[2010] CCJ 3 (AJ)

IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS

CCJ Appeal No CV 1 of 2010
BB Civil Appeal No 8 of 2007

BETWEEN

FRANK ERROL GIBSON	**APPELLANT**

AND

THE ATTORNEY GENERAL	**RESPONDENT**

Before The Right Honourable	**Mr Justice de la Bastide, President**
and the Honourables	**Mr Justice Nelson**
	Mr Justice Saunders
	Madame Justice Bernard
	Mr Justice Wit

Appearances

Mr Larry Smith, Mr Ajamu Boardi, Mrs Miriam White and Ms Michelle Knight for the Appellant

Ms Jennifer Edwards QC, Solicitor General, Ms Roslind Jordan and Ms Donna Brathwaite for the Respondent

JUDGMENT
of
The President and Justices Nelson, Saunders, Bernard, and Wit
Delivered jointly by
The Honourable Mr Justice Adrian Saunders
and
The Honourable Mr Justice Jacob Wit
on the 16th day of August, 2010

[1] On 10th June, 2010, we made an order in this appeal immediately after receiving the oral submissions of Mr Larry Smith, on behalf of the appellant, and those of the Solicitor General, Ms Jennifer Edwards, on behalf of the Attorney General. We then undertook to give in due course written reasons for our order. This is our reasoned judgment.

Introduction

[2] The appellant has been awaiting trial on a charge of murder since 2002. In October, 2006 he commenced this constitutional application in which he complained of breaches of his fundamental rights. He alleged that for the adequate preparation of his defence he had a constitutional right to be provided by the State with adequate "facilities". He claimed that such facilities included the assistance of an expert in the field of forensic odontology as well as the services of other relevant expert witnesses of his choosing. He also alleged that in breach of his constitutional right he had not been tried within a reasonable time. He requested from the court: a variety of declarations in relation to these alleged breaches, a mandatory order compelling the State to provide the requisite facilities within a reasonable time, a permanent stay or dismissal of the charge and an award of damages.

[3] The application and the appeal arising from it raise important issues regarding the interpretation of section 18 of the Barbados Constitution. The section contains provisions designed to secure the fundamental right of protection of the law. In particular it guarantees everyone charged with a criminal offence the right to a fair hearing within a reasonable time. A discussion of the issues to be determined requires a brief outline of the circumstances that prompted the filing of the constitutional application.

Background

[4] On the 16th January, 2002, the lifeless body of Francine Bolden was discovered lying in a grassy area at Pot House, St John. It was evident that she had recently been murdered. The left side of her face was severely crushed and covered by a large boulder.

[5] Frank Gibson, the appellant, was taken into custody on the 18th January, 2002 in connection with the murder investigations. At the time, a number of freshly made scratches and bruises were noticeable about Gibson's body. He told the police that he had received these injuries as a result of a fall from a tree. The most serious of the injuries, a wound on his right upper arm, attracted the attention of the police who took detailed photographs of it.

[6] During a search of his home, Gibson handed over certain items of clothing which he said he had washed "de other day". He also volunteered to the police samples of his blood. These pieces of evidence, together with nail clippings and blood taken from the deceased were all submitted to the FBI Laboratory Evidence Control Centre in Washington DC for analysis.

[7] The day after Gibson was taken into custody he was seen by Dr Victor Eastmond. With Gibson's consent the doctor took impressions of the injury to Gibson's right biceps. Dr Eastmond then proceeded to the Belmont Funeral Home where he inspected the body of the deceased. He took impressions of her upper and lower jaw and he carried back to his office all these impressions he had taken. He poured models which he subsequently reviewed. As a result of the examination and comparison which he carried out, Dr Eastmond concluded without doubt that the wound on Gibson's right biceps was a human bite-mark and that Francine Bolden was the only person who could have made that particular bite-mark.

[8] Gibson was arrested on suspicion of the murder. When informed of Dr Eastmond's conclusions Gibson maintained that he did not kill anyone. He repeated that he had sustained the injury to his right biceps as a result of a fall from a breadfruit tree and that the scrapes had similarly been sustained as a result of his falling from a "dounce" tree.

[9] The forensic analysis on the bits of evidence submitted to the FBI Laboratory came back in April, 2002. They disclosed nothing of substance and in these proceedings it is conceded by the Solicitor General that the only positive evidence linking Gibson to the murder is the findings of Dr Eastmond.

[10] The nature of Dr Eastmond's investigations and opinions places them squarely within a specific discipline that is concerned with the study of the characteristics of human bite-marks and the identification of persons responsible for such marks. This is the field of forensic odontology. Dr Eastmond is not himself a forensic odontologist. He is a dentist but he has done some training in that field. The reliability of identification based on forensic odontology is not without controversy. There is a view that such identification is less reliable than that based on other forensic sciences such as DNA testing or fingerprint impressions[1]. Indeed, there are reported cases in the United States of America in which reliance on identification by bite-marks led to serious miscarriages of justice. See for example: *Arizona v. Ray Krone*[2] and *Wisconsin v. Stinson*[3]. But we must not be taken by these remarks to be pre-judging Dr. Eastmond's conclusions; they simply serve to put his evidence in context.

[11] Although Gibson was charged with murder on the 23rd January, 2002, the preliminary inquiry did not commence until sometime in June 2004. He had been remanded in custody from the time of his arrest. He was eventually committed to stand trial in March 2005. A trial date was set for July of that year. When the trial got underway Dr Eastmond

---

[1]*See* for example: *There's Something About Novel Scientific Evidence*, **James E. Starr, 28 Sw. U. L. Rev. 417 1998-1999**; *The Illusion Of Science In Bite-Mark Evidence*, **Erica Beecher-Monas, 30 Cardozo L. Rev. 1369**; *Protecting Factfinders From Being Overly Misled, While Still Admitting Weakly Supported Forensic Science Into Evidence*, **Michael J. Saks, 43 Tulsa L. Rev 609**

[2] (1985) 182 Ariz. 319, 897 P.2d 621

[3] (1986) 397 NW2d 136, Wisc. App.

took the witness stand to give his evidence and the prosecution sought permission to have him deemed an expert. The defence counsel lodged an objection to the granting of such permission. The judge stopped the trial and traversed the case to the October Assizes. In October it was further traversed to the February 2006 Assizes.

[12] In January, 2006, Gibson's lawyers wrote to the DPP indicating, *inter alia*, that Gibson was seeking the services of a forensic odontologist to assist in the preparation of his defence and that as a consequence an adjournment of the trial would be requested. Defence counsel then contacted a forensic odontologist in the United Kingdom and received from him an indication of what his fees were likely to be for time spent reading and examining the relevant materials and preparing a report.

[13] When the case came on before Blackman, J in February, 2006, Mr Smith, acting on Gibson's behalf, indicated that his client was indigent and in no position to pay the fees of the forensic odontologist. Mr Smith requested a further adjournment so that attempts could be made to persuade the State to pay those fees on Gibson's behalf. Hearing of the case was adjourned.

[14] As an interesting aside, at about this same time, Clyde Anderson Grazette, another indigent man accused of murder, was similarly seeking funding from the State to pay for a DNA expert to assist him with *his* defence. Like Gibson, he too brought a constitutional application to compel the State to provide the requisite funds. That application resulted in the parties entering into a consent order that the State should provide the requisite funds. That application was heard by Chief Justice Sir David Simmons. Sir David adroitly managed then to get the parties to enter into a consent order that the State should provide funds to cover the airline costs, professional fees and hotel accommodation for the DNA expert to come to Barbados to assist Grazette with his defence. On this premise, Grazette was tried and convicted in November, 2007; his appeal to the Court of Appeal was dismissed on 18th September, 2008; and his application for special leave to appeal his conviction was dismissed by this Court on 3rd April, 2009. By contrast, Gibson is still awaiting a trial.

[15] To resume the narrative, on 22nd February 2006 Mr Smith wrote to the Hon. Attorney General requesting funding for the services of his forensic odontologist. Mr Smith also spoke with the newly appointed Attorney General on the issue. Not having received any satisfactory response Mr Smith sent a follow-up letter to the Attorney General's Chambers on the 9th May, 2006. When there was no reply to this further letter he again wrote on the 6th September, 2006. A response was finally received in October, 2006. The Permanent Secretary indicated that the Attorney General's Office would provide *ex gratia* an amount of Bds $2,000.00 to enable Gibson's forensic odontologist to review the relevant evidence and prepare a report.

[16] Defence counsel communicated with and obtained from two additional forensic odontologists *curricula vitae*, an indication of willingness to assist Gibson and their potential fee structure in this regard. In light of their responses the sum of Bds $2,000.00 was clearly insufficient to meet the fees and expenses of a reputable expert. Moreover, the Permanent Secretary's letter had made it a condition of the *ex gratia* offer that any reports obtained by the defence were to be made available to the Crown. Gibson was dissatisfied both with the sum of money offered and the disclosure condition attached to the offer. Within two weeks of receiving the Permanent Secretary's letter he launched his constitutional application.

[17] As previously indicated, the source of the fundamental rights in question is section 18 of the Constitution. The section reads in part:

> 18. 1. If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.
>
> 2. Every person who is charged with a criminal offence -
>
> a. shall be presumed to be innocent until he is proved or has pleaded guilty;

b. …

c. shall be given adequate time and facilities for the preparation of his defence;

d. shall be permitted to defend himself before the court in person or by a legal representative of his own choice; Nothing contained in subsection (2)(d) shall be construed as entitling a person to legal representation at public expense.

e. shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and

f. shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge.

The judgments of the courts below

[18] The constitutional application was heard in the latter half of November, 2006 by Blackman, J. In giving a fully reasoned judgment on 2nd February, 2007 the judge identified three issues for determination namely, whether: (a) Gibson was entitled to be provided at public expense with the services of the forensic odontologist; (b) the 29 month period between his being charged and the commencement of the preliminary inquiry into that charge constituted excessive delay amounting to a breach of the reasonable time guarantee in section 18(1), and (c) damages should be awarded in the event that it was found that there was a breach of that guarantee.

[19] On the first issue, Blackman J held that the principle of equality of arms was essential to a fair trial. The judge agreed with Gibson's counsel that the provision of the expert in question was a "facility" the cost of which should be borne by the State given Gibson's lack of means. The judge also agreed with counsel that the Crown was not entitled to a copy of any report received from the expert.

[20] On the second issue, the judge considered the 29 month period in question to be excessive and thus a breach of Gibson's right to a fair trial within a reasonable time. The judge ordered that the necessary measures be put in place to ensure the re-commencement of his trial by a date no later than 30th June, 2007.

[21] On the third issue, the judge found that it was a sufficient remedy to release Gibson on bail with one surety. Accordingly, no damages were awarded to him for the breach.

[22] A notice of appeal against the judgment of Blackman J was filed on 14th May, 2007 by the Attorney General. Over a year later, no record of appeal had been filed. On 4th June, 2008 Gibson moved the court by summons to strike out and dismiss the appeal. This summons was ultimately withdrawn after some communication with counsel on the other side. But filing it had the desired effect of expediting the processing of the appeal and the costs incurred as a result of its filing were awarded to Gibson. The appeal finally commenced before the Court of Appeal in February, 2009.

[23] The judgment of the Court of Appeal was delivered on 15th December, 2009. The Court of Appeal held that Gibson had no constitutional right to State-funded facilities that included provision of an expert; that Blackman J was wrong to make a mandatory order for funding of the expert by the State and that in any event the order made by Blackman J imposing such an obligation was too open-ended (para 54). The Court of Appeal was, however, of the view that a forensic expert was material to the defence (para 40); that Gibson "may be at a disadvantage" if he was unable to obtain expert help in dealing with the evidence of the prosecution (para 41), and that Gibson had made out a sufficient case for constitutional redress (para 40). The court held that the dilemma produced by appreciating that Gibson, "as an indigent defendant, has a constitutional right to facilities which include an expert but there is no constitutional provision for payment … can be resolved by a careful consideration and application of the doctrine of the separation of powers" (para 48). The court reasoned that to compel the State to fund the expert would be an improper encroachment by the judiciary onto the province of the Executive and the

Legislature which have control over the disbursement of the revenues of the State but the court was entitled to assume that if an appropriate declaration was issued the Executive would faithfully comply with and carry it into effect. The declaration which the court made, however, simply restated the rights set out in s.18(2)(c) and (e) in the words of the Constitution without indicating what action (if any) was required to be taken by the Government in order to vindicate those rights in the particular circumstances of this case.

[24] Like Blackman J, the Court of Appeal held that there was no obligation on Gibson to disclose to the prosecution the contents of any expert's report that was obtained as a result of funding obtained from the State. The court reasoned that at common law there was a right of silence and there was no onus on the defence to aid the prosecution. Parliament could make inroads into this principle but in Barbados Parliament had not done so in relation to the report of experts. The Court of Appeal also declined to make an award of damages because Gibson had "suffered no damage. He was lawfully detained and not abused".

[25] For reasons that are not apparent on the record the Court of Appeal refused Gibson leave to argue firstly, that his right to a trial within a reasonable time was further infringed by the delay in processing the appeal and secondly, that the charge against him should be permanently stayed or dismissed. The court nevertheless did address briefly the propriety of granting Gibson a permanent stay. Citing in support the majority view of the House of Lords in *A-G's Reference (No. 2 of 2001)*[4], the court held that justice demanded that, having been charged and indicted for murder, Gibson should be tried for the same. According to the court, "[T]he delay, regrettable as it is, should not be used by him as justification for failure to try to establish his innocence at a trial…"

[26] Gibson was dissatisfied with this judgment and it was his appeal to this Court that we heard and determined on 10th June, 2010. The reasons for the orders we made then may conveniently be grouped under two broad heads, namely, the issue of a fair trial and the issue of unreasonable delay.

---

[4] [2004] 2 AC 72

The fair trial issue

[27] On this issue Gibson's counsel made to this Court the same submissions that he had made to the courts below. Relying heavily on *Ake v Oklahoma*[5], a decision of the US Supreme Court, he argued that the provision of a state-funded expert was a "facility" within the meaning of section 18(2) of the Constitution. He identified the essence of the breach by the State as a failure to observe the imperatives of section 18(2)(c) and (e) in so far as those provisions require the State to afford facilities to every person who is charged with a criminal offence.

[28] We entertain very serious reservations about this approach. Section 18(2)(c) is almost identical to Article 6(3)(b) of the European Convention on Human Rights ("the European Convention") from which it was taken.[6] It is true that the term "facilities" found in these texts is usually defined merely by reference to what the term includes but an examination of the jurisprudence emanating from the European Court of Human Rights gives no support to the contention that the expression should be construed to include the provision of an expert funded by the State. It is usually interpreted to embrace such matters as: a) tangible objects such as pen, paper, computer and books that will assist in the preparation of one's defence; b) save where the public interest or statute requires otherwise, a right of disclosure to the prosecution's file, an opportunity for the accused to acquaint himself with the result of investigations carried out throughout the proceedings, access to all relevant elements that have been or could be collected by the competent authorities; and c) if the accused is in custody, conditions of detention that would allow him adequately to prepare for trial. See: *Jespers v Belgium,*[7] *Mayzit v Russia*[8] and *Natunen v Finland*[9].

---

[5] 470 U.S. 68.
[6] "*…Everyone charged with a criminal offence has the following minimum right:.. to have adequate time and the facilities for the preparation of his defence…*"
[7] (1981) 27 DR 61; (1983) 5 EHRR CD 305.
[8] [2005] ECHR 63378/00.
[9] [2009] ECHR 21011/04.

[29] Article 14(3)(b) of the International Covenant on Civil and Political Rights[10] similarly confers on everyone charged with a criminal offence the right "to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing".[11] The United Nations Human Rights Committee has stated that "facilities" in this context "must include access to documents and other evidence; this access must include all material that the prosecution plans to offer in court against the accused or that are exculpatory".[12]

[30] In *R v Bidwell,*[13] Forte JA of Jamaica (as he then was), in discussing the expression "facilities", focused his attention on the things that an accused would require in order to prepare himself to answer the charge laid against him and the opportunities that must be afforded him adequately to engage in such preparation.

[31] Having reviewed all the authorities cited to us we are not persuaded that section 18(2) gives to an accused a *right* to the services of an expert *funded by the State*. It seems to us that it would be straining the meaning of the term to include within it any such obligation on the part of the State. Interpreting the provision in this way would necessarily mean that this "right" could properly be claimed on any occasion and under any circumstance by "every person who is charged with a criminal offence". *See*: section 18(2)(c). But the Constitution does not envisage that on each occasion an accused, indigent or otherwise, would like to have the assistance of an expert, the State must pay for him to acquire those services.

[32] Other provisions of section 18 offer perhaps some support for the conclusion we have reached above. As we have seen above (para 17), Section 18(2)(f) mandates that every accused "shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge". And although section 18(2)(d) stipulates that an accused "shall be permitted to defend himself before the court

---

[10] 16 December 1966, United Nations, Treaty Series, Vol 999, p. 171 [ICPR].

[11] See also Article 8(2)(c) of the American Convention on Human Rights that refers to the right of an accused to "adequate time and means for the preparation of his defence"

[12] Human Rights Committee of the United Nations, General Comment No. 32. 21 August 2007, Geneva

[13] Criminal Appeal No 50/90 (Unreported) Court of Appeal of Jamaica

in person or by a legal representative of his own choice" section 18(12) makes it clear that "[n]othing contained in subsection (2)(d) shall be construed as entitling a person to legal representation at public expense". Thus, in instances where the assistance of an expert might conceivably be regarded as a "facility", the Constitution draws attention to that fact and states specifically whether such assistance is or is not to be funded by the State. It is apparent that the Constitution does not treat the services of these two categories of "experts" (i.e. interpreters and lawyers) as a provision of "facilities" even though it may be said that they "facilitate" the defendant in the conduct of his defence. Instead, the Constitution makes separate and explicit provision in relation to their services in each case expressly stating whether or not the State has a responsibility to pay the expert.

[33] As so much was made by counsel of the principle of "equality of arms", it must be pointed out that so far as the provision of "facilities" is concerned this salutary principle does not imply that an indigent accused must be placed on perfect parity with the prosecution. The prosecutorial arm of government has access to the enormous resources of the State. As such, it is not unreasonable to expect that quite often there may be a marked inequality between the facilities at the disposal of the prosecution and those available to an accused. Section 18(2) consequently stipulates that the facilities afforded to the accused must be "adequate".

[34] Since nothing in section 18(2) is intended to derogate from the right to a fair hearing guaranteed by section 18(1) (*See*: *Hinds v. Attorney General of Barbado*s[14]) Gibson's claim to have the services of a forensic odontologist and his complaint about inequality of arms are better assessed in the context of his right to a fair trial. Where the inequality of arms is so serious and the accused so handicapped that the mere inequality is likely to have a significant impact on the outcome of the trial, the accused is entitled then to argue that his fundamental right to a fair trial contained in section 18(1) is being infringed. In the circumstances of this case it was open to Gibson to demonstrate that without the services of a forensic odontologist his impending trial would not be fair. Since the

[14] [2001] 59 WIR 75 at [17]

Constitution permits him to complain of threatened infringements of his fundamental rights, he was not obliged to wait and make this allegation at the trial. In a case like this one, the complaint should ideally be made as early as possible by way of a constitutional application brought in a timely manner.

[35] When an accused person alleges that his trial is likely to be unfair and the court is persuaded by the allegation, the court cannot permit the trial to occur or to continue under conditions that render it unfair. Where the complaint is successfully made after the trial has concluded an appellate court is obliged to quash any conviction arising from the hearing.

[36] The Solicitor General seemed to believe that making an order that Gibson be provided with the services of a State-funded expert would open up the floodgates and result in the State being overwhelmed with such requests. We do not share similar anxieties. A court may only make such an order if after a careful examination of the facts of the particular case the court considered that a fair trial required it. Section 24(1) of the Constitution[15] requires a court to examine the specific circumstances of the accused and the entire context before determining whether it is appropriate to grant relief.[16]

[37] The starting point in the assessment is the presumption of innocence. *See*: s. 18(2)(a). Gibson has maintained his innocence and it must be presumed that he is innocent. It is not for him to "establish his innocence at trial". The Crown has the onus of proving his guilt. His trial is before a jury. He is charged with murder, the most serious of crimes. It is accepted by the parties before us that the *only* evidence positively linking him to the crime is of a highly scientific kind and that without this evidence there is no viable case against him. That evidence is to be given in court by a doctor who is not himself in regular practice in the particular scientific field. That field is, in the words of the Court of

[15] Section 24(1) states Subject to the provisions of subsection (6), if any person alleges that any of the provisions of sections 12 to 23, is being 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.

[16] *See*: *Cerisola v. Attorney General for Gibraltar* [2008] UKPC 18 where the Judicial Committee adopted this approach in relation to a similar section of the Gibraltar Constitution

Appeal, of a “complex and controversial” nature[17]. If Gibson were a wealthy man he would be able to procure the services of someone who can assist him in formulating questions for Dr Eastmond; in probing, testing that evidence; in pointing out to the jury any weaknesses there might be in it. But due to Gibson’s lack of means it is clear that he would be severely and unfairly handicapped in conducting a meaningful defence to the allegations made against him.

[38] There is another reason why it is important that Gibson be provided with such assistance. As far as it is possible to do so, we must ensure that at his trial the truth is established especially bearing in mind that if Gibson is convicted the judge has no option but to impose a death sentence. As Canadian Chief Justice McLachlin notes in *R. v. Harrer*[18], “At base, a fair trial is a trial that appears fair, both from the perspective of the accused and the perspective of the community… A fair trial is one that satisfies the public interest in getting at the truth” (para 45).

[39] *Ake v Oklahoma*[19] also underscored the importance of seeking an accurate resolution of the issues arising in the trial. *Ake* was concerned with the State providing to an indigent accused access to a psychiatrist. The principles espoused there are just as relevant to this case. Justice Thurgood Marshall of the United States Supreme Court stated then in a passage quoted by Blackman J:

> “…without the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense, to help determine whether the … defense is viable, to present testimony, and to assist in preparing the cross-examination of a State’s psychiatric witnesses, the risk of an inaccurate resolution of [the] issues is extremely high. With such assistance, the defendant is fairly able to present at least enough information to the jury, in a meaningful manner, as to permit it to make a sensible determination.”

[17] See *Carroll v The Queen* [1985] 19 A Crim R 410 where a similar view was held.
[18] [1995] 3 S.C.R 562 at [45]
[19] Supra, note 4 at para 82

[40] When one considers the sum total of the specific circumstances of this case, it was our view that there could not be a fair trial in this case if the defence, through lack of means, were deprived of access to the services of a forensic odontologist and this Court could not sanction Gibson's trial under those conditions. Furthermore there was no reason either in law or in logic to wait until an unfair trial was about to begin before taking steps to forestall it.

[41] Since there was uncertainty as to the choice of expert and the quantum of his fees and expenses, it was impossible for the Court to determine what sum of money was reasonably required by the appellant in order to obtain the expert assistance which he required for his defence. We considered that the proper course to follow was to give the parties an opportunity to hold discussions and exchange information with regard to these matters. It could reasonably be expected that from this exercise there would emerge an answer to the question of how much money was reasonably required for the purpose. We considered that having regard to the delays that had already occurred, the negotiations should be pursued with some urgency and we hoped they would culminate in the State paying or undertaking to pay an agreed sum for the funding of the expert. We were quite clear in our own minds that the trial ought not to be allowed to proceed unless that funding was provided. We were prepared, however, in the circumstances of this case, to leave it to the State to decide whether to provide that funding or to abandon in effect the prosecution of Gibson. We therefore made what was intended to be an interim order staying Gibson's trial. We thought that the parties should be given until the 15th July, 2010 to reach agreement on the cost of the expert and so we gave the appellant liberty to apply at any time after that date to make the stay of proceedings permanent and to have the charge against him dismissed. This provided for the situation in which the State had not by then paid or offered a reasonable sum to defray the cost of a forensic odontologist to advise the defence, attend the trial and give evidence, if required. The State on the other hand was given liberty at any time to apply to remove the stay if agreement was not reached on the level of funding required for the expert and such failure was due to the unreasonable demands of the appellant, or if, alternatively, the amount of the funding was settled and paid or agreed to be paid by the State, so that there was no longer any

impediment to holding the trial. In the former case, the appellant could not complain that the trial was unfair because his failure to obtain the assistance of a forensic odontologist would have been due to his own fault. The fate of this matter was therefore left in the hands of the parties, subject to the Court intervening to prevent an unfair trial taking place. We reiterate our hope that a fair trial will be held as expeditiously as possible.

[42] We cannot conclude on this first issue without commenting firstly on the separation of powers point raised by the Court of Appeal and secondly, on the point relating to the sharing of any report obtained by the defence. As to the former, while it is true that a certain comity must exist between the various branches of the State, we do not subscribe to the notion that the separation of powers principle can preclude the court from making an order against the Executive in exercise of the Court's power to redress or prevent breaches of constitutionally protected rights merely because the order requires the Executive to expend public funds. The Constitution is supreme[20] and in section 24(1) a responsibility is cast on the court to "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 the fundamental rights. Section 24 is deliberately couched in broad terms because, as was said by Lord Bingham in *Gairy v A.G. of Grenada,*[21] the court has, and must be ready to exercise, power to grant effective relief for a contravention of a protected constitutional right. If the appropriate way to remedy a breach is to make a mandatory order for the payment of money by the State, then that is what the court is empowered and obliged to do. But this was a case in which the Court was not in a position to quantify the sum of money which the State would be required to pay, and in which the Court could, with an easy conscience, leave the State with the option of paying for the defence expert or abandoning the prosecution. In these circumstances we did not consider it necessary or appropriate to make a mandatory order against the State along the lines of that made by Blackman J.

---

[20] Constitution of Barbados Chapter 1

[21] *Gairy v A.G. of Grenada (No. 2)* (1999) 59 WIR 174 at [23]

[43] On the question of the sharing of any report obtained by the defence as a result of funding provided by the State, both courts below held that there was no obligation on the accused to make any such report available to the Crown (Court of Appeal para 45; High Court para 49). The legitimate interests of the accused that are served here are the right to silence, the right to avoid self-incrimination and the right to require the prosecution to prove its case. In our order we decided this question in a slightly different manner from the way in which the courts below did. We adjudged that the defence was not obliged to disclose the contents of any report from the expert if the latter was not going to be called to give evidence at the trial. But we decided that if the defence proposed to call the expert to give evidence then the defence was obliged to share his/her report with the Crown.

[44] Nothing in our decision conflicts with the legitimate interests of the accused or with any constitutional right of his. On the contrary we consider that this part of our order further satisfies the overall objective of fairness. There is no right, constitutional or other, on the part of the defence to surprise the Crown with expert evidence in the middle of a trial. A fair trial is not one that is fair only to the accused. It is a trial that is fair to all. Even in the absence of legislation requiring such disclosure, it is competent for the Court to order it as a corollary to an order which the Court makes at the behest of the appellant so as to ensure the fairness of the trial.

The issue of unreasonable delay

[45] Before we received the oral submissions in this appeal, we considered an application by Gibson's attorneys for leave to argue two separate grounds of appeal: firstly, that Gibson's right to be tried within a reasonable time (i.e. his "reasonable time guarantee") was further infringed because of the delay by the Attorney General in the prosecution of the appeal to the Court of Appeal, and secondly, that further proceedings on the charge of murder should be permanently stayed or dismissed on account of the overall delay that had occurred to date. The Court of Appeal had earlier refused leave to argue these grounds (See: para 25 above). In Gibson's Re-Amended Notice of Motion filed in September 2006 he had actually sought an order "that the trial of the charge be

permanently stayed or that the charge be dismissed" but it would appear that neither counsel nor the trial judge adverted to this claim at the trial.

[46] We disallowed leave to argue the first of these as nothing was gained by its inclusion as a separate ground. When it is considering whether to determine or confirm that there has been unreasonable delay an appellate court *must* take into account any further unreasonable delay that has arisen since the initial consideration of the complaint. A person in custody who alleges a breach of the reasonable time guarantee effectively is complaining not about an event or some particular act. He is complaining about his situation. That situation lasts until he has been released or his complaint is otherwise appropriately addressed by a competent court. As the European Court of Human Rights has observed, to require successive applications to be made in respect of a continuing situation would be excessively formalistic[22]. If there is a worsening of the complainant's situation during the process of litigation then clearly the appellate court must have regard to this fact. In this connection unreasonable delay must be taken to include any undue lapse of time throughout the proceedings for which any of the emanations of the State, including a court, is responsible and, as the Inter-American Court makes clear, the duration of the proceedings runs from the arrest of the accused to the exhaustion of all appellate processes.[23]

[47] As to the second additional ground, we rejected the argument put forward by the Solicitor General that, by not actively pursuing the matter before Blackman J, Gibson must be taken to have "waived" his claim for a permanent stay or a dismissal of the murder charge. That claim was not an assertion of a right but instead a claim for a specific form of redress for breach of a right, the right in question being the reasonable time guarantee. Especially as this Court has never before addressed the issue, we thought that we should permit counsel to put forward arguments as to whether such relief was warranted. Ultimately, the real question is whether this Court considers that it is appropriate, in

---

[22] See: Case of *Neumeister v Austria*, Application No. 1936/63, Judgment of 27 June 1968. See also: *Martin v. Tauranga District Court* [1995] 2 NZLR 419 at 420 per Cooke, P

[23] See: *Case of Suárez Rosero Merits*. Judgment of November 12, 1997. Series C No. 35 at [71]

principle and specifically in relation to this particular case, to grant such relief. Before deciding that question we wish to make a few general remarks about delay.

[48] The public have a profound interest in criminal trials being heard within a reasonable time. Delay creates and increases the backlog of cases clogging and tarnishing the image of the criminal justice system. Further, the more time it takes to bring a case to trial the more difficult it may be to convict a guilty person. For a variety of reasons witnesses may become unavailable or their memories may fade, sometimes seriously weakening the case of the prosecution which carries the burden of proof.[24] Defendants released on bail for lengthy periods have an opportunity to commit other crimes if they are so disposed. The longer an accused is free awaiting trial, the more tempting becomes the opportunity to skip bail and avoid being tried. On the other hand, keeping remanded persons in custody for excessive periods increases prison populations and aggravates the evils associated with overcrowded jails. Moreover, there is a financial cost to the public in maintaining a person on remand.

[49] Even more telling than the societal interests at stake are the consequences to an accused of a breach of the reasonable time guarantee. This is evident in the case of a defendant who is not guilty. That person is deprived of an early opportunity to have his name cleared and is confronted with the stigma, loss of privacy, anxiety and stress that accompany exposure to criminal proceedings. But a defendant facing conviction and punishment may also suffer, albeit to a lesser extent, as he is obliged to undergo the additional trauma of protracted delay with all the implications it may have for his health and family life.[25] By deliberately elevating to the status of a constitutional imperative the right to a trial within a reasonable time, a right which already existed at common law, the framers of the Constitution ascribed a significance to this right that too often is under-appreciated, if not misunderstood.

---

[24] See *Barker v Wingo* 407 U.S. 514 (1972)

[25] *See: Attorney General's Reference No 2 of 2001* at [16].

[50] Blackman J's judgment indicates that counsel appearing on behalf of the Attorney General submitted to the judge that "delays were typical in Barbados and consequently ought to be tolerated" (para 53). The judge also records (para 65) that another counsel had deposed that "[w]ith the notable exception of the court presided over by Magistrate Pamela Beckles, a … preliminary inquiry into a charge of murder generally takes between one to four years to commence" and that "the Crown takes a very long time to respond" to requests for disclosure of the statements of witnesses. If these statements are accurate, and there was nothing to suggest that they were not, members of the Barbadian public have every right to be concerned about what may be considered as blots on the criminal justice system.

[51] To be fair, inordinate delays are not unique to the State of Barbados. They are prevalent in other Caribbean States as well. But this provides no justification for countenancing delay. Some States have actually made assiduous efforts to address the problem. The authorities in Saint Lucia, for example, have embarked upon such a course. It has involved the overhaul of the entire criminal justice system harnessing in the process the efforts of all the important sectors that have roles to play in it whether from the Executive, Legislature or Judiciary.[26] From all accounts it would appear that the measures taken, which seemed not to have required enormous expenditure, are yielding some measure of success.

[52] It is not of course for this Court to prescribe for Barbados the specific measures that it must take adequately to overcome the problem of delays in its criminal justice system. But we feel in duty bound to draw to the attention of the relevant authorities the urgent need to address it in a thorough and comprehensive manner if it is not already being so addressed. As the apex court responsible for interpreting and applying the rights set out in the Barbados Constitution, this Court cannot remain oblivious of well founded concerns that breaches of the right to trial within a reasonable time are systemic in nature. If on the other hand it is apparent that prompt measures are being taken to address this problem in

[26] In this regard, See: Saint Lucia S.I. No. 116 of 2008

a decisive manner then a court is likely to take cognizance of such measures when it has to assess the *reasonableness* of lapses of time or the remedies that should be applied. [27]

[53] This brings us to the question posed above at [47] in the context of the additional ground of appeal counsel for Gibson was given leave to argue. First we pose the question in a general sense. Is it appropriate for a Barbados court, in a fit case, to order a permanent stay or dismissal of a charge purely for breach of the right to be tried within a reasonable time? A similar question was referred to their Lordships in the House of Lords in 2001 and there was a sharp division of opinion among them. But one must be careful to examine the judgments in that reference, *Attorney General's Reference No. 2 of 2001*[28], against the background of the interplay between the provisions of the Human Rights Act of the United Kingdom and the European Convention. The Act specifically deems it unlawful for a public authority to act in a way that is incompatible with the rights laid out in the Convention. The majority in *Attorney General's Reference No. 2 of 2001* sought to avoid a finding that in proceeding to and actually holding a hearing after unreasonable delay the prosecutorial authorities and the court would be acting unlawfully. The consequence of such a finding, in their view, could only have meant that once a reasonable time had elapsed courts in the UK had no discretion and would be obliged in *every* instance to stay permanently or dismiss the pending charge. That was a result that, in the view of the majority, was unpalatable. We are, however, not faced with the same dilemma and we must proceed to answer the question in the context of the provisions of the Barbados Constitution itself.

[54] Section 18(1) gives three different and free-standing rights to any person who is charged with a criminal offence[29]. These rights correspond to separate obligations imposed by the Constitution on the State. For every accused person whose charge has not been withdrawn the State is obliged to afford a hearing that is: (a) fair; (b) before an

---

[27] *Martin v. Tauranga District Court* [1995] 2 NZLR 419 at 425 per Cooke, P

[28] [2004] 2 AC 72

[29] *See*: *Darmalingum v The State* [2000] 1 WLR 2303 and *Boolell v The State* [2006] UKPC 46 where the JCPC construes similar provisions.

independent and impartial tribunal established by law, and (c) held within a reasonable time.

[55] The fulfillment by the State of each of these obligations is fundamental to the criminal justice system and the obligations referred to at (a) and (b) are irreducible. Thus, if a trial is not likely to be or has not been fair, then, as stated earlier, the breach vitiates the trial process. Similarly, a court will not sanction a trial before a tribunal whose characteristics threaten to or actually fall short of basic requirements of independence and impartiality. Redress for an infringement of either of these rights cannot be limited by any overriding public interest in part because, unless the charge is altogether withdrawn or dismissed, it will normally be possible to convene a new trial on conditions that are fair or to hold one before a proper tribunal as the case may be. It is possible, so to speak, to re-set the clock so as to grant the accused the full measure of the right in question.

[56] This is not the case when the reasonable time guarantee has been breached. Once there has been excessive delay in trying an accused, a court may issue orders aimed at expediting the trial or provide some form of relief to the accused but there is nothing that the court can do to remedy the breach that has occurred in a way that will undo the past delay and its effects on the accused and the society. It is not possible to wipe the slate clean and revert to the *status quo ante*.

[57] Section 13(3) of the Constitution[30] gives a clear indication that a trial held after an unreasonable time is not necessarily fatally compromised merely on account of the delay, at least certainly not in relation to a person who has been in custody. That sub-section provides, *inter alia*, that if the accused is in custody and he has not been tried within a reasonable time he must be released either unconditionally or upon reasonable conditions "*to ensure that he appears at a later date for trial...*" The reasonable time guarantee therefore differs from the other two guarantees of section 18 (1) in two important

[30] The relevant part of the section states "……if any person arrested or detained upon reasonable suspicion of his having committed or being about to commit a criminal offense is not tried within a reasonable time, then, without prejudice to any further proceedings which may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial".

respects. Firstly, in the case of the other two guarantees, remedial action can be taken which will effectively cure the breach. This is not possible in the case of the reasonable time guarantee as one cannot turn the clock back. Secondly, while breach of the other two guarantees automatically vitiates the trial, the Constitution itself clearly suggests that breach of the reasonable time guarantee does not necessarily prevent a valid trial being held.

[58] A finding that there has indeed been unreasonable delay in bringing the accused to trial must be made on a case by case basis. It cannot be reached by applying a mathematical formula although the mere lapse of an inordinate time will raise a presumption, rebuttable by the State, that there has been undue delay. Before making such a finding the court must consider, in addition to the length of the delay, such factors as the complexity of the case, the reasons for the delay and specifically the conduct both of the accused and of the State. An accused who is the cause and not the victim of delay will understandably have some difficulty in establishing that his trial is not being heard within a *reasonable* time. One must not lose sight of the fact, however, that it is the responsibility of the State to bring an accused person to trial and to ensure that the justice system is not manipulated by the accused for his own ends. Even where an accused person causes or contributes to the delay, a time could eventually be reached where a court may be obliged to conclude that notwithstanding the conduct of the accused the overall delay has been too great to resist a finding that there has been a breach of the guarantee[31].

[59] In this case, both courts below were of the view that the 29 month period before the commencement of the preliminary inquiry constituted unreasonable delay in bringing the accused to trial. The State neither explained this delay nor disputed the finding that it was unreasonable and as such we need not make any further comment on it. The thrust of the State's argument in this case was that there ought not to be any award of damages or an order made permanently staying or dismissing the charge as relief for the admitted breach. The question therefore is what should the appropriate remedy be when there is a breach of the reasonable time guarantee?

---

[31] *See*: for example *Boolell v The State* [2006] UKPC 46

[60] In answering this question a court must weigh the competing interests of the public and those of the accused and apply principles of proportionality. One starts with the premise that the Executive Branch of Government has a constitutional responsibility to allocate sufficient resources to ensure that the reasonable time guarantee has real and not just symbolic meaning. A governmental failure to allocate adequate resources, or for that matter inefficiencies within the justice sector, could not excuse clear breaches of the guarantee[32] .

[61] When devising an appropriate remedy a court must consider all the circumstances of the particular case, especially the stage of the proceedings at which it is determined that there has been a breach. In particular the court should pay special attention to the steps, if any, taken by the accused to complain about the delay since, as was pointed out by Powell J of the US Supreme Court in *Barker v Wingo*[33], delay is not an uncommon defence tactic.

[62] A permanent stay or dismissal of the charge cannot be regarded as the inevitable or even the normal remedy for cases of unreasonable delay where a fair trial is still possible. Quite apart from prejudicing the operation of section 13(3), to so hold, as some other jurisdictions have done, would create too great a risk of unnecessarily placing trial courts in the uncomfortable position of having to choose between equally undesirable alternatives, namely: to permit a possibly dangerous criminal to avoid being tried or else to raise to an unacceptably high level the threshold for deeming unreasonable obviously inordinate delay. Having an inevitable permanent stay or dismissal of the charge as the single sanction for breach of the reasonable time guarantee may well reward the guilty, who escape being brought to justice, even as it does little or nothing for the innocent who cannot regain the time they have lost suffering under a cloud of suspicion or worse, being remanded in custody. We accept the view of the Inter-American Court of Human Rights that "the State's duty to wholly serve the purposes of justice prevails over the guarantee

[32] *See*: *Martin v Tauranga District Court* (1995) 2 NZLR 419 @ 425 per Cooke P
[33] 407 U.S. 514 (1972)

of reasonable time"[34]. The fundamental objective of the reasonable time guarantee is not to permit accused persons to escape trial but to prevent them from remaining in limbo for a protracted period and to ensure that there is efficient disposition of pending charges. The guarantee is an incentive to the State to provide a criminal justice system where trials are heard in a timely manner.

[63] But equally, we do not agree that a mere breach of the reasonable time guarantee could *never* yield a permanent stay or dismissal of the charge and that instead such relief should be reserved only for instances where the trial will be unfair or the accused can show prejudice. As previously indicated at [42], section 24(1) of the Constitution affords the court flexibility, power and a wide discretion in fashioning a remedy that is just and effective taking into account the public interest and the rights and freedoms of others. No conceivable remedy, including a permanent stay or dismissal, ought to be removed from the range of measures at the disposal of the court if the relief in question will prove to be appropriate. Given the high level of public interest in the determination of very serious crimes, however, it will only be in exceptional circumstances that a person accused of such a crime will be able to obtain the remedy of a permanent stay or dismissal for the breach *only* of the reasonable time guarantee. Of course, such a remedy will be readily granted in cases where the delay has rendered it impossible to hold a fair trial.

[64] Where breach of the reasonable time guarantee is established *before* trial the court should consider issuing a suitable declaration denouncing the breach and making an order that expedites the hearing. If the accused is in custody then the court *must* have regard to section 13(3) of the Constitution which requires the release on bail of the accused. If *at the trial* there is a conviction then the trial judge should always consider a reduction in the severity of the sentence in light of the delay. In this context the question may arise as to whether the severity of a mandatory sentence can be reduced on this ground but this is a matter that is far too important for us to comment upon without receiving specific submissions on it from counsel.

---

[34] *Case of La Cantura v. Peru.* Merits, Reparations and Costs. Judgment of November 29, 2006. Series C No. 162 at 149.

[65] In Gibson's case, the breach of the reasonable time guarantee is somewhat overshadowed by the arguments that revolved around provision of the services of the expert and the fairness of the trial. In any event, on the facts of this case we would not have considered it appropriate to issue a permanent stay or dismissal of the charge only because of the unreasonable delay that has occurred to date.

[66] The courts below have already found that there was inordinate delay between the time Gibson was charged and the time the preliminary inquiry began. That delay was further aggravated by the inordinate length of time taken to pursue the constitutional application, both before the High Court and the Court of Appeal. Gibson was released on bail by Blackman J, either on the date the judge gave his judgment on 2nd February 2007 or some time very shortly thereafter. But at the date of the hearing before this Court he was back in custody in relation to the murder charge because on 5th November 2007 he committed burglary and theft while on bail. He was convicted for these offences and re-incarcerated on 8th November, 2007 to serve concurrent sentences of 6 months for the burglary and 4½ months for the theft respectively. He completed serving these sentences in March 2008 but he remained in custody as his bail on the murder charge was revoked because leave was given for his surety to withdraw.

[67] In assessing the various periods of delay detailed above, a distinction should be made between the periods incurred prior to 2nd February, 2007 (the date when we assume that Gibson was set free on bail) and that which occurred thereafter. The latter period should be considered in a somewhat different light because during that time Gibson either was on bail or would have been on bail were it not for his commission of other offences and the withdrawal of his surety.

[68] While the overall delay is serious it must be balanced by the fact that Gibson is accused of an extremely serious crime committed in a particularly gruesome manner. The general public and the family members of the victim have a deep interest in the accused being brought to trial. In all the circumstances, we were not of the view that a permanent stay or

dismissal of the charge was warranted in this case. Instead, we held that at this stage the appropriate relief was to: uphold the finding that there had been a breach of Gibson's right to a hearing within a reasonable time; alter the conditions for his release by granting him bail with a surety in the sum of $10,000.00 on the condition that he report twice weekly on Mondays and Fridays at the police Station closest to his residence and by ordering further that any passport or travel document now in his possession or issued to him be deposited and retained by the Commissioner of Police pending completion of his trial or the dismissal of the charge against him; stay temporarily the criminal proceedings and issue the additional orders alluded to at [41] above so as to ensure either that a fair trial is held as soon as possible or else an opportunity be provided for arguments to be made to us as to whether the stay ought to be removed or be made permanent.

[69] As to the issue of the propriety of an award of damages which was specifically raised in this case, we disagree with the court below that such an award could only have been warranted if Gibson had established proof of damage or if he had been unlawfully detained or abused. Depending on the circumstances an award of damages may be an appropriate remedy for breach of any of the fundamental rights including a breach of the right to be tried within a reasonable time. It would, however, be repugnant to the public conscience that such an award should be afforded to an accused for the breach of that latter right when there is still the possibility that the accused may be tried and convicted for the offence with which he has been charged. An award of damages for breach of the reasonable time guarantee should be considered as an appropriate remedy only where the accused will no longer be tried or has been tried and acquitted or where his conviction has been quashed. And even in those cases the making of such an award should not be regarded as automatic but would depend on the particular circumstances of each case. It would therefore be inappropriate now to make any award of damages for this breach.

[70] For all these reasons we allowed the appeal, made the orders referred to and further ordered the State to pay Gibson's costs fit for two counsel.

/s/ M.A. de la Bastide

The Rt. Hon. Mr. Justice Michael A. de la Bastide (President)

/s/ R.F. Nelson

The Hon. Mr. Justice R. Nelson

/s/ A. Saunders

The Hon. Mr. Justice A. Saunders

/s/ D.P. Bernard

The Hon. Mme. Justice D. Bernard

/s/ J. Wit

The Hon. Mr. Justice J. Wit