BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

(Civil Division)

Claim No. 1396 of 2019

BETWEEN:

PEDRO ELLIS **APPLICANT**

AND

THE SUPERINTENDENT OF PRISONS **FIRST RESPONDENT**

THE ATTORNEY GENERAL OF BARBADOS **SECOND RESPONDENT**

Before the Honourable Mr. Justice Cecil N. McCarthy, Judge of the High Court

Date of Decision: 2020 March 31

Appearances:

Mr. Larry A. C. Smith QC, Ms. Desiree Browne, Mr. Kashka Hemans, Ms. Safiya Moore and Ms. Jamila Smith for the Applicant

Mr. Jared K. Richards for the First and Second Respondents

DECISION

INTRODUCTION

[1] The ancient writ of *habeas corpus ad subjiciendum* has often been employed to secure the liberty of the subject. Among the purposes of the writ is to

review the legality of an applicant's detention and to challenge the authority of the prison authorities to continue to detain him. The application is especially appropriate when a person is being detained without charges or where the detention cannot be legally justified.

[2] In this matter the Court is being asked to consider Pedro Ellis' ("the applicant") application for costs relating to a *habeas corpus* application filed on 1 November 2019, having regard to the fact that the Court of Appeal held that the applicant's detention was unlawful and ordered his release on the 12th day of November 2019. This decision is therefore solely concerned with the issue of costs.

Brief Factual Background

[3] By an *ex parte* application made on 1 November 2019 pursuant to Part 57 of the Supreme Court (Civil Procedure) Rules, 2008 ("the CPR") the applicant sought the following orders:

> *"1. A Writ of Habeas Corpus ad Subjiciendum ("the writ") be issued to the Superintendent of Prisons to have the body of PEDRO DEROY ELLIS produced before a Judge in Chambers at the Law Courts, Barbados Supreme Court Complex Whitepark Road in the parish of Saint Michael in this Island immediately after the receipt of the said Writ, together with the day and cause of this being detained, so that the judge may examine and determine such cause is legal.*

2. *Pursuant to the Civil Procedure Rules, 2008 ("CPR") 11.4(2)(a) and CPR 57.2(2) this application be heard without notice;*

3. *Pursuant to CPR 57.3(2) the Applicant be released from custody;*

4. *Further or in the alternative, pursuant to CPR 57.3(4) the writ be returnable at a time, date and place deemed appropriate by this Honourable Court.*

5. *The Respondent pay the costs of this Application."*

[4] The application was supported by an affidavit, also dated 1 November 2019, sworn by the applicant. In his affidavit the applicant detailed the history of the matter, which culminated in his application before the Court.

[5] The applicant mentioned the following salient facts which were reproduced as the grounds of the application. Since the grounds were set out in the applicant's affidavit and form the background to these proceedings, it is convenient to recite them in their entirety

[6] The grounds of the application are:

"1. The Applicant was charged on an indictment containing a single count of murder arising out of an incident on the 5th day of May, 2013. The Applicant was placed in police custody on that date, subsequently arrested and charged with the murder of Antonio Harewood and remanded to Her Majesty's Prison Dodds pending trial.

2. *Several bail applications were made by the Applicant, but all have been refused. The Applicant has been in custody from the 5th day of May, 2013 until the present.*

3. *The Applicant's trial on the indictment as aforementioned commenced on the 8th day of October 2019 and culminated on the 25th day of October when the jury returned a unanimous verdict of not guilty on the charge of murder.*

4. *Manslaughter arose on the evidence adduced during the trial. A direction in relation to manslaughter was put to the jury. This notwithstanding the jury was unable to reach a majority required for a conviction and was subsequently discharged.*

5. *Having been found not guilty on the single count of murder of which the Applicant had been charged, there is currently no proper indictment before the Court which the Applicant has to answer.*

6. *After the discharge of the jury, counsel for the Applicant made an application for bail. Immediately following the application counsel of the Crown expressed the view that there would be no justice in retrying the case. He subsequently recommended that bail be set in the sum of one hundred and fifty thousand dollars.*

7. *The Applicant's bail application was adjourned to 30th October, 2019. The Applicant was then remanded to Her Majesty's Prison Dodds.*

8. *The matter came on for hearing on the 30th day of October, 2019 with new Counsel representing the Crown. New Counsel for the Crown resiled from the position taken by previous Counsel on the 25th day of October, 2019 vis-à-vis there being no justice in retrying the matter. New Counsel stated that the Crown required more time to decide if they wanted to retry the matter and registered their objection to bail.*

9. The Applicant's application for bail was renewed and ultimately rejected by the trial judge. The matter was adjourned until the 13th day of November, 2019 for the Crown to indicate whether it intends to retry the matter.

10. The Applicant has thus far been detained for seven days.

11. As at the date hereof, seven days after the conclusion of the trial, a new indictment on the count of manslaughter has not been laid against him.

12. The continued detention of the Applicant in the present circumstances is unlawful."

[7] On 30 October 2019 the applicant filed an appeal to the Court of Appeal among other things requesting that the order of the trial judge remanding the applicant to prison until 13 November 2019 be set aside and that "the appellant be admitted to bail". This appeal was heard by the Court of Appeal on 12 November 2019, and at this hearing the Court of Appeal upheld the submission of counsel for the applicant that the applicant was being unlawfully detained at Dodds prison on an indictment that was spent. The Court of Appeal held that since there was no fresh indictment, nor was the applicant charged with any offence, he was to be released immediately.

[8] The Court of Appeal determined that the trial judge had erred in believing that it was open to him to consider the question of bail after the jury had found the applicant not guilty of murder on a single count indictment for

murder. The applicant was granted costs by the Court of Appeal to be assessed if not agreed between the parties.

[9] On the 15 November 2019, the applicant discontinued his application for habeas corpus it being rendered otiose by the decision of the Court of Appeal.

The Evidence

[10] The application for *habeas corpus* was supported by two affidavits. First, there was an affidavit sworn by the applicant which essentially recited the facts set out in the grounds of the application.

[11] The core facts are detailed at paragraphs 6 to 14 of the affidavit which state:

> *"6. After approximately five (5) hours of deliberations, I was acquitted of murder. However, the jury was neither able to reach a unanimous decision nor the requisite majority for a verdict on the lesser offence of manslaughter. Greaves, J dismissed the jury.*
>
> *7. My attorney-at-law, Mr. Larry A. C. Smith, QC made an application for bail on my behalf. In reply to this application, Mr. Oliver Thomas, Crown Counsel indicated that there was no justice in retrying the matter. He also stated that if bail is granted a surety in the sum of $150,000.00 would be appropriate.*
>
> *8. Greaves, J asked Mr. Thomas if he had the authority to make the statement he had made vis-à-vis there being no justice in retrying the case. He also*

indicated to Mr. Thomas that he should consult with the Director of Public Prosecutions regarding the retrial of the case, remanded the Applicant to HMPD and adjourned the matter until the 30th day of October, 2019, effectively denying the Applicant bail.

9. *(i) On the adjourned date, 30th of October, 2019, Mr. Alliston Seale, Principal Crown Counsel, represented the Crown in place of Mr. Thomas. Mr. Seale stated that Mr. Thomas had spoken out of turn as an inexperienced prosecutor. Moreover, that only the substantive Director of Public Prosecutions and not anyone acting with the ostensible authority of the office of Director of Public Prosecutions could make the decision to discontinue a matter. He further stated that the Crown needed more time to determine if they were going to retry the matter or not proceed any further.*

   (ii) In relation to the application for bail, which was before the Court, Mr. Seale indicated that he was objecting to bail and requested an adjournment.

10. *After hearing further submissions from Mr. Smith, QC for as to why I should be admitted to bail, Greaves, J refused the application and remanded the Applicant to HMPD until the 13th day of November, 2019.*

11. *I now find myself in a precarious position. Having been remanded to HMPD without being charged with any offence. The jury at my trial found me not guilty for the offence for which I was indicted. The issue of manslaughter having arisen on the evidence and put to the jury, the jury was undecided and unable to reach a majority verdict in respect of the lesser offence.*

12. The indictment contained a single count of murder. I was acquitted of the said charge. As such, there is currently no proper indictment before the Court.

13. Given that I was acquitted of murder and there is no proper indictment before the Court, I ought to be released.

14. My continued detention of the Applicant is unlawful."

[12] The second affidavit was sworn on 5 November 2019 by Ms. Jamila Smith, one of the attorneys-at-law representing the applicant. Her affidavit annexed a copy of the indictment on which the applicant was tried. That indictment charged a single count of murder.

The Issues

[13] There are two issues that arise for resolution in this matter:-

(a) Should the applicant be awarded costs?

(b) If costs are awarded to the applicant, how should those costs be quantified?

The Respondents' Submissions

[14] Counsel for the respondent, Mr. Jared Richards, made oral submissions as well as written submissions, which were filed on 9 March 2020.

[15] The submissions made by Mr. Richards can be summarized as follows:

i. The applicant withdrew the application for a writ of *habeas corpus* on the 15 November 2019 before it was heard by the Court. This means

that the matter was presumptively resolved in the respondents' favour, as no court orders were made against the respondents.

ii. The applicant having been denied bail by Greaves J., the proper protocol to adhere to in those circumstances was to file an appeal against the court's denial, regardless of whether the court misdirected itself on its jurisdiction.

iii. A litigant should expend all remedies available to him before relying upon a *habeas corpus* application. This is what the applicant did. He appealed to the Court of Appeal against the refusal of bail, and his appeal was successful. This success validated the suitability of appealing to the Court of Appeal for resolving predicaments such as the one the applicant endured. The availability of an appeal as a remedy meant that the writ was not properly before the court to begin with.

iv. In any event, an application for *habeas corpus* could not avail the applicant because this court lacked jurisdiction to hear it. The applicant was detained by Greaves J., and the writ was brought before the court. These two (2) High Courts share concurrent jurisdiction. *Habeas corpus* applications are made against inferior courts and other

public bodies. They cannot operate between two (2) courts that occupy the same position within the judicial hierarchy.

v. An assessment of costs is ideally performed where the party seeking costs provides statements of fees and disbursements to the court and the other party for study. When assessing costs, reasonableness, fairness, and proportionality are factors to which the court must pay heed.

vi. This matter did not progress beyond the *ex parte* hearing of the application, nor did it require substantial research or preparation and filing of documents. This is a special factor for the court to bear in mind if it considers that costs should be granted to the applicant.

[16] Mr. Richards referred the Court to a number of cases in addition to an extract from **David Clark and Gerard McCoy - The Most Fundamental Right of Habeas Corpus in the Commonwealth (Oxford University Press, 2000)**.

[17] Among the decisions cited by Mr. Richards was **Regina (Hilali) v Governor of Whitemoor Prison and Another [2008] 2WLR 299**, in which Mr. Richards asserts that the court held that the writ of *habeas corpus* was not available to the applicant in circumstances where the Extradition

Act provided for an appeal against the decision of the judge to issue a warrant.

[18] Furthermore, Mr. Richards submits that since the applicant was detained by Greaves J, the application for *habeas corpus* was unavailable since it was brought before a court of concurrent jurisdiction.

[19] At paragraph 31 and 32 of his written submissions Mr. Richards submits:

> *"[31] It has been noted in numerous cases and in* ***C.O. Williams Construction Ltd. v Blackman et. Al. High Court Suit No. 1033 of 1988 decision of 1989*** *that:*
>
> *"Proceedings on the Crown side of the Queen's Bench Division are those by means of which the Queen's Bench Division exercises its ancient jurisdiction of supervising inferior courts and public authorities. This jurisdiction used to be exercised principally by the prerogative writs of habeas corpus, certiorari, mandamus and prohibition. In Barbados it is now exercised by the prerogative writ of habeas corpus and by the orders of certiorari, mandamus and prohibition under Order 53 and by the powers of the judicial review under the Administrative Justice Act Cap. 109B."*
>
> *[32] The authors* ***David Clark and Gerard McCoy in the Oxford published text the Most Fundamental Right Habeas Corpus in the Commonwealth*** *noted usefully and by way of illustration at page 16:*
>
> *"In principle the military are amenable to the writ, unless special legislation exists, as in Singapore, to declare a military court to be a superior court. One result of this is to place the court beyond the reach of*

the writ, since habeas corpus is issued by a Supreme Court to inferior courts and tribunals and does not lie against coordinate Superior Courts (courts of the same rank or courts higher in the same hierarchy)."

The Applicant's Written Submissions

[20] The applicant's submissions, oral and written, were made by Mr. Larry Smith QC. The written submissions were filed on 17 December 2019.

[21] Mr. Smith's submissions can be summarised as follows:

i. The sole issue in this matter is that of costs. The court must ascertain which party is entitled to costs, and how they would be quantified.

ii. The general rule in respect of costs is that in litigation, the unsuccessful party pays the costs of the successful party. But this general rule is not absolute. Under certain conditions (which differ on a case-by-case basis), this rule can be deviated from. The court therefore enjoys a flexible discretion in determining which party is liable for costs.

iii. Costs as an issue in litigation is resolved through the exercise of common sense. In the interests of adhering to common sense, and the principles of natural justice, situations may occasionally arise where it is just for the court to *"order a successful party to pay all or part of the costs of the unsuccessful party."*

iv. The purpose of an application of *habeas corpus ad subjiciendum* is to protect or secure the applicant's liberty. It is available *"in all cases of wrongful deprivation of personal liberty."* And that availability is not curtailed by the deprivation of liberty being perpetuated through an order of a Judge of the High Court. If availability was so curtailed, it would mean that *habeas corpus* applications could never be made against the decision or order of a High Court Judge.

vii. The issue of bail was improperly raised through the oral bail application made on 25 October 2019. This is because there were no lawful bases on which the applicant could have been remanded to Dodds until 12 November, 2019. In this specific circumstance, the appropriate application for addressing the applicant's unlawful remand was the writ.

viii. Using a bail application to secure the freedom of an individual for whom bail could not have been a live issue is a misuse of the bail process. Additionally, the legality of the applicant's remand at Dodds was never presented to any Court of primary jurisdiction. Accordingly, it could not be raised at the Court of Appeal. A *habeas corpus* application is the correct mechanism for securing the freedom of an individual who is detained without lawful jurisdiction. And this

mechanism is available irrespective of whether there is an *"application for bail and a decision in relation thereto from which an appeal can be generated."* If the opposite were true, it would mean that an individual would be forced to endure an unlawful detention until such time as his appeal could be heard.

THE COSTS REGIME

[22] Sections 85(1) and 85(2) of the Supreme Court of Judicature Act, Cap. 117A, provide:

"85 Award costs.

(1) Subject to the rules of court, the costs of and incidental to all proceedings in the High Court and the Court of Appeal, including the administration of estates and trusts, are in the discretion of the court, and each court has power to determine by whom and to what extent the costs are to be paid.

(2) Where any enactment passed before or after 4th November, 1991 confers jurisdiction on the High Court or any judge thereof in regard to any matter without expressly conferring jurisdiction to award or deal otherwise with the costs of the proceedings connected with that matter, subsection (1) applies to authorise the court or judge, in its or his discretion, to award and deal with those costs."

The Supreme Court (Civil Procedure) Rules, 2008 (the "CPR")

[23] **CPR 37.2(1),** and **37.6(1)** provide:

"37.2 Right to discontinue claims

(1) A claimant may discontinue all or part of his claim without the permission of the court.

37.6 Liability for costs

(1) Unless

(a) the parties agree otherwise; or

(b) the court orders otherwise,

a claimant who discontinues is liable for the costs incurred by the defendant against whom the proceeding is discontinued before the service of the notice of discontinuance.

[24] CPR 64.5 and 64.6 provide:

"64.5 Entitlement to cover costs

A person may recover the costs of proceedings from some other party or person by virtue of

(a) an order of the court;

(b) a provision of these Rules; or

(c) an agreement between the parties.

64.6 Successful party generally entitled to costs

(1) In exercising its discretion under section 85 of [the SCJA], the general rule is that ***the court will order the unsuccessful party to pay the costs of the successful party****.*

(2) *The court may, however,* ***while acting judicially, make no order as to the costs or, in an exceptional case, order a successful party to pay all or part of the costs of an unsuccessful party****.*

(3) *Without limiting the court's discretion or the range of orders open to it, the court may order a person to pay*

(a) *only a specified proportion of another person's costs;*

(b) *costs from or up to a certain date only; or*

(c) *costs relating only to a certain distinct part of proceedings.*

(4) *In deciding who, or if any person should be liable to pay costs,* ***the court must have regard to all the circumstances****.*

(5) *Without limiting the factors which may be considered, the court must have regard to*

(a) *the conduct of the parties both and during the proceedings;*

(b) *whether a party has succeeded on particular issues, even if not ultimately successful in the case, although success on an issue that is not conclusive of the case confers no entitlement to a costs order;*

(c) *whether it was reasonable for a party to*

(i) *pursue a particular allegation; or*

(ii) *raise a particular issue*

and whether the successful party increased the costs of the proceedings by the unreasonable pursuit of issues;

(d) *the manner in which a party has pursued*

(i) the case;

(ii) a particular allegation;

(iii) a particular issue

and whether the manner increased the costs of the proceedings' and

(e) whether the claimant gave reasonable notice of an intention to pursue the issue raised by the application.

(Emphasis supplied)

[25] **CPR 65.2(1), 65.2(3), 65.11(1), 65.12(1)** and **65.12(2)** provide:

"65.2 Basis of quantification

(1) Where the court has any discretion as to the amount of costs to be allowed to a party, the sum to be allowed is the amount

(a) that the court deems would be reasonable were the work to be carried out by an attorney-at-law of reasonable competence; and

(b) which appears to the court ***to be fair both to the person paying and the person receiving such costs***.

(3) In deciding what would be reasonable, the court must take into account all the circumstances including

(a) any orders that have already been made;

(b) the conduct of the parties before as well as during the proceedings;

(c) the importance of the matter to the parties;

(d) the time reasonably spent on the case;

(e) the degree of responsibility accepted by the attorney-at-law;

(f) the care, speed and economy with which the case was prepared;

(g) the novelty, weight and complexity of the case; and

(h) in the case of costs charged by attorney-at-law to his client,

(i) any agreement that may have been made as to the basis of charging;

(ii) any agreement about what grade of attorney-at-law should carry out the work; and

(iii) whether the attorney-at-law advised the client and took the client's instructions before taking any unusual step or one which was unusually expensive having regard to the nature of the case.

65.11 Assessed costs of procedural applications

(1) On determining any interlocutory application except at a case management conference, pre-trial or the trial, the court must

(a) decide which party, if any, should pay the costs of that application;

(b) assess the amount of such costs; and

(c) direct when such costs are to be paid.

65.12 Assessment of costs – general

(1) This rule applies where costs fail to be assessed in relation to any matter or proceedings, or part of a matter or proceedings other than a procedural application.

(2) Where the assessment relates to part of court proceedings, it must be carried out by the judge, Master or Registrar hearing the proceedings."

(Emphasis supplied)

THE NATURE OF *HABEAS CORPUS*

[26] In **Secretary of State for Foreign and Commonwealth Affairs and Another v Yunus Rahmatullah [2012] UKSC, 48** Lord Kerr captures the substance and the power of the *writ of habeas corpus* in the following extract from his judgment at paragraphs 41 to 44. Lord Kerr said:

"41. The most important thing to be said about habeas corpus, at least in the context of this case, is that entitlement to the issue of the writ comes as a matter of right. "The writ of habeas corpus issues as of right" per Lord Scarman in R v Secretary of State for the Home Department, Ex p Khawaja [1984] AC 74 at 111. It is not a discretionary remedy. Thus, if detention cannot be legally justified, entitlement to release cannot be denied by public policy considerations, however important they may appear to be. If your detention cannot be shown to be lawful, you are entitled, without more, to have that unlawful detention brought to an end by obtaining a writ of habeas corpus. And a feature of entitlement to the writ is the right to require the person who detains you to give an account of the basis on which he says your detention is legally justified.

42. The remedy of habeas corpus is said to be imperative, even peremptory. Classically, it is swiftly obtained: see Lord Birkenhead in Ex p O'Brien [1923]

AC 603 at 609. This reflects the fundamental importance of the right to liberty. And, of course, conventionally the respondent to the writ will be the individual or agency who has actual physical custody of the person seeking release. But habeas corpus is – as it needs to be – a flexible remedy. As Taylor LJ said in R v Secretary of State for the Home Department, Ex p Muboyayi [1992] QB 244, at 269, "The great writ of habeas corpus has over the centuries been a flexible remedy adaptable to changing circumstances."

43. The effectiveness of the remedy would be substantially reduced if it was not available to require someone who had the means of securing the release of a person unlawfully detained to do so, simply because he did not have physical custody of the detainee – "actual physical custody is obviously not essential" per Atkin LJ in Ex p O'Brien [1923] 2 KB 361, 398 and Vaughan Williams LJ in R v Earl of Crewe, Ex p Sekgome [1910] 2 KB 576, 592, stating that the writ "may be addressed to any person who has such control over the imprisonment that he could order the release of the prisoner".

44. The object of the writ is not to punish previous illegality and it will only issue to deal with release from current unlawful detention – see Scrutton LJ in Ex p O'Brien [1923] 2 KB 361, 391. And the writ should only be issued where it can be regarded as "proper and efficient" to do so, per Lord Evershed MR in Ex p Mwenya [1960] 1 QB 241, 303.

[27] Moreover, it is a fundamental principle of the common law that no appeal will lie by the Crown against the order for discharge of an applicant for *habeas corpus*: see **Attorney-General v Radionov [2004] UKPC 38, and**

Frank Cartwright and Another v Superintendent of Her Majesty's Prison and Another [2004] UKPC 10. Fortunately, in 1985 section 58(1) of the Supreme Court of Judicature Act Chapter 117A was enacted. This section gives a right of appeal. It provides:

> *"An appeal lies to the Court of Appeal in any proceedings upon application for habeas corpus, whether civil or criminal, against an order for the release of the person restrained as well as against the refusal of such an order."*

[28] But as **Alleyne J.** observes in **Jeffrey Gittens v the Superintendent of Prisons et al Suit No: 479 of 2013 (date of decision, June 5, 2013)** even though the scope of the writ is wide it is not unlimited. In that case **Alleyne J.** held that the review of the legality of a sentence was not permissible via *the writ of habeas corpus*.

[29] Similarly, in the case at bar, were it not for the decision of the Court of Appeal which led to the discontinuance of the application for *the writ of habeas corpus*, this Court would have had to determine whether the decision of Greaves J to remand the applicant, pending a decision on retrial by the Crown, was an area which was the proper subject for challenge via the *writ of habeas corpus*.

[30] The decision of the Court of Appeal makes it clear that the trial judge had no jurisdiction to consider the issue of bail since the applicant was found not

guilty by the jury on the only count of the indictment before the court. Had this point been drawn to the attention of the judge one assumes that the applicant would have been freed, but on the evidence before me it appears that it was not. It is fair to say that the parties before the Court accepted that the judge was within his rights to consider bail, though Mr. Smith QC did assert his claimant's right to 'bail'.

[31] The issue therefore that this Court must consider is whether in those circumstances it is appropriate to regard this as a case in which there is a review of a decision of the superior court.

[32] Counsel for the respondents has argued forcefully that *habeas corpus* will not lie against a court of co-ordinate jurisdiction and has cited authority.

[33] In **Halsbury Laws of England/Rights and Freedom (Volume 88A (2013))/2**, the following statement appears at **paragraph 58** under the rubric **Reviewing Decision**:

> *"The writ of habeas corpus will not be granted where the effect of it would be to review the judgment of one of the superior courts which might have been reviewed on appeal or to question the decision of an inferior court or tribunal on a matter within its jurisdiction, or where it would falsify the record of a court which shows jurisdiction on the fact of it. However, in cases relating to extradition and the return of fugitive offenders, it has been held that there is power in the superior court to review the case as it appeared before the magistrate, not only to look at the*

evidence before the magistrate, but to consider whether any magistrate properly applying his mind to the question, could reasonably have come to the conclusion that a strong and probable presumption of guilt had been made out which would justify the magistrate in making the committal order."

[34] In **F. X. v Clinical Director of the Central Mental Hospital [2014] IESC 01**, the Supreme Court of Ireland addressed the common law of *habeas corpus* as it relates to *habeas corpus* proceedings and co-equal courts. Denham C. J. in delivering the judgement of the court in that case said at paragraphs 56 and 57 of his judgement:

"*56. There was a traditional understanding under the common law that habeas corpus is not, except in exceptional circumstances, available to review the decision of a judge of co-ordinate jurisdiction: See* ***Costello, The Law of Habeas Corpus in Ireland****, Four Courts Press, 2006.*

57. *Traditionally, the common law habeas corpus did not run to co-equal courts. In Re Aylward (1860) ICLR 448 it was held by the Court of Common Pleas that it entertained "no doubt but that we should far transcend our authority, as Judges of the land, in assuming to ourselves the power of overruling a decision of the Court of the Queen's Bench." It was held that the Court of Common Pleas had no power to consider the proprietary of the decision of the Queen's Bench. The above was quoted with approval by the Queen's Bench Division in Re Aikin (1881) ICLR 50 in which it was held that:-*

> "*It should be remembered that the present case comes before it as a Division of the High Court of Justice, and there is a comity between the several Divisions of the High Court of Justice exercising co-ordinate jurisdiction which ought to lead us in the present case from questioning the procedure of practice of another Division."*

[35] In this case counsel appealed to the Court of Appeal ostensibly on the issue of denial of bail and the Court of Appeal released the applicant based on the submission of counsel, and the recognition in fact, that the indictment was spent and there was no basis to hold the applicant.

[36] Counsel for the applicant emphasised that the appeal to the Court of Appeal was against bail. On this basis he seems to be suggesting that the issue of release of the applicant was a matter for a *habeas corpus* application since it concerned the wider principle of the liberty of the subject and the fact of unlawful detention.

[37] It seems to me that had Mr. Smith demanded of the trial judge the outright release of his client a refusal of the request would have been reviewable on appeal.

[38] Having not myself encountered any cases in which the common law of *habeas corpus* has been used by the High Court to review a decision of a judge of the High Court I am at this stage of the opinion that the better view

in the instant matter is that the decision of the trial judge is not reviewable by *the writ of habeas corpus* on traditional principles.

[39] However, I feel constrained to state that once the applicant had given sworn evidence that he was currently not charged with an offence, it would have been difficult for the defendants to insist on his detention.

[40] It is well known that the action for *habeas corpus* is available where the applicant alleges that he is being detained longer than is legally warranted by the sentence (see the discussion at paragraphs 23 to 31 of the judgement of Alleyne J. in **Jeffrey Gittens**, above.)

[41] It seems reasonable, therefore to conclude that the writ of *habeas corpus*, a fortiori, should be available where there is no conviction nor any pending charges against the applicant.

[42] Furthermore, it also seems arguable that the circumstances of this case represent 'exceptional circumstances' that would take the applicant's case outside of the strictures of the traditional rule that *habeas corpus* does not lie against the decision of a court of co-ordinate jurisdiction. For sure it is arguable that the flexibility of the writ ought to permit it to be applied in the peculiar circumstances of this case.

[43] However, I have received no argument nor authority that would justify my moving away from established precedent. This is even more so when I am of

the view that I do not have to make a decision on this issue to arrive at a decision on costs. I therefore decline to state specifically that the writ of *habeas corpus* will or will not lie in the special circumstances of this case.

The Law with Respect to Costs

[44] The rules governing costs are set out at paragraphs 22-25 above. Counsel for the respondent, Mr. Richards has relied on CPR 37(6) above. That rule states as follows:

> ***"Unless the parties agree otherwise; or the court orders otherwise, a claimant who discontinues is liable for the costs incurred by the defendant against whom the proceeding is discontinued before the service of notice of discontinuance."***

[45] Mr. Richards also contends that even if the applicant had not discontinued the matter the application was bound to fail. As a result, the respondent as the successful party ought to be awarded its costs pursuant to the general rule contained in CPR 64.6.

[46] However, CPR 64 (2) provides:

> *"The court may, however,* ***while acting judicially, make no order as to the costs or, in an exceptional case, order a successful party to pay all or part of the costs of an unsuccessful party.****"* (my emphasis)

[47] The effect of this rule is that a successful party may be ordered to pay the costs of an unsuccessful party.

[48] In **Joel King v The Commissioner of Police and the Attorney-General of Trinidad and Tobago (H.C. CV 2743 of 2014 date of decision, 15th November, 2016)**. **Mohammed J.** awarded costs to the applicant in a case where the applicant withdrew the writ of *habeas corpus* and discontinued the application three days after it was filed.

[49] In that case the applicant was detained without charge for about eight days, which led to the applicant applying for a writ of *Habeas Corpus*.

[50] Mohammed J. considered that it was reasonable in the circumstances of the case to pursue the *habeas corpus* application. He relied in part on another decision of the Trinidad and Tobago High Court, where Donaldson-Honeywell J. had ordered the respondent to pay the applicant's costs because the judge had found that it was reasonable for the applicant to pursue the *habeas corpus* application see: **Leason Alcala, Shaquille Alcala, Crystal Clarke v The Commissioner of Police of HC. CV 1018/2016, CV 1020/2016; CV 1022/2016**.

[51] **Mohammed J**. explained the circumstances of **Joel King** at paragraph 34 of his judgment which reads:

> *"In the proceedings before me, I also find it was reasonable for the Applicant to file an Application for the issue of the writ of habeas corpus. At the time of the filing of the Application the Applicant would have been in custody for approximately seven*

days without charge. At no point during that seven day period was the Applicant, his attorney, or his relatives informed that the police intended to charge him. He was advised that his file was sent to the DPP for advice, but that took a few days while he was detained without charge. It was not until the 28th July, 2014 that the Applicant's attorney, Mr. McMaster, was informed that the Applicant was to be charged on that day. Further, this information did not reach the attorney until ***after*** *the court had heard and issued the writ of habeas corpus."*

[52] In those circumstances Justice Mohammed, applying the relevant provisions of the Trinidad and Tobago Civil Procedure Rules, ordered respondents to pay to the applicant costs up to the issuing of the writ of *Habeas Corpus*.

[53] It is true that the Trinidad case is not on all fours with the instant case. In this case the applicant was originally properly charged and tried. However, having been found not guilty by the jury, his detention continued.

[54] In the instant case, where the applicant would have been detained for over 10 days without charge, I am persuaded that a similar order should be made.

[55] In this case the applicant was in custody awaiting trial since 5 May 2013. His several applications for bail were refused. On 25 October 2019, he was found not guilty of murder on a single count indictment. Despite the not guilty verdict the applicant was detained in prison until 12 November 2019, when he was freed by the Court of Appeal.

[56] The application for *habeas corpus* was made on 1 November 2019 after an attempt was made to obtain his release on bail, without success.

[57] It is now common ground amongst all concerned that there was no legal basis for his detention.

[58] The focus therefore, of the arguments of counsel for the respondents is therefore on the suitability of habeas corpus as a method of obtaining the applicant's release as distinct from an appeal.

[59] In this regard it should be noted that the trial judge's decision to remand the applicant was appealed on the basis of his right to bail, while the *habeas corpus* application was being pursued on the basis of his unlawful detention.

[60] In **May v Ferndale Institution 2005 SCC82**, in a comprehensive review of the law of Habeas Corpus the Canadian Supreme Court (per LeBel and Fish JJ. Mc Lachin CJ, Binnie, Deschamps and Abella JJ) held that prisoners may choose to challenge the legality of a decision affecting their residual liberty either in a provincial superior court by way of habeas corpus or in Federal Court by way of judicial review.

[61] The Court said:

> *"As a matter of principle, a provincial superior court should exercise its jurisdiction when it is requested to do so. Habeas corpus jurisdiction should not be declined merely because another alternative remedy exists and would appear*

to be more convenient in the eyes of the court. The option belongs to the applicant."

[62] When one considers that the remedy of *habeas corpus* is designed to be a quick remedy it is reasonable to expect that it would be chosen as a likely option to secure the applicant's release in the circumstances of this case.

[63] In all the circumstances it is my view that on the peculiar facts before the Court it could not be said to be an option that was chosen in violation of established precedent or one which was bound to fail.

Disposal

[64] Given the circumstances of the applicant's detention, I am of the view that the claimant should be awarded costs up until the withdrawal of the claim herein with respect to the application for *habeas corpus.*

[65] Pursuant to **Section 85** of the **Supreme Court of Judicature Act** and the relevant provisions of the CPR, particularly **CPR 64.6(2)** and **64.6(5)(c)** I order the respondents to pay the applicant's costs.

[66] I therefore make the following orders:

1. That the respondents shall pay to the applicant his costs of the application filed herein up to the date of discontinuance, including the cost of the notice of discontinuance.

2. Costs are to be assessed in default of agreement.

Cecil N. McCarthy
High Court Judge