



[2025] JMFC Full 3

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE FULL COURT
CLAIM NO. SU2021CV02326**

**THE HONOURABLE MRS. JUSTICE S. WINT- BLAIR
THE HONOURABLE MRS. JUSTICE T. HUTCHINSON SHELLY
THE HONOURABLE MRS. JUSTICE T. CARR**

BETWEEN	SHAQUILLE ASHLEY	CLAIMANT
AND	CLERK OF COURT, SAINT CATHERINE	1ST DEFENDANT
AND	HER HONOUR MS. ALICIA MCINTOSH, JUDGE OF PARISH COURT (SAINT CATHERINE)	2ND DEFENDANT
AND	JAMAICA FIRE BRIGADE	3RD DEFENDANT
AND	THE ATTORNEY GENERAL OF JAMAICA	4TH DEFENDANT

FULL COURT

Mr. John Clarke for the Claimant

Miss Jevaughnia Clarke and Jovan Bowes instructed by the Director of State Proceedings for the 1st, 2nd, 3rd and 4th Defendants

Heard: 28th October, 14th November 2024 and 22nd May 2025

Constitutional Law – Statutory Interpretation – Right to a Fair Trial – Right to Receive Records of Proceedings – Reasonable Time – Right to Due Process – Right to Equitable and Humane Treatment – Right to Presumption of Innocence – Right to Protection of Property – Right to Freedom of Movement – Right to Freedom from Arbitrary Arrest – Whether the police officers had reasonable suspicion – Right to Liberty and Security of the Person – Constitutionality of the Offensive Weapons (Prohibition) Act – Constitutionality of Regulation 41 of the Fire Brigade Regulations – Right to Make Representations – Whether a hearing should be convened before there is a suspension with half pay – Whether constitutional damages should be awarded – The Charter of Fundamental Rights and Freedoms (Constitutional

Amendment) Act, 2011, sections 13(2), 13(3)(a), 13(3)(g), 13(3)(h), 13(3)(j), 13(3)(p), 13(3)(r), 15 (1), 16(1), 16(2) and 16(7) – Fire Brigade Regulation 41

WINT-BLAIR, J

- [1] I have read in draft the reasons for the judgment prepared by my learned sister Hutchinson Shelly, J and I am in agreement. There is nothing that I wish to add.

HUTCHINSON SHELLY, J

Even the smallest rights deserve the full protection of the law, for justice does not concern itself with matters of scale. When the state, whether by indifference or oversight, disregards these rights, it falls upon courageous citizens to remind us all of a simple truth: constitutional freedoms are neither gifts nor privileges but enduring guarantees. To dismiss a claim as insignificant is to forget that every right vindicated strengthens the foundation of justice itself.

BACKGROUND

- [2] This matter originates from the arrest and subsequent charge of the Claimant, Mr. Shaquille Ashley, on October 19, 2019, by members of the police force. Mr. Ashley was charged with, inter alia, being armed with an offensive weapon in a public place (“armed with an offensive weapon”), specifically a ratchet knife. Additional charges of resisting arrest and disorderly conduct were also laid against him.
- [3] The 1st Defendant is the person in charge of prosecution at the Saint Catherine Parish Court along with other administrative responsibilities at the Court. The 2nd Defendant was the Parish Court Judge with conduct of the trial of Mr. Ashley for the charges mentioned above. The 3rd Defendant is the employer of Mr. Ashley. The 4th Defendant has been joined pursuant to the Crown Proceedings Act.
- [4] At the time of the incident, Mr. Ashley was reportedly in his home community of Gore Tuca, in the company of others, when he was approached and searched by the police. Following his arrest, he was tried and convicted on all the charges in the Parish Court of Saint Catherine. He was sentenced to the payment of a fine or in the alternative imprisonment. Upon appeal, the appellate court quashed the convictions and sentence relating to resisting arrest and disorderly conduct. The conviction and sentence for being armed with an offensive weapon was upheld.

THE CLAIMANT'S CASE

[5] Mr. Ashely filed a Fixed Date Claim Form on May 13, 2021, which was further amended on November 19, 2021, supported by several affidavits of Mr. Ashley. The following orders are sought:

1. *A Declaration that the First and Second Defendants had a duty to ensure that the Claimant received a record of the proceedings pursuant to section 16(7) of the Constitution.*
2. *A Declaration that the Claimant's constitutional right to presumption of innocence was breached and is being breached by the action of the Jamaica Fire Brigade to separate him from his job simply because he was charged for a criminal offence. His suspension continues until his name is cleared.*
3. *A Declaration that the Claimant's Constitutional rights in relation to freedom of movement was breached by the action of Constable Michael Mannings, service number 15005 of the Bridgeport Police Station who randomly decided to search the Claimant on walkway 25 of 19 October 2019 around 9:45pm whilst he was heading to work.*
4. *A Declaration that the description of a 'ratchet knife' as an 'offensive weapon' under Section 2(1) of the Offensive Weapons (Prohibition) Act, 2001 is contrary to the Constitution and therefore of no effect.*
5. *Damages for breach of the aforementioned constitutional rights*
6. *A Declaration that the 3rd Defendant's actions to suspend the Claimant from his job with half pay on his mere arrest by police officers breached his Constitutional rights to:*
 - a. *Equitable treatment (section 13(3)(h) of the Constitution)*
 - b. *Due Process (section 13(3)(r) of the Constitution)*
 - c. *Presumption of Innocence (section 16(5) of the Constitution)*
 - d. *Fair hearing within a reasonable time (section 16(1) and 16(2) of the Charter)*
 - e. *Protection of property (section 15 of the Charter)*
7. *Damages for the breach of those constitutional rights*
8. *Such further Order... as the Court considers appropriate...*
9. *Costs in the Claim.*

[6] Mr. Ashley contends that agents of the state, namely police officers who are not parties to these proceedings, violated multiple constitutional rights enshrined in the Charter of Fundamental Rights and Freedoms ("the Charter") by their actions of searching his

person, effecting his arrest, and seizing his ratchet knife to which his keys were attached. The rights allegedly infringed include his right to freedom of movement, freedom from arbitrary arrest, liberty and security of the person, and protection of property.

- [7]** He asserts that the 2nd Defendant's failure to provide the record of proceedings to himself and the Court of Appeal within the timeframe mandated by section 299 of the Judicature (Parish Court) Act constitutes a breach of his right to receive such records within a reasonable time under section 16(7) of the Charter. He further contends that the delay in furnishing the record has infringed his right to a fair trial within a reasonable time pursuant to section 16(1) of the Charter. It is noted that while Mr. Ashley had initially joined the 2nd Defendant to these proceedings, he subsequently filed a notice of discontinuance against her on November 22, 2022.
- [8]** Mr. Ashley claims against the 3rd Defendant concerning the issuance of a suspension order that resulted in his suspension from work with half-pay following his arrest and charge. He maintains that this suspension contravenes several Charter rights, including his right to equitable and humane treatment, the presumption of innocence, due process, and the protection of property. Moreover, he emphasizes that the absence of any hearing or determination regarding the status of his suspension or employment since its imposition, especially where the criminal proceedings have been finalized, has resulted in a breach of his right to a fair hearing within a reasonable time under section 16(2) of the Charter.
- [9]** Finally, Mr. Ashley mounts a constitutional challenge to the Offensive Weapons (Prohibition) Act, contending that the blanket prohibition on ratchet knives and their classification as offensive weapons under the Act are unconstitutional. He argues that the legislation fails to distinguish between lawful and unlawful possession, neglecting legitimate uses such as his own, where the knife served as a work tool. This blanket prohibition, he asserts, inevitably results in infringements of his constitutional rights,

including protection of property, freedom of movement, and liberty and security of the person.

- [10] Mr. Ashley contends that none of the alleged breaches can be justified in a free and democratic society. Accordingly, he seeks declaratory relief for the violations of his constitutional rights as well as an award of damages.

THE DEFENDANTS' CASE

- [11] The Defendants' position is unequivocal. They contend that none of the rights alleged by Mr. Ashley to have been violated were in fact breached or even engaged. In particular, they assert that the claim regarding breaches of the rights to liberty, freedom of movement, and security of the person is untenable, as these rights are expressly subject to the exception in section 14(1) of the Charter, which permits lawful arrest on reasonable suspicion of having committed an offence for the purpose of bringing an individual before a court. The Defendants maintain that the search was lawfully conducted and that the subsequent seizure of the ratchet knife was justified under the Offensive Weapons (Prohibition) Act, which authorizes confiscation where an offensive weapon is found in a person's possession.
- [12] With respect to the alleged breach of the right to receive the record of proceedings within a reasonable time, and the consequential claim of a violation of the right to a fair trial within a reasonable time, the Defendants assert that the delay in providing the record was justified and urged the court to assess the delay in its proper context and find it reasonable.
- [13] Regarding the claim that the 3rd Defendant's suspension order infringed Mr. Ashley's constitutional rights, it was argued that the suspension was imposed pursuant to Regulation 41 of the Jamaica Fire Brigade Regulations and Mr. Ashley has failed to demonstrate a valid comparator to substantiate his claim of inequitable treatment. It was further asserted that the suspension process does not mandate a hearing, and as such, there was no requirement for Mr. Ashley to be afforded an opportunity to make

representations before he was suspended with half-pay. Accordingly, the Defendants assert that no constitutional rights were engaged. They further contend that no hearing on the suspension can proceed while Mr. Ashley's constitutional challenge remains unresolved, and therefore, there is no breach of the right to a fair trial within a reasonable time under section 16(7) of the Charter.

- [14] Lastly, regarding the constitutional challenge to the Offensive Weapons (Prohibition) Act, the Defendants maintain that any infringement of constitutional rights is demonstrably justified in a free and democratic society. They further argue that statutory interpretation must be approached with deference to legislative intent, and that modifications, whether by reading in or striking out provisions, should only be undertaken in exceptional circumstances, which they assert do not exist in the present case.

PRELIMINARY POINT

- [15] It has been argued by Counsel for the Defendants that the Attorney General is not a proper party to this Claim. Reliance was placed on the case of **George Neil v Attorney General & Ors**¹ ("**George Neil**"), where the Full Court found that the Attorney General cannot be joined to a constitutional matter on the strength of the Crown Proceedings Act which is only applicable in civil proceedings. Accordingly, it was the submission of Counsel for the Defendants that in keeping with CPR 56.11(3) the claim ought to be only served on the Attorney General as an interested party.
- [16] The argument of Counsel for the Claimant, Mr. Clarke, is that the Attorney General is named in the official capacity as the legal advisor to the Crown. The Court gleans from the pleadings that this inclusion is necessitated by the potential implications of the Court's determination in this matter. Should the Court find that a constitutional breach was committed by the 1st and 3rd Defendants, who, for all intents and purposes, acted in their capacity as Crown servants, it may give rise to the award damages to Mr.

¹ [2022] JMFC Full 6

Ashley. Consequently, the Court's view is that Mr. Clarke is arguing that the Crown's legal and financial interests are engaged, warranting the 4th Defendant's presence in these proceedings pursuant to the Crown Proceedings Act.

[17] Section 13(2) of the Crown Proceedings Act states that “*civil proceedings against the Crown shall be instituted against the Attorney General.*” The authority of **George Neil** specifically indicates, whilst relying on the cases of **Kevin Simmonds v The Minister of Labour and Social Security & Ors**² (“Kevin Simmonds”); **Minister of Foreign Affairs, Trade and Industry v Vehicles and Supplies Limited & Anor**³; and **Scott Davidson v Scottish Ministers**⁴, that constitutional claims do not fall under civil proceedings (see: **George Neil** at paragraphs 14-25). The authorities outline that civil proceedings predominantly pertain to private law, encompassing areas such as torts and contract law.

[18] In **Freedom Come Ministries International Limited v The Attorney General**⁵ (“**Freedom Come Ministries**”), the Claimant challenged the constitutionality of the amendments and regulations promulgated under the Disaster Risk Management Act passed by Parliament. The claim was a challenge to the provisions empowering the Prime Minister to declare whole or parts of Jamaica a disaster area, as well as to direct the enforcement of measures to guard against or mitigate any risk. It was the Claimant's contention that the provisions, specifically section 26(2) conflicts with the Constitution. A situation which is akin to the contention of Mr. Ashley in the case at bar, this attack being against the Offensive Weapon (Prohibition) Act. In that matter, Counsel for the Defendant urged the court to adopt the position laid down in the cases of **George Neil** and **Kevin Simmonds**.

² [2022] JMFC Full 2

³ [1991] 1 WLR 552

⁴ [2006] SCLR 249

⁵ [2024] JMFC Full 05

[19] The Full Court in **Freedom Come Ministries** found as follows at paragraph 16 of the Judgment:

[16] We are of the view that the circumstances of this case are distinguishable from the cases of George Neil and Kevin Simmonds. We find that where there is a challenge to actions taken by the Government, in the absence of legislation to the contrary, the Attorney General, as the principal legal adviser must be the proper party in the claim. It can also be concluded, based on the dicta from the cases from the Court of Appeal and the Privy Council, that in the absence of legislation to the contrary, the Attorney General is a proper party in Constitutional claims, concerning the Crown, agents and servants of the state, or in cases where the parties are immune from suit.

[20] The Court has also considered the submissions of the respective parties and reviewed a number of decisions on the point which included, inter alia: **Maharaj v Attorney-General of Trinidad and Tobago (No 2) Privy Council (No. 2)**⁶; **Grant and Ors v Director of Public Prosecutions**⁷; **Charles v The Attorney General of Trinidad and Tobago**⁸.

[21] Upon careful examination of the claim as filed and applying the guidance provided by the Court in **Freedom Come Ministries**, it is evident that the challenge to the constitutionality of the legislation as well as the actions of the State Agents would necessitate the Attorney General's participation as a party to these proceedings as opposed to an interested party. In the circumstances, this claim is clearly distinguishable from the **George Neil** and **Kevin Simmonds** matters. Accordingly, the Defendant's request that the Attorney General be removed as a party to this claim is refused.

ISSUES

[22] In considering this matter, the following issues arise for consideration:

⁶ [1979] AC 385

⁷ [1980 30 WIR 246

⁸ [2002] UKPC 34

1. Has the right to a fair trial within a reasonable time under section 16(1) been breached by virtue of a breach of section 16(7) of the Charter to receive the record of proceedings within a reasonable time?
2. Has the suspension order by the 3rd Defendant breached any constitutional rights of Mr. Ashley?
3. Is the description of a ratchet knife as an offensive weapon under section 2(1) of the Offensive Weapons (Prohibition) Act 2001 contrary to the Constitution and of no effect?
4. Did the police officers breach Mr. Ashley's constitutional rights when they searched him, seized his ratchet knife with keys and arrested him?
5. Is Mr. Ashley entitled to Constitutional Damages?

LAW AND ANALYSIS

[23] I find it appropriate to begin with the relevant provisions of the Jamaican Constitution which has emboldened Mr. Ashley to come before this court to have his rights upheld. Section 2 of the Constitution provides as follows –

“Subject to the provisions of sections 49 and 50 of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.”

[24] Sections 49 and 50 of the Constitution vests Parliament with the authority to amend or alter its provisions and prescribe the procedural framework for doing so. Accordingly, section 2 of the Constitution affirms the supremacy of the constitutional text by stipulating that, except where expressly permitted through amendment or alteration, any law or provision thereof that is inconsistent with the Constitution shall be rendered null and void.

[25] The Charter is to be read and construed as one with the Constitution. The Charter repealed Chapter III of the Constitution and guarantees certain fundamental rights and freedoms to citizens and states at section 13(2) as follows –

“(2) Subject to sections 18 and 49, and to subsections (9) and (12) of this section, and save only as may be demonstrably justified in a free and democratic society –

- (a) this Chapter guarantees the rights and freedoms set out in subsections (3) and (6) of this section and in sections 14, 15, 16 and 17; and*
- (b) Parliament shall pass no law and no organ of the State shall take any action which abrogates, abridges or infringes those rights.”*

[26] Any individual who feels aggrieved by any provision in law which appears to breach any of the rights conferred by the Charter may seek redress by making an application to the Supreme Court. Section 19 provides –

“(1) If any person, alleges that any of the provisions of this Chapter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to same matter which is lawfully available, that person may apply to the Supreme Court for redress.

(2) Any person authorized by law, or, with the leave of the Court, a public or civic organization, may initiate an application to the Supreme Court on behalf of persons who are entitled to apply under subsection (1) for a declaration that any legislative or executive act contravenes the provisions of this Chapter.

(3) The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1) of this section 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 this Chapter to the protection of which the person concerned is entitled.”

[27] In this case, Mr. Ashley has approached the Court alleging that his constitutional rights have been breached and so he must establish this on a balance of probabilities. If he has done so, the Respondents have the burden of proving that the breaches were demonstrably justified in a free and democratic society.

Issue 1: Has the right to a fair trial within a reasonable time under section 16(1) been breached by virtue of a breach of section 16(7) of the Charter to receive the record of proceedings within a reasonable time?

Claimant's Submissions

- [28] Mr. Clarke submitted that Mr. Ashley's right to a fair trial within a reasonable time under section 16(1) of the Charter was breached due to the delayed transmission of the record of proceedings to the Court of Appeal. He further argued that this delay also violated section 16(7) of the Charter, as Mr. Ashley did not receive the record within a reasonable time after the Parish Judge's decision.
- [29] While acknowledging that "reasonable time" is not explicitly defined in section 16(7), Mr. Clarke urged the court to interpret it in light of positive law principles and the legislative intent of section 299 of the Judicature (Parish Court) Act. He relied on **Ray Morgan v The King (Jamaica)**⁹ to support his position. Mr. Clarke contended that the Clerk of Courts had a statutory duty to transmit the record and failed to do so within the prescribed two-week period, as 443 days had elapsed before its transmission. This delay, he argued, constituted clear proof of a constitutional breach.
- [30] Mr. Clarke asserted that the evidence having shown that there was a breach, the burden has shifted to the Defendants to justify the delay. He argued that they failed to discharge this burden, as the affidavit of Her Honour Ms. Alicia McIntosh lacked sufficient justification for the delay.

Defendants' Submissions

- [31] Counsel for the Defendants argued that the issue centres on the constitutional right to due process, which guarantees all persons charged with a criminal offence or subject to a determination of civil rights and obligations are to be given a fair opportunity to pursue their case.
- [32] Counsel contended that Mr. Ashley's Attorney was provided with both the transcript and the judge's notes of evidence, which together afforded sufficient time to prepare and advance his appeal, thereby mitigating the absence of the formal record of proceedings and ensured that his trial was heard within a reasonable time. Reliance

⁹ [2023] UKPC 25

was placed on several authorities, including **Allan Cole v R**¹⁰, **Absolam & Ors v R**¹¹, **Evon Jack v R**¹², **Paul Chen Young & Ors v Eagle Merchant Bank & Ors**¹³, **Germain Smith & Ors v R**¹⁴, and **Desmond Bennet v Jamaica Public Service Company Limited & Anor**¹⁵, to elucidate the interpretation of "reasonable time."

- [33] Counsel acknowledged that there was a delay in providing the record of proceedings, but maintained that the subsequent provision of the transcript and the judge's notes sufficiently rectified this issue. Consequently, Mr. Ashley's rights were no longer abridged, particularly since the appeal was heard between September 21-23, 2022, culminating in a written judgment. Counsel submitted that, under these circumstances, the claim of a breach of the right to a trial within a reasonable time should be dismissed.
- [34] It was further submitted that the explanation provided by the Parish Judge should be deemed adequate. Counsel emphasized that the delay, amounting to just over one year between Mr. Ashley's conviction and the transmission of the complete record, was neither inordinate nor unreasonable. Additionally, the prompt action of the Parish Court Judge in supplying the notes to the Clerk of Courts should be viewed favourably.

Discussion

- [35] The starting point for this discussion is section 16 of the Charter. This section enshrines several rights that are ancillary to and intended to protect the right to due process. In light of the submissions on this issue, it is appropriate to first assess whether the right to receive the record of proceedings within a reasonable time has been breached.

Right to receive record of proceedings within a reasonable time

- [36] Section 16(7) of the Charter states –

¹⁰ [2010] JMCA Crim 67

¹¹ [2022] JMCA Crim 50

¹² [2021] JMCA Crim 31

¹³ [2018] JMCA App 7

¹⁴ [2021] JMCA Crim 1

¹⁵ [2013] JMCA Civ 28

An accused person who is tried for a criminal offence or any person authorized by him on that behalf shall be entitled, if he so requires and subject to payment of such reasonable fee as may be prescribed by law, to be given for his own use, within a reasonable time after judgment, a copy of any record of the proceedings made by or on behalf of the court.

[37] Although this section indicates that there is a right to the record of proceedings within a reasonable time, there are a number of factors which must exist before this right is invoked. The person seeking to rely on this provision must have been tried for a criminal offence, must have required the record of proceedings and must have paid such prescribed fee. These preparatory ingredients are not disputed by the parties.

[38] Section 291 of the Judicature (Parish Court) Act explains what the records of proceedings entails. It is reflected as thus –

291. *In all proceedings in a Court by way of indictment, and in all summary proceedings before Courts of Petty Sessions by way of information for felonies, there shall be recorded on or in the fold of the indictment or information, in the form in Schedule E or to the like effect, the plea of the accused, the judgment of the Court and in case of conviction the sentence; and the Magistrate or in the summary proceedings aforesaid the presiding Magistrate, shall sign his name once at the end of the record.*

If an appeal is lodged against any such conviction, a note thereof and of the result of the appeal shall be subsequently added by the Clerk and signed by him.

Where any person charged before a Court with any offence specified by the Minister, by order, to be an offence to which this paragraph shall apply, is found guilty of such an offence, the Magistrate shall record or cause to be recorded in the notes of evidence, a statement in summary form of his findings of fact on which the verdict of guilty is founded.

In all summary proceedings other than as aforesaid, it shall be sufficient for the presiding [Parish Judge] or the Clerk to record on or in the fold of the information (the adjournments, if any, being noted), the place and day of hearing, the names of the adjudicating [Parish Judge] and the finding.

If the notes taken in any of the cases aforesaid are taken in a book, such book shall be preserved in the office of the Clerk, and a reference to the same shall be noted in the fold of the information or indictment; if the same are taken on loose sheets, such sheets shall be attached to the information or indictment.

In either case the information or indictment with the record made thereon as aforesaid, and with the notes aforesaid, shall

constitute the record of the case, and each such record shall be carefully preserved in the office of the Clerk of Courts, and an alphabetical index shall be kept of such records.

[Emphasis Added]

- [39] Mr. Clarke argued that it is the duty of the Clerk of Court to produce the record in a timely fashion and has cited section 299 of the Judicature of (Parish Court) Act in support of this argument. It is reflected thus –

299. *The Clerk of the Courts shall, not later than fourteen days after the receipt of the notice of appeal, forward to the Registrar of the Court of Appeal the record of the case together with the notes of evidence or a copy of the same certified as herein mentioned, and all documents which have been received as evidence or copies of the same certified as herein mentioned.*

- [40] For further context, section 300 is also reflected below –

300. *The notes of evidence taken by the [Parish Judge] or Clerk of the Courts, or a copy of the same certified by the Clerk of the Courts as being a true copy, and the documents received in evidence before the [Parish Judge], or copies of the same certified by the Clerk of the Courts as being true copies, shall be read and received by the Court of Appeal as the evidence in the case:*

Provided always, that the Court may in any case require the production of the original documents, or any of them, or of the original notes of evidence.

- [41] The Court understands Mr Clarke to be asserting that the statutory mandate that the record of proceedings be produced within fourteen (14) days carries two significant implications. First, it established a constitutional obligation on the part of the Clerk of Court to ensure that Mr. Ashley obtained these records pursuant to section 16(7) of the Charter. Second, the fourteen-day period specified by the statute represents the "reasonable time" referenced in section 16(7) of the Charter. The Clerk of Court having failed to provide the records of proceedings within the fourteen (14) days means that the right at section 16(7) has been breached.

- [42] The right contemplated under section 16(7) of the Constitution pertains specifically to the provision of the records of proceedings for the individual's own use with no specifications as to what these may be or include. In contrast, the obligation imposed

by section 299 of the Judicature (Resident Magistrates) Act specifically concerns the transmission of records of proceedings by the Clerk of Court upon receipt of the notice of appeal. These two legal provisions, while both addressing the period within which the record of proceedings is to be provided, arise in different legal frameworks and a statutory timeframe cannot automatically define the constitutional standard of "reasonable time."

- [43] The decision of **Desmond Bennett v Jamaica Public Service** makes it clear that the question of what is a "reasonable time" in the context of one's Charter rights is determined by the particular set of circumstances, to include an examination of the resources available to the Court. Mr. Clarke's attempt to equate statutory requirements with constitutional obligations is therefore untenable, as it conflates separate bodies of law and fails to account for their unique legal and interpretive contexts.
- [44] A determination of "reasonable time" is inherently subjective and varies on a case-by-case basis as seen in the authorities cited by Counsel for the Defendants. The jurisprudence makes it abundantly clear that "reasonable time," as alleged to be breached under section 16(7) of the Charter, must be assessed within the broader framework of overall trial fairness. While the Court acknowledges the relevance of these cases, it does not find it necessary to exhaustively analyse each one.
- [45] In **Allan Cole v R**, the Appellant was convicted in the Parish Court and challenged the fairness of the appeal on the basis that, inter alia, there was a delay of almost two years between the Notice of Appeal and the record of proceedings being available. Harrison JA (as he then was) who delivered the judgment had this to say:

*[72] In determining whether delay in bringing an accused to trial constitutes a breach of his right to a fair trial within a reasonable time under section 20(1) of the Constitution, the **court should therefore have regard to the length of the delay, the reasons alleged to justify it, the responsibility of the accused for asserting his rights, and any prejudice to the accused.** These principles are equally relevant to post-trial delays, inclusive of the appellate stage - see *Darmalingum v. The State* [2000] Cr. App. R. 445 and *R v Eric Bell* SCCA No. 16/98 delivered 29 September 2003. For my part, I do not think that the facts as outlined at*

paragraph 66 (supra) could constitute a breach of the appellant's right to a fair trial.

[73] The purpose of the "reasonable time" guarantee in respect of the appellate proceedings is to avoid a person convicted remaining too long in a state of uncertainty about his fate. See paragraph 54 of Kenneth Mills v Her Majesty's Advocate and Another, Privy Council DRA No. 1 of 2002 delivered 22 July 2002 and Stögmüller v Austria (1969) 1 EHRR 155, 191, para 5. The sole issue which the former case raised relates to the remedy which may be given to an appellant for a breach of his right to a hearing within a reasonable time under article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms, where there was a delay in the hearing of his appeal which was due to an act of the prosecutor. In Taito v the Queen Privy Council Appeals Nos. 50 and 59 of 2001 delivered 19 March 2002, the Board stated that the proposition in Darmalingum that the normal remedy is to quash the conviction, went too far. Darmalingum was a case where the defendant "had the shadow of the proceedings hanging over him for about 15 years". It was a wholly exceptional case.

[74] The record of appeal indicates that the certified copy of the notes of evidence taken by the magistrate was received in the Registry of this court on 21 May 2009. This would be almost two years after the appellant's conviction. Section 299 of the Judicature (Resident Magistrates) Act provides: "299. The Clerk of the Courts shall not later than fourteen days after the receipt of the notice of appeal, forward to the Registrar of the Court of Appeal the record of the case together with the notes of evidence or a copy of the same certified as herein mentioned and all documents which have been received as evidence or copies of the same certified as herein mentioned."

[75] The question is whether a post-conviction delay of almost two years is inordinate in the light of section 299. In my judgment, such delay without more constitutes a breach of the appellant's constitutional right to a hearing of his appeal within reasonable time.

- [46] The recommended approach outlined in **Allan Cole v R** is instructive, it is evident that the test to determine whether the record was provided within a reasonable time, pursuant to the constitutional provision, is to determine the length of the delay, the reason for the delay, whether the accused asserted his rights and any prejudice that may have resulted.

Length of the Delay

- [47] The uncontested facts establish that Mr. Ashley initially requested the record of proceedings from the Parish Court on August 12, 2020. Subsequent requests were

made by his counsel, Mr. Clarke, on August 13 and 31, 2020, and again on March 1 and 12, 2021. There is no indication from Mr. Ashley as to whether he personally received the record of proceedings. The only reference provided is the date the records were transmitted to the Court of Appeal, October 28, 2021.

[48] The court underscores that for a breach of the right under section 16(7) of the Charter to be established, it must be demonstrated that the records were not provided within a reasonable time. Mr. Clarke has contended that the delay spans 443 days, calculated from the date of the first request on August 12, 2020, to the transmission of the record of proceedings to the Court of Appeal on October 28, 2021.

[49] The evidence before the Court does not disclose the specific date on which the record of proceedings was provided to Mr. Ashley. However, at paragraphs 8, 18 and 19 of his affidavit, he explicitly avers that as of the date on which he swore on the affidavit, November 19, 2021, he had not received the record of proceedings.

[50] The Defendants have not provided any alternate timeframe that the court could utilise to determine the length of the delay. Although the language used in the Charter is the date that the record of the proceedings is provided to the Claimant, it is accepted that the period for assessing the delay was between the August 12, 2020, the date on which Mr. Ashley first requested the record of proceedings, up to October 28, 2021, when the record was transmitted to the Court of Appeal.

[51] While it has been argued that the delay in complying with the timeline specified at Section 299 of the Judicature (Parish Court) Act raises grave implications as to whether there was compliance with section 16(7) of the Charter, the case law shows that the Court has to consider whether such a delay, “without more” is sufficient to constitute a breach of this section of the Charter. In this situation, the delay did not exist in a vacuum as an explanation has been provided for it which must be examined by the Court.

The Reason for the Delay

[52] The affidavit of the Parish Court Judge establishes that the record of proceedings was provided to the Clerk of Court upon notification of the notice of appeal. However, no specific timeframe or date when this was done was provided.

[53] Mr. Clarke submitted that there was no explanation proffered by the Parish Court Judge in respect of the delay in transmission, neither was there any affidavit from the Clerk of Court in respect of same. As such, the delay was unjustified.

[54] The Parish Court Judge filed an Affidavit on October 22, 2021. Given Mr Clarke's assertions, it is pertinent that the affidavit be examined. The relevant portions of the affidavit are reflected as thus –

...

4. *In relation to the allegations in paragraph 4 to 8 of the Affidavit of the Claimant, at no time did I advise anyone that the Claimant would receive the notes of evidence from his trial when I was "good and ready". When I became aware that the Claimant had filed a Notice of his intention to appeal my decision, I promptly sent my notes to the Clerk of Court to be copied and typed.*
5. *During my time sitting as a Parish Judge in the Parish of St. Catherine we were short a judge for a number of judge for a number of months, the court office was understaffed due to quarantine orders when one of the Clerks contracted Covid 19. To compound the difficulties, consequent on my impending transfer, I had sittings for extended periods completing part-heard matters.*
6. *I was not aware that the Claimant made enquiries about the notes of evidence in person. The notes of evidence have now been typed, checked, and will be dispatched to the Court of Appeal.*
7. *I believe that in the circumstances, the notes of evidence were made available within a reasonable time after the verdict was delivered...*

[55] While I agree with Mr. Clarke that the Court requires affidavit evidence to properly ascertain the reasons for the delay in order to evaluate what constitutes a reasonable time, I disagree with his assertion that the affidavit failed to elucidate said reasons.

[56] Although the Affidavit did not contain specific timelines or dates disclosing when the actions were undertaken, at paragraph 5 there is a clear causal link between the impact

of the COVID-19 pandemic on the court's operations which resulted in under staffing among the Clerks and the quarantining of the staff as a whole. This situation was further compounded by the shortage of a Judge and the Parish Judge's own impending transfer which required her to focus on the completion of her outstanding matters. It was in these circumstances that the delay occurred.

[57] It is evident from this explanation that the operations of the Courts were significantly impacted by the foregoing factors. The end result of this was the fact that the record of proceedings was not transmitted until over a year later despite the effort of the Parish Judge to promptly hand over the notes of evidence upon becoming aware of the appeal. While it was unfortunate, that this resulted in a delay to Mr. Ashley being able to have his appeal scheduled for hearing, this was not a situation in which it was mere oversight or a deliberate withholding of same. The Court finds that the explanation provided is a meritorious one in light of the challenges which existed.

[58] In respect of Mr. Clarke's argument that there was no affidavit from the Clerk of Court, who bore the statutory responsibility, to justify the delay, the Court does not share the view that this was strictly required. The evidence by the Parish Judge clearly reveals the challenges within the operations of the Court which would have impacted the Clerk of Court's ability to comply with the statutory guidelines and these reasons have been accepted by the Court.

Claimant asserting his right

[59] It is unnecessary to delve exhaustively into this issue, as the evidence establishes that Mr. Ashley through a series of letters sent by his Counsel, made requests for the records. He also made visits to the Parish Court.

Prejudice

[60] Prejudice, in this context, requires the Court to consider how the delay in providing the record of proceedings has impacted Mr. Ashley, not only in relation to his ability to conduct his appeal, but also in terms of the disruption caused in his personal and

professional life. The prejudice must be extrapolated from the facts. In the further Supplemental Affidavit in Support of Orders Sought by Fixed Date Claim Form filed on November 19, 2021, Mr. Ashley spoke extensively about how the delay in receiving the record of proceedings has affected him. The relevant portions of the affidavit are reflected as thus –

...

6. *That on the 12 August 2020, I filed an appeal in this matter. On the 13 August 2020, my attorney-at-law, Mr. John Clarke, requested the record of proceedings and reminded the court of the statutory timelines regarding the notes of evidence and that the applicant was separated from his job pending the production of same.*
7. *That since the 28 October 2019, I have been subjected to disciplinary action by the 3rd Defendant. The 3rd Defendant has a policy which suspends me from my job with half pay until I have been found not guilty. The suspension is an interim action for a process which ultimately may see me being dismissed or suspended from the Jamaica Fire Brigade for being charged/convicted of the offences of resisting arrest disorderly conduct and being armed with an offensive weapon.*

...

12. *That I have been waiting for more than 14 months for the productions (sic) of the record of proceedings... This has caused me anxiety and has effectively placed my life in a limbo since October 28, 2019 when I was suspended from my work pending the trial of my criminal charge. The trial process also encompasses the right to appeal and I am suspended pending the decision of the appeal court...*
13. *I advised the 1st Defendant that the records (sic) of proceedings were necessary for [the] prosecution of my appeal and to defend myself against any administrative action to ensure that I did not lose my work.*

...

18. *That I attended the St. Catherine Parish Court on the 17, 25 October 2021 and on the 9th November 2021. On each occasion, I was advised by staff that the requested record of proceedings was not seen in the registry...*
19. *That up to today, I have not received the record of proceedings... despite my requests for same.*

20. *That the 3rd Defendant continues to separate me from my job (since 28 October 2019) pending the determination of court proceedings in this matter.*

...

23. *That I firmly believe the production of the record of proceedings would have facilitated the 3rd Defendant, the Public Service Commission and the local Privy Council to have all the relevant materials for their determination on whether I should remain suspended from my job.*

24. *That I do not believe that the 3rd Defendant would have suspended [me] from my work if it had regard to the record of proceedings...*

...

26. *... The absence of the record of proceedings continues to ensure that I am separated from my job.*

[61] Mr. Ashley's affidavit speaks to the tangible and psychological effects of the delay on him. The inability to receive the record of proceedings in a timely manner undoubtedly created a far from ideal situation for him as he was unable to move his matter forward on appeal without it. The fact that the disciplinary proceedings would be placed in limbo until the disposition of the appeal is also undisputed.

[62] While there was undoubtedly some prejudice occasioned to Mr. Ashley by this delay, in light of the explanation which had been provided for same, the Court is unable to conclude that it was sufficient, without more, to find that there was a breach of section 16(7) of the Charter.

Right to a fair trial within a reasonable time

[63] The court must now assess if Mr Ashley's right to a fair trial has been breached. The right which is being discussed here is found at section 16(1) of the Charter. It is reflected as thus –

16. – (1) Whenever any person is charged with a criminal offence he shall, unless the charge is withdrawn, be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

- [64] The right to a fair trial within a reasonable time encompasses all stages of judicial proceedings, including the appellate process (see: **Darmalingum v The State**¹⁶). The same considerations obtain in relation to what was assessed for the reasonable time guarantee as discussed under the first issue. The length of the delay, the reason for the delay, whether the Claimant asserted his right and the prejudice resulting from the delay.
- [65] In **Allan Cole v R**, a post-conviction delay of two years for the record of proceedings to be transmitted to the Court of Appeal for the hearing of the appeal was deemed as a breach of the right to a hearing of his appeal within a reasonable time. This was premised upon the principle that in those circumstances the delay was presumptively prejudicial there was no need to further inquire into the other factors (see: **Bell v Director of Public Prosecutions**¹⁷, **Tussan Whyne v R**¹⁸, **Flowers v The Queen**¹⁹ and **Reckford Maitland v R**²⁰). It is pertinent to note that the length of the delay considered in **Allan Cole v R** only included the time within which it took for the record of proceedings to be transferred and not the time within which it took for the appeal to be heard following the record of proceedings being sent over.
- [66] In the present case, a comparable factual scenario arises. Notably, Mr. Ashley has neither raised nor relied upon any grievance regarding the delay in the hearing of the appeal, upon the record of proceedings being transmitted. Therefore, the length of the delay being considered is the 14 months that it took for the record of proceedings to be transferred to the Court of Appeal. It is this period of delay that the Court deems material for consideration in the present matter.

¹⁶ [2000] Cr. App. R. 445

¹⁷ [1985] AC 937

¹⁸ [2022] Crim 42

¹⁹ [2000] UKPC 41

²⁰ [2022] JMCA Crim 5

[67] In the case **Germain Smith & Ors v R**²¹, relied on by Counsel for the Defendants, Brooks P opined on the constitutional right enshrined at section 16(1) of the Charter. He opined at paragraphs [122] to [124] –

*[122] ...the length of time does not by itself, entitle Mr Thomas to this particular constitutional relief. In a carefully considered judgment on the constitutional right to a trial within a reasonable time, McDonald-Bishop JA explained in **Julian Brown v R [2020]** JMCA Crim 42, that the applicant has to show that he has not contributed to the delay. The learned judge stated at paragraph [89]:*

“It means then that the enquiry into an alleged breach of section 16(1) cannot properly start and end with the length of the delay. The mere fact of delay, without more, is not sufficient to ground liability within the Charter. The investigation of the issue must necessarily involve a balancing exercise with consideration being given to other relevant factors within the context of the circumstances of the particular case. This balancing exercise is necessary because the constitutional right of the applicant to a fair trial within a reasonable time is to be balanced against ‘the public interest in the attainment of justice in the context of the prevailing system of legal administration and the prevailing economic, social and cultural conditions to be found in Jamaica’.”(emphasis added)

*[123] Thirdly, in **Melanie Tapper v Director of Public Prosecutions**, [2012] UKPC 26: [2012] 1 WLR 2712, the Privy Council stated that it was for local courts to determine what would amount to a breach of the constitutional requirement of a trial within a reasonable time. Their Lordships said, in part, at paragraph 19 of their judgment:*

“...On their exercise of discretion it would require something exceptional to justify the Board substituting its opinion for that of the domestic court. In particular, the domestic court is much better placed to judge the significance of delay having regard to local conditions and pressures on the courts (see **Bell v Director of Public Prosecutions** [1985] AC 937, 953E-G) ...G)” (Italics as in original)

[124] Unfortunately, the level of crime over the past two decades has provided more cases than the criminal courts in this jurisdiction, are able to accommodate in short order. As a result, a lapse of almost four years before a case comes on for trial is not considered so unreasonable, as to constitute a breach of section 16(1) of the Constitution, which guarantees that right. In the event that the lapse was found to be unreasonable and unconstitutional, the court would have been able to grant a remedy by a reduction in the sentence

²¹ [2021] JMCA Crim 1

(see paragraphs 24-28 of **Tapper v DPP**). That remedy is not available in this case.

[68] In assessing this claim, the Court is guided by the principles outlined in **Germain Smith & Ors v R**, which reaffirm that the mere length of a delay, without more, is not sufficient to ground liability in the Charter. In that case, the delay of four years without more, was not deemed sufficient to find a breach of the Appellants constitutional right under section 16(1) of the Charter. This is to be contrasted with the authorities which agree that the right has been breached where the delay in the matter is presumptively prejudicial.

[69] Applying the principles enunciated in **Germain Smith & Ors v R**, this court does not find that the length of the delay in this case by itself warrants a declaration that this right has been breached. Accordingly, the Court would need to go further and inquire into the other factors i.e. the reason for the delay, whether Mr. Ashley contributed to the delay and the prejudice caused.

Reason for the Delay

[70] This was previously discussed in the consideration of whether section 16(7) had been breached. It is undisputed that the delay was not caused by any action or inaction on the part of Mr. Ashley. The reasons provided speak to the operational challenges within the court system during the period of the COVID-19 pandemic. In my assessment of the explanation provided, I note that in **Melanie Tapper v Director of Public Prosecutions**²² the Privy Council emphasized that domestic courts are best placed to evaluate delays, considering local conditions and pressures on the legal system. Having conducted this assessment of the conditions which existed and their adverse impact on the operations of the Court, I do not agree that there was no good reason for the delay.

Prejudice

²² [2012] UKPC 26

[71] The prejudice caused by the delay remains the same as those which were aforementioned at paragraph [60]. While a delay of 14 months is undoubtedly significant, the Court must weigh this against the context in which it arose. The pandemic caused widespread disruptions across the judiciary, leading to backlogs and operational inefficiencies beyond the control of individual court officers. In spite of these challenges, the record of proceedings was subsequently provided to Mr Ashley, and his appeal was determined in 2022. While systemic challenges impacted the 1st Defendant's ability to transmit the record in a timelier fashion and impacted Mr Ashley's ability to proceed with his appeal, the Court is unable to find that this was sufficient to deprive Mr Ashley of his right to a fair hearing within a reasonable time.

[72] In arriving at this conclusion, the Court adopts the remarks of McDonald Bishop J in **Julian Brown v R** that *"...the mere fact of delay, without more, is not sufficient to ground liability within the Charter. The investigation of the issue must necessarily involve a balancing exercise with consideration being given to other relevant factors within the context of the circumstances of the particular case."* On a careful assessment of the factors outlined by the Defendant, the reason for the delay having been accepted as meritorious and the delay itself not being for an inordinate period, the Court finds that Mr. Ashley has failed to show that there was a breach of Section 16(1) of the Charter.

Issue 2: Has the suspension order by the 3rd Defendant breached any constitutional rights of Mr. Ashley?

The Claimant's Submissions

[73] Mr. Clarke argued that the delay in resolving the proceedings was not attributable to Mr. Ashley but rather to the failure to provide the record of proceedings to the Court of Appeal. He emphasized that, despite the conclusion of proceedings, the 3rd Defendant had made no attempt to initiate a hearing. He relied on **Ernest Smith & Co. (A Firm)**

& Ors v Attorney General of Jamaica²³ ("**Ernest Smith & Co. v AG**") to support his position.

- [74] Mr. Clarke contended that the affidavit evidence demonstrated that Mr. Ashley's salary was reduced by half, making his suspension an adverse decision. He argued that this suspension with half pay was unconstitutional, breaching his rights under sections 13(2), 13(3)(g), (h), (r), 15, and 16(5) of the Charter. He submitted that the policy of suspending persons charged with a criminal offence negatively impacted Mr. Ashley's right to the presumption of innocence. He further contended that the Commissioner's affidavit, failed to justify the special circumstances of Mr. Ashley's suspension, which violated his constitutional rights. Mr. Clarke outlined several issues with the suspension, including the lack of evidence that it was ordered by the Commissioner or Board, the absence of justification that it was necessary in the public interest, and its prolonged duration since October 28, 2019.
- [75] Mr. Clarke further submitted that the suspension was procedurally unfair and violated Regulation 41 of the Fire Brigade Regulations, as it was imposed by a District Officer who was of a lower rank than required by the regulations. He cited several cases, including **Faith Webster v Public Service Commission**²⁴ and **Michael Reid v Real Estate Board**²⁵, to support his argument.
- [76] In addressing the charges against Mr. Ashley, Mr. Clarke maintained that these did not justify his immediate suspension with half pay. He argued that suspending him for an offence under section 3(2) of the Offensive Weapons (Prohibition) Act, which carries a maximum fine of \$4,000, was disproportionate. Mr. Clarke highlighted the evidence of Mr. Ashley's supervisor, at trial, who confirmed that other employees of the 3rd Defendant regularly carried ratchet knives for work purposes. He argued that this, coupled with the Commissioner's failure to provide a rationale for the suspension,

²³ [2020] JMFC Full 7

²⁴ [2017] JMSC Civ. 69

²⁵ [2024] JMCA Misc. 1

demonstrated a misapplication of Regulation 41. He relied on **Birss v Secretary of State**²⁶ to reinforce this position.

The Defendants' Submission

- [77] Counsel for the Defendants submitted that Regulation 41 of the Fire Brigade Regulations grants the Board and the Commissioner the authority to suspend members, and Mr. Ashley's suspension was properly executed in accordance with these provisions. They asserted that the suspension was justified since criminal proceedings had been initiated against him and that the Superintendent, as an authorized officer, had the requisite authority to issue the Suspension Order.
- [78] Counsel urged the Court to consider the specific statutory framework and prevailing circumstances, relying on **Lloyd v McMahon**²⁷. They further contended that under Regulation 41(4)(e), if Mr. Ashley is acquitted following disciplinary proceedings, he would be entitled to back pay. Counsel argued that the Court should allow the disciplinary process to run its course, as any judicial intervention at this stage would be premature. Counsel posited that contrary to his assertions on this point, none of Mr. Ashley's constitutional rights had been violated, the decision of **Mafabi v Attorney General**²⁸ was cited in support.
- [79] In respect of procedural fairness, Counsel submitted that an assessment of natural justice must focus on whether the statutory framework of the Fire Brigade Regulations ensures due process and whether the Board and Commissioner adhered to these procedural safeguards. The key question was whether Mr. Ashley received just and equitable treatment within the prescribed statutory standards. Counsel emphasized that the Court must first determine whether the duration of the proceedings has been unduly prolonged. The next critical inquiry is whether the delay is attributable to the conduct of any of the principal parties involved.

²⁶ [1984] 1 NZLR 513

²⁷ [1987] AC 625

²⁸ [2014] 4 LRC 752

Discussion

The Right to Due Process

- [80] The right to due process is guaranteed under section 13(3)(r) of the Charter as provided for in section 16 of the Charter. This means, that a breach of any right under section 16 of the Charter would result in a breach to the right to due process. Mr. Clarke has contended that the right to due process has been breached by virtue of the suspension order issued by the 3rd Defendant. He cited additional breaches of the right to a fair hearing within a reasonable time by an independent and impartial tribunal pursuant to section 16(2) and the right to presumption of innocence pursuant to section 16(5) of the Charter.

Right to a fair trial within a reasonable time by an independent and impartial tribunal pursuant to section 16(2) of the Charter

- [81] Section 16(2) so far as is relevant, reads as follows –

“16 (2) In the determination of a person’s civil rights and obligations or of any legal proceedings which may result in a decision adverse to his interests, he shall be entitled to a fair hearing within a reasonable time by an independent and impartial court or authority established by law.”

- [82] It is pertinent to note that Mr. Ashley contends that two distinct violations of his right to a fair hearing under section 16(2) have occurred: (i) he was denied the opportunity to make representations prior to the adverse decision to suspend him, and (ii) the protracted delay of five (5) years in convening a hearing regarding either his employment status or the suspension itself.
- [83] To buttress this point, Mr. Ashley asserts that a suspension with half pay is a penalty and therefore he should have had a hearing before he was suspended. Further, that the Commissioner failed to show how his suspension was necessary in the public interest as is required under the Regulation 41 of the Fire Brigade Regulations.

[84] The suspension order issued to Mr. Ashley was done pursuant to Regulation 41 of the Fire Brigade Regulations. It states –

41. – (1) *Where –*

- (a) *any disciplinary inquiry or criminal proceedings have been or are about to be instituted against a member; or*
- (b) *the Board or Commissioner becomes aware of any misconduct on the part of a member; and*
- (c) *the Board or Commissioner in either case referred to in paragraph (a) or (b), is of the opinion that it is necessary or desirable in the public interest that the member should be forthwith suspended from duty,*

the Board or Commissioner, as the case may be, may direct that the member be suspended from duty.

(2) The order for suspension shall be in writing stating the reasons therefore and shall be made by the Chairman of the Board or Commissioner and a copy thereof shall forthwith be delivered to the member concerned.

(3) A member so suspended shall from the date of suspension be paid half pay until the final conclusion of the proceedings relating to the charge against him and appeal (if any).

(4) When as a result of the relevant disciplinary inquiry the member concerned –

- (a) *is ordered to be discharged, he shall not be entitled to any further payment in respect of the period during which he was suspended;*
- (b) *is fined, the pay withheld shall be applied against the fine and the balance (if any) paid to him;*
- (c) *is suspended without pay. he shall forfeit the half pay retained by him during his suspension pending trial;*
- [(d)] *is fined, the pay withheld shall be applied against the fine deemed to commence on the day on which he was suspended pending trial and any pay withheld in excess of the period ordered, shall be paid to him;*
- (e) *he is acquitted of the charge,*

he shall receive so much of his pay as may have been withheld.

(5) A member who has been summoned or arrested on a criminal charge may be forthwith suspended from duty without pay and deprived of all uniforms and other Government property in his possession and if admitted to bail may earn his livelihood as if he were not a member of the Brigade.

(6) A member who has been suspended from duty may not leave Jamaica without the permission of the Board acting on the recommendation of the Commissioner, and shall give to the Commissioner an address at which he may be found.

(7) All documents required to be served pursuant to these Regulations on a member who is under suspension from duty. shall be deemed to be properly served if sent by prepaid registered mail to the address given by that member in accordance with paragraph (6).

(8) A member convicted of a criminal charge involving dishonesty, fraud or moral turpitude or convicted of a criminal charge and sentenced to imprisonment shall not receive any of his emoluments after the date of such conviction pending the determination of the Board

Should there have been a hearing before Mr. Ashley was suspended?

[85] On a careful review of Regulation 41 it is evident that the process outlined does not require a hearing prior to the suspension of a member of the Fire Brigade. The question that then arises is whether this means that the process for suspension is unfair and thereby unconstitutional?

[86] On the question of fairness, in **R v Secretary of State for the Home Department ex parte Doody**²⁹, Lord Mustill opined at page 560 –

“What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that (1) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. (2) The standards of fairness are not immutable. They may change with the passage of time, both Page 9 in the general and in their application to decisions of a particular type. (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. (6)

²⁹ [1994] 1 AC 531

Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests, fairness will very often require that he is informed of the gist of the case which he has to answer.”

[87] In **Lloyd v McMahon**, Lord Bridge opined at pages 702-703 –

“... the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness.”

[88] The legal principles enunciated in these authorities establish that what constitutes fairness varies based on the factual circumstances in which the decision falls to be taken. This means that whether or not a hearing should have been convened before Mr. Ashley was suspended depends on the circumstances of his suspension.

[89] In **Public Service Commission v Ceron Richards**³⁰, the Privy Council had to consider whether a hearing was required before a decision was taken to suspend the Respondent under Regulation 88 of the Trinidad & Tobago Public Service Regulations. The Board opined –

32. *The first question in the context of the present case is whether, even though, in line with the decision in **Murray**, there is no automatic right either to a hearing or to be invited to make representations before a decision is taken under reg 88, fairness required the Commission in these particular circumstances to invite the appellant to make representations before it took the decision to suspend him pursuant to reg 88. In the Board’s view this was not required. The circumstances of this case were not of a kind to give rise to such a right as an incident of the duty of fairness. [emphasis mine]*

33. *The decision was taken in the context of an ongoing preliminary investigation under reg 90. By his letter of 2 August, which was before the Commission Mr Nanan, the investigating officer appointed by the COP, had asked for an extension of time to continue with his investigation into the alleged*

³⁰ [2022] UKPC 1

breaches of the prison officers' Code of Conduct. Accordingly, it was clear that his investigatory work to that date, including after review of any explanation the appellant had given pursuant to reg 90(3), had disclosed that there was sufficient substance in the allegation to require further examination before a recommendation could be made whether to bring disciplinary charges or not. Although the Commission did not know the details of the appellant's response since it did not have before it the letter of 19 July, it was clear from Mr Nanan's letter that the appellant had disputed the allegation against him, since otherwise further investigation would have been unnecessary. The extension requested meant that Mr Nanan would soon produce his report, in early September 2016.

34. In these circumstances, the Board considers that **there was no unfairness to the appellant involved in the Commission suspending the appellant on full pay in exercise of its powers under reg 88 without first giving him a hearing or inviting him to make representations.** The decision was taken in the course of the operation of the procedure under reg 90 which meant that a designated investigating officer was actively examining the facts of the case and would report shortly. He was better placed than the Commission to do this. **In view of the short time before the investigating officer would report, the opportunity for the appellant to make representations to the investigating officer in the course of his investigation, and the limited impact of [the] suspension under reg 88 on the appellant, the Commission was entitled to consider that it was appropriate to leave the investigation of the facts at this very preliminary stage to the investigating officer rather than try to conduct a separate investigation of its own. Fairness did not require the Commission to pre-empt Mr Nanan's investigation.** [emphasis mine]

35. The Board would observe that once the Commission received the report of the investigating officer, accompanied by relevant documents, it should have reviewed the position in the light of it. The report would have set out relevant information which ought to be taken into account when deciding whether or not the appellant could return to his duties. The evidence does not reveal what happened after Mr Nanan completed his report, but this is because the appellant brought no legal challenge directed to the Commission's conduct after it took the decision to suspend him in the first place. **The Board would also point out that in other contexts fairness might require the Commission to give an opportunity to make representations before deciding whether to exercise the power under reg 88. For example, the power in reg 88 is not limited to cases in which an investigation is taking place under reg 90 and, if no one is conducting an investigation of the facts, it might be incumbent on the Commission to examine them itself to some degree.** [emphasis mine]

[90] In the case of **Faith Webster v The Public Service Commission**, K. Anderson J relied on the authorities of **Card v Attorney General**³¹ and **Re Mitchell, Rafael**³² to

³¹ BZ 1938 SC 15

³² TT 2003 HC 85

analyse the legal principles governing the fairness of placing a public officer on interdiction under the Public Service Regulations. It is pellucid that such interdiction, along with the regulatory framework governing it, is analogous or equivalent to a suspension under Regulation 41 of the Fire Brigade Regulations. K. Anderson J opined at paragraphs [125] to [132] –

[125] *The claimant's counsel has relied on two authorities which he contends, support that contention, as has been propounded by him, namely: Card v the Attorney General (op. cit.) and Re Mitchell, Rafael (op. cit.).*

[126] *Both of those authorities are, it is to be noted, first instance judgments from the Supreme Court of Belize on the one hand and the High Court of Trinidad and Tobago, on the other hand. Those are courts with jurisdiction which is similar to that of Jamaica's Supreme Court. As such, neither of those judgments are binding on this court. At most, those judgments may be considered as being persuasive.*

[127] *In the Card case (op. cit.), Moe C.J. concluded that interdiction is not a penalty, but the withholding of half of an interdicted public officer's salary, is a penalty. Interestingly, in the Mitchell case (op. cit.), it was the opinion of Ventour J., as expressed in the judgment which he delivered in that case, that not only was the applicant's interdiction, 'a punishment,' but also that moreover, particularly in circumstances wherein the public officer or former public officer, who is the applicant, is by virtue of that interdiction, being made to suffer any financial loss, then that applicant is entitled to a 'hearing', prior to being interdicted.*

[128] *Accordingly, in the Card case, it was held that no hearing was required prior to interdiction, whereas in the Mitchell case, it was held that a hearing was required, prior to interdiction.*

[129] *What that divergence in approach, vis-a-vis hearing prior to interdiction, makes clear, is that the conclusion to be drawn in one case, will not necessarily be the conclusion to be drawn in another case involving judicial review proceedings, as regards the legal issue. Whether a particular disciplinary procedure constitutes a penalty or not, must, of necessity, depend on the particular circumstances of each particular case.*

[130] *In Jamaica, with respect to the non-payment of a position of an interdicted public officer's salary, this court accepts firstly, that the decision as to whether that will be done or not, is not a discretionary matter. That issue will be addressed further, in these reasons.*

[131] *If the withholding of the claimant's half salary constitutes a penalty, then undoubtedly, a decision to impose such a penalty, could only properly be taken/made, after the claimant had been afforded a fair hearing, or*

in other words, 'natural justice'. See: Cooper v Wandsworth Board of Works (op.cit.).

[132] Whether such withholding constitutes a penalty though, must, of necessity, depend on the particular circumstances of each particular case...

- [91]** It is important to clarify that the cases referenced herein arose within the context of judicial review. One basis for seeking judicial review is the alleged unconstitutionality of an administrative action. As such, while these decisions primarily concern judicial review, they remain persuasive in the context of a constitutional motion alleging a violation of fundamental rights. In particular, they provide guidance on whether the right to a fair hearing in the context of this particular issue has been engaged.
- [92]** These authorities establish that where a suspension is imposed with full pay, the principles of fairness do not necessarily mandate a prior hearing. However, where the suspension results in the withholding of salary, whether in whole or in part, fairness will generally require that the affected individual be afforded a hearing prior to the suspension. However, this principle is not absolute, as the necessity of a hearing ultimately depends on the specific factual circumstances of each case and the extent to which fairness considerations are engaged. The jurisprudence also makes it clear that while suspension, in and of itself, does not constitute a penalty and does not inherently necessitate a hearing, the imposition of any financial deprivation, specifically, the reduction of a suspended individual's salary can, depending on the circumstances, constitute a penalty.
- [93]** Unlike the regulations examined in the authorities cited, which allow for a discretion to be exercised in determining the portion of salary to be withheld upon suspension, Regulation 41 of the Fire Brigade Regulations prescribes a fixed deduction without affording any latitude to the Board or the Commissioner to determine the amount to be withheld. This distinction is pivotal. The absence of discretionary authority in this regard removes any evaluative or punitive element from the decision-making process. Consequently, this Court is of the view that the suspension with half-pay in this instance does not constitute a penalty being imposed by the Board/Commissioner.

[94] In these circumstances, a hearing on this issue, would not be required as there was no evaluative determination to be made regarding the quantum of his salary reduction, nor was there any room for subjective assessment that could have been influenced by representations from the affected party. Accordingly, the Court finds that there was no requirement for a hearing to be convened for representations to be made prior to the suspension of Mr. Ashley with half pay.

[95] It was also argued on behalf of Mr. Ashley that the Commissioner and the Board have failed to sufficiently demonstrate that his suspension was necessary or desirable in the public interest. He further asserts that his dismissal was effected by an individual of lower rank, thereby rendering the process procedurally improper. These contentions would more appropriately fall within the realm of a judicial review application, as they challenge the procedural propriety and reasonableness of the administrative decision-making process. Given that judicial review is governed by a distinct procedural framework, which has not been invoked in these proceedings, this Court declines to entertain or determine the merits of this argument.

Has the reasonable time guarantee been breached?

[96] In relation to this aspect of the discussion, the same principles in assessing the reasonable time guarantee obtains as was earlier discussed. This was confirmed in the judgment delivered by Jackson Haisley, J in the case of **Kevin Simmonds**.

[97] The issue at hand is a straightforward question of fact. It is undisputed that no hearings have been conducted regarding Mr. Ashley's suspension or employment status since his suspension on October 28, 2019. However, it must be noted that, pursuant to Regulation 41 of the Fire Brigade Regulations, no such hearing could have taken place prior to the conclusion of the criminal proceedings. Mr. Ashley's appeal was heard and determined in September 2022, establishing that the earliest possible opportunity for a hearing arose at that time. Despite this, no hearing has been convened to date, resulting in a delay of over two years, which remains ongoing. The reasons for this additional period of delay must then be examined.

What are the reasons provided for the delay?

- [98] Mr. Stewart Beckford, in his affidavit dated February 18, 2022, stated that a hearing could not be convened as Mr. Ashley's appeal had not yet been finalized. This explanation which was provided prior to the hearing of the appeal offers an adequate explanation for that period of delay. It is for this reason that the period of delay being assessed dates from the determination of the appeal and continues thereafter. In conducting this exercise, the Court observes that no supplemental affidavits were filed by the Defendants to account for the continued delay.
- [99] Counsel for the Defendants submitted that the additional delay resulted from the continuation of these proceedings. Legal submissions do not constitute evidence and cannot substitute for affidavit evidence, which serves a distinct evidentiary purpose. Nevertheless, in the interest of justice, this Court finds it necessary to consider the reasons advanced.
- [100] These proceedings do not fall within the language of disciplinary or criminal proceedings as outlined in Regulation 41 of the Fire Brigade Regulations and, as such, the question arises: could these proceedings preclude the convening of a hearing? If successful, Mr. Ashley's constitutional challenge could effectively nullify his conviction for being armed with an offensive weapon, as he directly contests the validity of the statutory provision under which he was charged. Therefore, any determination by this Court on that issue would have had a significant bearing on the outcome of any disciplinary hearing that might have been convened. In light of the possible ramifications for the criminal matter for which he stands convicted, it is evident that the 3rd Defendant's approach is reasonable as the disciplinary hearing would not be able to proceed until this claim has been determined.

Is the delay reasonable in light of the particular circumstances of the case such as its complexity and the conduct of the parties?

- [101] The hearing to be convened does not appear to involve any novel or complex legal issues. In light of the Court's finding that there is good reason for the delay it follows

that the hearing could not reasonably have proceeded until the resolution of these proceedings. Accordingly, the Court finds that the delay is justifiable.

Has the Claimant contributed to the delay, or has he done anything to assert his rights?

[102] This Court acknowledges the paucity of documents in respect of any communication between Mr. Ashley and the 3rd Defendant on this issue. However, it is evident that by initiating these proceedings, Mr. Ashley, while actively asserting his rights, has in turn significantly contributed to the delay in the progress of the disciplinary proceedings. Consequently, while the Court recognizes Mr. Ashley constitutional rights to bring a claim where he believes himself to be aggrieved, the Court is compelled to find that this action has been a significant and direct factor in the delay since the disposition of the matter in the Court of Appeal.

Conclusion

[103] In light of this finding, it is unnecessary for the Court to examine the remaining factors. Having initiated these proceedings, Mr. Ashley cannot now seek to blame the resulting delay on the 3rd Defendant by asserting it as a violation of his right to a fair hearing within a reasonable time. Consequently, the delay complained of does not constitute a breach of the guarantee under section 16(2) of the Charter to a fair hearing within a reasonable time before an independent and impartial tribunal.

Right to Presumption of Innocence

[104] Section 16(5) of the Charter protects the right of a person who is charged with a criminal offence with the presumption of innocence. It provides that –

“every person charged with a criminal offence shall be presumed innocent until he is proved guilty or has pleaded guilty.”

[105] The onus is on Mr. Ashley to prove how his right to presumption of innocence has been breached. As previously indicated Mr. Ashley’s suspension with half pay is not a punitive response. In the absence of evidence demonstrating that the suspension was in effect an adverse finding on the allegations against Mr. Ashley,

this Court is unable to conclude that his right to presumption of innocence was breached. Furthermore, the mere fact of adherence to Regulation 41 does not, in itself, equate to an endorsement of the allegations or an implicit finding of wrongdoing on the part of Mr. Ashley. It is, therefore, improper for this Court to infer, without any evidentiary basis, that the suspension was motivated by any assumption of guilt, rather than an administrative application of the regulatory framework governing disciplinary proceedings. Accordingly, the right to presumption of innocence has not been breached by virtue of the suspension order.

[106] It is now appropriate to return to the governing issue of whether there has been a breach of the right to due process under section 13(3)(r) of the Charter. In light of the fact that none of the rights enshrined under section 16 of the Charter have been found to be infringed, it follows as a matter of legal consequence that the right to due process under section 13(3)(r) of the Charter likewise was not breached.

Right to Equitable and Humane Treatment by a Public Authority

[107] This right is enshrined at section 13(3)(h) of the Charter. It states that everyone is entitled to “*the right to equitable and humane treatment by any public authority in the exercise of any function...*” In **Dale Virgo & Anor v Board of Management of Kensington Primary School & Ors**³³, the Court of Appeal stated at paragraph 133 that equitable treatment and inhumane treatment are not intertwined as treatment can be inequitable without being inhumane. Nonetheless, section 13(3)(h) of the Charter allows for both or one of the rights to be breached to satisfy the court that there was a breach of this right.

[108] In dealing with a possible breach of this right, the Privy Council in the case of **Bhagwandeem v Attorney General of Trinidad and Tobago**³⁴ which was applied in **Sean W Harvey v Board of Management of Moneague College, Ministry of**

³³ [2024] JMCA Civ 33

³⁴ (2004) 64 WIR 402

Education Youth and Information and Attorney General of Jamaica³⁵

established that the Applicant needs to show that he has been treated differently from some other similarly circumstanced person. At paragraph 18, Lord Carswell stated:

“A Claimant who alleges inequality of treatment or its own synonym discrimination must ordinarily establish that he has been or would be treated differently from some other similarly circumstanced person or persons, described by Lord Hutton in Shamoon Chief Constable of the Royal Ulster Constabulary [2003] 2 ALL ER 26 at paragraph 71 as actual or hypothetical comparators. The phrase which is common to the anti-discrimination provisions in the legislation of the United Kingdom is that the comparison must be such that relevant circumstances in the one case are the same, or not materially different, in the other”

[109] Inequity and inequality, though similar, are different concepts. In the decision of **Dale Virgo**, the Court indicated that though there are differences between the two concepts the test to determine inequity of treatment is the same or similar to inequality of treatment.

[110] Mr. Clarke argued that Mr. Ashley’s suspension from his job without any hearing in relation to the suspension decision and having his salary cut in half breaches this section of the Charter in that the Jamaica Fire Brigade treated Mr. Ashley less favourably than his counterparts. In my view this is not a proper comparator, Mr. Ashley would have had to bring evidence to show that another Firefighter who was charged with similar criminal offences, was not suspended and/or was not subjected to having his pay cut in half. Without showing a proper comparator, he has no foundation for claiming that this right has been breached by the 3rd Defendant.

[111] The Court finds that Mr. Ashley has failed to establish that he has been treated differently than another Firefighter in similar circumstances to his own and accordingly finds that no breach of his right to equitable and humane treatment has been established. It is pellucid from the evidence before this Court that there is no

³⁵ [2018] JMSC Full 3

indication of inhumane treatment being inflicted upon Mr. Ashley. Accordingly, the right in question has not been engaged.

Right to Protection of Property

[112] Section 15 of the Charter provides that:

“No property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired except by or under the provisions of a law that

(a) prescribes the principles on which and the manner in which compensation therefor is to be determined and given; and

(b) secures to any person claiming an interest in or right over such property a right of access to a court for the purpose

(i) establishing such interest or right (if any);

(ii) determining the compensation (if any) to which he is entitled; and

(iii) enforcing his right to any such compensation.”

[113] Mr. Ashley asserts that the withholding of 50% of his salary constitutes a violation of his right to the protection of property. This Court has already determined that his right to fairness was not infringed when he was denied the opportunity to be heard before the decision to withhold his salary was made. The critical issue that now arises is whether, in these circumstances, the deprivation of his salary, having been imposed fairly, ipso facto engages the right to protection of property.

[114] The protection of property enshrined in the Charter is not an absolute right, it permits lawful deprivation in accordance with procedures prescribed by law. Where the process leading to such deprivation is tainted by unconstitutionality however, it calls into question the legitimacy of the deprivation itself. The Court having found that the salary reduction was fairly imposed, it follows that the right to protection of property has not been engaged. In any event the sum withheld stands to be repaid to Mr. Ashley if he prevails in the disciplinary matter. Accordingly, a declaration regarding a breach of the right to property would not be justified in these circumstances.

Issue 3: Is the description of a ratchet knife as an offensive weapon under section 2(1) of the Offensive Weapons (Prohibition) Act, 2001 contrary to the Constitution and of no effect?

Claimant's Submissions

- [115] Mr. Clarke argued that the total ban on ratchet knives under section 3(2) of the Offensive Weapons (Prohibition) Act violates Mr. Ashley's constitutional rights under sections 13(3)(a), (f), (g), (h), (j), and 15 of the Charter of Fundamental Rights and Freedoms, and that these breaches are not demonstrably justifiable in a free and democratic society.
- [116] He maintained that the evidence shows the ban and the state's actions unjustly infringe Mr. Ashley's rights. Mr. Clarke emphasized that the ratchet knife was used as a work tool, and its blanket classification as an offensive weapon is unconstitutional. He relied on the judgment of his appeal found at **Shaquille Ashley v R**³⁶ and international cases **Andrew Teter and Others v Anne Lopez and Others**³⁷ ("**Teter v Lopez**") and **Commonwealth v David E. Canjura**³⁸ to support the argument that such bans should be narrowly tailored to apply only to criminals and must serve a rational, non-arbitrary purpose.
- [117] Mr. Clarke further submitted that the ban subjected Mr. Ashley to a credible threat of enforcement, resulting in his 24-hour detention and seizure of his knife and keys. He criticized the Court of Appeal's view that mere possession constituted knowledge of an offensive weapon and concluded that the classification should instead require the qualifier "without legal authority or reasonable excuse" to avoid being arbitrary.

Defendants' Submissions

³⁶ [2022] JMCA Crim 46

³⁷ 76 F.4th 938 (9th Cir. 2023)

³⁸ No. SJC-13432 (Mass. Aug. 27, 2024)

[118] Counsel for the Defendants submitted that the court must determine that it is unnecessary to read words into section 3(1) of the Offensive Weapons (Prohibition) Act to make it intelligible. Reliance was placed on the cases of **Mervin Cameron v Attorney General**³⁹, **Missick v Attorney General of Turks and Caicos Islands**⁴⁰, **Katrina Smith v Albert Peter Selby**⁴¹ and **Regina (Quintavalle) v Secretary of State for Health**⁴² to describe how statutes must be interpreted in these circumstances.

[119] Counsel asserted that while Mr. Ashley maintains that the ratchet knife was used in his trade, it was emphasized by the 3rd Defendants that this is false. Furthermore, the offence for which Mr. Ashley was charged simply requires that he knowingly has been in possession of it in a public place in order to infringe that section. The purpose of the possession is immaterial. Mr. Ashley has led no evidence for the court to find that the provision is contrary to the Constitution and thus the designation of a ratchet knife as an offensive weapon is demonstrably justified.

Discussion

[120] Mr. Ashley mounts a two-pronged challenge to the Offensive Weapons (Prohibition) Act. First, he contests the constitutional validity of designating a ratchet knife as an offensive weapon under section 2(1), arguing that the classification lacks a rational or objective basis. Secondly, he asserts that the offence of knowingly possessing an offensive weapon i.e. the ratchet knife pursuant to section 3(2) of the Offensive Weapons (Prohibition) Act is constitutionally flawed due to its unqualified nature, failing to account for legitimate circumstances under which possession may be justified. Resultantly, several rights under section 13(3) and his right under section 15 of the Charter have been breached.

[121] Section 2(1) of the Offensive Weapons (Prohibition) Act provides that –

*“offensive weapon’ means –
(a) ...*

³⁹ [2023] JMFC Full 2

⁴⁰ [2020] UKPC 30

⁴¹ [2017] CCJ 13 (AJ)

⁴² [2003] 2 WLR 692

(b) ...

(c) *any swordstick, ballistic knife, butterfly knife, flick knife, knuckleduster, knuckle knife or any knife which is commonly known as a switchblade, ratchet knife or rambo knife, or such other knife as the Minister may prescribe by order subject to affirmative resolution; ...*

Section 3 of the Offensive Weapons (Prohibition) Act provides –

“3. – (1) A person shall not, without lawful authority or reasonable excuse, knowingly have with him in any public place any offensive weapon falling within paragraph (a) or (b) of the definition of ‘offensive weapon’.

(2) A person shall not knowingly have in his possession in any public place, any offensive weapon falling within paragraph (c) of the definition of ‘offensive weapon’

(3) A person who contravenes subsection (1) or (2) commits an offence and is liable on summary conviction before a [Judge of the Parish Court] to a fine not exceeding four thousand dollars and in default of payment to imprisonment for a term not exceeding four months.

(4) It shall be a defence for a person charged with an offence under subsection (1) to prove that he had the article with him for the purposes of any lawful sport or the person's lawful trade, business or occupation.”

[122] Mr. Clarke placed reliance on two United States cases, **Teter v Lopez** and **Commonwealth v David E. Canjura**. However, these authorities are inapposite to the matter before this court. The legal reasoning in both decisions is fundamentally rooted in the constitutional framework of the United States, particularly the Second Amendment, which guarantees the right to bear arms, a protection that extends to ratchet knives as recognized "arms" within the scope of that provision.

[123] In contrast, Jamaica's Charter of Fundamental Rights and Freedoms contains no analogous provision enshrining a right to bear arms. Consequently, the rationale underpinning the judgments in **Teter v Lopez** and **Commonwealth v David E. Canjura** lacks relevance and persuasive value in resolving the legal questions concerning the prohibition on ratchet knives under Jamaican law.

[124] The case of **Julian Robinson v Attorney General**⁴³ (“**Julian Robinson**”) highlights key principles when challenging a statute’s constitutionality. The case establishes that there is a two-stage test for constitutionality. When a statute is challenged, the court must first determine whether the statute abrogates, abridges, or infringes a guaranteed right. If so, the second stage assesses whether the infringement can be demonstrably justified in a free and democratic society. The burden shifts to the state to provide cogent evidence justifying the law's impact on rights.

[125] At paragraph 11, of the Court of Appeal decision **Shaquille Ashley v R**, Laing JA (Ag) explained the basis for upholding the conviction when he stated as follows –

[11] *The appellant admitted in his evidence that Constable Manning took his utility knife from his right front pocket. He admitted that his utility knife is the same knife called a ratchet knife that was exhibited in evidence. Section 2(1) provides that:*

“‘offensive weapon’ means –

(a) ...

(b) ...

(c) any swordstick, ballistic knife, butterfly knife, flick knife, knuckleduster, knuckle knife or any knife which is commonly known as a switchblade, ratchet knife or rambo knife, or such other knife as the Minister may prescribe by order subject to affirmative resolution; ...”

It is clear on the evidence that the appellant was knowingly in possession of a ratchet knife and was accordingly in possession of an offensive weapon. (emphasis added)

[126] In his attack on the constitutionality of the Act, Mr. Clarke contends that mere possession of a ratchet knife in a public place constitutes the offence under section 3(2) of the Offensive Weapons (Prohibition) Act. This is a misinterpretation of the Court of Appeal’s position. The court did not assert that the mere fact of possession and presence in a public place was sufficient to establish culpability in Mr Ashley’s situation.

⁴³ [2019] JMFC Full 4

For the offence to be complete, there must be evidence that the accused **knowingly** possessed the ratchet knife. This entails not only physical possession but also awareness of the nature of the item – that it was indeed a ratchet knife.

[127] Thus, the critical elements of the offence were present: knowledge, custody, control and an acknowledgment of the item's prohibited nature. While the Court of Appeal acknowledged that the particulars of offence stated that the possession was 'without legal authority or reasonable excuse', the Learned Judge made it clear that these words while found at Section 3(1) of the Act, were not a part of Section 3(2) under which Mr Ashley had been charged and his possession of the item, even for the purpose of his lawful trade would not have amounted to a defence under Section 3(2).

[128] In spite of the distinction, which would call into question whether his rights had been engaged, Mr. Ashley argued that the enforcement of the Offensive Weapons (Prohibition) Act potentially engages the rights to liberty, security of the person, freedom of movement, security of property and freedom from arbitrary search. Therefore, it is incumbent on the state to show that the abrogation of these rights are demonstrably justified in a free and democratic society. The state has not provided any evidence to do so, instead, it focused its submissions on how section 3(2) of the Offensive Weapons (Prohibition) Act should be interpreted.

[129] In conducting an assessment as to whether the abrogation of the rights complained of would be justified in a free and democratic society, the Court is mindful that the rights afforded to Jamaican citizens under the Charter are not absolute and may be abridged in circumstances where it is just to do so. The court must therefore consider whether in a free and democratic society the abridgment of the rights complained of are justifiable. To do so, the court must determine: (1) the legitimacy of the objective pursued by the law and (2) whether the means chosen to achieve that objective are proportionate.

Legitimate Objective

[130] The primary objective of the Act is to promote public safety and reduce violent crime by restricting the possession of certain dangerous weapons, including ratchet knives. The State has a compelling interest in protecting the public from harm, preserving order, and fostering a safe environment. These aims are consistent with legitimate concerns in a democratic society, thereby satisfying the first requirement of the Oakes Test.

Proportionality Analysis

(a) Rational Connection

[131] There is a clear rational connection between the prohibition of the possession of offensive weapons, including ratchet knives, and the objective of reducing violence. Ratchet knives, by design, are easily concealable and capable of causing severe harm, making them a tool frequently associated with violent offences. Limiting access to such weapons is a logical step toward mitigating their use in criminal activities.

(b) Minimal Impairment

[132] The Act strikes a careful balance by criminalizing the *knowing* possession of these weapons in public spaces, rather than imposing an outright ban without consideration of intent or context. This approach ensures that innocent possession for legitimate purposes, such as within a secure private setting, is not unnecessarily penalized. The Act thereby minimally impairs individual rights while maintaining its protective function.

[133] Moreover, it may be contended that any lawful purpose for which a ratchet knife could reasonably be used can equally be accomplished with a kitchen knife, the possession of which is totally restricted in a public place, the purpose for its possession in the section under which Mr. Ashley was charged is immaterial.

(c) Proportionality of Effects

[134] The benefits derived from the Act namely, enhanced public safety and crime reduction, clearly outweigh any infringement on the rights complained of. The potential harm posed by the unrestricted possession of offensive weapons justifies the restriction

imposed by the legislation. The measures are reasonable and proportionate to the societal interest at stake.

Conclusion

- [135] Having applied the Oakes Test, it is evident that even if the rights of Mr. Ashley had been engaged pursuant to Section 19(1) of the Charter, any infringement of same is demonstrably justified in a free and democratic society. The Act serves a pressing and substantial objective and employs proportionate means to achieve its purpose without unduly infringing on protected rights. Accordingly, the provisions of the Act withstand constitutional scrutiny.

Issue 4: Did the police officers breach Mr. Ashley's constitutional rights when they searched him, seized his ratchet knife with keys and arrested him?

Claimant's Submissions

- [136] Mr. Clarke argued that Mr. Ashley was subjected to an arbitrary search, violating his constitutional rights under sections 13(3)(a), (f), and (j) of the Charter. He maintained that these breaches were neither necessary nor justifiable in a free and democratic society, relying on affidavit evidence detailing Mr. Ashley's arrest. He submitted that Constable Michael Mannings' evidence does not indicate that there was a reasonable basis upon which the search was effected. Mr. Ashley and the group of men were merely informed that they would be searched for illegal items. Mr. Ashley was subsequently arrested after a ratchet knife was discovered.
- [137] Mr. Clarke contended that Mr. Ashley's right to liberty under section 13(3)(a) was infringed due to his 24-hour detention, ending at 10:00 p.m. on October 20, 2019. He characterized the right to liberty as encompassing life, liberty, and personal security, citing **R v Cunningham**⁴⁴ and **Carter v Canada (Attorney General)**⁴⁵ in support. He further argued that the blanket ban on ratchet knives unjustifiably restricted Mr.

⁴⁴ (1986) CANLII 4678

⁴⁵ [2015] 1 SCCR 331

Ashley's liberty, as there was no evidence that he intended to use the knife unlawfully or posed a societal risk.

[138] Mr. Clarke asserted that Mr. Ashley's right to freedom of movement under section 13(3)(j) was curtailed during his detention, emphasizing that he was charged with a minor offence for which bail could have been granted. He noted that the Defendants had not contested this claim. Mr. Clarke argued that the burden was on the Defendants to justify the breach, yet they had provided no evidence to show that Mr. Ashley's search was lawful or non-arbitrary. He relied on **Gary Hemans v Attorney General**⁴⁶ to support his submission that Mr. Ashley was entitled to constitutional relief.

Defendants' Submissions

[139] Counsel for the Defendants argued that Mr. Ashley's detention and search did not violate his constitutional rights under section 13(3) of the Charter. They contended that his right to liberty and security of the person was not engaged, as he was lawfully detained under the Bail Act after being found with an offensive weapon and released within the statutory timeframe.

[140] Regarding the search, Counsel acknowledged that section 13(3)(j)(i) of the Charter protects against unjustified searches but argued that Constable Michael Mannings' actions were lawful and based on reasonable suspicion. They referenced **Hunter v. Southam Inc.**⁴⁷ to support the view that, although Jamaica's *Charter* does not explicitly mention "unreasonable" searches, an assessment of justification remains relevant.

[141] Counsel relied on a letter confirming that Mr. Ashley's detention was lawful under section 14(1)(f)(i) of the Charter, which allows detention on reasonable suspicion of a criminal offence for the purpose of bringing the individual before a legal authority. Counsel argued that the right to freedom of movement is not absolute and that the

⁴⁶ [2013] JMSC Civ 75

⁴⁷ [1984] 2 SCR 145

police acted within the law under the Offensive Weapons (Prohibition) Act. They maintained that Mr. Ashley failed to prove any infringement of his constitutional rights.

[142] In respect of the seizure of the knife with the keys attached, Counsel submitted that the right to property under section 15(1) of the Charter is not absolute, as property may be lawfully seized when justified. They cited **Rohan Fisher v Assets Recovery Agency & Anor**⁴⁸ to support this argument.

Discussion

Freedom from Arbitrary Search

[143] The right to freedom from arbitrary search is guaranteed under section 13(3)(j) of the Charter which states that every person has the right to protection from search of the person and property. The argument of Mr. Clarke is that the stop and search was arbitrary. The factual matrix which comprises the pleading for this breach of rights is found in the further supplemental affidavit of Mr. Ashley filed on November 19, 2021, and the record of proceedings from the Parish Court.

[144] The evidence relevant to the stop, search and arrest as found in Mr. Ashley's affidavit are reflected as thus –

...

3. *That on the 19 October 2019 at about 9:45 pm, I was randomly approached by police officer Michael Manning who was armed with a service pistol. He demanded that I turned around and give him a search. I refused.*
4. *The Police Officer then forcibly searched me and took a ratchet knife from my work pocket. I advised the knife was for work as I was a fireman. The Police indicated that he will lock me up because he can't (sic) lock me up despite me being a fireman. I was then assaulted and placed in the vehicle. I was driven to the Greater Portmore Police Station where I spent 24 hours in police custody. I was then released on 20 October 2019 at about 10:00 pm.*

...

⁴⁸ [2021] JMFC Full 4

[145] The evidence relevant to the stop, search and arrest as found in record of proceedings are located in the testimony of Constable Michael Mannings and are reflected as thus

—

... I recall October 19, 2019 at about 10 p.m. I was doing patrol duties along with Cpl. Plummer in the Portmore Area known as Gore Tuca in Saint Catherine... we were about to enter Walkway 25 where... I saw of group of men... and announced myself to the men... I shouted to the "Police" and informed them that I would be conducting a search for anything illegal... As I approached to conduct the search, I noticed one of the young men that is standing in the middle kept reaching down for his waist using his right hand... I approached that young man and instructed him to keep his hand away from his waist... He attempted three more times to go for his waist and each time I had to stop him... I then informed him of the dangers of reaching for his waist... I proceeded to search that man... I removed a brown handle ratchet knife from his right front pocket. When I took the knife from his pocket I informed him of the offence of being armed with an offensive weapon. I also cautioned and arrested him and began to escort him to the police service vehicle... Up to this time I had not obtained the person's particulars.

Corporal Plummer gave evidence at the trial and his evidence was very similar to the evidence of Constable Mannings.

[146] There are factual variations as to what happened on that night. Notably, the officers involved in the search were not parties to these proceedings. There are no affidavits filed from either of them. The court must determine from the notes of evidence contained in the record of proceedings, whether the search was arbitrary.

[147] What is an arbitrary search? An arbitrary search refers to a search conducted without lawful basis i.e. without a warrant or without having reasonable cause. It is clear and uncontested that the search was done without a warrant. The court must therefore determine whether the search by the police officers was done without reasonable cause.

[148] It is a well-established principle that in assessing whether a police officer had reasonable cause to conduct a search, the court must examine the officer's subjective state of mind at the material time, specifically whether the requisite suspicion was formed. Crucially, this subjective belief must be grounded in an objective factual basis

which is capable of justifying the suspicion. Even where these requirements are met, the court must be satisfied that the officers exercised their discretion in a manner consistent with the legal principles articulated in **Associated Provincial Picture Houses Ltd v Wednesbury Corporation**⁴⁹, particularly that the decision was not arbitrary, capricious, or irrational.

[149] Regarding the subjective test, the suspicion must be anchored on a rational factual basis formed in the officer's own mind (see: **Glenville Murphy v Attorney General & Ors**⁵⁰). The House of Lords in **O'Hara v Chief Constable of the RUC**⁵¹ underscored that only the information contemporaneously known to the officer is relevant.

[150] The objective test, articulated by Diplock LJ in **Dallison v Caffrey**⁵² requires the court to determine whether a reasonable person, presumed to have knowledge of the law and aware of the same information as the officer, would conclude that there were reasonable grounds for the arrest. The analysis must consider the totality of the circumstances known to the officer, including any information received or personal observations made. Additionally, the Privy Council in **Husein v Chong Fook Kam**⁵³ highlighted the potential necessity for officers to make further inquiries. Failure to ask pertinent questions or gather essential information may undermine the reasonableness of the suspicion.

[151] Although the cited authorities primarily address the legality of arrests, their underlying principles are readily adaptable to the context of reasonable cause to conduct searches. The same legal considerations apply, as both scenarios require a nuanced assessment of whether the officer held a genuine and objectively justifiable suspicion, based on the circumstances known at the time, to justify the intrusion on an individual's rights.

⁴⁹ [1947] 2 All ER 6801

⁵⁰ CLAIM NO. C.L. 1998/M 196 Delivered October 9, 2007

⁵¹ [1997] 1 All ER 129

⁵² [1965] 1 QB 348,

⁵³ [1970] AC 942

- [152] According to Mr. Ashley's account, the search conducted by the police appears to have been entirely arbitrary, devoid of any specific suspicion, let alone one that could objectively satisfy the threshold of reasonable suspicion required to justify such an intrusion.
- [153] In the officers' version of events, Constable Manning's focus on Mr Ashley and decision to single him out for search appears to have been predicated on the fact that he was observed reaching for his waist after being informed by the police that the group of which he was a part would be searched. The Court finds that Mr. Ashley's conduct of repeatedly reaching toward his waist despite clear instructions to desist provided an appropriate basis for the officer's concern.
- [154] While the initial decision to search might have been premature or lacked suspicion, Mr. Ashley's conduct on being informed of same provided sufficient grounds for a search based on a reasonable belief that he may have been concealing something. This development validated the search that followed thereby rendering the subsequent search lawful.
- [155] Although no affidavit has been filed by the police officers involved, the record of proceedings can properly be considered by the Court on this issue. The finding that the record can provide this assistance is one that does not appear to be disputed as Mr. Clarke in his submissions asked the Court to consider the evidence of Mr. Ashley's supervisor as to the popular use of the knife by firefighters in the course of their employment.
- [156] On a careful assessment of the evidence disclosed on the record of proceedings, the Court finds that the officers had formed a reasonable suspicion based on Mr. Ashley's individual actions. Reasonable suspicion once established constitutes a substantive defence to allegations of a breach of constitutional rights. Accordingly, the search would have been lawful and justified in the circumstances. As such, Mr. Ashley's assertion that there had been a breach of this right is without merit.

Right to Protection of Property

[157] The right to protection of property is enshrined in Section 15 of the Charter, which guarantees individuals the peaceful enjoyment of their possessions. However, this right is not absolute and may be limited where necessary for public safety, the prevention of disorder or crime, and other legitimate state interests.

[158] It is uncontested that the ratchet knife was seized, and that Mr. Ashley was charged with the offence of being armed with an offensive weapon. The issue for determination is whether this seizure amounted to an unlawful interference with Mr. Ashley's constitutional right to the protection of property. The statutory framework, including the Offensive Weapons (Prohibition) Act, empowers law enforcement to seize dangerous or unauthorized items found in the possession of individuals. Such actions are justified where they promote public safety and order. The principle of proportionality requires that interference with property rights be lawful, necessary, and not excessive in relation to the threat posed by the possession of the item.

[159] In this matter, it was established that the seized item was classified as an offensive weapon under the relevant statute. Section 3(5) of the Offensive Weapons (Prohibition) Act indicates that a constable shall –

- a. seize any offensive weapon referred to in subsection (2) which is found in the possession of any person in contravention of that subsection;*
- b. seize any other offensive weapon in respect of which he has reasonable cause to believe an offence has been committed under this section,*

and that weapon shall be detained by the constable until such time as any legal proceedings in respect of the offence are finally disposed of.

[160] Under the relevant statutory framework, police officers are duly empowered to seize such items pending the resolution of legal proceedings. The ultimate disposition of the property, whether by forfeiture or return, falls within the purview of judicial determination.

[161] The court therefore finds that the power of the police officers was properly exercised in seizing the ratchet knife. The seizure was conducted in accordance with statutory provisions and was neither arbitrary nor excessive.

[162] The seizure of the keys, which were attached to the knife at the time of confiscation, has been raised by Mr. Ashley for separate consideration. While police officers are entitled to seize items that are reasonably believed to be connected to an offence or necessary for evidentiary purposes, the Court was urged to consider that the mere fact that the keys were physically attached to the knife does not, without more, provide an independent legal basis for their seizure.

[163] It is evident from the record that neither Mr. Ashley nor his Counsel made any formal request to the police or the court for the return of the keys. There is also no indication of any refusal by the authorities to return them. In the absence of any evidence in this regard, the Court is unable to conclude that Mr. Ashley had been willfully deprived of the keys which were attached to the knife. Accordingly, I am unable to find that his constitutional right to property was engaged or infringed in this regard.

Right to Life, Liberty and Security of the Person

[164] Section 13(3)(a) of the Charter guarantees a composite set of rights encompassing life, liberty, and security of the person. While Mr. Clarke acknowledged the collective framing of these rights, he argued that a breach of any single right, or a combination of two, suffices to establish a violation under this provision. This position aligns with established legal principles and requires no extensive judicial inquiry for validation.

[165] The issue before the Court is whether Mr. Ashley has met the requisite evidential burden to demonstrate a breach of his rights under section 13(3)(a) of the Charter. It falls upon Mr. Ashley to establish how his detention, following the discovery of an offensive weapon in his possession in a public place, violated his constitutionally protected rights.

[166] In assessing the scope and application of the right, the Court finds the decision in **Julian Robinson** particularly instructive. That case emphasized the necessity of interpreting constitutional rights purposively and generously, ensuring such rights are not infringed or restricted except in accordance with the law. Additionally, **Kevin Simmonds** affirms that where a right is not engaged, no infringement can arise. Whether a right is engaged hinges on the specific facts of each case.

[167] Given the absence of any suggestion that the right to life is engaged, no determination on that point is required. The Court will therefore confine its analysis to the alleged breaches of the rights to liberty and security of the person.

[168] Mr. Clarke relied on the authorities of **R v Cunningham** and **Carter & Ors v Attorney General (Canada)**, where the courts addressed issues concerning the rights to life, liberty, and security of the person under section 7 of the Canadian Charter, a provision analogous to section 13(3)(a) of the Jamaican Charter. In **R v Cunningham**, Kopstein J had this to say in respect of the rights to liberty and security of the person at pages 229 to 230 –

“[Liberty] within the meaning of s 7 of the Charter may be properly considered by this court as beyond the idea of physical restraint and detention.

Similarly, the s. 7 right to “security of the person”, may protect rights in a different realm than the rights protected by other sections of the Charter. Again, in my view, the right to “security of the person” is an abstract right which may relate, in part at least, to actions of the State that have no relation to legal processes, but which may, none the less, undermine the security of the person. To take a blatant example, the exercise of the freedom of opinion or expression which is disturbing to the government or one of its agencies would be worth little, if upon the expression of an opinion the person expressing himself or herself suddenly found that he or she were the subject of great attention from the police, such as spot checks at every corner, constant observation, persistent questioning, or other forms of harassment.....that kind of harassment would undermine the security of the person..”

[169] In **Carter & Ors v Attorney General (Canada)**, the Canadian Court of Appeal stated its position in relation to the right to liberty and security at paragraph [64] in the following way –

[64] Underlying both of these rights is a concern for the protection of individual autonomy and dignity. Liberty protects “the right to make fundamental personal choices free from State interference: *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, at para. 54. Security of the person encompasses “a notion of personal autonomy involving ... control over one’s bodily integrity free from state interference” (*Rodriguez*, at pp 578 – 88 per Sopinka J., referring to *R v Morgentaler*, [1998] 1 S.C.R. 30) and it is engaged by state interference with an individual’s physical or psychological integrity, including any state action that causes physical or serious psychological suffering (*New Brunswick (Minister of Health and Community Services v. G. (J.))*, [1998] 3 S.C.R. 46, at para. 58; *Blencoe*, at paras. 55 – 57; *Chaoulli*, at para. 43 per Descamps J.; para 119, per McLachlin C.J. and Major J.; and paras. 191 and 200, per Binnie and Lebel JJ.). While liberty and security of the person are distinct interests, for the purpose of this appeal they may be considered together.

[170] It is undisputed that Mr. Ashley was detained for 24 hours. It is also undisputed that the reason for his detention was that he was found in possession of an offensive weapon in a public place. The Court is satisfied that the interpretation of section 13(3)(a) of the Charter must not be undertaken in isolation but rather in harmony with the broader provisions of the Charter. Particular attention must be given to section 14(1), which delineates specific circumstances which would not be deemed as a breach to the right to liberty. Of critical importance is section 14(1)(f), which permits lawful arrest or detention where there is reasonable suspicion of an individual having committed an offence or to prevent the commission of further offences.

[171] Counsel for the Defendants submit that the detention fell within the parameters of Section 14(1). Mr. Clarke however is not of this view. He has submitted that there is no conterminous link between the two sections. He argued that this is not an original argument as it was in fact rejected by the Full Court in **Roshaine Clarke v Attorney General** and deemed unnecessary in **Attorney General & Anor v JAMBAR**⁵⁴.

[172] In **Roshaine Clarke v Attorney General**, the Full Court emphasized that the rights to liberty and freedom of movement are distinct and independently protected under the Charter. It further held that section 14(1) of the Charter exclusively governs limitations

⁵⁴ [2023] UKPC 6

on the right to liberty and cannot be extended to restrict the right to movement (see paras [72] – [76]).

[173] In **Attorney General & Anor v JAMBAR**, the link between sections 13(3)(a) and 14(1) of the Charter was deemed unnecessary because the resolution of the issues before the Privy Council did not hinge on the applicability of section 14(1) of the Charter.

[174] This Court holds that there is an intrinsic connection between sections 13(3)(a) and 14(1) of the Charter, whereby section 14(1) delineates specific circumstances under which the right to liberty may lawfully be restricted. Accordingly, the Court finds that there is merit in the Defendants' submission that the right to liberty guaranteed under section 13(3)(a) would not be triggered if any of the factual conditions contemplated under section 14(1) were present.

[175] In **Blencoe v British Columbia (Human Rights Commission)**⁵⁵, the Canadian Court of Appeal found that the rights to liberty and security of the person had not been engaged. The court opined at pages 309 to 310 –

*“... The liberty interest protected by s. 7 is no longer restricted to mere freedom from physical restraint. **“Liberty” is engaged where state compulsions or prohibitions affect important and fundamental life choices. The s.7 liberty interest protects an individual’s personal autonomy. In our free and democratic society, individuals are entitled to make decisions of fundamental importance free from state interference. Such personal autonomy, however, is not synonymous with unconstrained freedom** ... (emphasis mine)*

The right to security of the person guaranteed by s. 7 protects the psychological integrity of an individual. However, in order for this right to be triggered, the psychological harm must result from the actions of the state and it must be serious ...

First, the s. 7 rights of “liberty and security of the person” do not include a generalized right to dignity, or more specifically a right to be free from the stigma associated with a human rights complaint. While respect for the inherent dignity of persons is clearly an essential value in our free and democratic society which must guide the courts in interpreting the Charter this does not mean that dignity is elevated to a free-standing constitutional right protected by s. 7.... Like dignity, reputation is not a free-standing right. Neither is freedom from stigma. Second, the

⁵⁵ [2000] 2 SCR 307

state has not interfered with the ability of the respondent and his family to make essential life choices. In order for security of the person to be triggered in this case, the impugned state action must have had a serious and profound effect on the respondent's psychological integrity. It is only in exceptional cases where the state interferes in profoundly intimate and personal choices of an individual that state-caused delay in human rights proceedings could trigger the s. 7 security of the person interest. Here, the alleged right to be free from stigma associated with a human rights complaint does not fall within this narrow sphere. The state has not interfered with the respondent's right to make decisions that affect his fundamental being."

[176] The reasoning of the Court in **Blencoe v British Columbia (Human Rights Commission)**, has been adopted and applied in decisions emanating from this jurisdiction. In the case at bar, the argument of Mr. Ashley is that his right to liberty was breached when he was unlawfully arrested by Constable Michael Mannings ("the officer") for being armed with an offensive weapon i.e. the ratchet knife. The evidence in this case discloses that upon the officer finding the ratchet knife in Mr. Ashley's possession he arrested him. The question which then arises is whether the officer was authorised by law to arrest him upon finding the ratchet knife?

[177] Similar to the legal framework governing warrantless searches, an individual may be lawfully arrested without a warrant where reasonable cause exists. The factors relevant to determining whether reasonable cause justifies an arrest mirror those considered when evaluating the legality of a search. It is important to note that section 15 of the Constabulary Force Act grants police officers the authority to arrest without a warrant upon reasonable cause. However, section 5(2) of the Offensive Weapons (Prohibition) Act provides that if, during a search conducted under subsection (1), evidence emerges suggesting that an offence under section 3 has been committed, further enforcement action may be warranted. It states –

"(a) the constable shall seize any offensive weapon found in the course of such search;

(b) the person shall give his true name and address to the constable when requested to do so,

(c) if the person fails to give his name and address the constable may, without a warrant, arrest that person."

(Emphasis added)

[178] It is clear that under the Offensive Weapons (Prohibition) Act, a police officer's authority to arrest a person found in possession of an offensive weapon without a warrant arises when the individual, upon request, fails to provide their particulars. This provision appears to condition the exercise of the arrest power on a specific statutory requirement. However, a pertinent question remains: does this limitation override or otherwise affect the general power conferred on police officers by section 15 of the Constabulary Force Act, which authorizes arrests without a warrant upon reasonable cause? The interplay between these provisions requires careful interpretation to determine whether the broader authority under the Constabulary Force Act continues to operate concurrently with the specific arrest power outlined in the Offensive Weapons (Prohibition) Act.

[179] The Offensive Weapons (Prohibition) Act was enacted to address a specific legislative mischief and establishes its own distinct framework governing the arrest of individuals found in possession of offensive weapons. In addressing the specific mischief, it allows an officer to arrest without warrant where the individual found with the weapon refuses to provide particulars requested. In considering similar submissions in the context of Mr. Ashley's conviction for resisting arrest, the Court of Appeal did not accept the Defendant's position that section 15 of the Constabulary Force Act simultaneously operates with, can override or be substitute for section 5(2) of the Offensive Weapons (Prohibition) Act. The Court found that the Offensive Weapons (Prohibition) Act was enacted to address a specific legislative mischief and establishes its own distinct framework governing the arrest of individuals found in possession of prohibited weapons. Therefore, where any conflict exists between the two statutes, established principles of statutory interpretation dictate that the later enactment generally takes precedence over the earlier one when addressing the same subject matter. Given that the Offensive Weapons (Prohibition) Act postdates the Constabulary Force Act, its provisions must prevail in situations where they overlap or are inconsistent, thereby ensuring that the legislative intent behind the more recent statute is respected and enforced.

[180] Accordingly, Mr. Ashley could only have been arrested without warrant in circumstances where he had refused to provide his name and address. The evidence discloses that neither Mr. Ashley's name nor address were requested before he was arrested. Therefore, the police officers did not have lawful basis to arrest Mr. Ashley. Subsequently, the arrest and detention of Mr. Ashley for 24 hours for being in possession of a prohibited weapon in these circumstances is deemed to be a breach of his rights to liberty and security of person.

Right to Freedom of Movement

[181] The right to freedom of movement is guaranteed under section 13(3)(f) of the Charter. It is Mr. Clarke's argument, that the finding that there was a breach of this right is predicated upon a finding that the right to liberty and security was breached. Furthermore, the facts upon which a breach to this right is premised are the said facts relied on for a breach of Mr. Ashley's right to liberty.

[182] This issue can therefore be dealt with expeditiously. Though, the rights to liberty and freedom of movement are separate and distinct rights, they are often engaged using the same set of factual circumstances. A finding of a breach of liberty will, in many instances, inherently encompass a violation of the right to freedom of movement. This is because the right to liberty broadly encompasses the freedom to navigate and move within a jurisdiction without arbitrary or unjustified restraint.

[183] In Mr. Ashley's case, the police conducted a search and thereafter detained him. Mr. Ashley's detention following the search, lasting around 24 hours, unjustifiably restricted his liberty. In these circumstances, the Court has determined that Mr. Ashley's right to freedom of movement, protected by section 13(3)(f) of the Charter, has been violated.

Issue 5: Is Mr. Ashley Entitled to Constitutional Damages

The Claimant's Submissions

[184] Mr. Clarke submits that as a result of the rights breached, Mr. Ashley's case is an appropriate one for an award of damages. Mr. Clarke argues that a special emphasis must be placed on the need to deter similar breaches in the future. Only a substantial award for vindictory damages for the infringement of the Mr. Ashley's constitutional rights could communicate this message. Reliance was placed on the cases of **Inniss v Attorney General**⁵⁶, **Kurt Mitchell v Attorney General**⁵⁷, **Allie Mohammed v The State**⁵⁸ and **Dale Austin v Attorney General & Ors**⁵⁹.

[185] Mr. Clarke submitted that the purpose of constitutional damages is to give sufficient award to (a) compensate, (b) vindicate the breach of constitutional rights and (c) deter future breaches. He argues that declarations alone are not sufficient. Citing a multiplicity of cases, Mr. Clarke argued that an appropriate award for the breaches to Mr. Ashley's rights is Ten Million Five Hundred Thousand Jamaican Dollars (JM \$10,500,000.00).

[186] Mr. Clarke also relied on **Gary Hemans v The Attorney General of Jamaica**⁶⁰ to indicate that compensatory damages are required in the amount of Four Hundred and Sixty Thousand Jamaican Dollars (JM \$460,000.00).

The Defendants' Submissions

[187] The Defendants submissions on damages is that if rights are found to be breached Mr. Ashley is not entitled to both vindictory and exemplary damages as they serve the same purpose. Counsel relied on the cases of **Attorney General v Ramanoop**⁶¹, **Inniss v Attorney General**, **Merson v Cartwright & Anor**⁶², **Thompson v Commissioner of Police of the Metropolis**; **HSU v Same**⁶³ and **Takitota v Attorney**

⁵⁶ [2008] 73 WIR 187

⁵⁷ [2023] JMSC Civ 110

⁵⁸ [1998] 2 AC 111

⁵⁹ [2020] JMSC Civ 35

⁶⁰ [2023] JMSC Civ 75

⁶¹ [2005] 2 WLR 1324

⁶² [2005] ALL ER (D) 144 Oct

⁶³ [1998] QB 498

General & Ors.⁶⁴ Counsel for the Defendants also indicated that if any damages are to be awarded in this case, it should be nominal in light of the circumstances.

Discussion

[188] In considering Mr. Ashley's request for constitutional damages for the breaches of his fundamental rights, the Court notes that any award would be only for the breach of his rights to liberty and freedom of movement consequent on his unlawful detention by the police for 24 hours.

[189] It is Mr. Ashley's position that both vindictory and compensatory damages should be awarded. Section 19 of the Charter gives an aggrieved person the right to apply to the court for redress and grants the court jurisdiction to make such orders as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of the provisions of this Chapter. This includes an award of damages to enforce the abrogated fundamental rights and freedoms.

Compensatory Damages

[190] On the issue of compensatory damages for the period of detention, useful guidance is provided at paragraph 131 of **Roshaine Clarke v The Attorney General of Jamaica** where the decision of **Maharaj v Attorney-General of Trinidad and Tobago (No 2)** was examined.

[191] In the course of the judgment in **Maharaj v Attorney-General of Trinidad and Tobago (No 2)**, Lord Diplock considered the effect of provisions in the former Trinidad and Tobago constitution which substantially reflects the provisions of section 19 of the Jamaican Constitution and specifically addressed the issue of redress for deprivation of liberty as follows:

"[320] What then was the nature of the 'redress' to which the appellant was entitled? Not being a term of legal art it must be understood as bearing its ordinary meaning, which in the Shorter Oxford Dictionary is given as: 'Reparation of, satisfaction or compensation for, a wrong sustained or the loss

⁶⁴ [2009] UKPC 11

resulting from this'. At the time of the original notice of motion the appellant was still in prison. His right not to be deprived of his liberty except by due process of law was still being contravened; but by the time the case reached the Court of Appeal he had long ago served his seven days and had been released. The contravention was in the past; the only practicable form of redress was monetary compensation. must first address the critical issue of whether the proper parties have been identified and named in these proceedings. It is a well-established principle that where a claimant seeks relief for a constitutional breach, particularly in the form of damages, the claim must be directed against the individuals or entities responsible for the violation.

[321-322] Finally, their Lordships would say something about the measure of monetary compensation recoverable under s 6 where the contravention of the claimant's constitutional rights consists of deprivation of liberty otherwise than by due process of law. The claim is not a claim in private law for damages for the tort of false imprisonment (under which the damages recoverable are at large and would include damages for loss of reputation). It is a claim in public law for compensation for the deprivation of liberty alone. Such compensation would include any loss of earnings consequent on the imprisonment and recompense for the inconvenience and distress suffered by the appellant during his incarceration."

[192] Further guidance on this question is gleaned from the decision in **Merson v Cartwright and Anor** wherein it was held that:

"if a case was one for an award of damages by way of constitutional redress, the nature of the damages awarded might be compensatory but had always to be vindicatory. Accordingly, the damages might, in an appropriate case exceed a purely compensatory amount. The purpose of a vindicatory award was not a punitive purpose or to teach the executive not to misbehave, but to indicate the right of the complainant... to carry on his life... from unjustified executive interference, mistreatment or oppression. The sum appropriate to be awarded to achieve that purpose would depend upon the particular infringement and the circumstances relating to that infringement. It would be a sum at the discretion of the trial judge."

[193] In **Roshaine Clarke v The Attorney General** the Court considered the approach which should be adopted in the calculation of damages to be awarded to that Claimant for his period of detention. The decision of **Patrick Whitely v The Attorney General**⁶⁵ where the court awarded Seventy- Five Thousand Dollars (\$75,000.00) per day was considered. The decision in **Denese Keane-Madden v The Attorney General of Jamaica and Corporal T. Webster**⁶⁶ ("**Denise Keane-Madden**") was also examined

⁶⁵ [2019] JMFC Full 06

⁶⁶ [2014] JMSC Civ. 23

in which damages were awarded for false imprisonment at One Hundred and Eighty Thousand Dollars (\$180,000.00) for six days, i.e., Thirty Thousand Dollars (\$30,000.00) per day. That figure when updated for inflation for the hearing before the Court amounted to Forty- Five Thousand Dollars (\$45,000.00). Although the **Denese Keane-Madden** decision was an assessment of damages for false imprisonment, the Court in the **Roshaine Clarke v The Attorney General** matter found that the award bears closer resemblance to an award for compensation in public law for deprivation of liberty alone.

[194] The decision of **R v Governor of Brockhill Prison, ex p. Evans**⁶⁷, page 1060 paragraphs F-G is also instructive as in that matter , the English Court of Appeal approved the trial judge’s refusal to award an amount for each day but rather to make a global award as compensation for the whole period of detention. Lord Woolf MR said:

“We accept that an award of £2,000 is well below the appropriate figure for 59 extra days of imprisonment. We increase the award to £5,000. This is a global figure. We recognise that it is possible to work out a daily, weekly, or monthly figure from this amount for the approximately two months extra imprisonment of this case but we discourage such an exercise. No two cases are the same. The shorter the period the larger can be the pro rata rate. The longer the period the lower the pro rata rate.”

[195] In **Takitota v. The Attorney General & Ors**, the Privy Council reaffirmed the approach of reducing the level of damages by tapering them when assessing an award for an extended period of unlawful imprisonment.

[196] In this matter, Mr Clarke submitted that Four Hundred and Fifty Thousand Jamaican Dollars (JM \$450,000.00) was an appropriate award for compensatory damages. However, he did not provide comparable cases in respect of the breach of this specific right. Although reference was made to the authority of **Ernest Smith & Co. v AG** that decision, largely turned on the Claimant’s right to a fair hearing within a reasonable time. An award of One Million Five Hundred Thousand Jamaican Dollars (\$1,500,000.00) was made when the CPI was 103.8 in May 2020. Counsel submitted that this sum updates to One Million Nine Hundred and Five Thousand Nine Hundred

⁶⁷ [1999] QB 1043

and Twenty-Seven Jamaican Dollars and Seventy-Eight Cents (JM \$1,905,927.78) using the CPI of October 2022 (126.41).

[197] In the instant claim, Mr. Ashley's unlawful detention was for a period of 24 hours. This situation while unfortunate was for a much shorter period than existed in the foregoing authorities. For this reason, the use of the daily rate is deemed as more appropriate for the purpose of calculating the award for compensatory damages. In the **Patrick Whitely v The Attorney General**, the award for the period of detention was handed down in July 2016 when the CPI was then 88.9. The Court is prepared to adopt this figure as a guide for determining the award that should be made to Mr Ashley. When the figure is adjusted upward to reflect the April 2025 CPI of 141.3, this amounts to One Hundred and Nineteen Thousand Two Hundred and Seven Jamaican Dollars (JM \$119,207.00). The Court therefore makes an award for compensatory damages to Mr. Ashley in this sum.

Constitutional/Vindictory Damages

[198] In addition to the monetary award for compensation for the deprivation of liberty the Court has been asked to consider whether an additional award of damages is appropriate to 'vindicate' Mr Ashley's constitutional rights which were infringed. It is important to note that vindictory damages are largely discretionary and dependant on the particular circumstances of a case.

[199] In the decision of **Attorney General v Ramanoop**, the Board provided guidance on this award as follows:

*"[19] An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. **The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. All these elements have a place in this additional award. 'Redress' in s 14 is apt to encompass such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in***

most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions 'punitive damages' or exemplary damages' are better avoided as descriptions of this type of additional award (Emphasis added).

[200] The decision in **Merson v Cartwright and Anor** is also instructive on this point. It is evident, that any relief to be granted to Mr. Ashley in recognition of the breach of his rights under the Constitution is meant to affirm the rights of the aggrieved individual. Bearing this in mind, the Court must take into consideration the exact nature of the breach and how it came about.

[201] In conducting this exercise, this Court takes into account the following matters in deciding whether an award of vindictory damages ought to be made in respect to the detention of the claimant and, if so, the quantum: (i) the arrest and detention of the accused where the circumstances had not escalated to the point where the legislation allows for this and (ii) the detention lasted for a period of 24 hours.

[202] Having regard to the authorities and the circumstances of this case, the Court is satisfied that the award of compensatory damages meets the justice of the situation and there is no need for an additional award of vindictory damages.

CARR, J

[203] I have read in draft the judgment of Hutchinson Shelly, J, and I agree with her findings. There is nothing that I would wish to add.

WINT-BLAIR J

ORDERS

[204] The following orders are made herein:

1. A declaration that Mr. Ashley's rights to freedom of movement and liberty and security of person was breached when he was unlawfully arrested on October 19, 2019, by members of the Jamaica Constabulary Force.

2. An award in the sum of One Hundred and Nineteen Thousand Two Hundred and Seven Jamaican Dollars (\$119,207.00) is granted to the claimant as compensatory damages.
3. Subject to any contrary written submissions and authorities by the parties filed and exchanged within 14 days of the delivery of this judgment, the Attorney General is ordered to pay the claimant's costs of and incidental to this trial to be agreed or taxed.

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S. Wint-Blair, J

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T. Hutchinson Shelly, J

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T. Carr, J