

IN THE SUPREME COURT

Criminal Division (Const. Side)

IN THE MATTER of Articles 17(1), 19(1)(a), 26(2) and 26(3)  
of the Constitution of the Commonwealth of The Bahamas

AND

IN THE MATTER of an Application by TYRESE CLARKE

Between

TYRESE CLARKE

Applicant

AND

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

**Before:** The Honourable Madam Justice Guillimina Archer-Minns  
**Appearances:** Mr. Matthew Walker for the Applicant  
Mr. Terry Archer Sr. with Ms. Makeda Stubbs for the Respondent  
**Hearing Date:** 25 January 2024

**RULING**

**Constitutional Law – Constitutional Motion – Abuse of Process – Scope of the Applicant’s Fundamental Rights and Freedoms under Articles 17(1), 19(1)(a), 26(2), and 26(3) of the Constitution of The Bahamas – Whether the Applicant’s Fundamental Rights and Freedoms under Articles 17(1), 19(1)(a), 26(2), and 26(3) were breached and/or threatened – Whether the Applicant’s Constitutional Motion amounts to an abuse of the processes of the Court – Effect of the proviso to Article 28 of the Constitution**

**INTRODUCTION**

1. Tyrese Clarke, the Applicant herein, is a 25-year-old Jamaican national, who filed a Constitutional Motion against the Director of Public Prosecutions, the

Respondent herein, asserting a breach and/or threat to his fundamental rights and freedoms under Articles 17(1), 19(1)(a), 26(2) and 26(3) of the Constitution of the Commonwealth of The Bahamas. The Applicant sought numerous reliefs, namely, a declaration that his fundamental rights and freedoms under Articles 17(1), 19(1)(a), 26(2), and 26(3) were breached and/or threatened and that the Respondent do bear the costs of this application.

2. The Applicant moved the Court by way of a Notice of Motion and Affidavit-In-Support sworn by himself, which were both filed on 10 August 2023.
3. The Respondent opposed this application by way of an Affidavit-In-Response sworn by Betty Wilson, Counsel and Attorney employed in the Respondent's Office, and filed on 26 October 2023.
4. The Court has read the Affidavits of the Applicant and Respondent and has heard their respective submissions.

### **FACTUAL BACKGROUND**

5. The factual background to this application, to put it succinctly, is as follows: the Applicant stands charged with Assault contrary to section 265(5) of the Penal Code, Chapter 84 of the Statute Law of the Commonwealth of The Bahamas.
6. The Applicant was arrested on 4 January 2023 and subsequently arraigned in Magistrate Court No. 6 before Senior Magistrate Carolyn Vogt-Evans. The Applicant pled not guilty and was denied bail. Magistrate Vogt-Evans fixed the Applicant's trial for 30 August 2023 and he was remanded to The Bahamas Department of Corrections.
7. On 14 June 2023, the Applicant, by Summons and Supporting Affidavit, applied to the Court for admission to bail. On 28 June 2023, submissions were made and the Court, by oral ruling, admitted the Applicant to bail subject to conditions. The conditions of the bail included payment of the sum of \$3,000.00 in cash or by way of escrow. The Applicant has since satisfied the terms of the bail, was admitted to bail, and continues to be on bail in compliance with those conditions.
8. The Applicant now makes the present application asserting a breach and/or threat to his fundamental rights and freedoms under Articles 17(1), 19(1)(a), 26(2) and 26(3) of the Constitution.



## AFFIDAVIT EVIDENCE

### The Applicant's Affidavit Evidence

9. As aforementioned, the Applicant's Affidavit-In-Support was filed on 10 August 2023 and sworn by himself. The Court reproduces the Affidavit in its entirety below –

I, **TYRESE CLARKE**, formerly remanded at Her Majesty Prison atop Fox Hill, on the island of New Providence, the capital city of the Commonwealth of The Bahamas, make oath and say that :-

- i. I was remanded to bail by decree of this Honourable Court on 28<sup>th</sup> June 2023.
- ii. I am advised that Counsel sought to produce fulfillment of bail in conformity with viva voce department of the Court. Fulfillment of bail was attempted twice and denied without reason by bail officers and officials without cause denying the full realization of the Court's order allowing for the "cash bail" or "bail at escrow" with no need for surety to the order of the Public Treasury, Commonwealth of The Bahamas.
- iii. I am advised that Counsel asked for a copy of the record of Lady Justice's ruling to her Clerk and at the Bail office, the two primary districts of the court where the record is detained in fulfillment of bail. A copy of the record denied contrary to s.5(a) Bail Act, 1994.
- iv. That upon reflection of the words of the Learned Justice, a Draft ruling was subsequently drafted for assent but was denied service by the Clerk of the Court. A copy of said ruling is marked and exhibited "TC-2" for her Ladyship's consideration as against the record of the Court.
- v. The Bail Office hardened Lady Justice's ruling, allowing but for "cash bail" in its strictest interpretation and not perfecting the full realization of her Ladyship's utterances from the bench.
- vi. Upon fulfillment of bail in the only prescribed form admitted at the bail office, I was still yet not admitted to bail until an additional sum was demanded and paid to the releasing Sergeant.
- vii. I was beaten by Police; my injuries have dissipated but Hospital records and testimony of witnesses that appraised me before and after arrest will attest to facial bruising, the loss of one tooth, facial swelling, and distortions of ocular and auditory senses.
- viii. That averments 2 – 3 and 5 – 7 concomitate to offend the Applicant's constitutional rights pursuant to Articles 17(1), 19(1)(a), 26(2) read together with 26(3) all of the Constitution of the Commonwealth of The Bahamas, 1973.
- ix. That the Crown bear the costs of this application.
- x. That the contents of this affidavit are true and correct to the best of my knowledge, information, and belief as from my knowledge, information and advisement.



## The Respondent's Affidavit Evidence

10. As aforementioned, the Respondent's Affidavit-In-Response was filed on 26 October 2023 and sworn by Betty Wilson. The Court reproduces the Affidavit in its entirety below –

I, **BETTY WILSON**, of the Southwestern District of the Island of New Providence, one of the Islands of the Commonwealth of The Bahamas, make oath and say as follows; that:

- i. I am an Attorney at the Office of the Director of Public Prosecutions, and I am duly authorized to make this Affidavit on behalf of the Respondent, the Director of Public Prosecutions from information received by me in my capacity aforesaid.
- ii. Save as hereinafter stated, no admissions are made regarding the assertions contained in the Affidavit of the Applicant; namely, Tyrese Clarke.
- iii. The Applicant in this matter was granted bail by way of an oral ruling delivered on 28<sup>th</sup> July 2023. The terms of which included satisfaction of the amount of \$3,000.00 cash or by way of escrow.
- iv. That the bail amount was satisfied by cash in compliance with the bail ruling.
- v. That since the satisfaction of bail, counsel again appeared before the Court arguing that bail was not satisfied in the proper means.
- vi. That at such hearing, the Honourable Madam Justice Archer-Minns would have read the ruling again to the Counsel appearing on behalf of the Respondent and indicated that a copy can be retrieved if desired.
- vii. That there has been no breach of the Bail Act.
- viii. That the Respondent is put to strict proof of the averments in paragraphs 3 – 7.
- ix. That there has been no breach of Article 17(1) as the Applicant herein has not been subjected to torture or to inhumane or degrading treatment or punishment.
- x. That there is nothing in the Applicant's Affidavit that particularizes that the Applicant was subjected to any degrading treatment or punishment.
- xi. That the alleged hospital records and testimonies are not supplied in the Affidavit of the Applicant, nor does the Applicant's Affidavit indicate when, where, or who allegedly abused him.
- xii. That there has been no breach of Article 19(1) as the Applicant has not been deprived of his personal liberty.
- xiii. That the Court considered the Applicant's rights to liberty and exercised its discretion and granted bail.
- xiv. That there has been no discriminatory treatment by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.
- xv. That there is nothing outlined or supporting the allegation of discriminatory treatment.
- xvi. That the parallel remedy of a bail variation exists if the Applicant is not pleased with the conditions delivered. As a result, this application is an abuse of the processes of the Court as the right to apply to the Supreme Court pursuant to Article 28 of the Constitution should be exercised only in exceptional cases where there is a parallel remedy.



- xvii. In the circumstances, the Respondent requests that this Honourable Court dismiss the Application.
- xviii. That the contents of this Affidavit are true and correct to the best of my knowledge, information, and belief.

## ISSUES

11. The issues to be determined by the Court are simply –
- i. Whether the Applicant's fundamental rights and freedoms under Articles 17(1), 19(1)(a), 26(2), and 26(3) of the Constitution of The Bahamas were breached and/or threatened; and
  - ii. Whether the Applicant's Constitutional Motion amounts to an abuse of the processes of the Court?

## LAW AND DISCUSSION

### **Issue One – Fundamental Rights and Freedoms**

12. Learned Counsel for the Applicant, Mr. Matthew Walker, asserted that the Applicant's fundamental rights and freedoms under Articles 17(1), 19(1)(a), 26(2), and 26(3) of the Constitution were breached and/or threatened.
13. The Constitution is the supreme law of the land and any other law inconsistent with the Constitution shall be deemed void to the extent of its inconsistency: **Article 2 of the Constitution**.
14. Chapter III of the Constitution outlines entrenched fundamental rights and freedoms afforded to every person in The Bahamas. The fundamental rights and freedoms, insofar as relevant to the Applicant's assertions, are contained in Chapter III of the Constitution. The Court, for completeness, reproduces the above-mentioned provisions below –
- “17. – (1) No person shall be subjected to torture or to inhuman or degrading treatment or punishment.
- (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Article to the extent that the law in question authorises the infliction of any description of punishment that was lawful in the Bahama Islands immediately before 10<sup>th</sup> July 1973.
19. – (1) No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases –
- (a) in the execution of the sentence or order of a court, whether established for The Bahamas or some other country, in respect of a criminal offence which he has been convicted or in consequence of his unfitness to plead to a criminal charge or in execution of the order of a court on the grounds of his contempt of that court or of another court or tribunal...
26. – ... (2) Subject to the provisions of paragraphs (6), (9) and (10) of this Article, no person shall be treated in a discriminatory manner by



any person acting by virtue of any written law or in the performance of the functions of any public office, or any public authority.

(3) In this Article, the expression “discriminatory” means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, place of origin, political opinions, colour, or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description....”

15. The Court, as the guardian of the Constitution and sentinel of persons’ fundamental rights and freedoms, is armed with the original jurisdiction to be the watchman for any assertions of alleged breaches and/or threats to persons’ fundamental rights and freedoms. This constitutional responsibility cannot be abdicated: **Article 28 of the Constitution**

16. In **Larry Amonte Artilius v The Director of Public Prosecutions [2022] 1 BHS J. 69**, Forbes J at paragraph 12 adjudged –

“12. Any person coming to the Court especially pursuant to an application asserting that his/her individual rights conferred under the Constitution of The Bahamas have been and/or is threatened as a result of an action and/or inaction of another, has the burden of proof to prove that such act or inaction occurred and as a result has suffered some loss and/or damage.”

17. The onus is therefore on the Applicant to prove that there is a *prima facie* breach and/or threat to his fundamental rights and freedoms. The Applicant must do so with cogent evidence. Bare or naked assertions without anything more cannot suffice. The Applicant must also demonstrate on the face of his pleadings the nature of the alleged breach and/or threat that is being asserted.

18. With respect to the Applicant’s assertion of an alleged breach and/or threat to his fundamental right and freedom to protection from inhuman treatment under Article 17(1) of the Constitution, the Court is of the view that such assertion is unfounded and without merit. The Applicant produced no evidence to support that he was subjected to inhuman treatment. It requires more than asserting that one was beaten by the police and/or suffered facial bruising and swelling, tooth loss, and damage to the ocular and auditory senses. Notwithstanding that the Applicant attested that hospital records and/or witness testimonies would support his assertion, no hospital records or witness testimonies were supplied nor did the Applicant in his evidence indicate when, where, or who allegedly tortured or subjected him to inhuman treatment.



19. With respect to the Applicant's assertion of an alleged breach and/or threat to his fundamental right and freedom to protection from arbitrary arrest and detention under Article 19(1) of the Constitution, the Court is of the view that such assertion is unfounded and without merit. The Applicant was arrested and stands charged for Assault contrary to 265(5) of the Penal Code, Chapter 84 (as amended). The Applicant was originally denied bail. He subsequently applied to the Court for admission to bail. The Court considered the Applicant's right to personal liberty and exercised its discretion and granted him bail subject to conditions. The Applicant has since satisfied the bail conditions, was admitted to bail, and continues to be on bail in compliance with those conditions. As a result, the Applicant's assertion that his personal liberty has been breached and/or threatened does not have a leg to stand on. It appears that the Applicant's true complaint is relative to his bail conditions. If the Applicant was dissatisfied with his bail conditions, he ought to have applied for a variation of the bail conditions as opposed to lodging a Constitutional Motion.

20. With respect to the Applicant's assertion of an alleged breach and/or threat to his fundamental right and freedom to protection from discrimination under Article 26(2) and 26(3) of the Constitution, the Court is of the view that such assertion is unfounded and without merit. The Applicant has produced no evidence to support that he was discriminated against by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority. More fundamentally, the Applicant failed to particularize, on the face of his Affidavit or otherwise, the nature of the alleged discrimination he was subjected to.

21. In **Dennis Bernard Doxilly v The Attorney General [2023] ECSCJ No. 8**, Genac-Phulgence J at paragraph 43 adjudged –

“43. It is important that Counsel remember that pleadings are important and lay the foundation of a claim. Evidence is critical ... The Court does not possess the ability to know what is in a litigant's contemplation as far as the evidence they intend to rely on and therefore the litigant and Counsel must take care to provide it in the proper manner.”

### **Issue Two – Abuse of the Processes of the Court**

22. As aforementioned, the Court's original jurisdiction to safeguard and protect any assertion of alleged breaches and/or threats to persons' fundamental rights and freedoms is contained in **Article 28 of the Constitution**. **Article 28 of the Constitution** provides –

“28. – (1) If any person alleges that any of the provisions of Articles 16 to 27 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him then, without prejudice to any other action with respect to the same matter which is lawfully



available, that person may apply to the Supreme Court for redress.

(2) The Supreme Court shall have original jurisdiction –

(a) to hear and determine any application made by any person in pursuance of paragraph (1) of this Article; and

(b) to determine any question arising in the case of any person which is referred to it in pursuance of paragraph (3) of this Article,

and may make any such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of the said Articles 16 to 27 (inclusive) to the protection of which the person concerned is entitled:

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

**Emphasis added**

23. Learned Counsel for the Respondent, Mr. Terry Archer Sr., in limine, asserted that this application was an abuse of the processes of the Court. Learned Counsel further asserted that a parallel remedy exists at law for the Applicant, which is a bail variation. If the Applicant was dissatisfied with his bail, he ought to have applied to the Court for a variation; not make a constitutional application. The right to apply to the Court pursuant to Article 28 of the Constitution should be exercised only in exceptional cases where there is a parallel remedy. Learned Counsel cited the decision of **Kemrajh Harrikisson v Attorney-General (1979) 31 WIR 348** to support his assertion wherein Lord Diplock at 349 adjudged –

“The notion that wherever there is a failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.”

24. In **Attorney-General and Another v McLeod (1984) 32 WIR 450 at 458**, Lord Diplock stated –



“The Judicial Committee has previously had occasion to draw attention to the necessity of vigilance on the part of the Supreme Court to prevent misuse by litigants of the important safeguard of the rights and freedoms enshrined in sections 4 and 5, that is provided by the right to apply to the High Court for redress under section 14...

In *Chokolingo v Attorney-General (1980)* page 354, ante, the Judicial Committee applying what they had previously said obiter in *Ramesh Lawrence Maharaj v Attorney-General of Trinidad and Tobago (No 2) (1978) 30 WIR 310*, held that the procedure for redress under section 6(1) of the 1962 Constitution was not to be used as a means of collateral attack upon a judgment of a court of justice of Trinidad and Tobago acting within its jurisdiction, whether original or appellate...”

25. In **Deshawn Brooks v The Director of Public Prosecutions SCCr App No. 104 of 2020**, Barnett P at paragraph 28 opined –

“28. It is settled law that resort should not be had to Article 28 proceedings where appropriate relief is available by way of ordinary litigation.”

26. In addition to the Court having found that the Applicant’s assertions that his fundamental rights and freedoms under Articles 17(1), 19(1)(a), 26(2), and 26(3) of the Constitution had been breached and/or threatened were unfounded and without merit, the Court is further of the view that this application amounts to an abuse of the processes of the Court. The Court’s policing role under Article 28 of the Constitution should only be used in exceptional circumstances, particularly, where the Court is satisfied that there is an adequate relief or means of redress available to the Applicant under some other law. Seemingly, the Applicant’s true complaint is relative to his bail conditions for which the Applicant since satisfied, was admitted to bail subject to, and continues to be on bail in compliance with said conditions.

**CONCLUSION**

27. The Court, having found that the Applicant’s assertions that his fundamental rights and freedoms under Articles 17(1), 19(1)(a), 26(2), and 26(3) of the Constitution had been breached and/or threatened were unfounded and without merit and that this application amounted to an abuse of the processes of the Court, makes the following orders, that –

- i. this application is hereby dismissed; and
- ii. there be no order as to costs.

**Dated this 29 day of February 2024**

  
**Guillimina Archer-Minns**

**Justice of the Supreme Court**