice.

[41] Further, Mr. Hanuman submitted that the Court ought to exercise its jurisdiction because the trial process involved a breach of natural justice. He stated the particulars of the alleged breach to be that the trial judge did not (i) inform the claimant of the nature of his sentence; (ii) provide a mathematical

breakdown showing him how he arrived at the term of imprisonment imposed; and (iii) advise him as to his right of appeal. Counsel submitted that, taken together, these constitute “extraordinary circumstances” which put this case over the *section 24(2)* bar.

[42] In making these submissions, Counsel seemingly had in mind the passage from the judgment in *Hinds* which I reproduced at paragraph [25]. In that passage Lord Bingham had placed reliance on Lord Diplock’s “salutary warning” in concluding that constitutional relief would “ordinarily” not be available in circumstances such as these. Lord Bingham had earlier, at *paragraph 23*, made reference to a passage contained in the judgment of Lord Diplock in *Maharaj* at *page 399*. That passage reads in part:

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. Where 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 section 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.

[43] However, any notion that this Court could exercise its *section 24(2)* power on account of a breach of a rule of natural justice is unsustainable for a number of reasons. First, the claimant has not pleaded his case on that basis. The error of which he complains in his claim is one of substantive law which, if established, could have been put right on an appeal. Secondly, even if established, none of the particulars identified by Counsel amounts to a failure to observe the rules of natural justice in respect of the sentencing hearing.

[44] Thirdly, Lord Diplock went on in the same passage to indicate that, even where a breach of natural justice is alleged, constitutional proceedings might only obtain where the sentence could not be corrected by an appeal. He stated:

... even a failure by a judge to observe one of the fundamental rules of natural justice does not bring the case within section 6 unless it has resulted, is resulting or is likely to result, in a person being deprived of life, liberty, security of the person or enjoyment of property. **It is only in the case of imprisonment or corporal punishment already undergone before an appeal can be heard that the consequences of the judgment or order cannot be put right on appeal to an appellate court** [my emphasis].

[45] Fourthly, the proposition advanced by Lord Diplock advocating a different approach to errors of fact, or substantive law on the one hand and errors of procedure, on the other is no longer good law. The practicality of the distinction had been questioned by Lord Hailsham in his dissenting opinion in *Maharaj (No 2)*. He stated at *page 410*:

I do not doubt the validity of the distinction viewed as a logical concept, though the line might be sometimes hard to draw. But I doubt whether the distinction, important as it may be intellectually, would be of much comfort to those convicted as a result of judicial error as distinct from deprivation of due process or would be understood as reasonable by many members of the public, when it was discovered that the victim was entitled to no compensation, as distinct from the victim of a contravention of section 1 of the Constitution who would be fully compensated.

[46] The Board returned to this issue in *Independent Publishing Co Ltd*. It rejected the validity of the distinction proffered by Lord Diplock in *Re Maharaj (No 2)* and rationalised the decision in that case. The Board stated at *paragraphs 87 to 89*:

[87] Lord Diplock's judgment has been widely understood to allow for constitutional redress, including the payment of compensation, to anyone whose conviction (a) resulted from a procedural error amounting to a failure to observe one of the fundamental rules of natural justice, and (b) resulted in his losing his liberty before an appeal could be heard. That, however, is not their Lordships' view of the effect of the decision. Of critical importance to its true understanding is that Mr Maharaj had no right of appeal to the Court of Appeal against his committal and equally, therefore, no right to apply for bail pending such an appeal.

[88] In deciding whether someone's s 4(a) "right not to be deprived [of their liberty] except by due process of law" has been violated, it is the legal system as a whole which must be looked at, not merely one part of it. The fundamental human right, as Lord Diplock said, is to "a legal system ... that is fair". Where, as in Mr Maharaj's case, there was no avenue of redress (save only an appeal by special leave direct to the Privy Council) from a manifestly unfair committal to prison, then, despite Lord Hailsham's misgivings on the point, one can understand why the legal system should be characterised as unfair. Where, however,

as in the present case, Mr Ali was able to secure his release on bail within 4 days of his committal - indeed, within only one day of his appeal to the Court of Appeal - their Lordships would hold the legal system as a whole to be a fair one.

[89] Once someone committed to prison for contempt of court could appeal in Trinidad and Tobago to the Court of Appeal, and meantime apply for release on bail, his position became essentially no different from that of a person convicted of any other offence.

[47] Lord Brown concluded at *paragraph 93* in this way:

Now that rights of appeal exist, indeed, their Lordships see little reason to maintain the original distinctions made in *Maharaj (No 2)* ... between fundamental breaches of natural justice, mere procedural irregularities and errors of law—distinctions which in any event were never very satisfactory for the reasons given by Lord Hailsham.

[48] The Board’s comments in *Independent Publishing Co Ltd.* was made in the context of an application under the Constitution of Trinidad and Tobago following a committal for contempt of court. However, as was observed by Bereaux JA in *Renne v The Attorney General of Trinidad and Tobago Civil Appeal No. P 57 of 2013 and Claim No. CV 2012-04245 (date of decision, 29 November 2016)*, at *paragraph 18*, “[t]he ratio decidendi ... is not to be [so] confined”. At *paragraph 12*, Bereaux JA stated the broader principle to be derived from *Independent Publishing Co Ltd* in this way:

In deciding whether someone’s section 4(a) right not to be deprived of their liberty except by due process of law, has been violated, it is the legal system as a whole which had to be examined and not merely one part of it.

(ii) Where there is no avenue open to the person aggrieved for redress then the legal system can be characterised as unfair. Where however there are avenues within the legal system by which an aggrieved person can pursue redress for the wrong committed against him then the legal system may be characterised as fair.

[49] In my judgment, the effect of *Independent Publishing Co Ltd.* is to preclude any reliance on a fundamental breach of natural justice as a basis for asserting a claim for constitutional redress where the legal system provides for an appeal. I do not see how the claimant can now seek to avail himself of *section 24(2)* of the Constitution to provide a collateral attack on his sentence. There was available to him an adequate alternative means of redress which he has failed to utilise for reasons that he has not disclosed to the Court. Indeed, it is still open to him to seek an extension of time within which to seek leave to appeal against his sentence. This Court is therefore enjoined by the proviso in *section 24 (2)* of *the Constitution* to decline to exercise its powers under that provision.

[50] Effectively, that disposes of this matter. Nonetheless, out of deference to Counsel, I will consider briefly the other issues that were raised by them.

### **IS THERE A REASONABLE GROUND FOR BRINGING THE CLAIM?**

[51] In the grounds of their application, the defendants assert that there has been no breach of the claimant's constitutional rights. The real question at this pre-

trial stage is whether the claimant has disclosed any reasonable grounds for bringing his claim. Mr. Hanuman indicated that if the Court determined on the basis of what is before it that the trial judge did give full credit for the time spent on remand, he would discontinue the proceedings. However, the defendants' submissions under this ground go beyond this point and I must consider them.

**Sections 13, 18 and 22.**

[52] The claimant asserts in his claim form that “the sentence manifestly violates Chapter 3 of the Barbados Constitution, in particular Articles 13; 18; and 22”. He does not refer to any other provisions in that Chapter, neither does he identify the particular rights implicated in the sections to which he refers. A request by the defendants for the provision of particulars might have been anticipated. However, the hearing of the application proceeded on the basis of Ms. Small's surmise as to the rights to which the claimant intended to refer. The obviousness of her selections and the absence of contrary indication by Mr. Hanuman inform much of what follows.

[53] *Section 13* of the Constitution deals with the protection of the right to personal liberty. *Section 13(1)(a)* reads:

13. (1) No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases, that is to say-

(a) ... in execution of the sentence or order of a court whether established for Barbados or some other country, in respect of a criminal offence of which he has been convicted.

[54] Citing that provision, Ms. Small submitted that there is no infringement of the *section 13(1)* right where the deprivation of liberty is as a result of a sentence imposed for a criminal offence. She submitted that to be the case in this matter. Counsel urged further that the claimant's documents provide no insight into how his incarceration infringes his *section 13(1)* right.

[55] There is merit in Ms. Small's submission. The claimant has evinced no basis on which the claim of a breach of *section 13(1)(a)* of *the Constitution* can be sustained. It is evident from that provision that the execution of a custodial sentence cannot itself be the basis of an infringement of the *section 13(1)* right. Seemingly, the claimant's case is that his personal liberty has been, or is being, infringed as a consequence of a sentence that is wrong in law.

[56] However, a sentence that was based on an error of law does not give rise to a breach of the *section 13(1)(a)* right. Lord Diplock's pronouncement at *paragraph 339* in *Maharaj (No 2)* that "no human right or fundamental freedom recognised by ... the Constitution is contravened by a judgment or order that is wrong and liable to be set aside on appeal" is still good law.

[57] This reasoning applies equally to claims in respect of *sections 22(1)* and *(2)* and *section 18*. *Sections 22(1)* and *(2)* read:

**22.** (1) No person shall be deprived of his freedom of movement, that is to say, the right to move freely throughout Barbados, the right to reside in any part of Barbados, the right to enter Barbados, the right to leave Barbados and immunity from expulsion from Barbados.

(2) Any restriction on a person's freedom of movement that is involved in his lawful detention shall not be held to be inconsistent with or in contravention of this section.

[58] Ms. Small submitted that the claimant has been lawfully detained and, hence, cannot contend that *section 22(1)* has been infringed with respect to him. I agree. In respect of *section 18*, Ms. Small focused on *subsection (1)* which provides that accused persons shall be afforded a fair hearing by a legally established independent and impartial court within a reasonable time. More comprehensively, *section 18* sets out a number of rights which are intended to secure protection of the law.

[59] Ms. Small submitted that *section 18(1)* applies solely to persons who are “charged with a criminal offence”; that the defendant no longer falls within that category of persons and, therefore, that he is not entitled to the benefit of that subsection. She cited a passage found at *paragraph 18 of Lovell v The Attorney General High Court Suit No. 0915 of 2016 (date of decision, 7 December 2018)* in support of this submission. There Scott J (Ag) stated:

The right to a fair hearing extends to the full course of the criminal trial ... 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.

[60] Counsel seems to have overlooked the fact that *section 24(1)* of the Constitution allows a person to apply for redress where he alleges that any of the rights in *section 12* to *23* has been, or is likely to be contravened in relation to him. This allows for a reflective assessment as to whether a *section 18(1)* right has been infringed. What matters is that the applicant was charged with a criminal offence at the time of the alleged infringement; not that he is not so charged at the time of the hearing.

[61] However, the claimant’s documents disclose nothing that implicates any of the rights set out in *section 18* of the Constitution. He has not demonstrated how any failure by the trial judge to give full credit for time spent on remand implicated his right to a fair hearing, or any other *section 18* right. Mr. Hanuman’s submissions in respect of alleged breaches of natural justice did not go to the fairness of the hearing. The transcript discloses that the claimant made extensive submissions by way of mitigation prior to being sentenced. What is his *section 18* complaint? Whatever it may be, it could have been raised on an appeal.

## TIME SPENT ON REMAND

[62] Ms. Small made submissions in respect of the complaint that the trial judge had failed to give full credit for the time spent on remand. She urged that (i) at the date that the sentence was imposed, it was a matter for the sentencing judge's discretion how the period of remand ought to be treated; and (ii) the trial judge had given full credit. She cited *Hall v R Crim App. No. 15 of 2008 (date of decision, 12 March 2010)* in support of the first limb of her submission. At *paragraph 11* of that decision, the Court of Appeal stated:

It would appear that in Barbados, where there is an absence of statutory provisions similar to those in the United Kingdom, that at common law the trial judge has the discretion to take all, part of, or even none of the time spent on remand into account when sentencing. The determination is dependent on the particular circumstances of each case ...

[63] Mr. Hanuman submitted that, while the transcript discloses that the trial judge said he intended to give full credit for the time spent, it was not clear from the record that he had done so. He urged that this was so since he did not provide a “mathematical breakdown” as to how he had arrived at the sentence.

[64] Counsel on both sides acknowledged that the decision of the CCJ in *Hall v R [2011] CCJ 6 (AJ)* revised the position enunciated by the Court of Appeal. In a decision delivered on 15 April 2011, de la Bastide PCCJ and Nelson, Saunders and Bernard JJCCJ held, at *paragraph 17*, that there is a “prima facie rule of full credit for time served in pre-sentence custody”. At

*paragraph 18*, they went on to state that there is a residual discretion in the trial judge not to apply the primary rule. They provided a non-exhaustive list of circumstances in which this might be done. At *paragraph 30* of his separate judgement, Wit J agreed that there is a *prima facie* rule “that time spent in custody should fully or at least substantially be taken into account by the sentencing judge”. He acknowledged that “the judge may only depart in a limited number of cases”.

[65] Ms. Small directed my attention to portions of the transcript in which the trial judge intimated that he would give full credit for the time spent on remand. However, I accept Mr. Hanuman’s submission, that the absence of a breakdown makes it impossible to determine what period, if any, was credited on that account.

[66] This lack of clarity from the record raises a question as to who bears the burden of proof on this issue and, if it is the claimant, whether he could discharge it on the evidence adduced to date. However, there is a more fundamental point that works against him. It arises from the fact that the claimant’s sentencing occurred on 10 June 2010, a date which fell after the Court of Appeal’s decision in *Hall* but before that of the CCJ.

[67] At the date of sentencing, the trial judge was bound to take the law as that enunciated by the Court of Appeal in *Hall*. In *Burton and Nurse v R [2014]*

*CCJ 6 (AJ)*, the CCJ considered the juridical effect of its decision in *Hall*. It stated at *paragraph 23*:

In particular, it was impossible for the trial judge to have taken account of our decision in *Romeo Hall*, which had not been given at the time he pronounced sentence, and it would have been improper for him to have attempted to anticipate that decision. The real question is whether the Court of Appeal hearing the appeal from the trial judge and seised, as it was by then, of the decision in *Romeo Hall* ought to have applied the principle of full credit for time served on remand. We consider that the Court of Appeal should have done so.

[68] The CCJ continued at *paragraph 30*:

We consider that the basic rule is that prisoners whose cases or appeals are pending or in respect of whom the statutory period to appeal to the courts has not yet expired are entitled to benefit from the ruling in *Romeo Hall*. Prima facie no other prisoner is so entitled. There remains a possibility of applying for an extension of time within which to lodge an appeal but such an application must be supported by sound and convincing argument. The applicant bears a heavy burden to satisfy the court on a number of matters including that there was good reason for the delay. It is only in wholly exceptional circumstances that an extension would be granted in order to file an appeal in order to benefit from the declaration of the law in *Romeo Hall* and the chances of success of such an application become more remote with the passage of time since that decision. Good reason for delay becomes more and more difficult to identify. After the period for appeal has passed the judicial process has prima facie run its course and is exhausted and any attempt to benefit from the declaration of the changed law is more properly addressed to and by the Executive through the exercise of the prerogative of mercy.

[69] These passages suggest that in any current litigation, the claimant would have to displace the prima facie position that he is not entitled to benefit from the

CCJ's decision in *Hall*. He was sentenced before that decision. He filed no appeal against that sentence. His evidence is that he has sought to have his concern addressed through the exercise of the prerogative of mercy but that this was unsuccessful. He waited some 8 years before moving this Court and has provided no explanation for the delay in seeking judicial review. In my view, there is now no basis on which he could argue that he is entitled to benefit from the CCJ's decision in *Hall*.

## **DISPOSAL**

[70] I have determined that this Court has jurisdiction to entertain the claimant's constitutional claim. However, I have concluded that it must refuse to exercise that jurisdiction. Additionally, the Court holds that the claimant's fixed date claim form and affidavit disclose no reasonable ground for bringing the claim. Accordingly, the defendant's application is allowed. I will hear the parties in respect of costs.

**OLSON DEC ALLEYNE  
JUDGE OF THE HIGH COURT**