**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE COURT OF APPEAL**

**CIVIL APPEAL NO. 87 OF 2011**
**CV NO. 00398 OF 2009**

**BETWEEN**

**RONALD DANIEL**

Appellant

**AND**

**THE ATTORNEY GENERAL**
**OF TRINIDAD AND TOBAGO**

Respondent

**PANEL: A. Mendonça, J.A.**
**P. Moosai, J.A.**
**J. Jones, J.A.**

**APPEARANCES:**

**Mr. G. Ramdeen instructed by Ms. S. Ramkissoon-Mark for the Appellant.**

**Mr. N. Byam instructed by Mr. B. James for the Respondent.**

**DATE DELIVERED: 12th July, 2016.**

**I have read the Judgment of Jones, J.A. and I agree with it.**

**A. Mendonça**
**Justice of Appeal**

**I too agree.**

**P. Moosai**
**Justice of Appeal**

## JUDGMENT

**Delivered by J. Jones, J.A.**

1. This is an appeal from the decision of the trial judge dismissing the appellant's claim for redress pursuant to sections 4(a), (b) and 5 (2)(h) of the Constitution. In essence the appellant challenges the delay of the prison authority in delivering a notice of withdrawal of his appeal to the Registrar of the Supreme Court and alleges that as a result his constitutional rights have been breached.

2. By a fixed date claim filed in February 2009 the appellant sought declarations that:

    (a) the failure and or neglect and/or omission of the State more particularly the Commissioner of Prisons, his servants or agents to provide him with a form for the withdrawal of his appeal on 25th May 2007 when he gave oral notice of appeal was in breach of his right to due process and protection of the law as guaranteed under sections 4(a),(b) and 5(2)(h) of the Constitution;

    (b) the failure and/or neglect and/or omission of the State more particularly the Commissioner of Police, his servants or agents to transmit to the Registrar of the Supreme Court his notice of withdrawal dated the 28th May 2007 on or before the 28th May 2007 was unconstitutional and in breach of his fundamental rights

as guaranteed and enshrined under section 4(a),(b) and 5(2)(h) of the Constitution; and

(c) his detention from 25th May 2007 until 8th June 2007 was unlawful and unconstitutional and in breach of his fundamental rights not to be deprived of his liberty except by due process of law.

The appellant also sought monetary compensation including aggravated and exemplary damages.

3. The trial judge dismissed the fixed date claim and ordered that the appellant pay the respondent 75% of his costs. In dismissing the claim the judge found, inter alia, that there was a contradiction in the facts before her that made the claim unsuitable for constitutional relief. We do not agree with the judge in this regard. In our opinion the facts were not in dispute. These facts are contained in the affidavit of the appellant filed in support of the fixed date claim and two affidavits filed on behalf of the respondent. There were no affidavits in reply nor was there cross-examination of the deponents on their affidavits.

**The facts**

4. On 26th April 2004 the appellant was convicted of the offence of armed robbery and was sentenced to 4 years hard labour. He appealed his sentence. Pursuant to section 128A of the Summary Courts Act Chap 4:20 once an appeal is pending an appellant in custody shall be treated in like manner as a defendant in custody awaiting trial. As a result of his appeal therefore the appellant was

incarcerated with other remand prisoners at the Remand Yard at the Golden Grove Prison.

5. During the period of his incarceration the appellant came to the conclusion that had he not appealed he would have been entitled to have his sentence remitted and would have been released on 26th December 2006. With that in mind, and with the expectation of being released, on Friday 25th May 2007, he says, he informed a prison officer of his intention to withdraw the appeal and asked to be provided with the requisite forms. He did not identify the prison officer, provide any means by which this prison officer could be identified or disclose the time when his request was made. According to the appellant he was advised by that prison officer, for reasons not relevant to this appeal, that he would have to wait until the following Monday to withdraw his appeal.

6. On 28th May 2007, the Monday following, he requested and was provided with the relevant forms by another prison officer. On that day he filled out, signed and returned the completed forms to the prison authorities for transmission to the Court of Appeal. Sometime afterwards, the appellant does not disclose exactly when, he was removed from the remand yard at the Golden Grove Prison and taken to the Port of Spain Prison where he joined other convicted prisoners.

7. Despite the withdrawal of the appeal the appellant remained in prison until 8th June 2007 when he was released pursuant to a Writ of habeas corpus issued by the High Court on 1st June 2007. The appellant provides no explanation for the

delay between his obtaining the order for the issue the Writ on 1st June 2007 and the order for his release on 8th June 2007.

8. According to the appellant the notice of withdrawal, signed by him and delivered to the prison authorities on 28th May 2007, was only received by the Clerk of Appeals on 6th June 2007. The notice was only directed to be forwarded to the Clerk of Appeals on the 31st May 2007 and only dispatched from the prison on the 1st June 2007. These facts are not disputed by the respondent and are consistent with the information contained on the notice of withdrawal.

9. In 2007 the appellant filed a second action in the High Court arising from his incarceration. This time his claim was against the Attorney General and the Commission of Prisons for false imprisonment. The judge found that this claim was for damages and all consequential loss suffered by him for false imprisonment for the period 28th May 2007 until 8th June 2007; aggravated and exemplary damages and special damages for loss of earnings during the period 28th May 2007 and 8th June 2007. This finding has not been challenged.

10. The appellant obtained leave to enter judgment against the Commissioner of Prisons and the Attorney General in the false imprisonment proceedings and for his damages to be assessed. On the assessment of damages the appellant was awarded the sum of $42,500.00 in damages and the sum of $11, 275.00 in costs by way of a consent order entered into with the State. According to the appellant this sum represented damages for his detention from 6th to 8th June.

11. The affidavits filed on behalf of the respondent in opposition to the appellant's evidence were by two prison officers of 25 and 13 years experience in the prison service respectively. They were both on duty in the reception area of the prison on 25th May. Their evidence primarily addressed the established practice adopted by the prison authority with respect to the withdrawal of appeals.

12. According to that evidence an inmate wishing to withdraw his appeal first indicates this intention to a prison officer who then, as soon as is practicable, escorts the inmate to the reception area. At the reception area the notice of withdrawal is filled out and the inmate required to sign. Once the inmate signs two things happen. As a result of his immediate classification as a prisoner arrangements are made for his transport to the Port of Spain prison for further processing and the forms are sent to the warrants section at the Maximum Security Prison.

13. The prison officers do not deny the evidence of the appellant as to what occurred on 25th and 28th May. They merely confirm that the appellant was not brought to the reception area on the 25th May. Further, by setting out the procedure followed by the prison authority in the case of a withdrawal of a notice of appeal, they provide the context for the appellant's evidence as to what occurred on 28th May. This context was not challenged by the appellant by way of an affidavit in reply.

14. During the course of the hearing, at the stage of written submissions, the appellant sought to have certain paragraphs in the affidavits of the prison

officers struck out on the grounds that no proper foundation had been laid for the receipt of the evidence. The paragraphs sought to be struck out deal with what the officers said was the established practice in the remand prison when dealing with withdrawals of appeals and the fact that the appellant was not brought to the reception area on the 25th May. The trial judge did not strike out the paragraphs. The appellant has in this appeal also challenged the judge's dismissal of that application.

15. We find that the judge was correct in her refusal to strike out the paragraphs. In our opinion the evidence was admissible. The basis of the submission before the trial judge and before us is that the evidence falls contrary to Part 31.3(1) of the Civil Proceedings Rules 1998 as amended ("the CPR"). Part 31.3(1) of the CPR provides that as a general rule an affidavit may only contain such facts as the deponent is able to prove from his own knowledge.

16. The evidence of the prison officers was they were both assigned to the reception area of the prison on 25th May 2007. Both officers depose to the fact that one of their duties is the filling out of withdrawal of appeal forms when an inmate wishes to do so. The more senior of the two officers was the officer in charge of the reception area and the person to whom inmates wishing to withdraw notices of appeal would be brought.

17. This evidence was not challenged. This unchallenged evidence, in our opinion, is sufficient to have their statements as to the practice followed in the remand prison admitted into evidence. Without more and given their unchallenged

evidence as to their duties it is difficult, if not impossible, to conclude that these officers did not have first hand knowledge of the established practice in the remand prison when an inmate wishes to withdraw an appeal.

18. In treating with the claim the judge identified two issues for her determination: (i) have there been breaches of section 4(a),(b) and 5(2)(h) of the Constitution and (ii) did res judicata and abuse of process apply. The issue of res judicata and abuse of process had been raised by the respondent in its written submissions before the trial judge.

19. With respect to the breaches of the Constitution the judge found that:

(i) to make a finding of a breach of the appellant's constitutional rights she was required to find mala fides on the part of the prison authority and the appellant had not provided clear and cogent evidence in this regard;

(ii) the appellant was required to show more than mere deprivation of liberty. He had to show that such deprivation was as a result of a denial to him of due process and he had not on the evidence made out such a case since he had been able to access the court and obtain a writ of habeas corpus for his release and damages for his false imprisonment.

(iii) While accepting that the prison authority ought to have acted with alacrity in effecting the appellant's desire to withdraw his appeal the evidence does not show that the appellant's right to the protection of the law had been breached. The

delay in processing the notice of withdrawal was acknowledged in the grant of the writ of habeas corpus and the order for damages for false imprisonment;

(iv) Section 5(2)(h) imposed a duty on the State to provide provisions that are necessary for the purpose of giving effect and protection to the appellant's rights and freedoms, and while proper administrative steps ought to be put in place to ensure that the delays that occurred in this case are exceptional, the alleged actions or inactions by the prison authority are insufficient to demonstrate that the appellant's right to move the court for the protection of his liberty had been infringed.

With respect to the issue of res judicata and abuse of process the judge was of the opinion that while res judicata did not apply the action was an abuse of process.

20. In coming to the conclusion that proof of mala fides was necessary in order to arrive at the conclusion that the appellant's constitutional rights were breached the judge was wrong. It is clear that there is no requirement to prove mala fides in order to succeed in all cases alleging breaches of due process or the protection of the law and it was certainly not necessary in the case before the Court.

21. Insofar as the judge was of the view that the evidence adduced by the appellant did not meet the case as presented she was, however, correct. We think that the appeal before us can be very simply be disposed of on two bases. The first is

evidential and the second on the basis that the proceedings are an abuse of the process of the court.

**The evidentiary lacuna**

22. Contrary to the submissions of the appellant, on the evidence, the appellant's real complaint was not that there was no procedure in place to protect his right to withdraw his appeal but rather that the procedure adopted resulted in unreasonable or unnecessary delay. Unlike the cases which dealt with the delivery of an inmate's notice of appeal, relied on by the appellant, the delay in the delivery of the appellant's notice of withdrawal did not result in his losing his right to withdraw his appeal.

23. In these circumstances the judge was correct in her determination that there was in place a procedure to address the wrong inflicted on the appellant by the delay. This wrong had in fact been addressed by the ability of the appellant to access the court by way of habeas corpus to obtain his release and to obtain damages for false imprisonment. In the circumstances the appellant's right to due process and the protection of the law was not breached and section 5(2)(h) had no application to the facts.

24. Further, and perhaps even more fundamental, was the fact that there was simply no evidence that the appellant was deprived of his liberty by the late delivery of his notice of withdrawal. At the heart of this appeal is the question of whether the appellant's continued detention during the period 25th May 2007, when he first sought to withdraw his appeal, and 8th June 2007, when he was released

from prison, was a denial of his liberty. At the time the appellant was serving a lawful term of imprisonment that, if remission did not apply, would have lawfully continued until 25th April 2008.

25. If remission did not apply the only effect of his withdrawal would have been that he would have continued to serve his detention, not as a remand prisoner, but as a convicted prisoner. The consequence of this would have been that he would have been transferred to the Port of Spain Prison and have had to perform that part of his sentence that required his detention to be accompanied by hard labour. The delay in these circumstances could have been considered to be to his benefit as it would have postponed his treatment as a convicted prisoner and the operation of the imposition of hard labour in accordance with his sentence.

26. To get to first base therefore the appellant would have had to satisfy the judge that he was entitled to have his sentence remitted. Submissions were made before the judge and, to a lesser extent, before us as to the application of the prison rules in this regard and the appropriate method of calculation of sentences in the light of these rules. The appellant has urged us to use this opportunity to make a definitive ruling on the manner in which the rules on remission are to be applied on the withdrawal of appeals. In this regard he referred us to, what he suggested was, the customary practice in the prison in support of his submission on how the rules are to be applied and, in particular, how they are to be applied with respect to the appellant.

27. We respectfully decline such an invitation for two reasons. First there is not sufficient evidence before us to allow us to go behind the literal reading of the relevant rules to the customary practice asserted by the appellant in his submissions and secondly, on a literal reading of the rules, there is no evidence before us that the appellant would have been entitled to have his sentence remitted.

28. With respect to the evidence of the customary practice the only passing reference to the manner in which the relevant rules are applied by the prison authority, in a case as the one before us, is contained in an affidavit sworn by the Assistant Commissioner of Prisons in a related matter and placed before the judge as an annexure to the appellant's affidavit.

29. This affidavit is exhibited for the purpose of identifying the procedure in the remand prison for the withdrawal of an appeal by a prisoner. In addition the affidavit identifies the relevant rules, the prison authority's method of calculating the earliest possible date of discharge in accordance with the remission rules and the practice of the prison in informing the prisoner of the possibility of such early discharge. The affidavit seeks from the court, that is, the court before whom that matter was listed, among other things, a determination of the applicability of the rules with respect to persons in custody who have withdrawn their appeals.

30. The affidavit however, while identifying the rules and the possible interpretations to be placed on them, does not identify a customary practice in the application of such rules at the prison. In these circumstances we are

satisfied that there was no evidence before the judge, and accordingly before us, as to the manner by which the rules as to remission have been customarily applied in the prison. We are therefore left with a literal reading of the prison rules made under the West Indian Prisons Act 1838[1]. In the course of the argument we have been referred to rules 285, 285A, and 288 as being the rules relevant to remission of sentences.

31. Rule 285 of the Prison Rules provides:

> "With a view to encouraging good conduct and industry and to facilitate the reformative treatment of prisoners, arrangements shall be made by which a convicted prisoner serving imprisonment, whether under one sentence or consecutive sentences or under any such sentence or sentences and the remnant of a previous sentence, for a period exceeding one month, may become eligible for discharge when a portion of his term of imprisonment has yet to run: Provided that nothing in the said arrangements shall authorise the reduction of any period of imprisonment to be served to less than 30 days."

32. Rule 285A[2] states:

> "Notwithstanding rule 285, where a prisoner is sentenced to a term of imprisonment, whether under one sentence or consecutive sentences the aggregate of which does not exceed

[1] Chapter 11 No 7 of the Laws of Trinidad and Tobago 1950 Rules and Regulations Vol VIII.
[2] The Prison(Amendment)Rules 1991 L.N 64

twelve months, he may become eligible for discharge when a portion of his term of imprisonment, not exceeding one half of the whole term of imprisonment, has yet to run, save nothing in this rule shall authorise the reduction of any period of imprisonment to be served to less than 30 days."

33. Rule 288 states:

(1) Every sentence mentioned in rule 285 shall be represented by a number of marks to be computed at the rate of six marks for every day of such sentence.

(2) Every day each prisoner will be credited with not less than six and not more than nine marks in respect of his industry and conduct for that day, and when such prisoner shall have earned the aggregate of marks by which the term of his sentence is represented, he shall be discharged unconditionally."

34. On a literal reading of the rules therefore three things become clear: (i) remission applies only to convicted prisoners; (ii) rather than a blanket entitlement to remission it is clear that remission must be earned. In other words to be entitled to remission the prisoner must earn sufficient marks in respect of his industry and conduct to achieve the aggregate marks which would entitle him to an unconditional discharge. (iii) remission is not to be applied automatically. Before remission can be applied there must be a computation by the prison authority of the marks earned by the prisoner each day in order to arrive at a date of release.

35. The idea that remission must be earned was espoused by the Caribbean Court of Justice in the case of **R v da Costa Hall (2011) 77 WIR 66**. In treating with an appeal against sentence from Barbados the judges had to consider what was the correct method of discounting a sentence to take into account time already served awaiting trial.

36. In treating with the effect of remission on the time already served by the appellant Wit J, echoing the position of the majority of the Court on this point, stated:

> "A consequence of the view I have expressed is that the appellant already having completed (more than) six years of a sentence of eight years would now have been, pursuant to s.41 of the Prison Rules 1974, *eligible* for a discharge on the basis of remission as he would have been clearly in a position where 'a portion of his sentence not exceeding one-fourth of the whole sentence 'of eight years (which is two years) has yet to run. This however, does not mean that we should have automatically ordered the prisoner's release. Firstly, remissions of sentence, as the majority states, fall within the purview of the prison administration and should, except perhaps in the odd case of judicial review, not be handled by the courts. Secondly, again in accordance with the majority, remissions have to be earned (and whether the appellant would have earned a remission we do not know). In any event sentencing judges have no business with

concepts like 'calendar years' or 'prison years'. Even without them, sentencing is already difficult enough. "

37. There is no evidence that points to the appellant being entitled to the benefit of a remitted sentence. The evidence of the appellant is simply that he expected that he would have been entitled to his full remission on the 26th December 2007. In these circumstances there is no evidence that the appellant would have been eligible to be unconditionally released by the 25th or 28th of May 2007 or indeed at all before 25th April 2008.

38. Before us the appellant submits that the fact of his release by Writ of habeas corpus is sufficient to show that he was entitled to have his sentence remitted. Unfortunately there is nothing on the affidavits as to the reasons for the issue of the Writ or to assist us with the basis upon which the Writ was issued. In his submissions before us the appellant says that the release was ordered because the Commissioner of Prisons made no return to the Writ. In our view this does not assist the appellant. There may be reasons other than an entitlement to a remitted sentence for such a failure, as for example, simply carelessness or negligence in failing to fill out the return.

39. In the absence of any evidence that the appellant was deprived of his liberty by the failure of the prison authorities to accept his oral withdrawal or to transmit his notice of withdrawal to the court on or before 28th May 2007 the appellant's claim that his right not to be deprived of his liberty except by due process of law also fails.

**Abuse of process**

40. The second basis on which this appeal can easily be disposed is on the basis of an abuse of process. The judge's finding that the appellant filed three cases arising out of the same facts has not been challenged. Before us the appellant submits that the judge fell into error as a result of a misunderstanding by her that both private and constitutional claims could arise on one set of facts. By this we understand the appellant to be submitting that the judge was of the opinion that private and constitutional actions could not arise on the same facts.

41. That in fact was not the position taken by the judge. The position of the judge on the abuse of process point we believe is summarized in the quotation from **The Caribbean Civil Court Practice** at page 235 which was applied by the Judge:

> "The concept of 'abuse of the court's process' in the form of re litigation is wider than res judicata or issue estoppel. It covers re litigation where a party failed to bring his whole case forward in one go and wishes to supplement it or bring in other parties in a second set of proceedings."

According to the judge "I would modify this passage and would add leaving out one of the parties on the motion and suing only one party as occurred in this case."

42. Although not referring to the case of **Henderson v Henderson [1843-60] All ER Rep. 378** by name in essence the judge applied the principle adduced in that case and the cases that followed, as encapsulated in the quotation from the

Caribbean Civil Court Practice, to conclude that the claim was an abuse of process.

43. The position and the manner of applying this type of estoppel has been comprehensively stated by the House of Lords in the case of **Johnson v Gore Wood & Co [2001] 1 All ER 481**:

> "…Henderson v Henderson abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. The public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the courts regards as unjust

> harassment of a party. It is however wrong to hold that because matter could have been raised in early proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad merits based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not……. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice.": per Lord Bingham of Cornhill at page 499.

44. The question that the judge had to answer was whether it was an abuse of the process of the court for the appellant to pursue this constitutional action in the light of his earlier pursuit of the false imprisonment claim. Applying the

**Henderson** abuse of process principle to the question, therefore, the first concern would be to see whether it was possible for the appellant to have brought his claim for constitutional relief at the same time as his common law claim for false imprisonment. If it were possible to bring both claims in the same action then the next question to be answered would be whether to pursue this claim in those circumstances was an abuse of process.

45. The judge adopted the position taken by Jamadar JA in **Antonio Webster v The Attorney-General Civil Appeal No 113 of 2009** in recognizing that constitutional issues may be dealt with in actions commenced by claim form as opposed to the fixed date claim form required by Part 56.7(1) of the CPR. In doing so the judge was correct. According to Jamadar JA the fact that Part 56 of the CPR required that a claim for constitutional relief be brought by fixed date claim form did not necessarily mean that a claim made by an ordinary claim form which raised constitutional issues was an abuse of process or a nullity since the court, through Part 56, had the means by which it could appropriately deal with both type of claims.

46. In **Webster** the issue for determination was whether a claimant in an action in tort, commenced by claim form under the Civil Proceedings Rules 1998 as amended ("the CPR"), could also seek declaratory relief for breaches of his constitutional rights where the relief claimed is claimed solely for the purpose of the assessment of damages in the tortious claim. In that case the proceedings were commenced as a common law claim but included in the relief declarations for breaches of Webster's constitutional rights.

47. In **Webster** the Court of Appeal dealt with the issue in the context of what was then the relatively new civil proceedings rules. In doing so it clarified the position taken by the Judicial Committee of the Privy Council in **Jaroo v the Attorney-General PC Appeal No. 54 of 2000** and **The Attorney-General of Trinidad and Tobago v Ramanoop PC App No 13 of 2004** in the light of Part 56 of the CPR.

48. On this point the position of the Court of Appeal, as vocalized by Jamadar JA, was that:

> "……..in general all claims for constitutional relief ought properly to be made by Fixed date Claim. If exceptionally such relief arises in matters commenced by claim form, then the proceedings are not necessarily an abuse of process or a nullity and where appropriate can be dealt with under Part 56.6 CPR 1998 as explained above. The converse of this position is addressed by Part 56.9 CPR 1998. Both of these provisions are consistent with the general rule at Part 8.4, CPR 1998 which provides that: "A claimant may make a claim which includes all, or any, claim which can be conveniently be disposed of in the same proceedings."

49. The appeal to the Privy Council by Webster was dismissed by it. In doing so, while not detracting from the statements made by Jamadar JA, the Privy Council was of the opinion that the action of Webster in seeking declarations that his constitutional rights had been breached was wrong, not because they could not

have been brought in the same action, but simply because they were redundant. The reasoning of the court was that, in any event, a finding of a breach of Webster's constitutional rights was required in order to secure an award of exemplary damages, in those circumstances, seeking declarations that they were breached would be alternative to such a finding and unnecessary.

50. We think that the judge was right in her determination that it was possible for both the constitutional claim and the common law claim to be launched at the same time and in the same proceedings. This is not only consistent with Part 8.4 of the CPR referred to above, and permitted by Part 56, but is in accordance with the overriding objective of the CPR which requires saving expense, ensuring that matters are dealt with expeditiously and that in allotting the Court's resources consideration be given to the other cases in the system.

51. Given that it was possible for both claims to have been launched at the same time the question here is whether the judge was right in her determination that not to do so was an abuse of process. According to the judge: "Section 14 relief on applications for redress under the Constitution is discretionary. There is no reason advanced by [the appellant] to me for the exercise of my discretion to allow [the appellant] to prosecute this action. This to me is affording a litigant an opportunity to misuse the Court's resources by attempting to rehash a previously litigated issue or issues which ought to have been litigated". According to the judge the appellant was "asking for another bite of the cherry under the guise of seeking Constitutional relief."

52. The judge seemed to be of the view that, after exercising his right to seek a parallel remedy, not being satisfied by the limited award received this constitutional claim was launched as a collateral attack on the earlier decision and aimed at attracting an award of aggravated and exemplary damages.

53. While the language used by the judge is not necessarily the language that we would have used, the conclusion drawn by her was certainly open to her on the evidence before her. And, while the judge seems not to have engaged in the exercise suggested by Lord Bingham in **Johnson v Gore Wood** and adopted by this Court in **The Attorney General v Mahabir Civ App. 238 of 2013,** we think that the judge was right in her determination that to pursue this case was an abuse of process.

54. In this case it is clear that the claims for relief under the Constitution could and ought to have been made at the same time as the false imprisonment claim. If that had been done then, under the court's case management powers and in accordance with Part 56, a judge would have been able to determine and give directions as to the most appropriate way of resolving the two types of claims. It would have been at this stage that the matters required to be considered by the cases of **Thakur Persad Jaroo v The Attorney General [2002] 5LRC 258 and Ramanoop v The Attorney General [2005] UKPC 15** would have been explored and reflected in the directions given by the judge as to the most appropriate way of determining the two types of claims.

55. According to **Johnson v Gore Wood,** in order to ascertain whether an action is an abuse, what is required here is a broad merits based judgment which takes into consideration the public, as well as the private, interests involved in the context of the facts of the case "focusing attention on the crucial question whether, in all the circumstances, a party is misusing the process of the court by seeking to raise before it an issue which could have been raised before."

56. The underlying public interest recognized in **Johnson v Gore Wood** is by and large the same as that before us: finality of litigation, the concept that a party ought not to be vexed twice with respect to the same facts, the move towards greater efficiency, saving of expense and the equitable allocation of the court's scarce resources. When that is weighed against the private interest of appellant in the context of the circumstances of this case the conclusion to be drawn can only be that the appellant's conduct in pursuing this case can be seen as an unjust harassment. In **Johnson v Gore Wood** the fact of a lack of funds on the part of the claimant caused by the party against whom he was claiming seemed to tip the balance in favor of the claimant's private interest and against a finding of abuse.

57. In this case, while damages and declarations were not appropriate in the habeas corpus proceedings, the fact is that, as the judge found, this was the third action brought on the same facts. The appellant has given no reason for his failure to pursue his constitutional claims in the false imprisonment action. Certainly by the time he commenced that claim the CPR, and in particular Part 56, applied. On the contrary, as noted by the judge, it would seem that in the false

imprisonment action by his statement of case the link had been made between the oppressive, arbitrary and unconstitutional actions of the Commissioner of Prisons and his entitlement to the aggravated and exemplary damages sought by him.

58. In accordance with Webster it ought to have been open to the appellant to secure an award of exemplary damages reflective of the breaches of his constitutional rights if there were indeed breaches of his constitutional rights. Further this is not a case where it was necessary to pursue a claim under the Constitution because the appellant's liberty was at stake. The appellant had already obtained that remedy in the earlier habeas corpus proceedings.

59. Before us counsel for the respondent submitted that the proceedings were an abuse of process and offended against the principles in Jaroo because there were alternative common law remedies open to the appellant. Although such an option is open to us the position in this case, in our opinion, is slightly different. Here initially, rather than launch a constitutional motion, it would seem to us that the Appellant properly, and in accordance with Jaroo, pursued the alternative option of the false imprisonment claim.

60. Unfortunately by not pursuing his remedy for any breaches to his Constitutional rights in the false imprisonment action, as was open to him under Part 56, the appellant fell squarely within the Henderson v Henderson abuse of process principles. It is for this reason that, although applicable, we prefer not to rest

our decision on the abuse principles that arose in the case of **Jaroo v The Attorney General.**

61. In the circumstances we agree with the judge and find that taking all the circumstances of this case into account the conduct of the appellant in pursuing this constitutional claim in the light of his earlier false imprisonment action is an abuse of the process of the court. Accordingly this appeal is dismissed and we will hear the parties on costs.

**J. Jones**
**Justice of Appeal**