IN THE SUPREME COURT OF
THE TURKS AND CAICOS ISLANDS

Action No: CL 17/2021

IN THE MATTER OF THE TURKS AND CAICOS ISLANDS CONSTITUTION ORDER 2011

IN THE MATTER OF THE CRIMINAL PROCEEDINGS NO. CR 35/12, 36/12, 37/12, 38/12 40/12 44/12, 18/14

BETWEEN:

(1) MICHAEL EUGENE MISICK,
(2) FLOYD BASIL HALL
(3) McALLISTER EUGENE HANCHELL
(4) JEFFREY CHRISTOVAL HALL
(5) THOMAS CHALMERS MISICK
(6) MELBOURNE ARTHUR WILSON **PLAINTIFFS**

AND

(1) THE ATTORNEY GENERAL OF THE TURKS AND CAICOS ISLANDS
(2) THE DIRECTOR OF PUBLIC PROSECUTIONS **DEFENDANTS**

CORAM: AGYEMANG CJ

MR. ARIEL MISICK QC, WITH MR. SELVYN HAWKINS FOR THE PLAINTIFFS
MR. ANDREW MITCHELL QC, WITH MR. QUINN HAWKINS AND MS. KATE DUNCAN FOR THE DEFENDANTS

HANDED DOWN ON 7TH MAY 2021

JUDGMENT

1. By an originating summons, the plaintiffs herein, (being the defendants in the case of R v. Michael Misick and Ors, save for the fifth defendant Mr. Clayton Greene), have brought suit against the defendants herein seeking these substantive reliefs:

   1. *"a declaration that the continuation of the proceedings in R v. Michael Misick and Ors. in any form or manner contravenes or is likely to contravene the plaintiffs' right to protection of law under section 1(a) of the 2011 Constitution, and their right to a fair trial within a reasonable time under section 6(1) of the Constitution;*
   2. *further and/or alternatively, a declaration that the continuation of the said proceedings in any form or manner contravenes or is likely to contravene the preambular and/or unwritten constitutional principle of the rule of law;*
   3. *an order dismissing the proceedings…"*

The Background facts

2. The matters that have given rise to the present application (referred to alternately, as the constitutional motion), are that the plaintiffs herein, all defendants in the criminal case of *R v Michael Misick and Ors.*, have for some years (ten years in the case of the second and seventh defendants and seven years for the first plaintiff), been charged for various crimes under the broad umbrella of 'corruption'.

3. They have since the 1st of March 2021, found themselves in some difficulty, following the decision of the second defendant to continue with the criminal prosecution against them (as well as Mr. Clayton Greene), despite the fact that the trial of the charges against them - which for most has taken nine years of their lives, has come to an end with the tragic death of the trial judge Harrison J. The continued prosecution which has been announced, has been followed by the filing and service of a new information by the second defendant, in which some of the charges have been "streamlined".

4. In the present constitutional motion, the plaintiffs complain that the trial of the charges against them has suffered inordinate delay, and that the continuation of prosecution will be unfair, and an infringement of rights guaranteed to them as persons charged with crimes, under the Turks and Caicos Islands Constitution Order 2011; more particularly, section 1(a) which guarantees them the protection of the law, and 6(1) which guarantees them a fair trial within a reasonable time.

5. The matters antecedent to the bringing of the application, are set out in the affidavit of Jahmal Misick (JM) the local instructed counsel for the first, fourth and fifth plaintiffs (first, fourth and sixth defendants in the criminal case).

6. The deponent's assertion, that the information contained in his affidavit was provided on behalf of all the plaintiffs, has been challenged by the defendants who have also produced their chronology of events. This alternative set of facts did not actually dispute the facts set out by JM, but expanded upon them, and on occasion, supplied missing information. I will therefore rely on both

the affidavits of Mr. Jahmal Misick (JM) and the version of events as recounted by Mrs. Khalila Astwood-Tatem (KAT) in my narration of the antecedent matters.

7. It all started when in 2009, a Special Prosecutor was appointed to investigate identified allegations of corruption. The appointment was made after a Commission of Inquiry chaired by Sir Robin Auld, looked into allegations of corruption against members of the House of Assembly in the six-year period of 2003-2009. The first plaintiff who was Premier, resigned from his position, and the investigation referred to as the Special Investigation and Prosecutorial Team (SIPT) commenced. The plaintiffs were said to have been included in the targets of that investigation which took place between 2009 and 2011, and that by 2011, it was allegedly publicly known that they would be facing prosecution. In that year, and in connection with impending proceedings, a restraint order was placed on the assets of the first plaintiff; the second and seventh defendants were charged with various offences. In the following year: 2012, the third to sixth plaintiff were all charged with various offences before Harrison J, a retired Jamaican Judge, who was appointed for a period of two years (which was extended over the life of the case) and made solely responsible for the criminal proceedings. The defendants in those proceedings pleaded not guilty, and the case went through the processes of sufficiency and pretrial readiness. In the pre-trial review that took place on 16th of September 2013, a time estimate of three to five months for the trial which was scheduled to commence on 7th July 2014, was provided by the Crown. Unfortunately, the trial did not commence then. In 2014, the first plaintiff who was returned to the country after extradition proceedings, was also charged with some offences and joined on the Information with the other co-accused.

8. The trial never did commence that year; it did in the last month of the year following. This was because a number of intervening applications were made. These included applications for judicial review of: legal aid rates for defence counsel, the Governor's extension of Harrison J's contract, among others. Constitutional motions were also brought by the defendants challenging various pertinent matters, and appeals on the decisions all the way to the Privy Council.

9. The trial was scheduled to commence on 7th December 2015 and was said to have commenced that day, although no evidence was called, the court having had to hear a number of applications: an extradition Speciality argument on behalf of the first defendant therein (first plaintiff); written submissions on abuse of process (adequate time and facilities) referencing unmanageability, and an application for a six-month adjournment. All of them were dismissed.

10. Finally, on 18th January 2016, the Prosecution opened its case.

11. The trial proceeded on choppy waters with further defence counsel applications. Some of these were: an application by the first plaintiff in February 2016 for a mistrial to be declared; an application for a stay of proceedings by the fifth plaintiff, a proposal by the second plaintiff to commence contempt of court proceedings against a newspaper reporting matters pertaining to the trial.

12. There were also a number of adjournments, no less than sixteen times after this, for a variety of reasons, including Christmas, Easter, Summer and "Hurricane" (three-week October) Breaks. Other adjournments were to

accommodate the court, defence counsel, and the Prosecution. These characterized the conduct of the trial until the Prosecution closed its case finally on 20th September 2018.

13. No-case submission filings, followed by oral submissions, took up some space until following a ruling on 29th July 2019. The first defendant, scheduled to open his defence, announced that he would not be calling evidence. The second defendant completed his evidence in chief and was undergoing cross-examination when in March 2020, the trial was adjourned due to the Covid-19 pandemic. Shortly after this, Regulations issued by the Governor (including regulation 4(6) which clothed a judge with jurisdiction to sit outside the islands to conduct cases), were challenged in a constitutional motion. An appeal was lodged against the decision at first instance to the Court of Appeal, followed by a further appeal to the Privy Council. Following the judgment of the Court of Appeal permitting a judge to sit outside the islands, applications were made by defence counsel regarding in-person hearing in the islands. The application was refused, and the trial resumed. There were a series of adjournments once again including an adjournment for the court administration to make logistical arrangements to accommodate the new mode of trial. The trial resumed, and the fourth defendant who had sought for, and was given a Goodyear indication of sentence, changed her plea from Not Guilty to Guilty and was sentenced. The trial resumed on the 28th of January 2021 and was adjourned to 15th February to accommodate a request from one defence counsel.

14. Before the next adjourned date, on 7th February 2021, the trial judge: Harrison J, died.

15. It is important to note that of the one thousand, eight hundred and seventy-nine (1,879) days that had elapsed from December 2015 (the scheduled commencement date), and the 28th of January 2021 (the last sitting date), only five hundred and twelve (512) days were utilised as sitting days. As aforesaid, this was preceded by the charges which for the second to sixth plaintiffs were preferred against them in 2011 and 2012, and for the first plaintiff, 2014.

16. Following his death, the court convened on 15th of February 2021 for directions. The second defendant herein was ordered to indicate his pleasure: whether he would continue with prosecution. On the 1st of March, the second defendant, through lead counsel for the Prosecution, informed the court that prosecution would continue. The next day, the Prosecution filed a new Information and applied that the new trial in respect of which Information had been filed, be conducted without a jury. Finally, an amended Information was filed on 3rd of March 2021.

17. This is what has brought on the present application (constitutional motion) by which it is submitted that it will not be fair to try the plaintiffs by reason of the delay which the plaintiffs urge this court to find to be unreasonable. The plaintiffs aver that the unreasonable delay constitutes a violation of the right of an accused person to a fair trial within a reasonable time, enshrined in section 6(1) of the Constitution Order 2011 of the Turks & Caicos Islands (the Constitution).

The Strike Out Application

18. The defendants have objected *in limine* to the constitutional motion and seek their own relief which is *inter alia*, that the first two paragraphs of the

constitutional motion be struck out in accordance with ***Ord. 18 r. 19(1) of the Rules of the Supreme Court 2000 (RSC 2000)*** for abuse of process, in that it is a collateral attack on the existing proceedings of *R v. Michael Misick and Ors*. The defendants also contend that adequate means of redress are available to the plaintiffs in the ordinary trial process. They further seek that paragraph 2 be struck out under the same provisions of the RSC 2000 for being incurably bad, and unknown to the law in the Turks & Caicos Islands.

19. It will be expedient to set the arguments in the order in which they were presented. This is because uncharacteristically, the plaintiffs who were apprised of the defendants' objections, addressed them in their skeleton arguments before the defendants had a chance to set out their arguments at length.

Plaintiffs' Arguments

20. The plaintiffs addressed two limbs of objection, the first of which was apparently abandoned by learned counsel for the defendants in argument. I will therefore simply set out the matters in contention between the parties.

21. The plaintiffs deny that the present originating summons that seeks redress under the Constitution, is an abuse of process. They contend most forcefully, that the availability of redress in the trial process - an abuse of process application - is not an effective alternative to a constitutional claim for violation of a right to a fair hearing within a reasonable time.

22. It is argued for the plaintiffs that despite the existence of section 21(2) of the Constitution which appears to bar constitutional challenges where adequate

remedies exist, the instant case is properly before this court. In this regard, the plaintiffs submit that there is a weight of authority approving the bringing of a constitutional motion before a trial (or retrial) commences. The reason for this is, that in a complaint that there has been a breach of a defendant's constitutional right to a fair trial within a reasonable time, a successful constitutional motion will put an end to impending proceedings. For this reason, they submit that it is more expedient for a constitutional motion to be brought before trial, than for the complaining defendant to be put through the expense and inconvenience of preparing for the new trial before having the opportunity to raise his objection to the trial.

23. Relying on dicta of celebrated jurists *in Herbert Bell v Director of Public Prosecutions and Another [1985] AC 937* per Templeman LJ at 947; *Gibson v The Attorney General [2010] CCJ 3 (AJ); (2010) 76 WIR 137* per Saunders J at pp 34, 49; *Urban St. Brice v The Attorney General of St. Lucia [2016] ECCJ (Unreported) SLUHCV AP2012/0027*, per Webster JA at 27, they contend that in this case as in the said cases, a constitutional motion brought before the trial would serve the ends of justice, for after a delay of about a decade (seven years for the first plaintiff), a new trial, having regard to the delay in the just-ended trial before Harrison J, would amount to a breach of section 6(1) of the 2011 Constitution, and that the parties ought not to be made to wait for the trial to commence, or be made to prepare for a trial that could be dismissed should the plaintiffs succeed in their plaint.

24. Nor, they contend, should the plaintiffs be directed to bring their complaints in an abuse of process application. The plaintiffs contend that an abuse of process application is not a true or adequate alternative to this constitutional

motion for a number of reasons including, that the requirements for the two processes, and the remedies available are different. In expatiation on the difference, they allege that while abuse of process involves bad faith, unlawful action, manipulation, or breach of a prosecutor's professional duties, one only need to demonstrate that there has been an unreasonable delay (and even that, without needing to show prejudice), for a finding that the right has been contravened. In other words, that the threshold of proof is higher in an abuse application than in a constitutional motion.

25. Furthermore, the power to stay proceedings because of abuse of process will be exercised where it will be impossible to give a defendant a fair trial and a stay is necessary to protect the integrity of the criminal justice system. The only remedy is to stay the proceedings. On the other hand, where the constitutional right is found to have been contravened, proceedings will be dismissed or permanently stayed if a fair trial can no longer take place, or it would otherwise be unfair to try the defendant. There would in that circumstance be simply a balancing of the protection of the fundamental rights of a defendant with the public interest in bringing offenders to justice, see: *Attorney General Ref. No 2 of 2001 [2004] 2 AC 72 at para 24.*

26. It was further argued that there is no separate cause of action, as provided under section 21 of the Constitution for constitutional redress; in a constitutional motion, at a minimum, the plaintiffs would be entitled to a declaration that their rights were infringed, even if the criminal proceedings were not stayed, nor dismissed. see: *Attorney General Ref. No.2 of 2001 [2004] 2 AC 72.* Further, relying on the intimation of the Privy Council in *Boolell v The State (Mauritius) [2006] UKPC 46,* the plaintiffs urge that short

of outright dismissal, a declaration of infringement of their rights, may have consequences for the future conduct of the proceedings, including any punishment if they were to be convicted.

Defendants' Arguments

27. The defendants maintain that none of the arguments canvassed by the plaintiffs are tenable. They provide a number of reasons for seeking a striking out of the originating summons for being a collateral attack on existing proceedings as well as frivolous, vexatious, and an abuse of the process of the court. These reasons include the immediacy of the criminal proceedings in which similar redress is sought by the very same plaintiffs.

28. They explain that there are at present, two applications before the court: this constitutional motion, and an application to stay proceedings for abuse of the process of the court. The two, they say, seek the same thing, being the termination of the proceedings. The said termination may be achieved through dismissal as is sought herein, or the permanent stay thereof, as is sought in the proceedings per the filing of an abuse of process application. Thus, it is their contention that not only is the redress afforded by an abuse of process application adequate, but it is in fact the same in effect as what is sought in this constitutional motion. To drive home their point, the defendants cite *Clarke (Stafford) v Attorney General of the Bahamas [1992] 45 WIR 1,* in which Clarke, convicted of murder and sentenced to death, invoked the jurisdiction of the Supreme Court for constitutional relief when his appeal was dismissed by the Court of Appeal. The court held that the language of the Constitution of The Bahamas which provides that "*the Supreme Court shall not exercise its powers under this paragraph if it is satisfied that adequate*

means of redress are or have been available to the person concerned under any other law" (which is on all fours with section 21(2) of the TCI Constitution), meant that redress had to be sought in the proceedings, not through resort to a constitutional motion. The defendants cite a line of authority that followed this line of reasoning: *Scantlebury v Attorney General of Barbados [2009] 76 WIR 86; Jaroo v A-G of Trinidad and Tobago [2002] 1 AC 871; Berry v Director of Public Prosecutions and Another [1995] 48 W.I.R 193; In Harrikissoon v Attorney General of Trinidad and Tobago [1980] AC 265.*

29. The defendants contend that this is the situation in which this court which is otherwise vested with jurisdiction to hear complaints on infringements of fundamental rights, under section ***21(1) of the Turks &Caicos Islands Constitution Order 2011,*** is barred by ***21(2)*** thereof from entertaining the constitutional motion once the court is satisfied that an alternative remedy that provides adequate means of redress is available. In the instant matter, the argument is strengthened by the fact that the two processes are within the same timeframe; thus the issuing of a constitutional motion adds nothing to the rights available to the defendants in the criminal proceedings.

30. The defendants contend also, that arguments on fair trial within a reasonable time cannot be advanced twice (double-headed challenge), which is what the plaintiffs will be doing if this constitutional motion is allowed to proceed having regard to the abuse of process application filed by the plaintiffs as defendants in the criminal proceedings, in the face of section 21(2) of the 2011 Constitution.

31. Delay is another factor to be considered by this court, the defendants urge. They submit that a successful constitutional motion may result in an appeal by the first defendant, an unsuccessful one by the plaintiffs and this right of Appeal goes all the way to the Privy Council. On the other hand, the determination of the abuse of process application in favour of the defendants would end the matter, the second defendant having no right of appeal. These matters must be considered by the court whose jurisdiction to dismiss the criminal proceedings is being invoked.

32. Upon reading the originating summons filed by the plaintiffs, the affidavit filed in support of the summons, the affidavit of Khalila Astwood-Tatem, the strike-out application brought by the defendants and the submissions of both sides, and having heard counsel on both sides, I set out the sole issue for determination by this court:

SOLE ISSUE FOR DETERMINATION

33. Whether or not the originating summons seeking constitutional relief (referred to as the constitutional motion) is frivolous, vexatious, and must be struck out as amounting to an abuse of the process of this court in accordance with *Ord. 18 r 19(1) of the RSC 2000.*

34. To consider this sole issue, I set out the relevant provisions of the ***Rules of the Supreme Court 2000*** (RSC 2000) and the ***Turks and Caicos Islands Constitution Order 2011*** (the Constitution):
Ord. 18 r. 19(1) (b) and (d) and O. 18 r. 19(3) provide:

"19. (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that-

(a) it discloses no reasonable cause of action or defence, as the case may be; or

(b) it is scandalous, frivolous or vexatious; or

(d) it is otherwise an abuse of the process of the court;

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(3) This rule shall, so far as applicable, apply to an originating summons… as if the summons…were a pleading."

Sections 1(a), 6(1), 21(1) and 21(2) of the Constitution *provide:*

1(a): *"1. Whereas every person in the Islands is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, without distinction of any kind, such as race, national or social origin, political or other opinion, colour, religion, language, creed, association with a national minority, property, sex, sexual orientation, birth or other status, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely—*

(a)life, liberty, security of the person and the protection of the law…"

6(1): *"If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law."*

21(1) and ***(2)***: "*(1) If any person alleges that any of the foregoing provisions of this Part has been, is being or is likely to be contravened in relation to him or her, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.*

(2) The Supreme Court shall have original jurisdiction—
(a)to hear and determine any application made by any person in pursuance of subsection (1); 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 foregoing provisions of this Part to the protection of which the person concerned is entitled; ***but the Supreme Court shall not exercise its powers under this subsection*** *if it is* ***satisfied that adequate means of redress*** *are or have been available to the person concerned under any other law." (my emphases)*

35. A number of sub-issues arise out of the main issue, and I will commence with the first, which is a matter regarding the procedure used in bringing this motion for constitutional relief.

An Originating Summons:

36. In their skeleton arguments and in the oral submission of learned counsel for the defendants, it is contended that procedurally, this application is improper due to the existence of disputes of fact which may not be resolved in a proceeding brought by an originating summons. The defendants invite the court to find that the facts upon which the application is grounded being the

"facts" set out in the first affidavit of Jahmal Misick (JM), are disputed by the defendants who have supplied another set of "facts" in an affidavit sworn to by Khalila Astwood -Tatem (KAT). They insist that their set of "facts" represent the true facts upon which any determination by this court must be based. Indeed, in KAT's affidavit, there were a number of times, she asserted that JM's affidavit did not provide a true chronology of the matters as it was allegedly skewed to minimise the role of the plaintiffs and their counsel, while maximising the role of the defendants. There was no response to this challenge by the plaintiffs. But despite the fact that the said challenge of procedure based on alleged facts in issue, was not relied on with any degree of seriousness by the defendants who raised it, I intend to address it as a preliminary matter:

Ord. 5 r. 4(2) of the RSC 2000 reads:

"Proceedings-

(a) in which sole or principal question at issue is, or is likely to be, one of the construction of an Ordinance or of any instrument made under an Ordinance, or of any deed; will, contract or other document, or some other question of law, or

(b) in which there is unlikely to be any substantial dispute of fact, are appropriate to be begun by originating summons".

37. Noting that the operative word in sub-rule (b) is "substantial", I examined the matters set out in the affidavits of both JM and KAT and found that while there were recognizable differences, there was no real dispute regarding the veracity of the matters narrated by JM, although there were challenges regarding accuracy and fulness. What KAT did was to provide a fuller account (sometimes with reasons for the happenings), such as events relating to the

appointment of the trial judge Harrison J, the extradition of the first plaintiff, pretrial judicial review applications by the plaintiffs relating to legal aid, various appeals upon the judgments of the Supreme Court and the Court of Appeal. On occasion she filled in missing gaps in the evidence including in-trial objections and constitutional motions, and sometimes, provided the reason for adjournments. At other times, she included matters that exposed the attitude of defence counsel, such as their alleged refusal to abide by the court's directive to admit certain facts, and one counsel's emphatic assertion that he had instructions not to assist the court. While these matters were important fill-ins, they did not dispute the facts set out by JM thus requiring findings of fact to be made by this court. That is the circumstance under which an originating summons would not be the appropriate process. Even then, Ord. 28 r. 4(3) or 28 r. 8 would come into play for the proceedings to be continued either on oral evidence, or as if begun by writ for the purpose. But it was not so in this case. In recognition of this, I set out the affidavit of JM and also set out the information provided by KAT to provide a fuller picture and her version of events. In my judgment, the disputes of fact even if the differences in narration could be so called, were not substantial.

38. The originating summons was therefore not an improper procedure to use to seek constitutional relief.

The Jurisdictional Bar:

39. It has been contended by the defendants that section *21(2) of the Constitution* operates as a jurisdictional bar to the entertaining of this application for constitutional relief, because there exist other remedies such as is being

explored by the bringing of an abuse of process application by all of the defendants in the criminal proceedings (including all the present plaintiffs).

40. The plaintiffs argue that section 21(2) should not operate to bar the hearing and determination of this constitutional motion because there is no adequate remedy. They aver that an application to stay the proceedings for abuse of process is not a true alternative to the constitutional relief sought by the originating summons for adequacy of remedy. They rely on the dictum of Charles J in ***Missouri Bain Thompson v The Commissioner of Police 2015/PUB/con/00015 at [24-25***] where he stated: *"'"The mere existence of an alternative remedy does not automatically prevent constitutional proceedings….The crux is its adequacy. The power to decline jurisdiction arises only where the alternative means of redress is inadequate"*. In this regard, they contend that whereas common law principles must be applied to determine the unfairness of proceeding with a trial, before an applicant can secure a stay of proceedings for abuse of process, a plaintiff in a constitutional motion, is only required to demonstrate that there has been inordinate delay, and without having to show prejudice at that. Further, that even where an applicant could not get a dismissal of the proceedings, he could secure a declaration that his right had been violated.

41. In my judgment, *Missouri*, as well as ***Herbert Bell v Director of Public Prosecutions and Another*** *[1985] AC 937*, ***Gibson v The Attorney General of Barbados*** *[2010] CCJ 3 (AJ); (2010) 76 WIR 137),* ***Urban St Brice v The Attorney General of St. Lucia*** *[2016] ECCJ (Unreported) SLUHCV AP2012/0027 [at 27]* and so many others like them, must be distinguished from the instant case for these reasons: The plaintiffs' originating summons

seeks relief for the alleged infringement of the right of the plaintiffs to be tried for a criminal offence within a reasonable time, provided under section 6(1) of the Constitution. They complain that the trial of R v. Michael Misick in which they are the defendants, has suffered inordinate delay, for which reason, a recommencement of the trial as announced by the second defendant, will infringe the rights of the plaintiffs to a fair trial. They seek a declaration that their right to a fair trial has been infringed, in consequence of which they seek a dismissal of the new trial.

42. That the plaintiffs are entitled to relief under the said constitutional provision where the court is persuaded that the said provision (section 6(1) has been breached, is without question. I could not agree more with Mr. Ariel Misick QC's most forceful submission that in elevating the right to a trial within a reasonable time to a constitutional provision, the people of Turks & Caicos had expressed the importance of the said right. Indeed, that is true of all the rights and protections contained in Part 1 of the Constitution which safeguard fundamental rights and freedoms. Section 21(1) has been provided as the machinery to enforce the said rights for it vests a cause of action in any individual whose rights have been violated or threatened; it also clothes this court with the jurisdiction to grant relief. However, section 21(2) places a fetter on the use of section 21(1). A jurisdictional bar is placed on this court where it is satisfied that there is adequate remedy under any law outside the Constitution to which the plaintiffs have access. Thus, the discretion exercisable by this court is only with respect to determining the existence of an adequate remedy under any other law. Upon such determination, the court, where it finds an adequate remedy in the trial process, ceases to have

discretion in the matter, it must deny constitutional relief and direct the suppliant to seek redress accordingly.

43. It is not, as learned counsel for the plaintiffs canvasses, because a plaintiff's rights which may be found to have been violated will not deserve the protection of the law that the court may decline jurisdiction, but that there exist other remedies, which may even be short of what the Constitution provides, provided they be adequate. Thus, it matters not that a successful constitutional motion may yield a declaration of rights violation. That its goal is to secure a dismissal of the proceedings, which effectively, the abuse of process application may also secure through a permanent stay, is what makes the abuse of process application which is available to the plaintiffs, as effective as the constitutional motion, and therefore provides adequate means of redress. That there exists an effectual remedy outside the enforcement of constitutional rights, is acknowledged by the plaintiffs who have brought an application to stay proceedings as an abuse of process in the criminal proceedings.

44. The history of this case distinguishes it from the cases which the plaintiffs rely on to make the case that a constitutional motion is appropriate because the trial is yet to begin. More particularly, the plaintiffs rely on dicta of celebrated judges in such seminal judgments as Templeman LJ in ***Bell*** (supra) <u>*at 947 [G]:*</u> *"If the constitutional rights of the applicant had been infringed by failing to try him within a reasonable time, he should not be obliged to prepare for a re-trial which must necessarily be convened to take place after an unreasonable time.";*

Saunders J in ***Gibson*** *(supra): "Since the Constitution permits him to complain of threatened infringement of his fundamental rights he was not obliged to wait to make this allegation at the trial. In a case like this the complaint should ideally be made as early as possible by way of constitutional application brought in a timely manner.";*

and Herbert JA in ***Urban St. Brice*** *(supra):*

"…where there is an alleged breach of a specific provision of the Constitution, for example, the right to a fair hearing within a reasonable time in section 8(1) of the Constitution of Saint Lucia and its equivalent in Barbados and Jamaica, the courts will be more inclined to allow a constitutional motion to proceed because the applicant should not have to prepare for a trial, or retrial, that will take place after an unreasonable delay…"

45. It is manifest that in all these cases, what prompted the insightful dicta was the fact that the court was told in persuasive arguments, that there was no need for the plaintiffs to seek constitutional relief, as there was adequate remedy in the trial process. With regard to the case of *Gibson* relied on by the plaintiffs, it must be noted that the Constitution of Trinidad and Tobago has no similar jurisdictional bar to entertaining parallel proceedings. With regard to the other cases relied on, the reasoning was that a defendant who chose the constitutional route to prevent a trial or retrial, should not be barred from doing so, for, as Templeman LJ put it: *"he should not be obliged to prepare for a re-trial which must necessarily be convened to take place after an unreasonable time".*

46. That is not the situation in the present case. I am grateful to JM for including in his chronology of events in his affidavit, the court sitting of 1st March 2021, coram: Agyemang CJ, in which the second defendant indicated that he wished to continue with prosecution. On that day, the Crown was ordered to file a new information by the next day 2nd March 2021. The Crown gave an indication that it wished to file an application for the court to consider a judge alone trial. It was following these, that learned counsel for the first defendant informed the court that he might wish to file a constitutional motion. Learned counsel for the third defendant also intimated that he might wish to bring an application to stay proceedings for abuse of process. The court in consequence gave directions that day, which were amended in the formal order of 2nd March 2021.

47. I reproduce the relevant part of the order:

"…4. New Informations to be filed and served by the Crown by 10 am Tuesday 2 March, 2021.

5. The Crown shall file and serve a Witness list by Tuesday 9 March, 2021.

6. The Crown shall file its application for trial without a jury, which must include time estimate for new trial, by 10 am on Tuesday 2 March, 2021.

7. The Crown shall file its submissions in respect of the application for trial without a jury by 10:00 am on Thursday 4 March, 2021.

8. The Defence shall file its response to the application for trial without a jury by 10:00am on Friday 12 March, 2021.

9. Any Defence application on abuse of process and/or any constitutional motion to be filed and served, together with skeleton arguments, by Wednesday 17 March, 2021.

10. The Crown shall file its submissions in reply to any application, which may be filed by the Defence on 17 March 2021, by Tuesday 23 March, 2021.
11. Thursday 25 March, 2021 is reserved for the hearing of the applications that are filed by the Defence"

48. On the 25th of March 2021 when the constitutional motion was argued, the application to stay proceedings for abuse of process had been filed. It is interesting that in the applications to stay proceedings for abuse filed by the first defendant as well as the second to seventh defendants therein, similar language indicated that the said application was without prejudice to the constitutional motion filed.

49. In the calendar of the court, which was communicated to parties and counsel, the court intended to hear the arguments on the constitutional motion and to follow it up (once completed), with a hearing on the application to stay the proceedings for abuse of process the day after the said arguments. It is evident then, that at the time the constitutional motion was argued, the abuse of process motion had been filed, and hearing thereof was scheduled right afterwards. The abuse of process application was therefore very much live. Thus, not only was it apparent, that the Crown was trial-ready, and that the new trial was imminent with the Information, as well as an application to have the matter determined without a jury filed, but that an application for alternative relief: for a stay of proceedings for abuse of process had been filed by the same plaintiffs, and was to be determined.

50. These circumstances distinguish the present application from the cases in which the learned judges were persuaded that a new trial would come after

some further delay and that there was no reason why the plaintiffs who had sought constitutional relief should not be spared the inconvenience and frustration of waiting for the trial to be convened (and for which they would have to prepare themselves), in order to raise the issue of an abuse of process.

51. Secondly, this application was pursued when an abuse of process application had been brought by the very plaintiffs who sought a stay of proceedings. What prejudice would the plaintiffs have suffered if they had decided, in view of the double process seeking similar relief, to abandon the constitutional motion having regard to section 21(2) of the Constitution, in order to pursue the application within the trial process? The constitutional motion sought a declaration that the plaintiffs' right to a fair trial within a reasonable time had been violated. They sought the consequential relief of the dismissal of the proceedings. The application for a stay of proceedings which it must be emphasised, is an application within the trial process, sought for a stay of proceedings which more often than not, terminates the proceedings.

52. Was the redress available in the latter process not adequate, when it in fact mirrored in effect what was sought in the constitutional motion? The plaintiffs said it was not, because at the very least, a constitutional motion would yield a declaration if the court was not minded to dismiss the proceedings, and that such declaration may be useful to them later in the trial. Thus, on they trudged, holding aloft the banner of section 6(1), unhelped by the very section 21 which vested a cause of action for infractions, doggedly insisting that they ought to be heard, if for nothing, because they could end up with a declaration which an abuse of process application would not entitle them to. It mattered not to the plaintiffs that the relief of dismissal of the criminal proceedings, which

was the redress they sought for the alleged violation of their right to a trial within a reasonable time, was effectively the same as the relief sought in the stay of proceedings for abuse of process. It mattered not to them either, that the facts on which they relied, and the arguments on delay they marshalled, were identical to those canvassed by the same defendants in the abuse of process application; or that the abuse of process, filed within the process, was scheduled to be heard by order of the court, right after their constitutional motion, if they insisted on proceeding with it.

53. As aforesaid, the plaintiffs, alleging that the application for stay for abuse of process was not a true alternative to constitutional relief, rely on Charles J's dictum in *Missouri* to submit that it was not enough that there existed an alternative remedy to what the plaintiffs seek, but that it must be adequate.

54. Of that effort I must enquire: is a stay of proceedings which at common law more often than not puts an end to the proceedings, not adequate if held on the balance against the dismissal of the proceedings of the criminal proceedings sought by the constitutional motion?

55. It is interesting that it was contended for the plaintiffs, not that a declaration of infringement of their right was sought for some other consequential relief besides the dismissal of the proceedings, but that it may count towards the future conduct of the proceedings, including any punishment if they were to be convicted. In support of this argument, they cited *Boolell v The State (Mauritius) [2006] UKPC 46*.

56. It is worthy of note that in *Boolell*, while the ground before the Privy Council was the alleged infringement of the appellant's right to a fair trial within a

reasonable time, it was redress sought within the appellate process, not as in the instant one, a constitutional motion brought at the same time as an abuse of process application under a Constitution that contains the jurisdictional bar of section 21(2).

57. The plaintiffs also submit that the matters requiring proof in an abuse of process application, such as: bad faith, unlawful action, manipulation, or breach of a prosecutor's professional duties, are not required for access of constitutional relief, as the only matter to be demonstrated is that the trial has suffered inordinate delay. Thus, they suggest that the threshold for seeking constitutional relief is higher than a stay for abuse of process. The unfortunate assertion has been rightly discredited by the defendants.

58. Indeed, the intimation that the standard of proof of a constitutional breach for which criminal proceedings may be dismissed, is that much lower than a demonstration at common law that the course of a prosecution is so abusive of the court's process that it ought not to be allowed to proceed, is a regrettable, artificial argument.

59. But the two relevant questions are: Is there an alternative remedy? Is that alternative an adequate means of redress? This is because section 21(2) is clear on the circumstances under which the court is barred from entertaining an application alleging a violation or threatened violation of fundamental rights.

60. In the face of section 21(2), the plaintiffs assumed the burden of persuading the court that the abuse of process - which they had resorted to in the trial process - was not a true alternative as it did not offer adequate means of redress which was, to quote Charles J in *Missouri*, "…the crux" of the matter.

61. The plaintiffs failed to discharge that burden. Clearly, not being able to find an explanation for proceeding with the constitutional motion in the face of section 21(2), they were left with what they waved before the court: the possibility of securing the lesser remedy of a declaration which may be helpful to them at trial, including a reduction in sentence.

62. While this argument may have held some merit in another circumstance, it did not in the present one, simply because the plaintiffs had also filed the abuse of process application, which sought redress within the trial process.

63. I have no difficulty in holding that in the present situation, there is an alternative means of redress, and it is an application to stay proceedings, brought within the criminal process, to which the plaintiffs have already helped themselves.

64. That the said process is adequate is beyond question, for its success will mean a termination of the proceedings which the plaintiffs seek herein.

65. The relevant portion of section 21(2) of the Constitution reads: *"…but the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress* ***are or have been available to the person*** *concerned under any other law."* (my emphasis)

66. Having regard to all the circumstances of this case, I am satisfied that the application to stay proceedings for abuse of process which, if granted will have the effect of a dismissal of the criminal proceedings, provides a means of adequate redress; that it is available to the plaintiffs is demonstrated by the

fact that the plaintiffs have already resorted to it, and await determination of that application.

67. The defendants have rightly described the bringing of both applications as a double headed challenge, and I will add, that perhaps the plaintiffs aim to "hedge their bets" by pursuing similar relief, upon the same facts, using two different routes.

68. In the ordinary course of things, the court should not countenance this; but section 21(2) actually bars this court from entertaining the constitutional motion where an alternative remedy (which exists and is adequate), is available to the plaintiffs and has in fact been pursued by them.

69. Ought this court, having held that there exists adequate alternative relief for the plaintiffs to decline jurisdiction? Most certainly, for a literal reading of section 21(2) of the Constitution commands it.

70. But should this originating summons be struck out under Ord. 18 r. 19(1) (d)? No doubt, a case for a striking out may be made on the matters already discussed: that this constitutional motion was pursued in the same time frame as the abuse of process application which seeks similar remedy in the face of section 21 (2) of the Constitution.

71. I fail to see any *bona fides* in this application pursued after an abuse application seeking similar relief had been filed, in the face of section 21(2) to which the plaintiffs were referred by the defendants in a preliminary objection.

72. Indeed, it seems to me, that the arguments justifying the present application appear contrived, and this is the contriving: that on their own showing, the plaintiffs have not pursued this application because they did not believe there was adequate alternative remedy, but because they consider the threshold of proof in a constitutional motion, lower than the abuse of process argument.

73. On 16th March 2021, the second to seventh defendants in the criminal proceedings filed an application to stay proceedings on the ground that that they were an abuse of the process, or otherwise unfair. On 18th March 2021, the first plaintiff filed the same application.

74. Although the plaintiffs had filed the instant originating summons on the 8th of March 2021, the court's order was that arguments on processes filed by the defendants would be heard on the same day: 25th of March 2021. Both applications were grounded on the timeline of the case, a matter that is acknowledged by JM in his affidavit in support of the constitutional motion.

75. Thus, in proceeding with their arguments seeking constitutional relief in the face of the jurisdictional bar of section 21(2), the plaintiffs, evidently pursued a plan of "hedging their bets", a phenomenon that must not be permitted in our courts.

76. ***Blacks Law Dictionary 10th Ed***. defines "frivolous" as: "lacking a legal basis or legal merit…not reasonably purposeful"; and "vexatious" as: "without reasonable or probable cause or excuse…" The determination of either or both depends on the surrounding circumstances.

77. In ***Attorney General of Trinidad and Tobago v Ramanoop [2006] 1 AC 328***, an appeal in which the question of whether exemplary damages may be awarded by way of redress for contravention of the human rights provisions enshrined in the Constitution of Trinidad and Tobago, the Privy Council in recommending a suitable compensatory award for egregious conduct that violated the fundamental rights of *Ramanoop*, discussed the matter of pursuing constitutional relief where other remedies may suffice. Lord Nicolls said at para. 26:

"...Frivolous, vexatious or contrived invocations of the facility of constitutional redress are to be repelled. But "bona fide resort to rights under the constitution ought not to be discouraged."

78. As aforesaid, I am hard pressed to find *bona fides* in the present application, not so much in bringing it, as in proceeding with it side by side applications for abuse of process in the face of section 21(2) of the Constitution.

79. This court has both inherent jurisdiction, and jurisdiction under Ord. 18 r 19(1) of RSC 2000 to prevent the abuse of its process by striking out such processes.

80. Having found that the present application was pursued in the circumstance of a double-headed attack and in the face of section 21(2) of the Constitution, I find in consequence, that it has no *bona fides* and appears to be contrived, for the possible purpose of increasing the chances of the plaintiffs' success in their plaint against the defendants. It is also, undoubtedly vexatious as it has been brought against the defendants one of whom is faced with the alternate process of an application for a stay for abuse of the court's process. Even so,

I will stop short of describing it as frivolous and altogether as an abuse of the process.

81. I will therefore not strike out this suit in accordance with Order 18 r. 19(1) (b) and (d) of the RSC 2000. I will however, acting on section 21(2) of the Constitution, dismiss this application in favour of the other applications properly brought in the trial process which provides an adequate common law remedy.

82. It is unnecessary in the circumstance to consider the arguments canvassed on behalf of the plaintiffs, or to have regard to the alternative relief sought.

83. The originating summons seeking the constitutional relief set out at the first is accordingly dismissed.

Sgd.

M.M AGYEMANG CJ