

COMMONWEALTH OF THE BAHAMAS  
IN THE SUPREME COURT

CONSTITUTIONAL SIDE  
CRI/CON/00052

IN THE MATTER OF Articles 20(1) and 28 of the Constitution  
of the Commonwealth of The Bahamas

BETWEEN

BENJAMIN MCPHEE

Applicant

AND

THE ATTORNEY GENERAL

Respondent

**Before:** His Lordship the Honourable Senior Justice Bernard Turner

**Appearances:** Mr. Benjamin McPhee appearing Pro Se  
Ms. Cashena Thompson for the Respondent

**Hearing Date:** 27 June 2023

**BACKGROUND**

1. On 14 May 2014, the Applicant was convicted of murder on VBI No. 53/3/2012 and was subsequently sentenced to Forty (40) years imprisonment. He appealed the sentence and on 10 May 2016, the Court of Appeal dismissed his appeal and found that this Court's sentence of Forty (40) years was reasonable as the murder was particularly gruesome, callous and appeared to be premeditated.
2. Thereafter, the Applicant sought to appeal the decision of the Court of Appeal to His Majesty's Privy Council ("**Privy Council**"), mainly on grounds which were never brought before the Court of Appeal. According to the Applicant, the Privy Council wrote a letter informing him that the Board was unable to consider such an appeal as those grounds he wished to advance were never argued in the Court of Appeal.
3. On that basis, he then made a Constitutional application before this Court claiming that his Constitutional rights were infringed as he did not have competent counsel and he has exculpatory evidence which was never furnished to this Court nor the appellate courts.

4. To advance his position, he prepared a hand written letter to the Court outlining reliefs sought and reasons why he should be permitted a retrial. In essence, the reliefs sought under this Constitutional application are as follows:
  - A. **“A declaration that the Applicant has been, is being, or is likely to be deprived of the right to a fair hearing in regard to the incompetency of his past appeal court attorney, Mr. Anthony Newbold who is the primary reason why he did not get a fair hearing at the Court of Appeal.**
  - B. **A declaration that the Applicant is currently charged with (one count) of murder, where a past trial was adjudicated in the Supreme Court before Justice Bernard Turner’s Court in 2014 where the Applicant was found guilty on 14 May 2014 where he was represented by Mr. Rodger Gomez Jr.**
  - C. **A declaration that Mr. Newbold failed to follow the Applicant’s instructions as he did not challenge the conviction aspect during the appeal proceedings, but only challenged the sentencing.**
  - D. **A declaration stating that, as a result of Mr. Newbold’s incompetency and not adhering to the Applicant’s instructions, the Applicant was unfairly deprived of a fair appeal hearing as guaranteed under article 20(1) of the Constitution.”**
5. Essentially, the letter provides that his counsel at the appellate court, Mr. Anthony Newbold (**“Mr. Newbold”**), did not follow his instructions as he failed to advance the correct grounds of appeal. The Applicant also claims that evidence of phone calls between him and his co-convict, Ms. Shanice Rolle, was never put into evidence. He claims such evidence would exonerate him of any wrongdoing, thus making such evidence exculpatory. Not only this, but he claims that this evidence was discussed in open court during the case management conferences prior to the trial, yet such evidence was never formally placed before the Court.
6. Furthermore, he claims that he did not have a fair trial as his attorney was not competent and this prejudiced his position and ultimately caused his imprisonment.
7. In response to the Applicant’s submissions, Counsel for the Respondent submitted that the Applicant was, by law, afforded every opportunity to advance his defence at this Court and every other court. She further submits that his attorney’s failure to advance his case according to his instructions does not mean his Constitutional Rights have been infringed. Counsel further contends that he is also barred from bringing any further proceedings in relation to his conviction and sentencing as this Court is now *functus*, and thus has no jurisdiction over the matter any longer. She concludes by requesting that the Court dismiss the Applicant’s application, as being an abuse of the process of the court.

## ISSUE

8. The issue that this Court must determine is whether the Applicant’s Constitutional Rights as guaranteed under Articles 20 and 28 of the Constitution, have been infringed.

**LAW**

9. Article 20 of the Constitution provides:

**“20. (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, at his own expense, by a legal representative of his own choice or by a legal representative at the public expense where so provided by or under a law in force in The Bahamas;**

**(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;**

**(f) .....**

**(g) shall, when charged on information in the Supreme Court, have the right to trial by jury, and except with his own consent the trial shall not take place in his absence unless he so conducts himself in the court as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence.**

**(3) When a person is tried for any criminal offence, the accused person or any person authorised by him in that behalf shall, if he so requires and subject to payment of such reasonable fee as may be prescribed by law, be given within a reasonable time after judgment a copy for the use of the accused person of any record of the proceedings made by or on behalf of the court...**

**(5) No person who shows that he has been tried by a competent court for a criminal offence and either convicted or acquitted shall again be tried for that offence or for any other criminal offence of which he could have been convicted at the trial for that offence, save upon the order of a superior court in the course of appeal or review proceedings relating to the conviction or acquittal....**

**(8) Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time (emphasis added)”**

10. Further, article 28 of the Constitution states:

**“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 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 means of redress are or have been available to the person concerned under any other law.**

**(3) If, in any proceedings in any court established for The Bahamas other than the Supreme Court or the Court of Appeal, any question arises as to the contravention of any of the provisions of the said Articles 16 to 27 (inclusive), the court in which the question has arisen shall refer the question to the Supreme Court.”**

11. In relation to a fair hearing, in *The Queen v Shane Gibson* BS 2019 SC 26, Charles Snr. J. made the following pronouncement:

**“117 In AG’s Reference No. 2 of 2001 [supra], Lord Bingham stated at para [13]:**

**“It is accepted as “axiomatic” that a person charged with having committed a criminal offence should receive a fair trial and that, if he cannot be tried fairly for that offence, he should not be tried at all: R v. Horseferry Road Magistrates’ Court, ex p. Bennett [1994] 1 A.C. 42, 68.”**

12. The Learned judge went on to say the following at paragraphs 137, 154, and 156 to 157:

**“137.....many of the cases emphasize that the proper remedy is ordinarily to be found in the common law or statute and only exceptionally by recourse to the Constitution. He referred to what Lord Bingham said in Hinds v. Attorney General of Barbados [supra], quoted at para [89] of Boodram:**

**“IT WOULD BE UNDESIRABLE TO STIFLE OR INHIBIT THE GRANT OF CONSTITUTIONAL RELIEF IN CASES WHERE A CLAIM TO SUCH RELIEF IS ESTABLISHED AND SUCH RELIEF IS UNAVAILABLE OR NOT READILY AVAILABLE THROUGH THE ORDINARY AVENUE OF APPEAL. As it is a living, so the Constitution must be an effective instrument. But Lord Diplock’s salutary warning remains pertinent: a claim for constitutional relief does not ordinarily offer an alternative means of challenging a conviction or a judicial decision ... The applicant’s complaint was one to be pursued by way of appeal against conviction, as it was ...**

**154 In Jaroo, the Privy Council addressed the proposition of dressing up a case in constitutional clothes to avoid a trial. At para 39, the Board said:**

**“Their Lordships respectfully agree with the Court of Appeal that, before he resorts to this procedure, the Applicant must consider the true nature of the right allegedly contravened. He must also consider whether, having regard to all the circumstances of the case, some other procedure either under the common law or pursuant to statute might not more conveniently be invoked. If another such procedure is available, resort to the procedure by way of originating motion will be inappropriate and it will be an abuse of the process to resort to it. If, as in this case, it becomes clear after the motion has been filed that the use of the procedure is no longer appropriate, steps should be taken without delay to withdraw the motion from the High Court as its continued use in such circumstances will also be an abuse.”**

156 It is well established that 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. See: Jaroo; *Harrikissoon v. Attorney General of Trinidad and Tobago* [1980] A.C. 265 and *Chokolingo* at pp. 111–112 and *Hinds*.

157 *Harrikissoon* concerned the case of a teacher who was transferred from one school to another. He sought redress under the Constitution. Plainly, no constitutional right was implicated by these facts. The Privy Council was resolute in stating that constitutional redress could not be used as a substitute for judicial control of administrative action. Lord Diplock at p. 268 said:

**“THE NOTION THAT WHENEVER 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 an 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 (emphasis added).”**

13. In the case of *Reid v The Queen* (1980) AC 343 Lord Diplock opined as follows:

***“...it is for the prosecution to prove the case against the defendant. It is the prosecution's function, and not part of the functions of the court, to decide what evidence to adduce and what facts to elicit from the witness it decides to call. In contrast the judge's function is to control the trial, to see that the proper procedure is followed, and to hold the balance evenly between prosecution and defence during the course of the hearing and in his summing up to the jury. He is entitled, if he considers it appropriate, himself to put***

*questions to the witness to clarify answers that they have given to counsel for the parties; but he is not under any duty to do so, and where, as in the instant case, the parties are represented by competent and experienced counsel it is generally prudent to leave them to conduct their respective cases in their own way (emphasis added)..*"

14. With respect to competent counsel, the Privy Council addressed the matter at length in the case of **Bernard v The State (Trinidad and Tobago) [2007] UKPC 34**. There, the court made the following pronouncements:

**“[23] A Defendant in a criminal trial is entitled to a fair trial at common law, and the constitutional right to due process of law and the protection of the law under s 4 of the Constitution of Trinidad and Tobago will, if infringed, also entitle a citizen to a remedy: cf Boodram v The State [2001] UKPC 20, [2002] 1 Cr App Rep 103, [2001] 4 LRC 647. In a case like that under appeal, the danger which may arise from inadequate representation is that in the absence of effective conduct of the defence, the conviction may be unsafe and there may be a miscarriage of justice.”**

15. At paragraph 27 of the judgment, Lord Carswell referred to the decision of Lord Bingham in **Randall v R [2002] UKPC 19, [2002] 1 WLR 2237, 2251, para 28, [2002] 2 Cr App Rep 267**:

**“While reference has been made above to some of the rules which should be observed in a well-conducted trial to safeguard the fairness of the proceedings, it is not every departure from good practice which renders a trial unfair. Inevitably, in the course of a long trial, things are done or said which should not be done or said. Most occurrences of that kind do not undermine the integrity of the trial, particularly if they are isolated and particularly if, where appropriate, they are the subject of a clear judicial direction. It would emasculate the trial process, and undermine public confidence in the administration of criminal justice, if a standard of perfection were imposed that was incapable of attainment in practice. But the right of a criminal Defendant to a fair trial is absolute. There will come a point when the departure from good practice is so gross, or so persistent, or so prejudicial, or so irremediable that an appellate court will have no choice but to condemn a trial as unfair and quash a conviction as unsafe, however strong the grounds for believing the Defendant to be guilty. The right to a fair trial is one to be enjoyed by the guilty as well as the innocent, for a Defendant is presumed to be innocent until proved to be otherwise in a fairly conducted trial.”**

16. At paragraph 30, the Court made the following conclusion:

**“[30] When they come to apply these principles to the present case, their Lordships are left in no doubt that the conviction must**

be set aside. The Appellant was deprived of the proper protection by the appointment of inexperienced counsel and the failure on the part of the court to afford him the necessary materials and opportunity to prepare himself properly. It may be seen from the Board's analysis in this judgment that the impact which this had on the proper presentation of the Appellant's case is likely to have been serious. It may also be seen that the prosecution case was not so overwhelmingly strong that even effective advocacy could not have been of real avail to the Appellant. Their Lordships can only conclude that the Appellant did not receive a fair trial.””

17. In relation to the law on when a court is considered *functus officio*, the case of **Daniel Coakley et al v The Crown BS 2021 CA 178**, made the following observations:

“9 In **R v Gohil; R v Preko [2018] EWCA Crim 140** the facts of the case as extracted from the head note are that:

“The defendants in two separate cases were convicted of, or pleaded guilty to, offences of fraud and money laundering. In the first case the Court of Appeal dismissed the defendant's renewed application for leave to appeal against conviction. In the second case the Court of Appeal dismissed the defendant's appeal against conviction. Both defendants later applied to reopen the final determinations of the Court of Appeal on the grounds that the Court of Appeal had been misled by the Crown's failure to disclose relevant material.”

10 The English Court of Appeal said:

“110. On the footing upon which **R v Yasain** was decided, namely that there is no difference between the jurisdiction of the Civil Division and that of the CACD to reopen previous final determinations, it can safely be said that of the CACD will not reopen a final determination of any appeal unless:

(i) It is necessary to do so in order to avoid real injustice;

(ii) The circumstances are exceptional and make it appropriate to reopen the appeal; and

(iii) There is no alternative effective remedy.”

11 In the case of **R v Henry [2018] 5 LRC 546** Henry was convicted and sentenced for the offence of causing dangerous harm. He appealed to the Court of Appeal which, by oral judgment eight days following the hearing of the appeal, dismissed Henry's appeal and confirmed his conviction and sentence. At that time the court indicated that its reasons would follow. When the court's written judgment was produced the court allowed the appeal and quashed Henry's conviction and sentence with no reference to the earlier oral judgment which dismissed the appeal. The DPP sought to



appeal the written judgment on the basis that the court became functus officio from the date of the oral judgment.

12 The DPP's appeal to the Caribbean Court of Justice (CCJ) was allowed on the basis of errors by the Court of Appeal but in the course of delivering its judgment the CCJ accepted that:

“[17] ...It is thus settled law that a court has an inherent power to even reopen a criminal appeal to ensure that justice is done...”

13 Of course, there can be no fixed circumstances where this jurisdiction can be exercised, save that it must be only in exceptional circumstances. This is particularly so in criminal cases where finality plays an important role. This point was made in *Edney L. Burrows Jr v R; Thaddeus Williams Jr. v R* SCCrApp. Nos 12 and 13 of 2021 where the Court said:

“22. The jurisprudence does make it clear that in criminal matters, and the compelling need for finality, the exercise of this jurisdiction must be restricted to exceptional circumstances (emphasis added).”

## **DISCUSSION AND CONCLUSION**

***Whether the Applicant's Constitutional Rights as guaranteed under Articles 20 and 28 of the Constitution, have been infringed.***

18. Being aware of the wording of Articles 20 and 28 of the Constitution and bearing in mind the contents of the Applicant's letter, the Court is not persuaded that the Applicant's case warrants any remedy. This Court heard the trial of the action. A jury was empaneled. Witnesses were called and cross-examined and evidence from both sides were heard and considered. Furthermore, ample time was afforded to the Applicant to prepare and present his defence.
19. In addition, the accusation that the Applicant's counsel at the appellate level was incompetent has not been substantiated. The Applicant has not provided sufficient evidence confirming that his counsel did not follow his instructions regarding the appeal of his conviction, nor any evidence that his attorney at first instance failed to provide any exculpatory evidence. The Applicant was able to address the Court at any stage of the proceedings and make any representations he found necessary to advance his case.
20. If the Applicant believed his counsel was incompetent as early as the initial trial, he could have represented himself or sought new counsel. To now come before this Court at this stage years after conviction can only be seen as an abuse of the process of the court and this Court will not allow the administration of justice to be thrown into disrepute.

21. Appeal is the correct mechanism which the Applicant should have invoked to pursue any redress regarding his conviction. This Constitutional application is unfounded and misconceived.
22. Furthermore, this Court agrees with the Respondent's counsel – this Court is *functus*. The trial has already been heard and adjudicated on by this Court. There are no special circumstances which warrant the re-opening of this matter. The Court is not prepared to do so in the absence of any material irregularity during the course of the trial - which again has not been proven or substantiated.
23. In the circumstances and in accordance with the aforementioned authorities, the Applicant's Constitutional Rights have not been infringed. Accordingly, this application is hereby dismissed.

**Dated this 11<sup>th</sup> day of July, A D 2023**

  
**Bernard S A Turner**  
**Senior Justice**