BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

Civil Suit No: 1379 of 2014

BETWEEN:

ARDEN BLACKMAN	**CLAIMANT**
AND	
THE ATTORNEY-GENERAL	**FIRST RESPONDENT**
THE MAGISTRATE DISTRICT 'A'	**SECOND RESPONDENT**

Before: The Hon. Madam Justice Shona O. Griffith, Judge of the High Court

Date of Hearing:	**2020: 6th October**
Date of Decision:	**2020: 8th December (Oral)** **2020: 16th December (Written)**

Appearances:

Mr. Hal Gollop QC for the Claimant.

Mr. Jared Richards in association with Ms. Nicole Boyce for the Respondents.

Judicial Review – Committal Proceedings – Right to Cross-examine Prosecution Witnesses – Refusal of Request to Recall Witnesses for Cross-examination – Whether Breach of Natural Justice.

DECISION

Introduction

[1] The Claimant, Arden Blackman, was in June, 2014, committed to stand trial for an offence under the Sexual Offences Act, Cap. 154 of the Laws of Barbados. In September, 2014 the Claimant commenced proceedings for judicial review arising from that committal, against the Attorney-General as legal representative of the Government, and the judicial officer who committed him, the Magistrate of District A, Barbados ('the Magistrate). It suffices to say at this juncture, that the Claimant's complaint in relation to his committal is that his Attorney-at-law was denied the opportunity to cross-examine the Prosecution's witnesses. The claim for judicial review targets the Magistrate's refusal to recall prosecution witnesses after the Claimant had been committed, in order for them to be cross examined.

[2] The orders sought on review are (i) a declaration that the denial of the opportunity to cross examine was ***inter alia***, unreasonable, an improper exercise of discretion, an act of bad faith; and a breach of natural justice; (ii) an order of certiorari to quash the decision of the Magistrate which denied the Claimant the opportunity to cross examine; (iii) an order of mandamus to compel the re-opening of the Preliminary Inquiry (PI), to afford the Claimant his right to cross examine the witnesses; (iv) damages, costs and interest.

There Application lists seven (7) grounds of review, ranging from abuse of power, ultra vires, unreasonableness and a breach of natural justice. The Claim for review is resisted primarily on the basis that the procedure at the Preliminary Inquiry was conducted fairly and in accordance with the right to a fair hearing as guaranteed by section 18 of the Constitution.

Background

[3] The basic facts of this matter are not in dispute, however there are aspects of the parties' respective accounts of what transpired at the PI, which require the Court to resolve and make findings of fact. The evidence at the hearing of the Application for Review comprised four (4) witnesses, namely the Claimant on his own behalf; and for the Respondents, two police prosecutors involved in the PI – Sgts EG and JI, and former Magistrate DH who conducted the proceedings. Save for Sgt. EG, there was no cross examination of witnesses thus their affidavit evidence stood unchallenged. To the extent that there were any material facts in dispute, the Court is therefore at liberty to accept or reject facts from the unchallenged affidavits, and will specifically highlight those findings below. The evidence on the respective cases can be summarised as set out below.

The Claimant's Case

(i) In March, 2010 the Claimant was charged with an offence under the Sexual Offences Act and was represented by an Attorney-at-Law in the conduct of his Preliminary Inquiry (PI). The Claimant received bail and his case was adjourned to May, 2010. The Claimant lists eleven (11) further adjourned dates between May, 2010 and March 2014, on which days he says no evidence was taken and the Complainant was absent for most of those dates. The Claimant also avers that the numerous adjournments were occasioned as his Attorney had not received his disclosure (of witness statements);

(ii) Paragraphs 7 through 11 of the Claimant's affidavit are best extracted verbatim:-

> *"7. My Attorney became ill towards the end of September, 2013 and was hospitalised. Sometime after his return to work, he told me that Coreen Hinkson had given her evidence in his absence however the Prosecuting Sergeant had advised him that they would be willing to have her recalled for cross-examination.*
>
> *8. The case came on for hearing 13 June 2014. However my Attorney was not in attendance at Court and I was unaware of the reason for his absence.*
>
> *9. On 20 June 2014, the case came on for hearing and the Magistrate expressed that she was prepared to commit me to stand trial in the Assizes.*

10. My Attorney reminded the Court of the promise made previously to him that the witness would be brought back for cross-examination and requested that it be done in accordance with my right to a fair hearing under the law.

11. The Magistrate expressly refused the request made by my Attorney and maintained her position to commit me. In the process, she told my Attorney, "you could do what you have to do" when he suggested that he would seek Judicial review of the matter.

(iii) By way of evidence, the Claimant sought also to rely on two letters, one written shortly after his committal in June, 2014 by his Attorney to the Director of Public Prosecutions ('the DPP'); and the response thereto returned to his Attorney by the DPP, in August, 2014. These letters were appended to, but were not addressed in the Claimant's affidavit. Instead, the letters were referred to in the Statement of Particulars signed by Queen's Counsel for the Claimant, which accompanied the Fixed Date Claim.

(iv) For now, it can be stated that the purpose of those letters was to illustrate that the Claimant's Attorney, shortly after the committal, wrote to the DPP requesting that the hearing be re-opened to facilitate the cross-examination of the Prosecution's witnesses. The letter in response from the DPP declined to do so. Queen's Counsel for the Claimant's specific complaint in relation to that response is that it

conveyed that a re-opening of the PI was unrealistic in light of the fact that the then Magistrate had been elevated from the Magistracy.

The Respondents' Case

[4] The first affidavit filed in response to the Claim was that of the former Magistrate, DH who gave an account of the proceedings from the court's record, summarised as follows:-

(i) The Claimant's first appearance before former Magistrate DH was on 6th April, 2011, at which time he was represented by his Attorney-at-Law, (who remains in such capacity in the instant proceedings). Said Attorney-at-Law informed the court that he had received disclosure (of the Prosecution's witness statements);

(ii) According to the record, aside from the final date on which the matter was called in June, 2014, the Claimant's Attorney appeared in the matter only on three (3) occasions - specifically the 6th April, 2011, 20th December, 2011 and 5th June, 2012. The court received no communications in connection with his absences and as a consequence, former Magistrate DH states that the Claimant was reissued with his disclosure on the 18th April, 2013 so as to expedite the matter. It is also stated that the former Magistrate DH from time to time enquired of the Claimant whether he was still represented by his Attorney and received

responses in the affirmative, but the Claimant was unable to say why his Attorney was not attending the proceedings;

(iii) The Complainant gave evidence in the absence of the Claimant's Attorney and former Magistrate DH says that she indicated to the Claimant that 'should his attorney make a request to have her [the Complainant] recalled for cross-examination that this would be allowed.' The Complainant however had given evidence one year prior to the Claimant's committal and no request had been made to the court for her recall;

(iv) The record of the proceedings shows a total of 15 adjourned dates of hearing from the 6th April, 2011 (when the Claimant first appeared before the former Magistrate DH) to the last scheduled date on the 20th June, 2014. The Claimant's Attorney's attendance on the last date of 20th June, 2014 amounted to two (2) years from his last appearance in June, 2012;

(v) In relation to the witnesses, the Complainant gave evidence on the 13th June, 2013; a second witness DC on the 7th February, 2014; police constable MS on the 9th May, 2014; and police constable B on the 13th June, 2014. On those days when the evidence of witnesses was taken, the former Magistrate DH says that the Claimant was afforded

the opportunity to put questions to the witnesses, and was given assistance in so doing, in light of the absence of his counsel;

(vi) Insofar as the Claimant speaks to his Attorney's illness preventing said Attorney from attending Court in September, 2013, former Magistrate DH depones that the Complainant's evidence taken in June, 2013, was before that period of illness. Further, that the Claimant was present in court and was as such aware that the Complainant had given evidence, contrary to the impression the Claimant seeks to give in paragraph 7 of his affidavit in support of his Application for Judicial Review;

(vii) On the 13th June, 2014 there was another matter before the Court in which the Claimant's Attorney was involved and the former Magistrate DH learned from co-counsel appearing in that case, that the Claimant's Attorney was out of the island. There was no appearance entered by counsel in that matter on behalf of the Claimant. The Claimant was in fact committed to stand trial on that day, in the absence of his Attorney. However the Claimant's surety was absent and the case was adjourned to the 20th June, 2014 for purposes of enabling the Claimant's surety to re-sign his bail and to be made aware of his duty given that the Claimant had been committed;

(viii) On the 20th June, 2014 the Claimant's Attorney attended. The former Magistrate DH however says she made no statements regarding her intention to commit the Claimant, as he had already been committed on the 13th June, 2014. The former Magistrate denies that on the 20th June, 2014 she refused the Claimant's Attorney's request for recall of the Prosecution's witnesses – the Claimant's Attorney, she says, had made no request orally or in writing, prior to the Claimant's committal on the 13th June, 2014 for witnesses to be recalled.

[5] The two other witnesses on behalf of the Respondents were Sergeants JI and EG. Sgt JI's evidence was that:-

(i) Sgt. JI first appeared as Prosecutor in the matter on the 6th April, 2011 and concurs that the Claimant's Attorney informed the court that he was already in receipt of disclosure. Further, that at the Attorney's request he was even given a fresh set of statements prior to the evidence being taken. Sgt JI also concurs that whilst the Claimant was always present on his dates of hearing, his Attorney was not, and the Claimant was unable to account for his Attorney's whereabouts when asked by the Magistrate;

(ii) Sgt JI states that the Claimant was allowed to question the witnesses who gave evidence and that he did question the witnesses.

Also, the Claimant was told on several occasions by the Magistrate to remind his Attorney that the witnesses could be recalled for cross-examination should the Attorney wish to do so.

(iii) The Claimant was committed to stand trial by the Magistrate on the 13th June, 2014 and the matter adjourned to the 20th June, 2014 to allow the Claimant to bring his surety. Sgt. JI states that on 20th June, 2014 the Claimant did come with his surety as well as his Attorney. The Attorney, says Sgt. JI, complained that the Prosecutors had promised that the witnesses would be recalled for cross-examination. Sgt. JI however denied that she had any conversation with the Claimant's Attorney regarding cross-examination of witnesses.

[6] The Respondents' third witness, Sgt. EG was present in court in relation to this matter only on the 20th June, 2014 and as such, short of having been informed by others as to what had transpired, was personally unaware of any events occurring prior to that date. Sgt. EG confirms that on the 20th June, 2014 the Claimant's Attorney requested that witnesses be recalled for cross-examination. In response however, Sgt. EG says that the Magistrate read out the dates on which the Claimant's Attorney had been absent and confirmed that the Claimant had already been committed on the 13th June, 2014. Sgt EG denied having ever had any conversation with the Claimant's Attorney

regarding cross examination of witnesses. Sgt. EG was cross-examined by Queen's Counsel for the Claimant, however, no evidence was elicited under cross examination that which detracted from his evidence in chief.

The Court's Findings of Fact

[7] As stated before, save for the evidence of Sgt. EG (whose cross examination produced nothing material), there was no challenge to the affidavit evidence of any of the witnesses. The Court therefore finds the following material facts from the affidavits of all witnesses:-

(i) The Claimant was in March, 2010 charged with an offence under the Sexual Offences Act, Cap. 154, for which he received bail and thereafter appeared at divers times for the conduct of his Preliminary Inquiry at the District 'A' Magistrate's Court, Barbados;

(ii) The Claimant was represented at his PI by an Attorney-at-Law who appeared on some but not all occasions. In total, the proceedings from the date of charge (presumably arraignment) on 5th March, 2010, comprised a total of 20 dates of hearing and it is accepted from the unchallenged evidence of the former Magistrate DH, that the Claimant's Attorney, appeared only on four (4) of those occasions. These occasions were the 6th April, 2011; 20th December, 2011; 5th June, 2012; and 20th June, 2014;

(iii) It is also accepted from the evidence of DH that in light of the Claimant's inability to answer her inquiries as to his Attorney's whereabouts during the proceedings, the former Magistrate never received any notification of or explanation for the Attorney's absence during the course of the proceedings;

(iv) The evidence of former Magistrate DH, that the four Prosecution witnesses gave evidence on the 13th June, 2013; 7th February, 2014; 9th May, 2014 and 13th June, 2014 is accepted. As a result, it is therefore also accepted as was contended by the Respondents' witnesses, that the Claimant's Attorney was absent on all of the days when witnesses gave evidence at the PI;

(v) Paragraph 7 of the Claimant's affidavit gives the impression (i) that the Complainant's evidence was given after the period that his Attorney fell ill in September, 2013; and (ii) that he (the Claimant) was not present on the day the Complainant gave evidence, as he (the Claimant), learned of the Complainant giving evidence from his Attorney. From the evidence of former Magistrate DH and Sgt. JI, the Court accepts that the Complainant gave evidence on the 13th June, 2013, which was a period before the Claimant's Attorney fell ill.

Further, the Court accepts that the Claimant was present on the day the Complainant gave evidence, but his Attorney absent. Paragraph 7 of the Claimant's affidavit is therefore rejected;

(vi) It is accepted from the evidence of former Magistrate DH and from Sgt. JI, that the said Magistrate told the Claimant on more than one occasion that his Attorney would be able to make a request for the witnesses to be recalled for cross-examination. It is accepted however, that there was no such request made by the Claimant's Attorney prior to the 20th June, 2014;

(vii) It is further accepted from the former Magistrate DH and Sgt. JI, that the Claimant was committed to stand trial for the offence with which he was charged, on the 13th June, 2014. Further, that the date of hearing on 20th June, 2014 was for the purpose of enabling the Claimant's surety to carry out the formalities arising from the Claimant's committal. Paragraphs 9 and 11 of the Claimant's affidavit are therefore rejected;

(viii) It is accepted from the Prosecutors Sgts. JI and EG that contrary to what was alleged in court on the 20th June, 2014 by the Claimant's Attorney, they (the Prosecutors), had no conversation with the said Attorney regarding the recall of any witnesses for cross-examination.

(ix) The allegations regarding the Claimant's Attorney's conduct on the 20th June, 2014 and the responses thereto attributed to the former Magistrate, are all irrelevant.

The Submissions of Counsel

[8] Queen's Counsel for the Claimant contends in the round, that the Claimant was denied due process as a result of the Magistrate's refusal to permit witnesses to be recalled for cross examination. Specifically with respect to the application for judicial review, the lack of due process was couched in terms of a denial of natural justice, in that the Claimant was denied the opportunity in relation to two constituent parts of the right to a fair hearing. These were (i) the right to cross examine witnesses; and (ii) the right to call witnesses in one's own defence. Queen's Counsel cited **Thomas v Baptiste**[1] as his authority for the importance of due process, such importance being necessary to protect citizens from 'absolute monarchy and the exercise of arbitrary power'. The Magistrate's refusal to permit the recall of witnesses for purposes of cross-examination was also termed an abuse of power and an unreasonable exercise of discretion.

[9] Queen's Counsel also addressed two letters which were attached to the Claimant's affidavit.

[1] (1998) 54 WIR 387

The first was written by him to the DPP requesting that the DPP intervene by way of re-opening the PI in order for him to cross-examine the Prosecution's witnesses. The second letter was the response of the said DPP to that request. Queen's Counsel submitted that the DPP's response to his written request for the re-opening of the PI, provided a further ground of review. It was submitted that the response was to the effect that the matter could not be conveniently reopened because the Magistrate who had conducted the PI, having been elevated (to higher office), was no longer available. Queen's Counsel submitted that this response, exacerbated the unlawfulness of the matter, as the DPP possessed the power to ensure that the Claimant received his right to a fair hearing, and unreasonably chose not to exercise such power. As a consequence, this amounted to a further basis upon which the Claimant should be granted the relief sought by way of judicial review.

[10] Counsel on behalf of the Respondents firstly addressed the application for review with reference to the guaranteed right to a fair hearing as contained in section 18 of the Constitution. Counsel referred to Barbadian Court of Appeal authority **Niles v the Queen**[2], in which the right to a fair hearing was explained with reference to a hearing that was fair in substance, as opposed to one in which there were irregularities not amounting to a denial of a fair trial.

[2] BB 2015 CA 15

Flowing from this qualification, Counsel referred to **Jahree v State of Mauritius**[3], therein considering ***Gooranah v The Queen [1968] MR 122***. The right to a fair hearing was therein examined with reference to the constitutional provisions which entitle an accused to be permitted to defend himself, and for that purpose to retain legal representation of his choice.

[11] The right therein was explained in terms of the court not having a duty to compel the obligations of an accused's attorney-at-law. Counsel cited **Ward v R**[4] as illustration for the application of this position locally, albeit acknowledging that there was a breach of the accused's right to a fair hearing found in that case. The relevance of the case however, pertained to the duties of the court which were set out therein, when deciding to proceed in the absence of a defendant's legal representative. Such duties were said to include ensuring that the defendant has read or been given sufficient time to read the papers, as well as making an official note as to the steps taken in the proceedings.[5] Counsel accepted that the right to a fair hearing extends to a PI, but was of the view however, that based on these authorities, the Claimant herein was not denied a fair hearing at his PI.

[3] [2005] UKPC 7
[4] BB 2006 CA 21
[5] Extracted from Jahree v State of Mauritius, fn 3 supra

[12] Counsel pointed to the fact that the Magistrate continuously queried the whereabouts of the Claimant's attorney; notified the Claimant that witnesses could be recalled for cross-examination if so requested by his Attorney; the Claimant was provided afresh with his disclosure given the continued absence of his Attorney; and the Magistrate provided assistance to the Claimant in the manner as if he were unrepresented. Further, Counsel for the Crown submitted that there is no absolute right to legal representation throughout the course of the trial, particularly where the absence arises from the actions of the attorney as illustrated by **Dunkley et anor v R.**[6] Also, that the absence of legal representation alone does not render a hearing unfair or unconstitutional.[7]

[13] With respect to the issue of cross-examination, Counsel for the Respondents acknowledged that the right to a fair hearing embodies the right to cross examine, as same is provided in section 18(2)(e) of the Constitution. Counsel also acknowledged the purpose of cross examination in effect as being to test the veracity or character of a witness.[8] Counsel submitted that the Magistrate provided the Claimant with an opportunity to pose questions to witnesses and 'would have assisted him' in the absence of his attorney.

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[6] [1995] 1 All ER 279
[7] Hinds v Attorney-General et anor (199) 59 WIR 75
[8] Para 34 Submissions on behalf of Respondents, extracting Halsbury's Laws of England, Vol 27 (2015 ed).

Further, that the right cross-examine was not equivalent to a right to cross-examination carried out by an attorney. Finally, Counsel for the Respondents submitted that the Magistrate's conclusion of the PI notwithstanding the absence of the Claimant's attorney gave effect to the Claimant's right to have his hearing within a reasonable time, as mandated by section 18(1) of the Constitution.

The Court's Consideration

[14] The Court's consideration of this matter is commenced by placing in context the parameters of the claim for review which has been filed. The subject matter of the claim for review was pleaded as the decision of the Magistrate, in refusing to recall for cross-examination, witnesses who gave evidence in the absence of the Claimant's attorney. The claim for review was not put forward on the basis that the Claimant was wrongly committed to stand trial for the offence for which he was charged. In terms of the evidence led, the Court has already accepted, that the Claimant was committed to stand trial on the 13th June, 2014. At worst, if the committal could not have been concluded until the formality of the binding over of his surety was complete, the Claimant was committed on the 20th June, 2014.

In any event, the action complained of was therefore a ruling made by the Magistrate, either during or after the Claimant's PI proceedings. More particularly, that ruling, was an exercise of the Magistrate's discretion in the course of the PI, as opposed to a decision.

[15] The Court questions whether this ruling, standing by itself, should have been the basis for the application for review; as opposed to, in the Court's view, the Magistrate's decision to commit the Claimant, by reason of the refusal to recall witnesses. The Court considers that it must be the act or decision to commit which is to be impugned by reason of the Magistrate's refusal to recall witnesses, and will proceed on that basis. Further in relation to the parameters of the claim for review, the Court excludes the line of argument pursued by learned Queen's Counsel for the Claimant, which pertained to the letters attached to the Claimant's affidavit. The first of these letters, was issued by the learned Queen's Counsel to the DPP, within one week of the Claimant's committal and by that letter a request was made for the DPP to intervene by re-opening the matter, so as to allow the witnesses to be recalled for cross-examination. The second letter, was issued on behalf of the DPP to learned Queen's Counsel, declining to intervene as requested.

[16] These letters, were attached to the Claimant's affidavit without having any basis identified in the said affidavit for their introduction into evidence.

There was no objection to the letters, but the absence of objection does not oblige the Court to take into account or attach weight to evidence in relation to which there is no proper foundation. Technically, these two letters concern the Claimant and his criminal proceeding, thus it was open to him to have introduced them into evidence. However, the Claimant himself made no mention of these letters or their relevance to his case in his affidavit. The relevant foundation for the letters was contained in (paragraphs 16 and 17) of the Statement of Particulars which accompanied the Application for Review, which was not evidence before the court or even a document signed by the Claimant. The Court does not consider that there was satisfactory foundation established for the letters to be utilised as evidence in the proceedings.

[17] The correctness or not of this view aside, the argument advanced by learned Queen's Counsel in relation to the effect of these letters, (particularly, that of the DPP's response to the request for intervention in reopening the proceedings), does not find favour with the Court. The argument as understood by the Court, is that the DPP's refusal to re-open the hearing was unreasonable and/or arbitrary, particularly having regard to the reason

expressed for the refusal. The reason expressed was that the presiding Magistrate had been elevated and was therefore no longer available.

(The Court would agree, that in a situation where all things are equal, and one is faced with a challenge to the fairness of a hearing, such a response could not be an appropriate answer to a charge of unfairness).

[18] However, the Court's position accords with that taken by way of objection by Counsel for the Crown, which is that the case at bar had nothing to do with any action taken or not taken by the DPP. The claim for review which was filed and pleaded does not include the DPP as a party; and as a creature of the Constitution vested with the authority and control of criminal proceedings[9], a review of the DPP's actions or omissions ought to have been advanced against the DPP directly. Arising from the context stated above, the Court considers that this claim for judicial review engages the following issues:-

(i) Was the Claimant denied a fair hearing of his Preliminary Inquiry, as a result of the refusal of the Magistrate to permit witnesses to be recalled for cross-examination?

(ii) If yes to (i) above, what relief if any, should be afforded the Claimant?

[9] Section 79 of the Constitution, subject to those areas excepted to the Attorney-General under section 79A, none of which arise in this case.

Issue (i) – The Preliminary Inquiry and a Fair Hearing

[19] The Court restates its understanding of the claim for review as being predicated on the right to a fair hearing – particularly, that there was a breach of natural justice. Further, the review arises in relation to the Magistrate's committal of the Claimant to stand trial for the offence charged, as opposed to the ruling, by which she refused to permit the recall of witnesses for cross-examination after the Claimant had been committed. Also in relation to the context of these review proceedings, the subject matter being a charge for a criminal offence, the right to a fair hearing is grounded as a fundamental right under the Constitution. The proceeding before this Court, however, is one for judicial review and one must be careful not to treat the claim as one for breach of a constitutional right as appears to have been done by the Crown, in its defence of section 18(1) of the Constitution.

[20] Consistent with judicial authority and the Barbados Constitution itself, the Court considers that resort to the Constitution, even where breach of a fundamental right is alleged, should as a general rule be a last resort, where there are alternative remedies which can appropriately provide redress to a litigant.[10]

[10] Proviso to section 24(2) of the Barbados Constitution; ***Jaroo v Attorney General*** (2002) 59 WIR 519; ***Attorney-General v Ramanoop*** (2005) 66 WIR 334.

With respect to judicial review and claims under the Constitution, there are differences in remedies and approach to the court, and whilst the remedies may overlap, the Court considers that in light of the proviso to section 24(2) of the Constitution, a claim for Constitutional relief ought to be distinctly pleaded. It has not been so done in this case, and the fact that the claim for review implicates a constitutional right does not elevate it to a claim for constitutional redress. As such the Court is careful to reiterate, that it is dealing solely with a claim for judicial review.

[21] In relation to the subject matter under review, there was no variance between Queen's Counsel for the Claimant and Counsel for the Respondents in relation to whether or not the right to a fair hearing extends to a PI. The Court nonetheless refers to the case of **Re Williams & Salisbury**[11] in which Crane C. dispelled all doubts that Guyana's then equivalent to Barbados' section 18(1)[12] applied to preliminary inquiries. After refuting all arguments presented to the contrary, Crane C said as follows, which is extracted so that the grounding of the alleged breach of natural justice in the instant case, can be placed within context (emphasis mine):-

> *"In my judgment the terms of art 10(1) are reasonably capable of a meaning allowing its application to proceedings at a preliminary inquiry, and should be so construed as its ordinary*

[11] (1978) 26 WIR 133 @ 147-148
[12] Constitution of Guyana, Art. 10(1)

> *meaning, or, if necessary, as a 'liberal' one, unless the provisions of the rest of the article (10(2) to (14)) compel a restricted application. I do not think they do. While I share the view that art 10 should be looked at as a whole, I think also that its provisions can be construed distributively, that is to say, as related to different stages in the judicial proceedings from the time a person is charged with an indictable offence to his acquittal or conviction. Some safeguards will be relevant to the time a charge is made on an arrest, for example, art 10(2)(b) – the right to be told in detail the nature of the offence; some are plainly relevant to the trial stage only, for example, art 10(5) – that no person shall be tried twice for the same offence; others would be relevant during both the preliminary inquiry and the trial stages, for example, art 10(2)(d) – the right to be defended by a lawyer of his own choice. As regards art 10(2)(a) – the presumption of innocence – Bishop J, in Halstead ((1978) 25 WIR 522) said it is relevant when the accused is put on trial. I prefer the view that it arises and operates in favour of an accused from the time he is charged until he pleads guilty or is found guilty by a jury.*

[22] With reference to the above, the right to cross-examine witnesses and to call witnesses in support of one's case, would in this Court's view, fall into the category of being relevant to both the PI and trial stages, in the manner identified by Crane C. However, the Court considers it of greater utility to examine authorities which speak to the specific stage of the proceedings under review, namely the PI stage, and where possible, also to the specific right which is alleged to have given rise to the breach of natural justice as asserted by the Claimant. It is firstly confirmed that the committal proceedings are

subject to review and may be quashed by an order of certiorari - **R v Horseferry Road Magistrates' Court, Ex p. Adams.**[13] In this case, a committal for trial on a charge of assault was quashed on the basis that a defendant was not permitted by the examining magistrate to call witnesses after the rejection of a submission of no case to answer upon the close of the prosecution's case. This authority cements the Court's view in relation to the Application for Review herein having been unsuitably directed towards the Magistrate's ruling refusing to recall witnesses for cross-examination, as opposed to the decision to commit the Claimant to stand trial.

[23] The jurisdiction to challenge a committal by way of judicial review and to impose the remedy of certiorari acknowledged, the Court also refers to **R v Oxford City Justices, Ex p Berry**[14] to illustrate that the nature of the inquiry (preliminary inquiry/committal proceedings as distinct from a trial), gives rise to several factors which a court would have to take into account in considering the exercise of its discretion on an application for judicial review.

In that case (**Ex p. Berry**), the refusal of an examining magistrate to receive evidence from a defendant seeking to challenge the voluntariness of alleged confessions was not successfully reviewed, notwithstanding that the right to

[13] [1978] 1 All ER 373
[14] [1988] QB 507

such challenge was statutorily prescribed (by PACE). The court therein found that relief by way of judicial review would not save for exceptional circumstances be afforded where inadmissible evidence was received by a magistrate, given the opportunity available at trial to challenge it[15].

[24] Further, out of the 5 charges for which the defendant had been committed, one did not depend upon the alleged confessions, therefore the committal in relation to that one charge could not be impugned. As a consequence, it was recognised that it would remain open for the prosecution in any event to include the additional four charges on the defendant's indictment regardless of whether the committal for those four charges was quashed. Following the rationale in this authority, in the instant case, when examining the application for review, the Court must be mindful of the nature of committal proceedings, insofar as they amount only to a stage of the criminal proceedings, at which there is no determination of guilt.

[25] The Court will now examine the nature of the right breached, which the Claimant alleges to have resulted in him being denied a fair hearing.

The Court firstly considers the purpose of cross-examination (which was helpfully set out by Counsel for the Respondents in her submissions)[16] as

[15] Cf R v Bedwellty Justices, Ex P Williams [1997] AC 225
[16] Para 34, Submissions on behalf of the Respondents, referencing Halsbury's Laws of England Vol. 27 (2015 ed).

being a means to challenge accuracy, truth or completeness of evidence, as well as to undermine the credibility or character of the witness. This is clearly a feature of the trial which is available at both the PI and trial stages of criminal proceedings. The question is whether the denial of that right at a PI, automatically results in the hearing being deemed unfair; or whether the circumstances in which the denial of the right was occasioned as well as the actual effects on the hearing, must also be considered.

[26] The case put forward by the Claimant, suggests the position to be based on the former view – i.e. that the Claimant's committal is automatically to be deemed unfair, having regard to the Magistrate's refusal to permit the recall of witnesses for purposes of cross-examination. Further, this was the position adopted by learned Queen's Counsel in answer to the Court's inquiry in this regard, in oral argument at the hearing of the Application for judicial review. The Court does not agree with this position and will turn to decided authorities in order to demonstrate why.

R v Bedwellty Justices, Ex P Williams[17] -

(i) This case concerned an application for judicial review seeking an order of certiorari to quash the committal of the applicant on several charges of conspiracy to pervert the course of justice.

[17] [1997] AC 225

The examining magistrate committed the applicant on the basis of written statements of co-defendants which were inadmissible and there was no other evidence going towards proof of the charges.

(ii) Subsequent to the committal, the crown prosecution served further statements to be used at trial, which did contain evidence in support of the charges. The order for certiorari was however granted and the committal quashed, on the basis that a committal on inadmissible evidence where no other evidence was available amounted to a grave error of law.

(iii) Further, that error was compounded by the loss of opportunity to cross-examine the makers of the statements, in circumstances where the right to cross examine was part of the procedure stipulated by section 4(2) (sic)[18] of the Magistrate's Court Act, 1980. In relation to this specific right prescribed by the governing statute, there is no corresponding provision in the Magistrate's Court Act, Cap. 116A or in the Magistrate's Court (Criminal Procedure) Rules, 2001.

(iv) It is therefore considered that this decision in which a committal was quashed in part because of the absence of the opportunity to cross

[18] The section was section 4(3) which prescribed that evidence before examining justices was to be taken in the presence of the accused and the defence was entitled to put questions to the witnesses at the enquiry.

examine, is distinguishable given the absence of any corresponding statutory right to cross examine prescribed in the specific law or procedure pertaining to committal. The decision is also distinguishable on the basis that at the time of committal, there had been no admissible evidence which entitled the magistrate to commit.

(v) Insofar as the right to cross-examine is contained as part of the due process provisions in section 18 of the Constitution, the Court considers that rather than there being an automatic finding of unfairness, the approach must be that held by the Court of Appeal in **Ward v R**,[19] which is to go on to consider the actual consequence of any breach of due process on the fairness of the proceedings. This position is illustrated by **Matthews v The State**[20], which discusses *Neill v North Antrim Magistrate's Court*,[21] both examined further below.

Matthews v The State[22]

(i) The Trinidad and Tobago Court of Appeal had under consideration a ground of appeal from a conviction of an accused person, that in the committal proceedings, after the close of the prosecution's case, the accused had not been told of his right to call witnesses.

[19] BB 2006 CA 21
[20] [2001] 3 LRC 400
[21] [1992] 4 All ER 846
[22] Supra

Then Chief Justice De La Bastide, reviewed a number of authorities, including ***Neill v North Antrim***[23] which had concluded that different kinds of irregularities at committal proceedings would have differing consequences on the lawfulness or otherwise of the proceedings. Further, the nature of the consequence depended on the nature of the irregularity, its effect on the proceedings and the overall circumstances of the case.

(ii) In ***Neill***, the failure at the PI stage was that committal was based on inadmissible hearsay evidence and there had been no opportunity to cross-examine the Prosecution's witnesses. This failure led to a quashing of the committal therein. It has to be noted, that the Court of Appeal in ***Matthews,*** viewed the committal (in Neill) which had been based on inadmissible hearsay evidence not tested by cross-examination, as a far greater error, than the situation under their consideration (*in Matthews*), which was that the accused had not been informed of his right to call witnesses.

[23] supra

(iii) De La Bastide however, stated as follows[24], which the Court finds to provide useful guidance in considering the facts of the case at bar, emphasis mine:-

> *"It was true that the wording of s 18 suggested nothing less than a mandatory or imperative requirement. However, whether there had been a breach of natural justice or a want of due process depended not merely on the nature of the irregularity but on the particular circumstances of each case and whether the irregularity had resulted in a demonstrable prejudice to a particular accused. Whilst certain procedural rules were so fundamental that breach of them automatically meant that the proceedings were void, a breach of s 18 did not fall into such category. The degree of the gravity of a breach of procedural rules varied not only according to which rule was broken, but also according to the particular circumstances in which the breach occurred, so that different breaches of the same rule could produce different results"*

Neill v North Antrim Magistrate's Court et anor

(i) This case was highlighted in ***Matthews v The State***, discussed above, and the observation was made in ***Matthews***, that the absence of cross-examination of witnesses was found to be a critical omission which gave rise to the quashing of the committal proceedings as being substantially unfair. The absence of cross-examination is the nature of the breach of due process in the case at bar.

[24] Matthews v The State supra, @ pg 410

However, a direct reading of the case reveals factual circumstances which are distinguishable from the circumstances herein. In ***Neill***, the committal of the appellants on charges including assault and theft, had been based on the admission of written statements made by eyewitnesses.

(ii) The eyewitnesses were two minors, whose mothers had informed the police that they were afraid to come forward based on threats made against them by the defendants. The police informed the magistrate what the boys' mothers had said of their fear of coming forward. The police had not spoken to the boys themselves regarding their alleged fear and the magistrate accepted the evidence of that fear emanating from the mothers, as told to the police officers, and admitted written statements of the boys of their account of the incident.

(iii) In those circumstances, the court found that the evidence going towards guilt in the first place had been based on a hearsay account of what transpired. Secondly, that the critical evidence of fear in relation to coming forward was also hearsay and that as such, the evidence as a whole in the committal was manifestly unreliable, being hearsay having not been subjected to cross-examination.

(iv) This case can be distinguished from the case at bar, in that the evidence is that the Claimant, was permitted to and did avail himself of the opportunity to put questions to the prosecution witnesses. Further, insofar as this case and ***Matthews v The State*** speak of demonstrable prejudice, the Claimant herein has failed in any way to illustrate to the Court what evidence was led against him, for example, whether weak, unreliable or otherwise.

(v) In ***Neill***, as well as in ***Bedwellty***, the decisions therein demonstrate what kind of evidence had been under consideration and why the absence of cross-examination was considered fatal. Further, in both cases, the evidence upon which the committal had been based was inadmissible for one reason or another. The Court in the case at bar, has no such information pertaining to the actual evidence upon which the committal was based, except that it is clear that at the very least there is some direct evidence of the offence charged as the Complainant in the matter gave evidence.

(vi) It is considered that it was incumbent upon the Claimant, to have demonstrated the manner or extent to which he claims to have suffered as a result of the denial of cross-examination. It is therefore again stated

that the Court does not agree with the Claimant that the refusal of cross-examination automatically resulted in a denial of a fair hearing.

R v Liverpool Justices Ex p Blain[25]

(i) This is the final decision which the Court will examine in relation to any questions raised by an absence of cross-examination or other irregularity at a preliminary inquiry. In this case, the applicant sought to quash his committal in circumstances where the magistrate committed him to stand trial without requiring the prosecution to call their final two witnesses. Inter alia, the applicant claimed that he was deprived of the opportunity to cross-examine those witnesses to his detriment and as such the committal ought to be quashed.

(ii) The court found that there had been a failure to demonstrate that the excluded evidence would have provided any significant value to the defendant had it been led.

As illustration in that regard, reliance was placed on ***R v Bedwellty*** (which has already been distinguished from the case at bar). Finally, Collins J, expressed the view which finds favour with this Court, that:-

> *"It is only rarely that this Court will interfere to quash committal proceedings that have taken place. Very rarely will this Court interfere where there has been a prima facie case based on admissible evidence shown. That is made clear by the further*

[25] [1997] Lexis Citation 1153

observations of Lord Cooke in the Bedwellty case at page 371 between letters F and G. It is seems to me this is not one of those rare cases."

[27] Having reviewed the authorities listed above in paragraph 26, the Court extracts the following principles which it considers applicable to the case at bar.

(i) A preliminary inquiry is a stage of the trial and therefore is a part of the hearing to which section 18(1) of the Constitution applies. As a consequence, the right to a fair hearing within a reasonable time applies to a preliminary inquiry.[26] A magistrate's decision to commit a defendant to stand trial is susceptible to judicial review and may be quashed by an order of certiorari[27];

(ii) The components of a fair hearing thereafter contained in section 18 of the Constitution apply either to both stages of a hearing or possibly only one[28]. The right under consideration, that is, to cross-examine witnesses, is considered to be applicable to both stages of the hearing;

(iii) The right to cross-examine witnesses is not a specifically prescribed part of the statutory process of a preliminary inquiry (as distinguished

[26] Re Williams & Salisbury supra
[27] R v Oxford City Justices, Ex p. Berry
[28] Re Williams & Salisbury

from section 4(3) of the Magistrate's Court Act, 1980 of the UK as it initially stood[29].

(iv) Following the Court of Appeal decision of **R v Ward**[30], the Court adopts the approach that even if there is a breach of section 18, it is still necessary to consider whether the hearing was rendered unfair;

(v) The right to cross-examine witnesses is an important right which recognises the fact that an accused should be afforded the benefit of being discharged at the stage of committal if the evidence would so allow;[31]

(vi) Even though the right to cross-examine witnesses is an important one which could give rise to a quashing of a committal if the opportunity to do so is not afforded, it is nonetheless incumbent upon an applicant seeking to have his committal quashed, to demonstrate that there was a denial of some significant value to his defence, having regard to the nature and quality of evidence upon which he was committed;

(vii) The quashing of a committal is a remedy which should be granted only in rare or exceptional cases.

[29] Section 493) was repealed circa 1986 after PACE came into force.
[30] supra
[31] R v Bedwellty Justices, supra

[28] Taking into account the above principles which have been extracted from the authorities examined, the Court now considers these principles with reference to the evidence of the case at bar. The facts found by the Court regarding the conduct of the PI are that the Claimant was represented by an Attorney who appeared on only 4 of the 16-20 dates of hearing. Save for the 13th June, 2014 which was the date of the Claimant's committal, there had been no explanations provided to the Magistrate as to the reason for the absence of his Attorney. With no evidence demonstrated to the contrary, the reason for the failure to cross-examine the witnesses was not occasioned by the Magistrate. Further the Court has accepted on the evidence, that Claimant was present when the witnesses gave evidence, and availed himself of the opportunity provided to him to put questions to the witnesses. Unlike in the authorities of ***Bedwellty*** and ***Neill v North Antrim***, there has been no attack made on the sufficiency of the evidence on which the Claimant was committed for trial. As stated in ***Bedwellty*** and applied in ***Ex. p Blain***, there has been no demonstration of what possible advantage based on the evidence which was submitted, the Claimant was deprived of by the failure of his Attorney to cross-examine the witnesses who gave evidence at the PI.

Conclusion and Disposition

[29] In the circumstances, the Court is not of the view that the committal of the Claimant was effected in breach of his rights to natural justice. Further, the Court does not accept that the committal was in any other way unfair. To be clear, the Court does not find that within the circumstances of this case, that the Magistrate's refusal to accede to the Claimant's Attorney's request to recall witnesses for purposes of cross-examination amounted to a denial of the Claimant's right to natural justice. The Claimant was afforded the opportunity to have his Attorney present during the course of the inquiry and there is no evidence which suggests that he was denied such opportunity.

[30] To the contrary, the evidence is that the Attorney was absent on the days on which evidence was taken without any communication provided to the court. Further, the Magistrate's invitation to the Claimant, (repeated on more than one occasion), for witnesses to be recalled for cross-examination, was not requested until the 20th June, 2014.

At that time, the Claimant had already been committed and the Court is unable to conclude that it was an unreasonable or arbitrary exercise of the Magistrate's discretion at that final stage of the proceedings, (coupled with the Attorney's unexplained absences on all except four prior dates of hearing,

to have refused to recall witnesses). The Application for judicial review is therefore dismissed.

[31] The following orders are made on disposition of the Claim:-

(i) The Application for judicial review of the Claimant's committal to stand trial is dismissed;

(ii) The Magistrate's refusal to accede to the request on behalf of the Claimant to recall the prosecution's witnesses for cross-examination:-

(a) Did not amount to a breach of natural justice, having regard to the circumstances of the entire proceedings;

(b) Was not an unreasonable or arbitrary exercise of discretion or power having regard to the circumstances of the proceedings; and

(iii) There is no order as to costs.

SHONA O. GRIFFITH
Judge of the High Court