COMMONWEALTH OF THE BAHAMAS

IN THE COURT OF APPEAL

SCCrApp No. 46 of 2024

BETWEEN

ADRIAN PAUL GIBSON

Appellant 1

AND

JOAN VERONICA KNOWLES

Appellant 2

AND

JEROME MISSICK

Appellant 3

AND

PEACHES FARQUHARSON

Appellant 4

AND

ELWOOD DONALDSON

Appellant 5

AND

DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

BEFORE: **The Honourable Mr. Justice Isaacs, JA**
The Honourable Mr. Justice Evans, JA
The Honourable Mr. Justice Smith, JA

APPEARANCES: **Mr. Damian Gomez, KC, along with Mr. Murrio Ducille, KC; Mr. Donald Saunders; Mr. Bryan Bastian; Mr. Ryan Eve; and Mr. Ian Cargill, Counsel for Appellants**

Ms. Cordell Frazier, Acting DPP, with Ms. Karine MacVean, Ms. Cashena Thompson, and Ms. Kristin Butler-Beneby, Counsel for Respondent

DATES: **14 March 2024; 21 March 2024**

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Criminal Appeal- Articles 20 and 28 and 104(1) of the Constitution- Section 166 of the Criminal Procedure Code- Section 178 of the Evidence Act- Additional Evidence- Fundamental Rights- Locus Standi- Adequate means of Redress.

This case involves an appeal by Adrian Paul Gibson and others against an Order by Senior Justice Grant-Thompson. The Order granted the Director of Public Prosecutions (DPP) leave to adduce additional evidence from witness Rashae Lenora Gibson during the trial. The DPP served an immunity agreement with Ms. Gibson and a Notice to call her as a witness after the trial had commenced. The Appellants objected and have appealed the Order, arguing that it was impermissible and prejudicial under various legal provisions, including Sections 166 and 178 of the Evidence Act, Section 259 of the Criminal Procedure Code, and Articles 20(1) and 20(2)(c) of the Constitution. Their complaints included the timing of the Notice being too late, infringement on their right to be informed about evidence before trial, infringement on trial preparation facilities, and a threat to their right to a fair trial under Article 20 of the Bahamian Constitution. The DPP contested the Court of Appeal's jurisdiction over this appeal, arguing that the parties failed to meet the constitutional requirements of Articles 28 and 104(1). The Appellants claimed jurisdiction under Article 104(1) for Supreme Court decisions involving Article 28's fundamental rights jurisdiction. On March 14, 2024, after hearing arguments from both parties, the Court reserved its decision.

Held: Appeal dismissed as the Appellants have no standing pursuant to Article 104(1) of the Constitution. There is no order as to costs.

Article 28 provides individuals with recourse to the Supreme Court for redress in cases of alleged contraventions of constitutional provisions. The absence of such an application prevents the Court from considering the matter under Article 28. For a decision to be justiciable under section 104(1), the decision must constitute a final ruling of the Supreme Court made within the jurisdiction conferred by Article 28 of the Constitution of the Bahamas. In this case, it is evident that no application was submitted to invoke the Court's jurisdiction under Article 28.

In any event the combined effect of Sections 259 and Section 166 of the CPC allow a witness who has not given evidence at a preliminary inquiry nor a deposition in a VBI to be allowed to give evidence at the discretion of the trial judge. The determination of reasonable notice rests with the trial judge, considering the circumstances under which the evidence was acquired. In this case the name of the witness was not in issue and the statement provided give the details of the evidence which the witness was expected to give. On the question of the notice period Judge who was of the view that the Crown served the notice as soon as they received the police Statement. This was a finding of fact gleaned from the date on the statement and the date of service. The statement was dated the 27th February 2024 and served on the 29th February 2024.

Adrian Paul Gibson et. al. v The Director of Public Prosecutions SCCon/CrApp No. 97 of 2023 considered
Bowe v R [2006] UKPC 10 considered
Elwood Donaldson v The Director of Public Prosecutions SCCon/CrApp. No. 100 of 2023 considered
Government of the United States of America v Frederick Nigel Bowe [1989] 3 WLR 1256 considered
Harrikissoon v Attorney General of Trinidad and Tobago [1980] PC App. No. 40 of 1977 considered
Olive Casey Jaundoo v Attorney General of Guyana [1971] AC 972 considered

JUDGMENT

Judgment delivered by the Honourable Mr. Justice Milton Evans, JA:

1. By Notice of Motion filed on the 6th March, 2024. The Appellants seek to appeal the Order of the Honourable Madam Senior Justice Grant-Thompson dated the 5th March, 2024 whereby she granted leave to the Respondent to adduce additional evidence in the trial of the Appellants after the trial had commenced.

2. The Appellants by their notice seek *'an Order pursuant to Article 104 (1) of the Constitution of the Bahamas 1973, quashing the said Order dated the 5th March, AD,2024 or otherwise setting it aside and a further Order staying the proceedings before the Honourable Madam Senior Justice Grant Thompson'.*

3. The Notice of Motion further indicates the intention to rely on two grounds, namely:

> **"1. The Learned Judge erred in law by failing to find that the adducing of additional evidence through the intended testimony of Rachae Lenora Gibson in the middle of the trial deprived the Appellants of adequate facilities to prepare their respective defences in violation of each of: - Section 166 of the Criminal Procedure Code Act, Chapter 93: Section 178 of the Evidence Act; Cap 68; Articles 20 (1) 20(2) (c) of the Constitution of the Bahamas, 1973.**
>
> **2. The Learned Trial Judge erred in law by making the order appealed from without the benefit of any evidence supporting the making of the said Order by reason of which the Appellants and each of them have been deprived of a fair hearing as guaranteed by Articles 20 (1) and 20(2) (c) of the Constitution of the Bahamas 1973."**

BACKGROUND

4. The matter in the Court below was commenced by Voluntary Bill of Indictment No. 167/6/2022 which contained Ninety-Eight (98) counts. Twenty –Six (26) of those counts related to the witness proposed to be called pursuant to the Notice of Additional Evidence.

5. The trial in the Court below has commenced and has been ongoing for some months. However, on the 29th February, 2024, the Crown served an Immunity Agreement in respect of Ms. Rashae Lenora Gibson, granting her complete immunity from criminal prosecution in return for complete and truthful information, statements and testimony, relative to matters the subject of the ongoing trial. The Crown also served a Notice of Additional Evidence to call Rashae Lenora Gibson as their witness.

6. The application by the Crown for leave to call the said witness was objected to by Mr. Ducille, KC and supported by Mr. Gomez, KC. Mr. Ducille in opposing the application submitted that the proposed course of action was impermissible. He contended that the application should have been made before the jury was empaneled and that having not been made at the correct time it was now highly prejudicial.

7. Mr. Ducille further relied on section 178 of the Evidence Act, Chapter 65 and contended that the Learned Judge should decline the Crown's application. That section provides as follows:-

> **"178. (1) In any criminal proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.**
>
> **(2) Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence."**

8. Mr. Ducille's final point was that to allow the application would result in an unfair trial in breach of the Appellants/Defendants Constitutional rights under Articles 20 (1) and 20(2) (c) of the Constitution of the Bahamas 1973.

9. Mr. Gomez for his part submitted that the Crown's application should be refused as there was not strict compliance with the provisions of Section 166 of the Criminal Procedure Code. That provision which was the basis of the Crown's application provides as follows:-

> "**166. No witness who has not given evidence at the preliminary inquiry shall be called by the prosecution at any trial <u>unless the accused person has received reasonable notice in writing of the intention to call such witness.</u>**
>
> **Such notice must state the witness's name and give the substance of the evidence which he intends to give. <u>It shall be for the court to determine in any particular case what notice is reasonable, regard being had to the time when and the circumstances under</u>**

which the prosecution became acquainted with the nature of the witness's evidence and decided to call him as a witness:

Provided that when, under the provisions of section 120 of this Code, the plan of a surveyor or the report of a medical practitioner or analyst has been tendered at the preliminary inquiry it shall not be necessary for the prosecution to give notice of the intention to call any such surveyor, medical practitioner or analyst as a witness at the trial of the information." [Emphasis added]

10. Mr. Gomez also relied on section 259 of the Criminal Procedure Code which he described as an umbrella clause which allows an accused person to know the evidence against him. That section provides that-

> **"259. The provisions of this Code and of any other law respecting the form and contents of an information and respecting the proceedings on information in the Supreme Court, shall apply, mutatis mutandis, to the form and contents of a bill of indictment, and to the proceedings following upon the filing of a bill of indictment in that Court, whether a voluntary bill of indictment or otherwise, as if the references in those provisions to an information were references to a bill of indictment." [Emphasis added]**

11. In concluding his submissions in the Court below Mr. Gomez relied on section 178 of the Evidence Act and adopted the authorities relied on by Mr. Ducille together with the relevant provisions of the CPC, and the relevant Constitutional Provisions.

12. After hearing submissions from the Parties the Learned Judge made the following Orders:

> **"1. The charges may be reread with the charges previously attributed to Ms. Rashae Gibson omitted.**
>
> **2. The charges may be officially dropped relative to Ms. Rashae Gibson before the Court and the former Co-accused may give evidence for the Crown, and**
>
> **3. The Defence may state how long they need to reasonably prepare** to **receive her evidence. A one (1) week period should be reasonable from today's date, which is the 12th of March, 2024. This would be a total of two (2) weeks since the Notice was originally provided."**

THE APPEAL

13. The Director of Public Prosecution (DPP) contended before us that the present Appeal is not properly before us as the parties have not met the requirements of Articles 28 and 104 (1) of the Constitution. As this is an issue which goes to our jurisdiction to entertain the proposed appeal we raised this issue upfront with the Appellants.

14. The Appellants submitted that they are able to proceed with this appeal by virtue of Article 104 (1) of the Constitution. That provision is in the following terms:-

> **"104. (1) An appeal to the Court of Appeal shall lie as of right <u>from the final decisions of the Supreme Court given in exercise of the jurisdiction conferred on the Supreme Court by Article 28 of this Constitution</u> (which relates to the enforcement of fundamental rights and freedoms)". [Emphasis added]**

15. In my view for a decision to be justiciable under section 104 (1) it must be a final decision of the Supreme Court given in exercise of the Jurisdiction conferred on the Supreme Court by Article 28. The relevant question then is whether the decision of Senior Justice Grant-Thompson was made in the exercise of her Jurisdiction conferred by Article 28.

16. Article 28 provides as follows:-

> "**28. (1) If any person alleges that any of the provisions of Articles 16 to 27 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him then, without prejudice to any other action with respect to the same matter which is lawfully available, <u>that person may apply to the Supreme Court for redress.</u>**
>
> **(2) The Supreme Court shall have original jurisdiction —**
>
> **(a) <u>to hear and determine any application made by any person in pursuance of paragraph (1) of this Article;</u> and**
>
> **(b) to determine any question arising in the case of any person which is referred to it in pursuance of paragraph (3) of this Article, and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of the said Articles 16 to 27 (inclusive) to the protection of which the person concerned is entitled:**
>
> **Provided that the Supreme Court shall not exercise its powers under this paragraph if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law.**

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

(4) No law shall make provision with respect to rights of appeal from any determination of the Supreme Court in pursuance of this Article that is less favourable to any party thereto than the rights of appeal from determinations of the Supreme Court that are accorded generally to parties to civil proceedings in that Court sitting as a court of original jurisdiction.

(5) Parliament may make laws to confer upon the Supreme Court such additional or supplementary powers as may appear to be necessary or desirable for enabling the Court more effectively to exercise the jurisdiction conferred upon it by paragraph (2) of this Article and may make provision with respect to the practice and procedure of the Court while exercising that jurisdiction." [Emphasis added]

17. It is beyond dispute that the Appellants filed no application before the Court. At paragraph 3 (ii) of her ruling the learned Judge clearly states that **"Mr. Ducille, KC never filed a Notice of Motion as is the required practice in order to bring a Constitutional claim".** This statement was not challenged by either Mr. Gomez or Mr. Ducille before us. They both assert that Mr. Ducille made the application on his feet. We have been provided with no transcript of the proceedings but what I have been able to glean from the ruling and the submissions before us is that there was no application made.

18. Mr. Ducille and Mr. Gomez both made submissions before the Court below which referred to the Constitution but they did so in response to the application made by the Crown to adduce the evidence of Rashae Gibson. There is nothing on the record to show that even orally an indication was made that the Appellants were making an application pursuant to Article 28. It is also clear that the Learned Judge did not treat the application before her as anything more than an application pursuant to section 166 of the Criminal Procedure Code Act. I am satisfied therefore that there was no application made which invoked the exercise of the Courts jurisdiction under Article 28.

19. In my view the Appellants reliance on the line of cases beginning with **Olive Casey Jaundoo v Attorney General of Guyana** [1971] AC 972 does not assist them. Mr. Gomez submitted that as Parliament nor the Rules Committee has made any provision with respect to the practice and procedure of the Court while exercising the Article 28(1) jurisdiction, parties are free to approach by any method.

20. In **Jaundoo** the Board considering similar provisions of the Guyanese Constitution held that-

> " **The right to apply to the high Court for redress conferred by Article 19(1) was expressed to be subject to paragraph (6) of that article, and since neither Parliament nor the rule making authority of the Supreme Court had exercised their power under article 19(6) to make provision with respect to practice and procedure the method was unqualified and the right wide enough to cover applications by <u>any form of procedure by which the high Court could be approached to invoke its powers,</u> and an Originating Motion was one of the ways by which that could be done." [Emphasis added]**

21. It is clear that the approach to the Court under Article 28 although not specified to be by way of any particular process, the process chosen must be one by which the Supreme Court could be approached. However, as noted earlier I am satisfied that the Appellants did not make an application pursuant to Article 28 of any kind. All submissions were in response to the application by the Crown.

22. At no point was the Honourable Attorney General sought to be joined. He after all is the custodian of the Constitutional rights of the citizens of the Bahamas and the defender of any challenges to or under the Constitution pursuant to Article 28. I do not accept Mr. Ducille's submission that the Attorney General's powers have been ceded to the Director of Public Prosecution. The powers ceded to the DPP were limited to the institution and conduct of Criminal proceedings and related powers and duties.

23. For completeness I note that the only other means of access to this Court which a defendant in a Criminal trial has is by virtue of Section 12 of the Court of Appeal Act which states as follows:-

> **" Right of appeal from Supreme Court.**
>
> **12. (1) A person convicted on information in the Supreme Court after the coming into operation of this subsection, may appeal under the provisions of this Act to the Court on any of the following grounds-**
>
> > **(a) that evidence was wrongly rejected or inadmissible evidence was wrongly admitted;**
> >
> > **(b) that the verdict was unreasonable or could not be supported having regard to the evidence;**

(c) that under all the circumstances of the case, the verdict is unsafe or unsatisfactory;

(d) that the conviction was erroneous in point of law;

(e) that some specific illegality or irregularity, other than hereinbefore mentioned, substantially affecting the merits of the case was committed in the course of the trial;

(f) that the sentence passed was based on a wrong principle of law; or

(g) that the sentence passed was unduly severe.

(2) A person sentenced by the Supreme Court under subsection (2) of section 218 of the Ch. 91. Criminal Procedure Code Act may appeal to the court under the provisions of this Act against that sentence.

(3) The Attorney-General on behalf of the Crown may, with the leave of the court appeal to the court against any sentence passed after the coming into operation of this section on a person-

(a) convicted on information in the Supreme Court; or

(b) sentenced by the Supreme Court under subsection (2) of section 218 of the Criminal Procedure Code Act, unless the sentence is one fixed by law.

(4) The provisions of any Act shall, as they apply to an appeal against sentence made under subsection (1) or (2), mutatis mutandis apply to an appeal made under subsection (3).”

24. This provision is clearly not of assistance to the Appellants and understandably was not relied upon by them. It is only activated after conviction or sentence, neither of which occurred here.

25. I am aware that although an Appellant may not have a right of appeal pursuant to Article 104(1) he may be able to raise Constitutional points if they arise out of an appeal which he has before this Court. This was decided by the Judicial Committee in the case of **Bowe v R** [2006] UKPC 10. However, this is not such a case and as such that principle cannot assist them.

THE SUBSTANTIVE CLAIM

26. In the event that I am wrong in my finding that the Appellants are not properly before us as they have not shown that they meet the requirements set out in that article I have

considered the substantive issue before the Court. I was reluctant to do so as our findings will affect any future appeal in this matter in the event that any of the Appellants are convicted. However, the parties were alerted to this and decided to proceed.

27. The issue before the Court below was not a difficult one. The practice of filing Notices of additional evidence during trial is not novel. It is not impermissible as contended by Mr. Ducille. There is nothing in the Act which says it cannot be done. Mr. Ducille focused on the first portion of section 166 which provides that '**No witness who has not given evidence at the preliminary inquiry shall be called by the prosecution at any trial…"** However, even when requested by the Court he studiously avoided referring to the remainder of the section. The remainder of the section qualifies that general statement by stating that '**unless the accused person has received reasonable notice in writing of the intention to call such witness.'[Emphasis added]**

28. In my view, the combined effect of Sections 259 and Section 166 allows a witness who has not given evidence at a preliminary Inquiry nor in a deposition in a Voluntary Bill of indictment process to be allowed to give evidence at the discretion of the trial Judge. The Judge must be satisfied that the defendant is provided with the name of the proposed witness and the substance of the evidence the witness proposes to give. The Judge must then be satisfied that reasonable notice of the intention to call the witness has been given. The section is clear that 'i**t shall be for the court to determine in any particular case what notice is reasonable, regard being had to the time when and the circumstances under which the prosecution became acquainted with the nature of the witness's evidence and decided to call him as a witness'. [Emphasis added]**

29. In this case the name of the witness was not in issue and the statement provided give the details of the evidence which the witness was expected to give. The question of the notice period was a matter for the Judge who was of the view that the Crown served the notice as soon as they received the police Statement. This was a finding of fact gleaned from the date on the statement and the date of service. The statement was dated the 27th February 2024 and served on the 29th February 2029.

30. The learned Trial Judge was clearly open to suggestions from the Appellants as to how much time they would need to prepare in order to ensure that they had a fair opportunity to consider the statement before the witness is called. It is difficult therefore to conceive of the proper basis on which, assuming we had jurisdiction, that the Order should be set aside. Beyond that, even if there was a basis to set aside the order the rationale in asking that the proceedings as a whole be stayed is mystifying.

RESOLUTION

31. For the forgoing reasons I would dismiss the appeal as the Appellants have no standing pursuant to Article 104(1) of the Constitution.

32. I do not accede to the Respondent's application for Costs and make no order as to costs.

33. Before leaving this matter I feel constrained to note that it is clear that the Legislature's intent was to insure that Criminal matters do not reach this Court until the matter has been determined with a conviction and sentence. This makes sense for two important reasons. Firstly, trial's duration would be manifestly increased and the criminal justice system further plagued with delays. Secondly, it is really not generally in the Defendant's best interest to have every error or perceived error corrected prior to conclusion of his trial. He may well find that if convicted after all he has no points left which to raise.

34. A third consideration is that as under our law, a defendant in an ongoing criminal Matter can only access this Court by way of a Constitutional action the choice must be considered carefully. As Lord Diplock in **Harrikissoon v Attorney General of Trinidad and Tobago** [1980] PC App. No. 40 of 1977 observed:

> "**The right to apply to the High Court under section 6 of the Constitution for redress when any human right of fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms, but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures…"**

The Honourable Mr. Justice Evans, JA

Judgment delivered by the Honourable Mr. Justice Jon Isaacs, JA:

35. I have read the judgment of my brother Evans, JA and I am in complete agreement with his analysis, conclusions and disposition.

36. I add two matters that raise a concern for me. First, my dislike for appeals from interlocutory decisions of a judge or magistrate made in a criminal trial. Although their Lordships in the Judicial Committee of the Privy Council were speaking to an extradition appeal, the sentiment expressed at pages 18-19 of the judgment delivered by Lord Lowry in the case of **Government of the United States of America v Frederick Nigel Bowe** [1989] 3 WLR 1256 is equally as applicable to the usual criminal trials. His Lordship stated as follows:

> **"The way in which the proceedings before the magistrate were interrupted in order that the fugitive might apply to the Supreme Court for orders of certiorari and prohibition has meant that their Lordships' decision in the extradition appeal does not achieve finality, since the evidence against him remains to be heard and considered. Their Lordships here take the opportunity of saying that, generally speaking, the entire case, including all the evidence which the parties wish to adduce, should be presented to the magistrate before either side applies for a prerogative remedy. Only when it is clear that the extradition proceedings must fail (as where the order to proceed is issued by the wrong person) should this practice be varied."**

37. It is clear that the present break in proceedings does not come even close to bringing finality to the trial of the Appellants. Nor is it even suggested that the exclusion of the evidence of Rashae Gibson will bring an end to the trial that is proceeding.

38. Second, although this appeal was found to be incompetent for the reasons articulated by my brother Evans, JA, I reiterate in part, paragraph 20 of my judgment in the earlier appeals of **Adrian Paul Gibson et. al. v The Director of Public Prosecutions** SCCon/CrApp No. 97 of 2023 and **Elwood Donaldson v The Director of Public Prosecutions** SCCon/CrApp. No. 100 of 2023:

> **"20. I sound a word of caution that the fundamental rights provisions of the Constitution must not become the first refuge of disgruntled litigants lest those provisions lose their importance as safeguards of societal rights..."**

39. For the reasons set out in the judgment of Evans, JA, I too would dismiss this appeal.

The Honourable Mr. Justice Isaacs, JA

Judgment delivered by the Honourable Mr. Justice Gregory Smith, JA:

40. I have read the judgments of Isaacs, JA, and Evans JA, and I agree with them. I merely wish to add the following:

41. The tailpiece of Article 28(2)(b) of the Constitution states that:

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

42. I am of the view that the trial process itself does contain adequate means of redress for any perceived breach of any alleged constitutional right which may possibly occur due to the introduction of the evidence of Ms. Rashae Gibson. I say this because the trial judge, as she has stated in her judgment, can and will give the appropriate directions to the jury with respect to the evidence of Ms. Gibson. This ought to correct any perceived unfairness or unconstitutionality which may result from the presentation of the evidence of Ms. Gibson in the trial**.** See: **Harrikissoon** cited above. I too will dismiss this appeal.

The Honourable Mr. Justice Smith, JA