THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No: P-181 of 2013
Claim No. CV2012-03170

BETWEEN

ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Appellant

AND

DION SAMUEL

Respondent

PANEL: A. Mendonça J.A.
P. Jamadar J.A.
J. Jones J.A.

Date of Delivery: March 11, 2019

APPEARANCES:

Mr. R. Martineau S.C. and Mr. L. Murphy appeared on behalf of the Appellant

Mr. R. Simon appeared on behalf of the Respondent

I have read the judgment of Mendonça J.A. I agree with it and have nothing to add.

/s/ P. Jamadar J.A.

I have read the judgment of Mendonça J.A. I also agree with it and have nothing to add.

/s/ J. Jones J.A.

JUDGMENT

Delivered by Mendonça J.A.

1. The Respondent was at all material times a member of the Coast Guard which is an arm of the Defence Force. He enlisted in 2004. He was an able-bodied seaman and assistant cook. During the period August 2008 to September 4, 2009 the Respondent was instructed to undergo several random drug tests for which he was required to provide urine samples. All of the tests returned negative results for the presence of any drug save for the last test which was conducted on September 4, 2009. As a consequence of the positive drug test the Respondent was charged with the offence of conduct to the prejudice of good order and military discipline contrary to Section 77 of the Defence Act Chapter 14:01 having tested positive for 9-Carboxy-THC which is the principle metabolite of cannabis.

2. **Section 77** of the **Defence Act** is as follows:

> "Any person subject to military law who is found guilty of any conduct or neglect to the prejudice of good order and military discipline is liable, on conviction by Court-martial, to imprisonment for two years or less punishment."

3. There is evidence that the Respondent was charged with two other offences – one being absent without leave contrary to Section 48 (a) of the Defence Act. The evidence is however silent as to the outcome of these charges. They are in any event not material to this appeal which concerns the charge of conduct to the prejudice of good order and military discipline contrary to Section 77 of the Defence Act.

4. The charge was not dealt with by Court-martial but was heard summarily by the Respondent's commanding officer, Captain Kent Moore, now retired, and the Respondent was found guilty. He was subsequently discharged from the Defence Force by the Chief of Defence Staff on December 19, 2011 for the reason that his service was no longer required pursuant Section 28 of the Defence Act. The Respondent then brought these proceedings under Section 14 of the Constitution of the Republic of Trinidad and Tobago seeking redress for alleged infringements of certain of his fundamental rights guaranteed by the Constitution namely the enjoyment of property and not to be deprived thereof contrary to Section 4(a); the right to equality before the law and the protection of the law contrary to section 4(b) and the right to equality of treatment from any public authority in the exercise of any functions contrary to Section 4(d). The Respondent also claimed that he was denied a fair hearing contrary to section 5(2)(e) of the Constitution.

5. The Respondent sought the following relief:

    i. A declaration that his discharge on 19th December 2011 from the Trinidad and Tobago Defence Force on the grounds that

his services were no longer required, amounts to an infringement of the [Respondent's] constitutional right to the enjoyment of property under section 4(a) of the Constitution of Trinidad and Tobago as well as an infringement of his right to equality of treatment by a public authority in the exercise of its functions under Section 4(d) of the Constitution;

ii. A declaration that the failure of the Trinidad and Tobago Defence Force to pursue court martial proceedings against the [Respondent] prior to his discharge on the 19th December 2011, amounts to an infringement of the [Respondent's] constitutional right not to be deprived of the right to enjoyment of property except by due process of law under section 4(a) of the Constitution;

iii. A declaration that the failure of the Trinidad and Tobago Defence Force to pursue court martial proceedings against the [Respondent] prior to his discharge on 19th December 2011, amounts to an infringement of the [Respondent's] constitutional right to equality before the law and the protection of the law under section 4(b) of the constitution;

iv. A declaration that the failure of the Trinidad and Tobago Defence Force to pursue court martial proceedings against the [Respondent] prior to his discharge on 19th December 2011 is unfair, unreasonable, *ultra vires* the Defence Act Chap 14:01, an abuse of power and authority, a failure to consider the [Respondent's] representation or defence in relation to an allegation, by adopting and applying an inflexible policy and was in breach of the principles of natural justice since at no time prior to the decision was the [Respondent] given an opportunity to be heard and amounts to an infringement of the [Respondent's] constitutional right to a fair trial under section 5(2)(e) of the Constitution;

v. A declaration that the failure of the Trinidad and Tobago Defence Force to pursue court martial proceedings against the [Respondent] prior to his discharge on 19th December 2011, without being afforded any or any sufficient opportunity to be heard in relation to the allegation, charge and/or any penalty, including discharge and amounts to an infringement of the [Respondent's] constitutional right to procedural provisions as are necessary for the purpose of giving effect and protection to the rights and freedoms under section 5(2)(h) of the Constitution;

vi. An order that monetary compensation including aggravated and/or exemplary damages for distress, inconvenience and loss suffered by the [Respondent] as a result of the contravention and breach of his fundamental rights under the Constitution be assessed and paid to the [Respondent];

vii. An order that monetary compensation and loss of salary, emoluments and benefits suffered by the [Respondent] as a result of the contravention and breach of his fundamental rights under the Constitution be assessed and paid by the [Respondent];

viii. All such orders, writs and directions as the court may consider appropriate for the purpose of enforcing, or securing the enforcement of and/or redressing the contravention of the Human Rights and Fundamental freedoms to which the [Respondent] is entitled under the Constitution;

ix. Such further and/or other relief as the nature of the case may require; and

x. Costs.

6. The Respondent's claim was heard before Kokaram J. He held that there were no infringements of the Respondent's right under Section 4(a) to the enjoyment of property and not to be deprived thereof except by due process of law and of the Respondent's right under Section 4(b) and (d) to equality before the law and his right to equality of treatment from a public authority in the exercise of any functions. The Trial Judge, however, held that the Respondent's right to a fair hearing under Section 5(2)(e) and to the protection of the law guaranteed by Section 4(b) of the Constitution were infringed.

7. The Trial Judge was of the view that the summary hearing before the Respondent's commanding officer lacked the hallmarks of a fair trial. Further, and in any event, the Defence Force adopted the wrong procedure in discharging the Respondent when it failed to hold a Court-martial. The Respondent having requested a Court-martial there should have been one and the failure to do so constituted a breach of the Respondent's right to

protection of the law. The Trial Judge further rejected the Appellant's argument that these constitutional proceedings were an abuse of process since there were parallel remedies available to the Respondent.

8. In the circumstances the Trial Judge made the following orders:

   (a) That the [Respondent's] discharge on 19th December 2011 from the Trinidad and Tobago Defence Force on the ground that his services were no longer required contravened: (a) the [Respondent's] right to the protection of the law as guaranteed under Section 4(b) of the Constitution and (b) The [Respondent's] right to a fair hearing guaranteed under Section 5(2)(e) of the Constitution and is therefore illegal null and void and of no effect.
   (b) That the [Appellant] do pay to the [Respondent] damages in the sum of $18,000.00.
   (c) That the [Appellant] do pay to the [Respondent] 50% of his costs which are assessed in the sum of $45,000.00.

9. The Appellant now appeals and seeks an order of this Court setting aside the orders of the Trial Judge and the dismissal of the [Respondent's] claim.

10. Mr. Martineau for the Appellant began his submissions by saying that the civil courts are always reluctant to interfere with matters of discipline where the military is concerned. He made this point, he said, by way of "background".

11. As to the substantive issues Mr. Martineau submitted that there were two main issues in this case – (1) whether there was a breach of the right to protection of the law guaranteed by Section 4(b) of the Constitution and (2) whether these proceedings constituted an abuse of process.

12. In relation to the right to protection of the law, Mr. Martineau argued that contrary to the finding of the Trial Judge the Respondent did not have a right to a Court-martial. The Respondent's commanding officer was entitled to hear the charge against the Respondent summarily. Further, the Respondent had received a fair hearing in accordance with the principles of fundamental justice.

13. In so far as the Trial Judge found that as the Respondent was not given a fair hearing the Appellant was in breach of Section 5(2)(e) of the Constitution, Mr. Martineau submitted, that he was wrong to do so. This section places a restriction on what Parliament may do, which is not an issue in this appeal. Section 5(2)(e), however, is relevant in that it informs the content of a right to protection of the law. The irrelevant consideration, submitted Mr. Martineau, was whether there was a breach of the right to protection of the law, and as the Respondent was not entitled to a Court-martial and was given a fair hearing, the right to protection of the law was not infringed.

14. Mr. Martineau further submitted that even if the Respondent was entitled to a trial by Court-martial and/or was not given a fair hearing, there is no breach of the right to protection of the law as the Defence Act provided alternative remedies to the Respondent at Sections 118 and 195 to redress the failure to have a Court-martial and to hold a fair hearing. It was also submitted that the Respondent could seek appropriate redress by judicial review proceedings. Mr. Martineau contented as there were such remedies, which the law afforded, the Respondent could not complain that he was denied the right to protection of the law guaranteed by the Constitution.

15. Further, Mr. Martineau argued that in the alternative or in any event these proceedings are an abuse of process as there were alternative remedies available to the Respondent which he failed to pursue. In this regard Mr. Martineau again placed reliance on Sections 118 and 195 of the Defence Act. He further submitted that judicial review of proceedings were available to the Respondent. The failure to pursue these alternative remedies made these constitutional law proceedings an abuse of process.

16. Mr. Simon for the Respondent supported the Trial Judge's conclusions. He contended that the Trial Judge was right to find that the Respondent did not receive a fair hearing and that his right to protection of the law was infringed.

He submitted that the Respondent was entitled to have a trial by Court-martial if he so elected. He did so elect but was denied it. This was a blatant denial of the protection of the law to which the Respondent was entitled. In any event the hearing he received was contrary to the rules of natural justice and procedural fairness. Mr. Simon further submitted that Sections 118 and 195 of the Defence Act relied on by the Appellant are not relevant on the facts of this case.

17. So far as the abuse of process point is concerned, Mr. Simon submitted it was appropriate to proceed by way of constitutional proceedings as there were genuine constitutional issues to be tried.

18. Arising out of the submissions of counsel for the parties the following issues arise for determination on this appeal:

    (1) Was there a breach of Section 5(2)(e) of the Constitution?

    (2) Was there a breach of the Respondent's right to protection of the law guaranteed by Section 4(b) of the Constitution?

    (3) Do these proceedings constitute and an abuse of process?

19. Before proceeding any further it is appropriate to set out the material provisions of the Defence Act to which more detailed reference will be made.

Defence Act Chapter 14:01:

87. (1) When the commanding officer has investigated a charge against a non-commissioned officer or other rank, he shall, where the charge is—

(a) not one which can be dealt with summarily and the commanding officer has not dismissed it; or

(b) one which can be dealt with summarily but the commanding officer is of opinion that it should not be so dealt with,

take the prescribed steps for the charge to be tried by Court-martial; but in any other case he shall proceed to deal with the charge summarily, and may, if he records a finding of guilty, impose one or more of the following punishments, that is to say:

(aa) where the accused is a non-commissioned officer—

(i) severe reprimand or reprimand;
(ii) where the offence has occasioned any expense, loss or damage, stoppages;
(iii) admonition;
(iv) a fine of a sum not exceeding the equivalent of twenty-eight days pay;

(bb) where the accused is a man—

(i) detention for a period of forty-two days or, if the accused is on active service, field punishment for a period of forty-two days;
(ii) a fine of a sum equivalent to thirty days pay;
(iii) where the offence has occasioned any expense, loss or damage, stoppages;
(iv) confinement to barracks for a period beginning with the day of the sentence and not exceeding twenty-eight days;
(v) stoppage of leave;
(vi) extra guards or piquets;
(vii) admonition.

(2) The commanding officer may, where he finds an acting warrant officer, an acting non-commissioned officer or a corresponding rank guilty and imposes only the punishment of stoppages, order such an accused to revert to his permanent rank, or to assume an acting rank lower than that held by him but higher than his permanent rank.

(3) Notwithstanding anything contained in subsection (1), the commanding officer shall, where he—

(a) has determined that the accused is guilty; and

(b) considers that the proper punishment for the charge, if taken summarily—

(i) is a punishment other than—

severe reprimand,

reprimand,

admonition,

confinement to barracks,

extra guards or piquets; or

(ii) involves a forfeiture of pay,

before recording a finding, give the accused an opportunity of electing to be tried by Court-martial.

(4) Where the accused elects to be tried by Court-martial under subsection (3), the commanding officer shall not record a finding but shall take the prescribed steps for the charge to be tried by a Court-martial.

(5) Subject to subsection (6), where a charge is one which can be dealt with summarily, but the commanding officer has referred the charge for trial by Court-martial under subsection (3), the higher authority to whom the charge is referred may refer the charge back to the commanding officer to be dealt with summarily; and on any such reference, subsections (1), (2), and (3) apply as if the commanding officer had originally been of opinion that the charge should have been dealt with summarily.

(6) A higher authority shall not refer back a charge to a commanding officer where the accused has elected to be tried by Court-martial and has not withdrawn his election.

91. (1) Rules of Procedure may specify the charges which may not be dealt with summarily—

(a) by a commanding officer;

(b) by an appropriate superior authority; and

(c) by a commanding officer or an appropriate superior authority except with the permission of an officer authorised to convene a Court-martial for the trial of the accused.

(2) A commanding officer or an appropriate superior authority may deal summarily with the following charges:

(a) any charge not specified by Rules of Procedure; and

(b) any charge which may be dealt summarily with permission of an officer authorised to convene a Court-martial, upon the obtaining of such permission.

(3) The powers of a commanding officer or appropriate superior authority to impose punishment shall be subject to such limitations as may be specified in that behalf by the Rules of Procedure.

118. (1) Where a charge has been dealt with summarily, otherwise than by dismissal, the reviewing authority may at any time review the finding or sentence.

(2) The reviewing authority may, where on a review under this section he is of the opinion that it is expedient to do so by reason of any mistake of law in the proceedings on the summary dealing with the charge or of anything occurring in those proceedings which involved substantial injustice to the accused, quash the finding; and if the authority quashes the finding, he shall also quash the sentence.

(3) Where on a review under this section the reviewing authority is of the opinion that a punishment imposed was invalid, or too severe, or (where the sentence included two or more punishments) that those punishments or some of them could not validly have been imposed in combination or are, taken together, too severe, the reviewing authority may vary the sentence by substituting such punishment or punishments as he may think proper, being a punishment or punishments which could have been included in the original sentence and not being in the opinion of the reviewing authority more severe than the punishment or punishments included in the original sentence.

195. (1) If an other rank thinks himself wronged in any matter by any officer other than his commanding officer or by any other rank, he may make a complaint with respect to that matter to his commanding officer.

(2) If an other rank thinks himself wronged in any matter by his commanding officer, either by reason of redress not being given to his satisfaction on a complaint under subsection (1) or for any other reason, he may make a complaint with respect thereto to the Council.

(3) The Council or the commanding officer shall investigate any complaint received by him under this section and shall take such steps as he may consider necessary for redressing the matters complained of.

20. Before I embark on a consideration of the issues I would like to briefly address Mr. Martineau's "background" point that civil courts are reluctant to interfere in matters of discipline when the military is concerned. There are indeed decided cases that support that statement. One such case is **R v. Army Council ex parte Ravenscroft [1917] LTR 300, 307** where it is said (per Viscount Reading CJ) that a "*civil court has no power to intervene in matters which*

concern military conduct" (see also ***R v Jamaica Defence Force ex parte Granville William Pitter M-66 of 1995; Re Mansergh (1861) 1 B&S 400, 406*** and ***R v Jamaica Defence Force ex parte Ian Hugh Clarke M 91 of 1993***). But in all these cases there was a recognition that the civil courts had no power to intervene where the issues concern <u>purely</u> matters of military conduct and military law. So that in **ex parte Ravenscroft** a more complete statement of Viscount Reading CJ (at page 307) is "*I have no doubt that this court as a Civil Court has no power to intervene in matters which concern military conduct and purely military law affecting the rules and regulations prescribed for the guidance of officers or their military discipline*". Similarly in **R v Jamaica Defence Force ex parte Granville William Pitter** the court noted at paragraph 1, "*this court can only interfere with military courts and matters of military law in so far as the civil right of the soldier may be affected*".

21. In **Halsbury's Laws of England Volume 41, 4th edition** at paragraph 54 it is stated that "a person subject to service law is not entitled to seek redress in civil courts for an infringement of rights given to him, not by ordinary law, but only by service law; in such a case the aggrieved person must look to the service code for the remedy and its enforcement" (*See also Halsbury's Laws of England Volume 3 (2011), 5th edition at paragraph 341*.)

22. The reference to service law in that statement from Halsbury's Laws includes military law which would include the Defence Act. The statement, however, recognises that the serviceman is not entitled to seek redress in the civil courts when there are infringements of rights given to him only by service law. That statement is consistent with the cases above referred to and I believe correctly sets out the law. The statement, however, recognises that where the complaint relates to an infringement of rights given by law other than service law the courts can intervene. It seems to follow that where the complaint is that the serviceman's constitutional rights are infringed the courts can intervene. As this case concerns complaints that the Respondent's

constitutional rights have been infringed, the claim was properly instituted by the Respondent under Section 14 of the Constitution and the appeal from the Trial Judge's decision is properly before this court.

23. Returning to the issues raised on the submissions, I will treat with the first and second issues together. I accept Mr. Martineau's argument that this case is not about a breach of Section 5(2)(e) of the Constitution. This Section provides that subject to Chapter 1 and Section 54 of the Constitution, Parliament may not deprive a person of a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations. The section therefore imposes a prohibition on what Parliament may do (see ***Rees v Crane [1994] 2 AC 173, 188***). Whether Parliament acted contrary to that prohibition is however not an issue in this case. In the circumstances in so far as the judge found that there was an infringement of Section 5(2)(e) of the Constitution he was wrong to do so and that finding should be set aside.

24. However, as Mr. Martineau correctly acknowledged, Section 5(2)(e) is not entirely without relevance as it serves to inform the content of the right to protection of the law (see ***Thornhill v Attorney General of Trinidad and Tobago [1981] AC 61, 70***). It is now well settled that the right to protection of the law includes a right to a fair hearing by courts and other judicial bodies. As was noted by Lord Diplock in **Ong Ah Chuan v Public Prosecutor [1981] AC 648, 670 para G**:

> "…a Constitution founded on the Westminster model and particularly in that part of it that purports to assure to all individual citizens the continued enjoyment of fundamental liberties or rights, references to "law" in such contexts as "in accordance with law", "equality before the law", "protection of the law" and the like, in their Lordships' view, refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution."

That applies equally to the Constitution of Trinidad and Tobago (see also ***Maya Leaders Alliance and Others v Attorney General of Belize (2015) 87 WIR 178 para 47***; ***Attorney General and Others v Joseph and Boyce (2006) 69 WIR 104 para 64*** and ***Sam Maharaj v Prime Minister [2016] UKPC 37***).

25. It is also well settled that the right to protection of the law includes access to the courts and other judicial bodies. As the Caribbean Court of Justice observed in the **Maya Leaders Alliance case** at paragraph 44, "*access to independent and impartial courts or other judicial bodies is perhaps the most visible aspect of the right to protection of the law*".

26. In view of the above and subject to the argument of Mr. Martineau that as there are alternative remedies available there was no infringement of the right to protection of the law, the complaints of the Respondent that he was denied a trial by Court-martial and was not given a fair hearing at the summary trial of the Section 77 charge are capable of constituting breaches of his right to protection of the law. The questions that therefore arise are whether the Respondent had a right to trial by Court-martial and/or whether he was denied the right to a fair hearing. I would address the alternative remedies argument of Mr. Martineau after I have discussed those questions.

27. The Trial Judge found that the Respondent requested a trial by Court-martial but was denied such a trial. Instead his commanding officer proceeded to deal with the charge summarily. It seems that the Trial Judge was of the view that having requested a trial by Court-martial, the Respondent was entitled to it and the denial constituted a breach of his right to protection of the law. The Appellant has not taken issue with the Trial Judge's finding of fact that the Respondent requested a trial by Court-martial. There is however no provision in the Defence Act that requires a trial by Court-martial to be held simply because it is requested by the accused. The fact therefore that the Respondent requested a Court-martial does not by itself entitle him to a trial by Court-

martial. The question there is whether the Respondent's commanding officer could have heard the charge summarily.

28. In deciding this question sub-sections (1) and (2) of Section 91 of the Defence Act are relevant. In so far as they are material, they provide that the rules of procedure may specify the charges which may not be dealt with summarily by a commanding officer or which may not be dealt with summarily by a commanding officer except with the permission of an officer authorised to convene a Court-martial for the trial of the accused. Where the rules of procedure do not specify that a charge may not be dealt with summarily or they do not specify that a charge may not be dealt with summarily except with the permission of an officer authorise to convene a Court-martial, a commanding officer may deal with the charge summarily.

29. It is common ground between the parties that the rules of procedure do not specify that a charge under Section 77 of the Defence Act may not be dealt with summarily. Neither do they specify that the charge under Section 77 may not be dealt with summarily by a commanding officer except with the permission of an officer authorised to convene a Court-martial for the trial of the accused. In the circumstances, Section 91(2) of the Defence Act gives the Respondent's commanding officer discretion to deal with the charge summarily. As it is a discretion, it is open to him to hear the matter summarily. Section 87 of the Defence Act is relevant here and it is to be noted that for the purposes of the Defence Act the Respondent is considered an "other rank".

30. Section 87(1) provides that although the charge is one which can be dealt with summarily, the commanding officer may not do so if he is of the opinion that it should not be dealt with summarily. In such a case he shall take the prescribed steps for the charge to be tried summarily. When however the commanding officer is of the opinion that the charge can be dealt with summarily and proceeds to do so, in the event of a guilty verdict he is

constrained as to the punishments he may impose (see Section 87(1) (aa) and (bb). Section 87(3) of the Defence Act is also relevant to a commanding officer dealing with the charge summarily. This section provides that where the commanding officer has determined that the accused is guilty and "considers" that if taken summarily the proper punishment for the charge is other than the punishments described at Section 87(3)(b), the commanding officer, before recording a finding shall give the accused an opportunity of electing to be tried by Court-martial.

31. In this case, although the Respondent's commanding officer dealt with the charge summarily and recorded a finding of guilty, he imposed no punishment. In so doing the commanding officer did not act in breach of Section 87(1) (aa) or (bb). A Section 77 charge is one that could be dealt with summarily and he did not run afoul of the restrictions on the punishment which he may impose as outlined at Section 87 (1) (aa) and (bb). If the matter rested there then the commanding officer, it seems to me, cannot be faulted. However, there is more to it.

32. What the commanding officer did was write to the Chief of Defence Staff by letter dated June 22, 2010 indicating that the Respondent was brought before him on the Section 77 charge and based on the available evidence he was found guilty. He then stated "*therefore I wish for him to be discharge (sic) on the grounds "service no longer required*"". The Chief of Defence Staff duly obliged and discharged the Respondent.

33. Mr. Simon has submitted that the commanding officer having written to the Chief of Defence Staff expressing the wish that the Respondent be discharged, is evidence that he considered a punishment other than that provided for in Section 87(3)(b) and in those circumstances the commanding officer should have given the Respondent the opportunity of electing to be tried by Court-martial as provided for in that section.

34. Mr. Martineau contended that the evidence before the court only pointed to the commanding officer writing to the Chief of Defence Staff to express his wish for the Respondent to be discharged. Discharge, he submitted, was not a punishment provided for by the Defence Act. There is therefore no evidence that the commanding officer considered any punishment and was therefore not obliged and was not required by Section 87(3) to give the Respondent an opportunity of electing to be tried by Court-martial.

35. The effect of Mr. Martineau's submission, it seems to me, is that a commanding officer only considers a punishment other than those in Section 87(3)(b) if what he considers amounts to a punishment that is recognised by the Defence Act as a punishment and of course is not a punishment listed in Section 87(3)(b). If that is so, Mr. Martineau is correct in his submission that the commanding officer did not consider a punishment. Section 80(1) of the Defence Act specifies "discharge with ignominy from the Force" as a punishment that may be imposed on an other rank after a trial by Court-martial. Section 80(4) provides that an other rank shall be sentenced to be discharged from the Force if he is sentenced to imprisonment for a term exceeding in 42 days. There is, however, no provision in the Defence Act that recognises as a punishment discharge simpliciter. I, however, cannot accept Mr. Martineau's submission as that would be to put too narrow a construction on Section 87(3)(b). Punishment in my view should be construed more generally and given its plain English meaning which is the infliction or imposition of a penalty as retribution for an offence. A penalty in that context means an adverse consequence.

36. In this case it is impossible to dissociate the commanding officer's wish that the Respondent be discharged or in other words be removed from the Force, from the finding of guilt on the Section 77 charge. The letter which the commanding officer wrote to the Chief of Defence Staff said as much. It is clear from that letter that the commanding officer's wish that the Respondent be

discharged was as a consequence of the finding of guilt. And in his affidavit the commanding officer refers to his finding that the Respondent was guilty of the charge and said "*as such, a request was made for him to be discharged*". The inevitable conclusion is that the commanding officer considered that the discharge of the Respondent or his removal from the Force was the proper penalty or adverse consequence that should be inflicted on the Respondent with respect to the Section 77 offence of which the Respondent was found guilty.

37. In my judgment therefore the commanding officer having considered the proper punishment was other that the punishments set out in Section 87(3)(b) ought to have given the Respondent an opportunity of electing to be tried by Court-martial. Had this been done it is clear on the evidence that the Respondent would have so elected. In essence therefore the respondent was denied a trial by Court-martial. This is capable of constituting an infringement of the Respondent's right to the protection of the law. I say "capable" because whether it amounts to an infringement of the right of course depends in this appeal on the alternative remedy argument by Mr. Martineau.

38. The next consideration is whether the Respondent was given a fair hearing. In view of my conclusion that the failure to give the Respondent an opportunity to elect to have a trial by Court-martial is capable of constituting an infringement of the Respondent's right to the protection of the law, it is not strictly necessary to consider whether the Respondent was denied a fair hearing. However, for completeness, I will do so.

39. The focus here is what occurred at the hearing before the Respondent's commanding officer, Mr. Kent Moore. Mr. Moore swore an affidavit and was cross-examined on it. Also present at the hearing was Mr. Hadyn Poon who at the time was a Lieutenant Commander of the Trinidad and Tobago Defence Force (Coast Guard). He too swore an affidavit and was cross-examined. There

were areas of disagreement in the evidence on behalf of the Appellant when compared to the evidence on behalf the Respondent. In the end, however, the Trial Judge relied on the evidence of the Respondent and made the following findings in relation to the hearing before the commanding officer, which in my judgment, was open to him to do:

a. The Respondent was not given a formal notice of the charges;
b. The Respondent was unarmed as to the specific particulars of the charge to properly prepare for the hearing;
c. The Respondent was unable to properly brief his legal representative as he was unsure of the charges and the evidence against him;
d. The Respondent was not provided with a copy of the certificate of analysis of his urine sample which contained the result of the drug test;
e. The Respondent was told that there was a zero tolerance policy in respect of drug use in the Defence Force but was not given a copy of it nor was it explained to him, nor is any evidence led as to the zero tolerance policy;
f. There were no witnesses who attended the hearing to lead evidence particularly in relation to the certificate of analysis and the results of the drug test.

To these findings the Trial Judge also added:

i. That the Respondent was not given the opportunity of electing to be tried by Court-martial;
ii. That the commanding officer failed to convene a Court-martial after it was requested by the Respondent; and
iii. That the commanding officer failed to take into account the Respondent's record or invite representations in relation to the nature of the punishment that should be imposed on the Respondent.

The Trial Judge concluded in all the circumstances the hallmarks of a fair trial were absent. I am unable to disagree with the Trial Judge's conclusion.

40. It is sufficient to refer to the findings at (d) and (f) as outlined at para 39 (above). The Respondent was not, prior to the hearing, provided with a copy of the certificate of analysis of the urine sample which contained the results of the drug test. There were also no witnesses at the hearing to give evidence in relation to the certificate of analysis. Fairness required the Respondent to have the opportunity to defend himself to produce a result favourable to him. He was denied that opportunity when he was not provided with a copy of the certificate of analysis before the hearing and when the certificate was apparently accepted as evidence in the absence of the person who examined the urine sample and concluded that it was positive.

41. It is not in dispute that the Respondent was told that he had the opportunity to ask questions of each witness but that is however of no usefulness to the Respondent when the witness who can speak to the urine analysis, which is the core of the case against him, does not appear to give evidence. It would seem to me that fairness required the person who did the analysis to be present at the hearing so as to be available for cross-examination. Concomitant with that, fairness also required that the certificate of analysis be made available before the hearing to provide the Respondent with a reasonable opportunity to properly prepare his defence and to question the witnesses for the prosecution. It is here relevant to note that the certificate of analysis was described as a "*preliminary certificate of analysis*". As the Trial Judge noted, that "*in itself [raised] the question as to its meaning*." It also underlines the fairness requirement for the certificate to have been provided before the hearing to the Respondent and for its maker to be present at the hearing.

42. It is also not disputed that the Respondent was told, after the evidence against him was heard, that he could reserve his defence, in other words, he need not be heard on his defence on that day. However, that warning coming as it did, in circumstances where the certificate of analysis of the urine sample of the

Respondent was already received in evidence without any opportunity for him to question its maker was too little too late.

43. In light of the above, having been denied a trial by Court-martial and a fair hearing, the next consideration is whether that constituted a breach of his right to protection of the law in the circumstances of this case. Mr. Martineau's submission, as has been set out above, was in essence that there was no infringement of the constitutional right to protection of the law because the law provided other avenues to remedy the matters complained of. Mr. Martineau in this regard referred to Sections 118 and 195 of the Defence Act and to the remedy of judicial review. Mr. Simon did not dispute the submission that if there were available remedies in relation to the matters complained of by the Respondent that there would be no infringement of the constitutional right to protection of the law. He was right to adopt that position. As was stated by the Privy Council in **Nankissoon Boodram v Attorney General and Anor. (1994) 47 WIR 459, 494:**

> "The "due process of law" guaranteed by [Section 4 of the Constitution] has two elements relevant to the present case. First, and obviously, there is the fairness of the trial itself. Secondly, there is the availability of the mechanisms which enable the trial court to protect the fairness of the trial from invasion by outside influences. These mechanisms form part of the "protection of the law" which is guaranteed by section 4(b), as do the appeal procedures designed to ensure that if the mechanisms are incorrectly operated the matter is put right. It is only if it can be shown that the mechanisms themselves (as distinct from the way in which, in the individual case, they are put into practice) have been, are being or will be subverted that the complaint moves from the ordinary process of appeal into the realm of constitutional law."

The effect of that therefore is where the law provides mechanisms to properly or effectively address an individual's complaint, he cannot complain of an infringement of the right to protection of the law unless the mechanisms

themselves are being or will be or have been subverted. It is only at that point that the individual's complaints move into the realm of constitutional law.

44. Similar statements may be found in the judgments of Saunders J and Wit J in **Lucas and Anor v Chief Education Officer and Anor [2016] 1 LRC 384.** Saunders J stated (at para 138):

> "The right to protection of the law may successfully be invoked whenever the state seriously prejudices the entitlement of a citizen to be treated lawfully, fairly or reasonably and no cause of action is available effectively to assuage consequences to the citizen that are deleterious and substantial. There is therefore likely to be a breach of the right whenever a litigant is absolutely compelled to seek vindication under the constitution for infringement by the State of a fundamental right."

And Wit J at para 174 said:

> "Let me start by stating that, logically, a violation of the right to be treated fairly, which may in the circumstances include a right to be heard, will not in itself, as is often suggested, constitute an infringement of the right to protection of the law. Such infringement would in my view only occur where unfair treatment by or on behalf of the State cannot properly be remedied under the existing administrative, statutory or common law."

45. It is appropriate to note that the above statements of Saunders J and Wit J were made in minority judgments in that case. But the principle that the constitutional right to the protection of the law may not be properly invoked where the law provides an effective or proper remedy was not disputed by the majority.

46. In the circumstances the constitutional right to protection of the law is not infringed where the unfair or unlawful treatment that is complained about can be effectively or properly remedied under the existing administrative, statutory or common law. The question therefore is whether Sections 118 and

195 of the Defence Act and the remedy of judicial review provide an effective or proper remedy.

47. In answering that question it is not appropriate to view the denial of a trial by Court-martial or the failure to afford the Respondent a fair hearing in isolation from the discharge of the Respondent from the Defence Force.

48. A complaint of the Respondent in relation to the denial of a Court-martial and a fair hearing are inherently linked to his discharge from the Force. This is apparent from the relief claimed by the Respondent at (ii), (iii), (iv) and (v) as set out in paragraph 5 of this judgment. The complaints all relate to the failure to hold a Court-martial and/or to afford a fair hearing "prior to discharge". In short, the complaint of the Respondent is that his discharge is the consequence of the failure to hold the Court-martial or to afford him a fair hearing. The discharge is therefore part of the package of the Respondent's complaints.

49. From the evidence in this case it cannot be denied that there was a connection between the finding of guilt under the Section 77 charge which was wrongly dealt with summarily and in which the Respondent was denied a fair hearing and the discharge of the Respondent from the Defence Force. I have already alluded to the commanding officer's evidence that his wish that the Respondent be discharged from the Force was as a consequence of his finding of guilt on the Section 77 charge. The Chief of Defence Staff also filed an affidavit which says nothing that suggests that his decision to approve the discharge of the Respondent from the Force was based on anything other than the finding of guilt.

50. In view of the above, in determining whether the avenues as submitted by Mr. Martineau provide an effective or proper remedy, they should provide an effective or proper remedy not only for the failure to hold a Court-martial and

to provide a fair hearing but should also provide a proper or effective avenue to remedy the discharge of the Respondent from the Force.

51. In that light I would first consider Section 118 of the Defence Act. Under Section 118(1) where a charge has been dealt with summarily and not dismissed, the reviewing authority may at any time review the finding and sentence. The reviewing authority in the circumstances outlined at Section 118(2) may quash the finding and when he does that he shall quash the sentence. Alternatively the reviewing authority may simply vary the sentence under Section 118(3) of the Defence Act.

52. The section applies where the finding is made and the sentence is imposed upon the summary dealing of the charge. In this case, however, the commanding officer did not impose any sentence as a consequence of his finding of guilt. Further, the section does not allow the reviewing authority to review the discharge of the Respondent which was not a sentence imposed by the commanding officer on the summary dealing of the charge. Section 118, therefore, in my view does not provide an effective or proper remedy in the circumstances of this case.

53. In relation to Section 195, sub-section (1) deals with complaints by other ranks in respect of wrongs committed by “any officer” other than the commanding officer or by any other rank. Of course in this case the approval for the discharge was given by the Chief of Defence Staff. It is doubtful that the Chief of Defence Staff is considered “an officer” for the purposes of Section 195. I do not think he is. Section 195(1) would therefore not allow the other rank to complain about the discharge in so far as it was approved by the Chief of Defence Staff. It would indeed be remarkable if the section did allow that as the effect would be to allow the other rank to complain of the actions of the Chief of Defence Staff, to the other rank’s commanding officer – someone of lower rank and authority. This would be an unlikely result. In any event, in the

circumstances of this case the complaint to the commanding officer would involve a complaint of the commanding officer's actions as he is the one who wrongly dealt with the charge summarily, did not afford the Respondent a fair hearing and who requested the Chief of Defence Staff to discharge the Respondent. It amounts to a complaint of the actions of the commanding officer to the commanding officer. That cannot amount to an effective or proper remedy. Further Section 195(1) would not apply to the failure of the commanding officer to hold a Court-martial or the finding of guilt made by him if only for the reason these would be wrongs of the commanding officer and Section 195(1) refers to circumstances where the other rank thinks himself wronged in any matter by any officer other than his commanding officer.

54. Section 195(2) provides that an other rank may make a complaint to the Defence Council when (a) he thinks himself wronged by his commanding officer by reason of redress not being given to the other rank's satisfaction on a complaint under Section 195(1) or (b) when for any other reason he thinks himself wronged by his commanding officer. When a complaint is made to the Defence Council it shall investigate the matter and take such steps as it may consider necessary for redressing the matters complained of.

55. It seems to me that in so far as the section provides for an other rank who thinks himself wronged by his commanding officer for the reason that he was not given satisfactory redress on a complaint under 195 (1), the intention of the section is to allow for a complaint to the Defence Council when the complaint is one that could properly have been made under 195(1). In so far as Section 195(1) does not allow for complaints in respect of wrongs by the other ranks's commanding officer or the Chief of Defence Staff the section would not apply in the circumstances of this case.

56. With respect to Section 195(2) which allows for complaints to the Defence Council in respect of wrongs by the commanding officer "for any other

reason", here again that applies where the other rank thinks himself wronged by his commanding officer and would not apply to the actions of the Chief of Defence Staff who approved the Respondent's discharge from the Force and who was not the Respondent's commanding officer.

57. In the circumstances neither Section 195 nor Section 118 of the Defence Act provide any or any effective or proper remedy for the unfair and unlawful treatment of the Respondent.

58. In relation to judicial review, it is doubtful that such a procedure could provide any relief without recourse to constitutional principles. As I mentioned earlier in this judgment, the authorities suggest that the courts do not intervene in matters purely of military conduct and military law. This is so even where the court is approached on an application for judicial review. The Jamaican case of ***R v Jamaica Defence Force ex parte Ian Hugh Clarke M 91 of 1993*** may serve to demonstrate this.

59. In that case the applicant applied for an order of *certiorari* to quash the order of discharge of the Chief of Defence Staff. The court considered the matter on its merits and refused the application for *certiorari*. The court, however, went on to consider whether it had jurisdiction in the matter. The court opined that as the applicant's application raised questions purely of military law and procedure and that the order the court was asked to make would only establish the applicant's status as a soldier, the applicant's civil rights were not affected and accordingly the court had no jurisdiction. This finding of the court was clearly obiter and from what the court said made without the benefit of submissions by either party. But it does represent the position in the authorities referred to earlier that courts would not interfere where the civil rights of the soldier are not affected. What distinguishes this case, as I have said earlier, is that the Respondent has sought relief under the constitution. In the circumstances it seems to me that judicial review proceedings would

not provide the remedy for the complaints of the Respondent unless of course recourse were had to the Constitution. In that event it is the Constitution that provides the remedy. There is in essence no alternative remedy.

60. Further, it would seem to me that the Respondent would not be able in judicial review proceedings to recover damages as he did in these proceedings. In those circumstances also judicial review proceedings would fall short of providing an effective or proper remedy.

61. In the circumstances, in my view neither Section 118, Section 195 nor judicial review proceedings would provide an effective or proper remedy and in those circumstances the Respondent's right to protection of the law was infringed and the Trial Judge was correct to so hold.

62. The above discussion as to the availability of alternative remedies in relation to the complaints by the Respondent effectively answers Mr. Martineau's last argument that these proceedings are an abuse of process. His submission was that these proceedings are an abuse of process because of the availability of parallel remedies. If such remedies existed then constitutional relief should not be sought "*unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course*" (see ***Attorney General v Ramanoop [2005] UKPC 15 at para 25***). Mr. Martineau's argument here was in essence the same in relation to the availability of alternative remedies, that is to say that Sections 118 and 195 of the Defence Act and judicial review proceedings provide the Respondent with parallel remedies with the consequence that these proceedings which seek constitutional relief is an abuse of process. In view of my findings in relation to Sections 118 and 195 of the Defence Act and judicial review proceedings, I must conclude that there are no parallel remedies in these proceedings and they are not an abuse of process.

63. In the circumstances, I would allow the appeal only to the extent that the Trial Judge's finding that the denial of a fair hearing to the Respondent constituted a breach of section 5(2)(e) of the Constitution is set aside. I would therefore uphold the Trial Judge's findings that the Respondent's discharge on December 19, 2011 from the Trinidad and Tobago Defence Force on the ground that his service was no longer required has contravened the Respondent's right to the protection of the law as guaranteed under Section 4(b) of the Constitution and that the Appellant do pay to the Respondent damages in the sum of $18,000.00.

64. I would also hear the parties in relation to costs.

A. Mendonça J.A.