IN THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No.P248 of 2013

BETWEEN

KELVIN DUNCAN
RAMDATH JOKHAN

Appellants

AND

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Respondent

PANEL: **A. Mendonça, J.A.**
N. Bereaux, J.A.
P. Rajkumar, J.A.

APPEARANCES: **Mr. Kenneth Thompson for the Appellant**
Mr. N. Byam for the Respondent

REASONS

Delivered by A. Mendonça J.A.

1. On October 06th 2017, we dismissed this appeal. We now give our written reasons for so doing.

2. This was an appeal from the dismissal of the appellants' claim that their constitutional right to security of the person and not to be deprived thereof except by due process of law, as enshrined in section 4(a) of the Constitution, was infringed as a consequence of an erroneous decision of the Court of Appeal.

3. In brief, the facts are that on June 04th 1999, the appellants were convicted of certain criminal offences and sentenced to a term of imprisonment of fifteen years. They appealed their convictions and sentences and remained in custody pending the determination of their appeals. The appeals were allowed in part, but the Court of Appeal affirmed the sentence. In affirming the sentence, the Court of Appeal ordered that it should run from the date of its decision. It gave no consideration to section 49(1) of the Supreme Court of Judicature Act.

4. Section 49(1) is as follows:

> The time during which an appellant, pending the determination of his appeal, is released on bail, and subject to any directions which the Court of Appeal may give to the contrary to any appeal, the time during which the appellant, if in custody is specially treated as an appellant under this section shall not count as part of any term of imprisonment under his sentence, and, in the case of an appeal under this Act, any imprisonment under the sentence of the appellant, whether it

> is a sentence passed by the Court of trial or the sentence passed by the Court of Appeal, shall, subject to any directions which may be given by the Court of Appeal, be deemed to be resumed or to begin, as the case requires, if the appellant is in custody, as from the day on which the appeal is determined, and, if he is not in custody, as from the day on which he is received into prison under the sentence.

5. The effect of the section is that a convicted person, who has appealed but remains in custody pending the determination of his appeal, does not receive credit for the time in custody towards his sentence in the event of an unsuccessful appeal, unless the Court of Appeal directs otherwise. He will therefore lose the time spent in custody unless the Court of Appeal directs otherwise. Under the section, therefore, the Court of Appeal may take into account the time spent by the appellant in custody awaiting the determination of this appeal, and direct that his sentence run from some date other than the determination of the appeal.

6. Section 49(1) was considered by the Privy Council in two cases, namely, **Ali v The State [2006] 1 WLR 269** and **Bhola v The State, Privy Council Appeal No 26/2005**.

7. In the **Ali** case, Lord Carswell, speaking on behalf of the Board, stated that the Court of Appeal must consider in each case in the light of the relevant facts whether to exercise its discretion to back-date the sentence and if so, for what length of time. Each case ought to be looked at on its merits to ascertain whether the appeal is devoid of merit, an attempt to manipulate the criminal appeal system for the applicant's benefit or is otherwise a deliberate waste of the Court's time and resources. His Lordship then went on to outline (at para 17) the following approach that the Court of Appeal should adopt in relation to the section:

> In the first place, their Lordships consider that the making of orders backdating sentences to the date of conviction should not be restricted to exceptional cases.

> Secondly, it is wrong in principle to take into account the heinousness of the offence or the prisoner's lack of remorse, for these are factors which are relevant only when the original sentence is passed Counsel for the State cited to the Board an Australian decision, *R v Wort [1927] VLR 560*, …. in which the Court of Criminal Appeal in Victoria had regard to the prisoner's record and the leniency of the sentence. Their Lordships consider that this was incorrect in principle and that this decision should not be followed. Similarly, regard should not be paid to the prisoner's conduct since conviction, except and so far as it may tend to show the state of mind in applying for leave to appeal. Thirdly, any decision by which it is determined that there should be loss of time should be proportionate, that is to say, it should impose a penalty for binging or persisting with a frivolous application which fairly reflects the need to discourage wasting the court's time without inflicting an unfairly long extension of imprisonment upon the applicant. Their Lordships do not wish to be prescriptive about the appropriate length of loss of time orders, which is a matter for each appellate court in each individual case. They consider, however, that they should be made with regard to the abuse which they are designed to curb and would not expect them to exceed a few weeks in a large majority of cases."

8. In **Bhola**, the appellant was convicted of demanding money with menaces and sentenced to a term of imprisonment of six years. The Court of Appeal made no direction under section 49(1) and accordingly the time spent in custody, between conviction and appeal did not count towards his sentence. Mr. Bhola appealed to the Privy Council against both conviction and sentence. The Board dismissed the appeal against conviction. In respect of the sentence, the Board found that the Court of Appeal erred in not giving a direction under section 49(1) that the time between conviction and appeal be counted towards the appellant's sentence. Lord Brown, speaking on behalf of the Board, stated (at para 25):

> "It remains to consider the appeal against sentence which the Board can deal with altogether more briefly. This appeal concerns the proper approach to section 49(1) of the Supreme Court of Judicature Act of Trinidad and Tobago and involved no more than the straightforward application of the Board's very recent decision in *Ali v The State of Trinidad and Tobago (*Practice Note) [2006] 1WLR 269. It is unnecessary to rehearse here the substance of that decision, or indeed, set out the terms of section 49(1). Suffice it to say that the appellant's appeal to

> the Court of Appeal could not possibly have been characterised as frivolous or time-wasting and no basis whatever has been suggested for that Court properly to have withheld the direction necessary under section 49 to ensure that the appellant was not penalised as to his time in custody through having exercised his right of appeal. The appeal to the Board on this issue was in truth here irresistible. …

The Board accordingly directed that the time between Mr. Bhola's conviction and the determination of his appeal should count as part of the term of imprisonment and noted that as a consequence Mr. Bhola had served his sentence and ordered his immediate release.

9. The judgments in the **Ali** and **Bhola** cases were handed down after the decision of the Court of Appeal in this case. They, however, set out the proper application of section 49(1) which, of course, was existing at the time of the decision of the Court of Appeal. The decisions of the Privy Council, therefore, represented the law at the time of the decision of the Court of Appeal, which the Court should have applied in the determination of the appellants' appeals. It is, however, not in dispute that the Court of Appeal failed to consider section 49(1) contrary to the judgments of the Privy Council in the **Ali** and **Bhola** cases that the Court should consider in each case whether to exercise its discretion under the section. There is also no indication on the unchallenged evidence before the Court that this was a case where the Court of Appeal should have withheld its discretion under section 49(1) to direct that the sentences of the appellants should run from the date their sentences were imposed by the trial judge. In the circumstances we can therefore proceed on the basis that at the time the Court of Appeal decided the appellants' appeals, it erred in failing to consider section 49(1), and give effect to it so as to ensure that the appellants did not lose the time spent in custody awaiting the determination of their appeals.

10. Had the Court exercised its discretion as contemplated by section 49(1), the appellants would have been released several months earlier than when they were eventually released. It is the appellants' contention that this error of the Court of Appeal amounted to a violation of their constitutional right to security of the person and the right not to be deprived thereof except by due process of law contrary to section 4(a) of the Constitution (the right of the individual to life, liberty, security of the person, and enjoyment of property and the right not to be deprived thereof except by due process of law).

11. This contention did not find favour with the trial judge. He held that the appellants' fundamental right had not been infringed. He stated that in considering whether the appellant's were denied due process, the legal system had to be looked at as a whole and the system provided remedies to the appellants that could have been utilized to remedy the error of the Court of Appeal. The judge specifically stated that it was open to the appellants to pursue an appeal to the Privy Council.

12. Mr. Thompson, counsel for the appellants, advanced two main submissions before this Court. First, he contended that the failure by the Court of Appeal to consider section 49(1) and to back-date the appellants' sentences to the date of their conviction, constituted a denial of due process. Secondly, although he conceded that the appellants could, with special leave, appeal to the Privy Council and did not attempt to do so, he contended that in any event, that was not an effectual remedy as it would not deliver to the appellant's monetary compensation.

13. The issue in this appeal may be stated in these terms:

> Whether the error of the Court of Appeal upon the conclusion of the appellants' appeals not to give a direction pursuant to section 49(1) of the Supreme Court of Judicature Act, resulting in the appellants serving a longer prison term than they would have had such a direction been given, amounted to a breach of the appellants' right to security of the person and the right not to be deprived thereof except by due process of law as guaranteed by section 4(a) of the Constitution.

14. In **Independent Publishing Co Ltd v The Attorney General of Trinidad and Tobago and Another [2005] 1 AC 190**, an issue before the Privy Council concerned a journalist, who was convicted of contempt of Court. He was sentenced to fourteen days imprisonment. He sought redress under the Constitution contending that his conviction infringed his right not to be deprived of his liberty except by due process of law. His constitutional motion was dismissed by the trial judge. He appealed to the Court of Appeal and was granted bail the day after his appeal was lodged. The Court of Appeal held that his right to liberty and not to be deprived thereof except by due process of law was infringed and ordered damages to be assessed in respect to the four days of imprisonment he had already served before he lodged his appeal and was granted bail. The Attorney General appealed to the Privy Council. The Privy Council allowed the appeal and dismissed the journalist's constitutional motion. The Board held that the right is not to a judicial system that is infallible but to one that is fair. In those circumstances, in considering whether a claimant was deprived of due process as a consequence of judicial error, it is the legal system as a whole which must be looked at and not one part of it. If the legal system looked at as a whole can be characterised as fair, the

claimant can be regarded as having enjoyed the benefit of due process. If it is characterised as unfair, then the claimant's right not to be deprived of his liberty without due process is infringed. It was held that the legal system as a whole was fair and there was therefore no denial of due process.

15. In coming to that decision, the Board considered and explained their judgment in **Maharaj v The Attorney General of Trinidad and Tobago (No. 2) [1979] AC 385**, Lord Brown who gave the judgement of the Board referred (at paras 85 and 86) to the judgment of Lord Diplock and the dissenting opinion of Lord Hailsham in **Maharaj No. 2**. He then stated (at paras 87 and 88):

> "**87**. Lord Diplock's judgment has been widely understood to allow for constitutional redress, including the payment of compensation, to anyone whose conviction (a) resulted from a procedural error amounting to a failure to observe one of the fundamental rules of natural justice, and (b) resulted in his losing his liberty before an appeal could be heard. That, however, is not their Lordships' view of the effect of the decision. Of critical importance to its true understanding is that Mr. Maharaj had no right of appeal to the Court of Appeal against his committal and equally, therefore, no right to apply for bail pending such an appeal.
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> **88**. In deciding whether someone's section 4(a) 'right not to be deprived [of their liberty] except by due process of law' has been violated, it is the legal system as a whole which must be looked at, not merely one part of it. The fundamental human right, as Lord Diplock said, is to "a legal system….that is fair". Where, as in Mr. Maharaj's case, there was no avenue of redress (save only on appeal by special leave direct to the Privy Council) from a manifestly unfair committal to prison, then, despite Lord Hailsham's misgivings on the point, one can understand why the legal system should be characterised as unfair. Where, however, as in the present case, Mr. Ali was able to secure his release on bail within four days of his committal – indeed within only one day of his appeal to the Court of Appeal – their Lordships would hold the legal system as a whole to be a fair one."

16. An almost identical issue as in this appeal, came before this Court in **Civ. App. 57/2013 Desmond Renne v The Attorney General**. In that case, the appellant was convicted of arson and two counts of causing grievous bodily harm. He was sentenced to six years imprisonment. He appealed and remained in custody pending the appeal. The Court of Appeal allowed his appeal in relation to the two counts of causing grievous bodily harm but affirmed his conviction in relation to the arson. The Court of Appeal, in imposing the six-year term of imprisonment directed that the term begin from the date of the disposition of the appeal, i.e. May 11th 2004. The Court of Appeal gave no reason for so directing and appears to not to have considered section 49(1). The appellant was released on May 7th 2008. He had spent fifteen months awaiting his appeal and had that time been taken into account, he would have been released on or about February 6th 2007.

17. Bereaux, JA, who gave the judgment of the Court of Appeal in the **Renne** case, expressed the issue before the Court in these terms:

> "The question in this appeal is whether the failure of the Court of Appeal to direct, upon the dismissal of the appellant's appeal against conviction, that his sentence should run from the date of conviction, was an error which resulted in the appellant's being deprived of his right to liberty without due process contrary to section 4(a) of the Constitution."

18. Bereaux, JA, then considered the **Independent Publishing Co. Ltd.** case, and was of the view that it provided a complete answer to the issue raised on the appeal. He expressed his understanding of the holding in that case in this way (at para 12):

> "(i) In deciding whether someone's section 4(a) right not to be deprived of their liberty except by due process of law, has been violated, it is the legal system as a whole which had to be examined and not merely one part of it.

(ii) Where there is no avenue open to the person aggrieved for redress then the legal system can be characterised as unfair. Where however there are avenues within the legal system by which an aggrieved person can pursue redress for the wrong committed against him then the legal system may be characterised as fair."

19. The Court of Appeal went on to hold that Mr. Renne had a right to pursue an appeal to the Privy Council to seek the appropriate redress. Bereaux JA stated (at para 21):

> "This case is quite unlike **Maharaj No. 2**. In that case, Maharaj had no right of appeal from the High Court to the Court of Appeal and equally, no right to apply for bail pending such an appeal. The absence of those processes afforded him no opportunity for a quick release from prison and he was forced to serve out his time during which efforts were made to obtain special leave to appeal directly from the High Court to the Privy Council. In this case the appellant had a right of appeal from the Court of Appeal to the Privy Council in respect of both conviction and sentence. He also had a right of appeal from the High Court to the Court of Appeal which he exercised. It is true that an application for special leave can be a somewhat protracted process but as the decisions in **Ali and Tiwari** and **Bhola** show, the right of an appeal is an effective right which, had he chosen to exercise it, would have secured his early release. Not only did he not exercise it but no reason has been advanced for not doing so."

The system as a whole therefore presented a fair opportunity to Mr. Renne to pursue his appeals in respect of conviction and sentence and secure his early release. It was therefore fair. Accordingly he had not been denied due process.

20. We consider the **Renne** case to have correctly applied the **Independent Publishing Co. Ltd.** case and that case is also relevant here. As in the **Renne** case, the claim here is that the appellants were denied due process and this was occasioned by judicial error. Where that is the claim it is the legal system as a whole that must be examined to ascertain whether it can be characterized as fair or one that is unfair. Where the legal system when looked at as a whole can be characterized as fair the claimant would have had the benefit of due process. It

is otherwise where it is characterized as unfair. Where the legal system provides an effectual avenue to correct any shortcomings occasioned by the error then the system is one that can be charcterised as fair.

21. In our view, the legal system in this appeal when examined as a whole, must be characterised as fair. Like in the **Renne** case, the appellants here had a right to pursue an appeal to the Privy Council with special leave of the Privy Council. The appellants did not avail themselves of such a remedy. We do not believe it can be argued, and indeed it was not, that had the appellants done so, they would have obtained leave and that the appeal would have been determined before the appellants began to serve any portion of their sentences that could have been attributed to the error of the Court of Appeal. There is also no reason to doubt in view of the **Ali** and **Bhola** cases, and indeed, none was advanced, that the error of the Court of Appeal would have been corrected had an appeal been pursued. The appellants cannot now complain that they were denied due process.

22. Mr. Thompson sought to distinguish this case from the **Renne** case on the basis that in this case the appellants had applied for relief while they were still incarcerated. Mr. Thompson was referring to the relief sought by the appellants in these proceedings, that is to say their constitutional claim before the Court. The appellants sought a declaration that the error of the Court of Appeal contravened their right to due process and also sought orders directing their immediate release from custody and the payment of monetary compensation. The claim was filed approximately eight months before they were released upon completion of their sentences but was only determined after. Mr. Thompson may have been suggesting that

because the claim was not determined before they served their sentences there was some unfairness in the system occasioned by the delay.

23. If the issue is one of delay in determining the appellants claim, then the appellants would need to do more that simply point to the time the claim was filed and when it was determined. There was no evidence by which the Court could determine the reasons for the delay and whether the delay was occasioned by some failure that would serve to characterise the system as unfair.

24. That, however, is not the issue. The constitutional claim of the appellants sought relief that was dependent on a finding that they were denied due process. The answer to the question whether the appellants were denied due process was dependent on whether the legal system as a whole can be characterised as fair or unfair. This was the question whenever the claim was determined. The timing of the decision would not affect the issue for determination. So if the constitutional claim was made and determined much earlier, the question raised by it would be the same and so would be the answer. The appellants no doubt desired to secure their release as early as possible but the constitutional claim was not the remedy to achieve that in the circumstances of this case.

25. Before concluding, there is one other matter arising from the appellants' submissions to which we should refer. Mr. Thompson referred to two High Court decisions (namely, CV 2010-03410 **Bhola v The Attorney General** and CV 2012-05135 **Wiggins v The Attorney General**) in which it was found that the claimants' right to liberty and not to be deprived

thereof except by due process of law was infringed by reason of the failure of the Court to backdate their sentences pursuant to section 49(1). In each case the claimant was granted monetary compensation. It was submitted that these decisions were to be preferred and they should be followed. These decisions, however, misconstrued the decision of the Board in the **Independent Publishing Co. Ltd.** case and applied the wrong test. They were expressly disapproved of by the Court of Appeal in the **Renne** case for those reasons, with which we agree, and therefore should not be followed. We need say no more about them.

26. For the above reasons this appeal was dismissed. On the determination of the appeal, Mr. Byam, counsel for the respondent indicated that he was not seeking any order as to the costs of the appeal. Accordingly, we made no order as to costs on the appeal.

Dated the 17th October 2017

A. Mendonça
Justice of Appeal

N. Bereaux
Justice of Appeal

P. Rajkumar
Justice of Appeal