COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Criminal Division

VBI No. 353/12/2015

IN THE MATTER of Article 28 & 20 (2)(c) of the Constitution of the Commonwealth of The Bahamas

BETWEEN

FREDDIE SOLOMON RAMSEY
a.k.a. FRED RAMSEY

Applicant

AND

THE ATTORNEY GENERAL

Respondent

BEFORE: The Honourable Mr Justice Bernard Turner

APPEARANCES: Mr Wayne Munroe QC and Ms Tommel Roker for the Applicant
Mr Garvin Gaskin, Director of Public Prosecutions and Ms Cordell Frazier for the Respondent

HEARING DATE: 20 May 2016

RULING

TURNER J.

The Defendant herein was charged with eighteen (18) counts of offences contrary to the Prevention of Bribery Act (the said Act) and the Penal Code; four (4) counts being allegations of Conspiracy to commit bribery and the other fourteen (14) counts being allegations of bribery, contrary to the said Act.

2. On 3 May 2016 the Defendant was convicted by a jury in the Supreme Court of fourteen of the eighteen counts, and acquitted of two of the Conspiracy counts and two of the Bribery counts.

3. Upon his conviction and upon being queried as to whether, consistent with the Criminal Procedure Code Act, which reads at section 183:

> **183. If the accused person is convicted, or if the accused pleads guilty, the Registrar shall ask him if he has anything to say why sentence should not be passed upon him according to law, but the omission so to ask him shall have no effect upon the validity of the proceedings.**

4. Counsel on behalf of the accused indicated that, having regard to the Prosecution's asserted failure to make full disclosure of material to the Defence that they would wish to raise a constitutional issue.

5. The matter was thereafter adjourned for consideration of this issue and the Defendant was allowed to continue on bail, having been advised that his continued bail did not necessarily mean, if he were to be later sentenced, that he would receive a noncustodial sentence.

6. Thereafter the Defendant filed a Notice of Motion and an affidavit in support thereof. The Notice seeks the following relief:

i. **A Declaration that:**

a. **The Applicant's constitutional right has been infringed;**

a. Article 20(2)(c) of the Constitution of The Bahamas which affords the Applicant the right to be given adequate time and facilities for the preparation of his defence has been infringed due to the Respondent's failure to full and frank disclosure of documents relative to The Bahamas Electricity Corporation's DA11 & DA12 works which were the subject of the offences.

i. The Applicant be afforded Constitutional redress pursuant to Article 28 of the Constitution of The Bahamas;

The affidavit in support reads:

I, TOMMEL A. ROKER of the Eastern District of the Island of New Providence, one of the Islands of the Commonwealth of The Bahamas, Counsel and Attorney, make Oath and say as follows:

1. That I am a Member, of the firm Munroe & Associates, Counsel and Attorneys for the Applicant and I am duly authorized to swear this Affidavit.
1. Unless otherwise stated, I depose to the facts and matters herein from my own personal knowledge and from my knowledge acquired by me from my review of papers, documents and files in my possession and the possession of the Applicant which information I believe to be correct and true.
2. That I swear this Affidavit in support of the Notice of Motion filed herein and further to the motion in arrest of judgment by Wayne R. Munroe on the 3rd May, 2016, pursuant to section 184 of the Criminal Procedure Code, Chapter 91 of the Statue Laws of The Bahamas.
3. That the Applicant's file was handed over to the chambers of Munroe & Associates on or about the 5th April, 2016.
4. That the contents of the file contained the V.B.I, file along with 2 bundle of documents.
5. That those bundle of documents were labeled Volume 1- consisting of MS documents and Volume 2- consisting of bank records.
6. That the Applicant former Counsel withdrew formally off the record on the 8th April, 2016.
7. That by letter dated the 14th April, 2016 we were served with a copy of the Declaration of Custodian of Records. Now produced and shown to me and marked exhibit TAR-1 is a true copy of the said letter.
8. That by letter dated the 15th April, 2016 we were served with the Board Sub-Committee 1999 document & The Bahamas Electricity Corporation Minutes

of the Extraordinary Meeting held the 26th October, 2000. Now produced and shown to me and marked exhibit TAR-2 is a true copy of the said letter.

9. **That we were not served with any other documents, only documents exhibited before the court.**
10. **That as a result of the Respondent's failure to make full and frank disclosure of documents of BEC as described by the witness Kevin Basden on the 25th April, 2016, the Applicant was not afforded a fair trial and his constitutional right has been infringed.**

7. What would be observed at once is that the Affidavit referred to a Motion in arrest of Judgement, pursuant to section 184 of the Criminal Procedure Code. That section reads:

> **184. (1) The accused person may at any time before sentence, whether on his plea or otherwise, move in arrest of judgment on the ground that the information does not, after any amendment which the court is willing and has power to make, state any offence which the court has power to try.**
> **(2) The court may, in its discretion, either hear and determine the matter during the same sitting or adjourn the hearing thereof to a future date to be fixed for that purpose.**
> **(3) If the court decides in favour of the accused he shall be discharged from that information.**

8. Counsel on behalf of the Defendant however at the hearing foreswore any reliance on section 184 of the said CPC and concentrated his submissions entirely on the assertion of a breach of the applicant's constitutional right to a fair trial; the particular provision of the Constitution alleged to have been breached being Article 20(2)(c), which reads:

> **" 20 (2) Every person who is charged with a criminal offence.....**
> **(c) shall be given adequate time and facilities for the preparation of his defence."**

9. In response to the application, the Crown filed an affidavit. That affidavit reads:

I, SERGEANT 1600 BARRY SMITH of the Royal Bahamas Police Force, New Providence, one of the islands of the Commonwealth of The Bahamas, make oath and say as follows:

1. That I am presently attached to the Police Liaison Section in the Office of the Attorney General and I am duly authorized to make this Affidavit on behalf of the Respondent from my own knowledge and from information received by me in my capacity aforesaid.

2. That this Affidavit is made in response to the Affidavit of Ms. Tommel A. Roker in support of the Notice of Motion filed herein on the 11th May, 2016 and further to the motion in arrest of judgment made by Mr. Wayne Munroe on the 3rd May, 2016 pursuant to section 184 of the Criminal Procedure Code, Chapter 91 of the Statute Laws of The Bahamas.

2. That save as hereinafter stated, no admissions are made regarding the assertions contained in the Affidavit on behalf of the Applicant in this matter.

3. That as regard to the Applicant's application for the motion in arrest of judgment the Respondent avers that the same is unfounded as the information does state offences which this Court has power to try and has tried pursuant to the Prevention of Bribery Act, Chapter, 88 of the Statue Laws of The Bahamas. In particular, sections 89(1) of the Penal Code, Chapter 84 and section 4(2)(a) of the Prevention of Bribery Act, Chapter 88 in respect of the conspiracy to commit bribery counts and section 4(2)(a) of the Prevention of Bribery Act, Chapter 88 in respect of the bribery counts.

4. That the Voluntary Bill of Indictment (VBI) was served on the Applicant on the 15th December, 2015 being information No. 353/12/2015 before then Magistrate Gullimena Archer-Minns. Also served with the VBI were two (2) bundles of documents, comprising of volume I and volume II.

6. That Volume I contained documents labeled MS 001- MS-271 and Volume II was an assortment of bank records, emails and invoices.

6. That the attorneys of record at the service of the VBI and all subsequent Case Management hearings were Messrs Roger Minnis and Myles Parker.

7. That during those hearings no request was made by Counsel for the Applicant for any documents relative to BEC necessary for the preparation of the Applicant's defence.

8. That on the 8th April, 2016 this matter was set before the Honourable Mr. Justice Bernard Turner for Pre-Trial Review (PTR). Mr. Minnis and Ms. Roker were present and Ms. Cordell Frazier appeared for the Crown. I was informed by Ms. Frazier and verily believe that at that time Ms. Roker had indicated to Mr. Minnis that the Applicant had retained their chambers in this matter. That Mr. Minnis indicated that he was aware and only came to seek leave of the Court to withdraw as counsel for the Applicant.

9. That I was also informed by Ms. Frazier and verily believe that during the PTR, Mr. Minnis sought leave to withdraw as counsel on both his behalf and Mr. Parker's and that the Applicant was thereafter asked if he had any objections to the application and he replied no. That leave was thereafter granted.

10. I was also informed by Ms. Frazier that at no time during the PTR did Ms. Roker request any documents of the Crown. That the Court was informed that Munroe & Associates were now counsel for the Applicant and that Mr. Munroe, who had carriage of the matter, was out of the jurisdiction but will be ready for trial on the 18th April, 2016.

11. That I am also advised by Ms. Frazier and verily believe that in addition to the two (2) bundles of documents served on the Applicant at the presentation of his VBI, a subsequent bundle which was entered into evidence as "Exhibit FR IB" was served on the Applicant before the commencement of this trial.

12. That the Applicant at all material times was in possession of all the documents in which the prosecution relied on.

13. That paragraphs 8 and 9 of Ms. Roker's affidavit are admitted.

14. That I am advised by Ms. Frazier and verily believe that there has been no failure on the part of the Respondent for disclosure as required by law. That the evidence of Mr. Kevin Basden was that he produced documents from their storage in compliance with the Production Order and that some of them related to the DA-11 and DA-12 projects.

15. That the Respondent relies on the proviso to Article 28(2) of the Constitution as there was and is an alternative remedy available to the Applicant, that is, an appeal to the Court of Appeal.

16. That in the circumstances and for the above mentioned reasons the Respondent respectfully request that Notice of Motion filed herein be dismissed.

10. Counsel on behalf of the applicant concentrated his submissions, in respect of the factual matrix, on what he referred to as the failure of the Crown to provide disclosure of two classes of documents. The first class of documents were the Immunity agreements between the main witness for the prosecution, Mark Smith, and the prosecutorial authorities of the government of the United States of America and his immunity agreement with the prosecutorial authorities of the government of The

Bahamas. Both of those agreements were acknowledged to exist, in the evidence of Ms Antoinette Bonamy the Director of Legal Affairs in the Office of the Attorney General, and in Mr. Smith's evidence.

11. The second class of documents complained of not being disclosed were documents which Mr. Kevin Basden, the former General Manager of the Bahamas Electricity Corporation (BEC), stated in his evidence were secured from the records of BEC and turned over to the police as a result of a request. Counsel for the applicant submitted that as Mr. Basden stated that he secured relevant records related to the DA11 and DA12 contracts (the subjects of the 18 counts in the Indictment against the applicant), and that from the evidence it was apparent that Mr. Basden provided more records to the authorities than were provided to the defence, that that amounted to a failure to disclose this unused material to the defence and effectively breached the applicant's Article 20(2)(c) rights.

12. In support of these submissions several authorities were cited. In **Linton Berry v The Queen1992 3 WLR** 153 the following was stated by the Board:

> **"In this case by far the most important ground of appeal is the contention that written statements made by Zaidie and Matadial to the police were not disclosed before or during the trial have been wrongly withheld from the defendant"**

13. This portion of the decision was emphasized to indicate that discovery can take place both before and during a trial.

14. Counsel also cited **Franklyn & Vincent v the Queen Nos. 20 & 21 of 1992, UKPC** where the Board stated:

> **"These provisions of section 20 do no more than codify in writing the requirements of the common law which ensure that an accused person receives a fair trial. They would therefore be part of the law of Jamaican even in the absence of the constitution. They do not contain any specific requirement as to what is to be provided to a defendant before trial and a determination of whether the constitution has been contravened by the non-provision of statements of witnesses who are to be called by the prosecution before a trial depends upon an assessment of the facts of a particular case as against these general standards of fairness prescribed by the constitution. In this respect the position is no different from that**

indicated by the Human Rights Committee of the United Nations in relation to communication number 283 of 1988 of Aston Little with respect to an alleged violation of Article 14 of paragraph 3(b), of the International Covenant on Civil and Political Rights, by failing to provide the complainant with adequate time and facilities for the preparation of his defence. The Committee stated:-

"The right of an accused person to have adequate time and facilities for the preparation of his defence is an important element of the guarantee of a fair trial and a corollary of the principle of equality of arms. In cases in which a capital sentence may be pronounced, it is axiomatic that sufficient time must be granted to the accused and his counsel to prepare the defence for the trial; this requirement applies to all the stages of the judicial proceedings. The determination of what constitutes 'adequate time' require an assessment of the individual circumstances of each case'.

Undoubtedly a defendant will be assisted in preparing his defence if he is provided with copies of statements on which the prosecution proposed to rely prior to the commencement of his trial. It is therefore desirable, where this is practicable, for statements to be provided. Clearly the more serious and the more complex the proceedings, the greater the desirability that statements should be provided and the more likely that it will be practicable to provide the statements. In the converse situation, where the offence is trivial, to be dealt with summarily, where the issues are simple, the provision of statements before trial is less important.

In Jamaica as in England, in the case of offences which are triable only summarily when the offences are properly regarded as being "petty offences", it is not normally practicable or necessary in order to obtain a fair trial for the defendant to be served in advance with copies of witnesses' statements. In cases where offences are being tried on indictment before a jury, again in Jamaica the position is the same as in England and before the trial begins the defendant will receive copies of depositions or statements of witnesses to be called on behalf of the prosecution. In England in the case of offences triable "either way", that is summarily or on indictment, the position is now governed by the Magistrates Courts (Advance Information) Rules 1985. Under these the prosecution, on request, are required to furnish to a defendant as soon as practicable either a copy of those parts of every written statement which contain information as to the facts and matters of which the prosecutor proposes to adduce evidence in the proceedings or a summary of the facts and matters of which the prosecutor proposes to adduce evidence in the proceedings. However the requirement does not apply if the prosecutor is of the opinion that the disclosure of any particular fact or matter in compliance with the requirements might lead to any person on whose evidence the prosecution propose to rely being intimidated or otherwise to the course of justice being interfered with. If the requirements are not complied with, then the court is required to adjourn the proceedings pending compliance with the requirement, unless the court is satisfied that the conduct of the case for the accused will not be substantially prejudiced by non-compliance with the requirement.

This position reflects the report of an Interdepartmental Committee under the Chairmanship of Lord Justice James in 1975: The distribution of Criminal Business between the Crown Court and Magistrates' Courts. In that report, the Committee stated that it is "most desirable in the interests of justice that defendants should be fully acquainted with the case against them as far as it is practicable to achieve this"; and that "the most satisfactory method of acquainting the defendant with the case against him would be by supplying him with copies of the witness statements".
As to the concerns which had been expressed to that Committee that it would be undesirable to serve witness statements on the defence on the ground that there is danger of witnesses being intimidated or induced to change evidence their evidence, the Committee submitted that they did not regard this as a compelling objection since in "all cases committed for trial, which include the more serious cases, where there is the greatest risk of intimidation of, or interference with, witnesses, the defence receives copies of the witness statements or depositions."

15. Counsel submitted that having regard to the challenges of the Defendant's memory in respect of events from sixteen years ago, and indeed the prosecution's witnesses reliance on documents for their testimony, the 'failure' of the prosecution to provide them with the unused material provided to them by Mr. Basden amounted to a denial of the applicant's fair trial rights.

16. In respect of the immunity agreements, counsel submitted that since they were not provided with the agreements, that they had no way of knowing the contents of the agreements and whether there were any particular stipulations in respect of giving truthful testimony and being full and frank in your evidence. For those reasons too, they submitted that the trial was not fair.

17. In response, the Crown submitted that the application was an abuse of the process of the court, in that the applicant did not seek an order for discovery of these items, but instead waited on the decision of the jury in the matter, and then, upon being found guilty by the jury of 14 of the 18 offences, sought to bring a motion in arrest of judgment.

18. As already indicated, counsel for the applicant has foresworn any reliance on motion in arrest of judgment, but posits this application entirely on the Constitution. In that regard, counsel for the Respondent submitted that, as the applicant had common law redress available to him in respect of this issue of disclosure, by making an

application for disclosure, he is precluded, pursuant to the proviso to Article 28 of the Constitution from making a constitutional application at this point. The Proviso reads:

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

19. It was submitted that the applicant had the whole trial, inclusive of case management hearings, to bring to bear the issues of non-disclosure. It was further submitted that counsel for the applicant, at the no-case stage, indicated that the issue of disclosure, would be dealt with, but upon the commencement of the no-case submission, he indicated that the defendant would no longer pursue the issue of disclosure.

20. Counsel cited, in support of his submission, the decision of the Privy Council in **Jaroo v Attorney General of Trinidad and Tobago 2002 UKPC 5.** In Jaroo, the Board stated, beginning at paragraph 36:

> 36. **Their Lordships wish to empasise that the originating motion procedure unders 14(1) is appropriate for use in cases where the facts are not in dispute and questions of law only are in issue. It is wholly unsuitable in cases which depend for their decision on the resolution of disputes as to fact. Disputes of that kind must be resolved by using the procedures which are available in the ordinary courts under the common law. As Lord Mustill indicated in *Boodram v A-G of Trinidad and Tobago* [1996] AC 842, 854, in the context of a complaint that adverse publicity would prejudice the appellant's right to a fair trial, the question whether the appellant's complaint that the police were detaining his vehicle was well founded was a matter for decision and, if necessary, remedy by the use of the ordinary and well-established procedures which exist independently of the Constitution. But instead of amending his pleadings to enable him to pursue the common law remedy that had always been available to him, the appellant chose to adhere to that procedure, he did not challenge the statements in Sergeant Flemming's affidavit that further inquiries were being undertaken which would lead to the apprehension of those concerned in the theft of the vehicle and that it was necessary to preserve it as material evidence.**
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> **37. Dr. Ramsahoye said that it was sufficient for him to meet this challenge to show that there had been a breach of section 4(a). This was because it was provided by section 4(1), that his right to apply to the High Court by way of originating motion was without prejudice to any other action with**

respect to the same matter that is lawfully available. He said that Lord Diplock's observations in Harrikissoon and the Attorney-General of Trinidad and Tobago had been misunderstood by the Court of Appeal. He maintained that it was the making of a 'mere allegation' of a contravention of a human right or fundamental freedom that was being criticized in that passage by Lord Diplock. He accepted that a mere allegation was not enough to entitle the applicant to proceed by way of an originating motion. But he said that, provided that he could establish that there had been a breach of the constitution guarantee, the choice of remedy was a matter for the individual".

38. Their Lordships do not accept this argument. The appropriateness or otherwise of the use of the procedure afforded by section 14(1) must be capable of being tested at the outset when the person applies by way of originating motion to the High Court. All the court has before it at this stage is the allegation. The answer to the question whether or not the allegation can be established lies in the future. The point to which Lord Diplock drew attention was that the value of the important and valuable safeguard that is provided by section 14(1) would be diminished if it were to be allowed to be used as a general substitute for the normal procedures in cases where those procedures are available. His warning of the need for vigilance would be deprived of much of its value if a decision as to whether resort to an originating motion was appropriate could not be made until the applicant had been afforded an opportunity to establish whether or not his human rights or fundamental freedoms had been breached".

39. Their Lordships respectfully agree with the Court of Appeal that, before he resorts to this procedure, the applicant must consider the true nature of the right allegedly contravened. He must also consider whether, having regard to all the circumstances of the case, some other procedure either under the common law or pursuant to statute might not more conveniently be invoked. If another such procedure is available, resort to the procedure by way of originating motion will be inappropriate and it will be an abuse of the process to resort to it. If, as in this case, it becomes clear after the motion has been filed that the use of the procedure is no longer appropriate, steps should be taken without delay to withdraw the motion from the High Court as its continued use in such circumstances will also be an abuse".

21. Further, counsel cited the decision of the Bahamas Court of Appeal in **McEwan v Bahamas (Prime Minister) No. 24 of 2002** to support his submission that even if the applicant suffered some breach of his rights, he had adequate opportunities to seek redress, but chose not to and that in those circumstances his application ought to be dismissed as an abuse of the process of the court. In **McEwan**, the Court stated, at paragraph 95:

> "In this case, on the Respondent's own affidavit, he had five years in which to bring an application to vindicate his claims, but nothing was done until

after parliament was dissolved and the general elections were called. Then he claims that his constitutional and fundamental right to vote in absolutely secrecy was infringed by the Act, but harks back to something that occurred in 1997, and a judgment which was given in 1993 (?). If ever there was a diminution in the value of the constitutional freedom given by Article 28(1) of the Constitution, I think this case exemplifies it."

22. The Respondent also cited the decision of the Court of Appeal of The Bahamas in **Terry Delancey v The Attorney General Bahamas Court of Appeal No. 43 of 2006,** in which the Court stated, beginning at paragraph 77:

"77. ....., counsel for the appellant in the present appeal argued very strongly that the learned judge erred in law and on the facts when he held that the appellant had had adequate means of redress for the alleged unfair hearing of appeal No. 5 of 1996 by this court by means of applying to the Judicial Committee of Her Majesty's Privy Council for leave to appeal to that body from this court's decision.

78. In so holding the learned judge had accepted Mr. Gaskin's preliminary submission that the proviso to Article 28(2) applied to the situation facing the learned judge and, accordingly, dismissed the applicant's application.

79. Paragraphs (1) and (2) of Article 28 of the Constitution read:

"28. – (1) If any person alleges that any of the provisions of Articles 17 to 27 of this Constitution has been, is being or is likely to be contravened in relation to him then, without prejudice to any other action with respect to the same matter which is lawfully available, 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 paragraph (1) of this Article; and

(b) to determine any question arising in the case of any person which is referred to it in pursuance of para-graph (3) of this Article,

and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of the said Articles 16 to 27 (inclusive) to the protection of which the person concerned is entitled:

Provided that the Supreme Court shall not exercise its powers under this paragraph if it is satisfied that adequate means of redress are or have been available to the

person concerned under any other law." (Emphasis supplied)

80. It is contended that Isaac J gave too narrow an interpretation to the words of the proviso to Article 28(2) of the Constitution which should, it is submitted, be given a broad and purposive interpretation so as to safeguard the rights of the individual as against the coercive powers of the government.

81. I accept that the "antecedents and form of [Chapter III of the Constitution] call for a generous interpretation avoiding what has been called the austerity of "tabulated legalism" suitable to give to individuals the full measure of the rights and freedoms referred to" - per Lord Wilberforce in *Minister of Home Affairs v. Fisher [1980] A.C. 319 at p. 328 H.*

82. In the present appeal, the learned judge in the Supreme Court was asked to rule that a constitutionally higher court had breached the fundamental rule of fairness of hearing both sides to a case by not waiting until the transcript of the trial of the appellant in the magisterial court could be prepared again and sent to this court.

83. Assuming, but not deciding, that such a decision is possible in the Supreme Court since it is that Court which is given original jurisdiction to hear and determine complaints about breaches of persons' fundamental rights, it is not quite clear how that Court is to go about making such a decision without having even a judgment of this or any other higher court or any record of the hearing in this court to consider.

23. Here too, Counsel for the Respondent submits that the proviso to Article 28 applies and that this application ought to be dismissed as an abuse of the process of the court.

24. On the issue of disclosure, it was submitted that everything relied on by the prosecution, inclusive of the documents relied on in re-examination, (when the prosecution produced and exhibited a document not initially relied on) for the purpose of rebutting something suggested to the witness in cross-examination, was disclosed to the other side, as asserted in paragraphs 13 and 15 of the affidavit in response.

25. Counsel further submitted, that the authorities relied on by the applicant, viz **Berry and Franklyn & Vincent**, essentially establish principles in respect of documents being relied on by the prosecution, which they asserted that they have produced in this

matter. In any event, they submitted that those decisions were consonant with local decisions on discovery, inclusive of **The Attorney General v Sean Cartwright et al No. 8 of 2004,** a decision of The Court of Appeal of The Bahamas, in an appeal by the Crown against the decision of a Judge of the Supreme Court on hearing a constitutional motion in respect of the issue of disclosure of information intended to be relied on by the prosecution in a drug prosecution in the Magistrates Court, where the Learned Judge had ordered:

> *"18. As the Attorney General acting for the Commissioner of Police has been unable to bring to the attention of the court any acceptable reason why the requirements of the applicants should not be met e.g. security of any witnesses or the protection of state security, I make the following order:*
>
> 1. *That all the audio and video tapes including those not to be used by the prosecution be made available to the applicants for listening, viewing and copying, if required, within seven (7) days. Such copying to be done at the expense of the applicants within seven (7) days after production of the tapes for viewing and listening.*
>
> 2. *That the matter be remitted to the magistrate for the continuation of the trial within 21 days from the delivery of the tapes.*
>
> 3. *The costs of this application to be awarded to the applicants such costs to be taxed if not agreed."*

The Court of Appeal observed at paragraph 35 that:

35. "In The Bahamas neither the legislature nor the executive appears to have made any agreed decision on the issues of disclosure. However, the judiciary of this country has followed the decision in *Franklyn and Vincent* in *Floyd Sawyer and Others v The Attorney General (No. 21 of 1992) (unreported)).* That case indicates that detailed summaries of the prosecution's case or copies of witnesses' statements (where the safety of the witness is not an issue) should be given to the defence as a *"facility"* for preparing

their defence. That case was also followed in *The Government of the United States of America and Another v. Samuel Knowles and Others.*

36. In this case, the learned judge decided, among other things that a recent decision on a similar point by the learned Chief Justice was given without the benefit of the decisions by the South African Constitutional Court and the Namibia Court. Having looked at that decision it seems to us that the learned Chief Justice was simply following *Franklyn and Vincent* and *Floyd Sawyer* which are binding on him and all courts below the Privy Council.

37. It is important to note that in the case from Namibia - State v Nassar [1994] 3 L.R.C. 295, one of the cases to which the learned judge referred, Muller, Ag J who gave the decision of a two-judge (Divisional) Court of the High Court of Namibia, restricted that decision to "summary trials in the High Court" of that country. He said -

> "We were not called upon to decide what the situation would be in criminal trials in inferior courts, and it is not intended that this decision should be regarded as necessarily setting a precedent for trials in inferior courts. Other principles or factors which were not considered for the purposes of coming to this decision may apply to trials in inferior courts, and it is noteworthy that in the United Kingdom a distinction is made." (Emphasis added)

38. The second case of Shabalala v A G of the Transvaal [1996] 1 L.R.C. 207 from South Africa is another decision apparently relied on by the learned judge. In that case, three questions were referred by a Provincial Division of the Supreme Court which had refused applications for access to relevant police dockets on the ground that the applicants had not satisfied that court that the documents were required by them within "the meaning of section 23 of the Constitution of South Africa for the exercise of any of their rights to a fair trial".

39. The first question referred to the Constitutional Court was "whether on interpreting the Constitution a court was bound by principles of stare decisis to follow the decision of a superior court or whether it might hold that a decision of such a court was per incuriam because it had incorrectly interpreted the Constitution." In this case it may appear that the learned judge asked a similar question and decided that the lower court was not bound by the decision in Franklyn and Vincent v. Regina.

40. The second and third questions so referred were:-

> "(2) Whether an accused might rely on the right of access to information held by the state where reguired 'for the exercise or protection of his rights'(s 23 of the Constitution) in order to exercise the right to a fair trial contained in s 25(3) and if so, to what extent, under what circumstances and subject to what conditions (if any) such access should be exercised. (3) Whether any provision in the Constitution permitted an accused to consult with prospective witnesses who had given statements to the police and if so, under what circumstances and subject to what conditions (if any) such consultations should be exercised." (Emphasis applied)

41. In that case, the court was dealing with a murder trial where there had been no equivalent to a preliminary inquiry under our Criminal Procedure Code. Apparently, such trials in the Supreme Court of that country now take place with the prosecution only being required to attach a summary of material facts to the indictment. Section 144(3)(a) of their 1977 Criminal Procedure Act requires the prosecution to give the defence a summary of the substantial facts of the case which - "in the opinion of the Attorney General [is] necessary to inform the accused of the allegations against him and that it will not be prejudicial to the administration of justice and the security of the state, as well as a list of names and addresses of the witnesses the Attorney General intends calling at the summary trial."

42. That provision and the decision of the Constitutional Court must be viewed against the backdrop of section 23 of the Republican Constitution which reads:

"Every person shall have the right of access to all information held by the State or any of its organs at any level of government in so far as such information is required for the exercise or protection of any of his or her rights." (Emphasis added)

43. It should also be noted that in dealing with the right to a fair trial under section 25(3) of the South African Constitution Mohammed D-P had this to say at p. 222 - 223:-

"The basic test in the present matter must be whether the right to a fair trial in terms of s 25(3) includes the right to have access to a police docket or the relevant part thereof. This is not a question which can be answered in the abstract. It is essentially a question to be answered having regard to the particular circumstances of each case.

Ordinarily, an accused person should be entitled to have access at least to the statements of prosecution witnesses but the prosecution may, in a particular case, be able to justify the denial of such access on the grounds that it is not justified for the purposes of a fair trial. What a fair trial might require in a particular case depends on the circumstances. The simplicity of the case, either on the law or on the facts or both, the degree of particularity furnished in the indictment or the summary or substantial facts in terms of s 144 of the 1977 Act, the particulars furnished pursuant to s 87 of the 1977 Act, the application of the law pertaining to the adequacy of the particulars furnished might have to be re-examined having regard to the 'spirit, purport and objects' of the Constitution. The details of the charge read with such particulars in the regional and district courts, might be such as to justify the denial of such access."

44. The learned judge went on to deal with a number of other situations which may give rise to the exercise of the right of disclosure under s 23 of that constitution as part of the right to a fair trial. At p. 223 Mohammed D-P pointed out that in other cases "which might include a substantial number of routine prosecutions in the inferior courts, there might be scant justification for allowing such access to police dockets in order to ensure a fair trial for the accused." His Lordship referred to a "simple charge in respect

of a minor offence involving no complexities of law, in which there is no reasonable prospect of imprisonment and in which the accused can easily adduce and challenge the evidence which the state might lead against him or her, through an analysis of the charge sheet and any particulars furnished in respect thereof.". . .

45. The Canadian Charter of Rights contains a similar provision so that the decision in R v Stinchcombe [1992] L.R.C. (Crim) 68 also appears inapposite to the provisions of our Constitution which pre-dates the Canadian Charter by some 9 years.

46. In our judgment the learned judge erred in law in seeking to follow decisions from jurisdictions which have different constitutional provisions than ours and also in not considering the effect of the most important fact that in the instant case there is no refusal by the prosecution to let defence counsel have access to and/or listen to the audiotapes and view the videotapes, nor did the learned judge give any weight to the fact that a *"more detailed summary of the prosecution's case"* and the transcription of the audiotapes had been given to the defence by the time the motion was heard. Additionally, the pivotal fact is that the prosecution was concerned about the authenticity of the tapes up to the moment of reception in evidence, and not to conceal any evidence nor in any way to inhibit the defence in preparation of their trial.

47. We understand that two of the reasons for requesting the copies appear to be (i) to ensure that the originals are not tampered with in the period before they are adduced in evidence at the summary trial and (ii) to ascertain whether the respondent had their telephones in their possession when the alleged conversations were recorded. Since the dates of the telephone intercepts have been given, the respondents can reasonably be expected to recall whether they had their instruments in their possession during that period. It is not reasonably necessary therefore, for copies of the audiotapes to be made in order to prepare a defence. As to the videotapes,

it is usual that photographs are given to defendants after they are exhibited in court - either at a preliminary inquiry or trial and as Tolson's case indicates, they are prima facie admissible. We do not think, therefore, that insisting on copies of the videotapes at this stage is "reasonably necessary" for the preparation of the defence.

48. **Mr Munroe pointed out that the motion did not ask for costs as this was a criminal matter and *Nigel Bowe v. Government of the United States of America et al* made it clear that criminal cases do not normally attract an order of costs.**

47. **We therefore allow the appeal and set aside the order for disclosure as well as the order for costs.**

48. ...."

26. The Respondent's submitted that the effect of this decision, and any other decisions binding on this court, is that there is no legal or other constitutional requirement for the Crown to turn over unused material to the Defence in a criminal prosecution, be it in the Magistrates Court or the Supreme Court. They contended that there remained the requirement for the Crown to turn over any documents or other information inconsistent with the evidence of any prosecution witness, or any information of assistance to the Defence, but that that requirement did not extend to the Defence having a right to peruse their files to determine if there was something which they might wish to use in their defence. They submitted that the application is, in substance, a fishing expedition which, they submitted, ought to be frowned upon as it is outside of the legal obligations established by the various cited authorities on disclosure.

27. In respect of the immunity agreements, they submitted that the non-disclosure of the contents of the immunity agreements were not even a part of the Constitutional Motion as filed (and extracted above, see paragraph b of the Notice of Motion).

28. Finally, counsel submitted that, consistent with their primary position in respect of the application, that it is an abuse of the process of the court, all of these issues are matters which may be taken on appeal, against the merits of the conviction of the

applicant in this matter; in that regard they cited section 13(1)(e) of the Court of Appeal, that section reads:

> **13. (1) After the coming into operation of this section, the court on any such appeal against conviction shall allow the appeal if the court thinks that the verdict should be set aside on the grounds that —**
>
> **(a) under all the circumstances of the case it is unsafe or unsatisfactory;**
>
> **(b) it is unreasonable or cannot be supported having regard to the evidence;**
>
> **(c) there was a wrong decision or misdirection on any question of law or fact;**
>
> **(d) in the course of the trial, there was a material illegality or irregularity substantially affecting the merits of the case; or**
>
> **(e) the appellant did not receive a fair trial,**
>
> **and in any other case shall dismiss the appeal:**

29. The applicant's submission on this issue was that as the Court of Appeal is not a fact finding body, it would be an inadequate remedy for the applicant to challenge this issue of non-discovery in the Court of Appeal.

30. They challenged the abuse point on the basis that the authorities cited, (**Jaroo et al**) are not applicable to this case as they were matters in which Motions had been filed whereas this application arose in the very proceedings in which the breach is alleged. Further they submitted that, as stated in **Jaroo**, an Originating Motion is appropriate where there are no factual disputes, which it was submitted, is the case here.

31. I have considered all of the submissions in this matter. As indicated in the affidavits filed on behalf of both the Applicant and the Respondent, present counsel for the applicant became involved in the matter within a matter of weeks before the start of the trial. As indicated in the affidavit of the Respondent, previous counsel did not, in any

pre-trial hearing apply for any discovery.

32. Once present counsel came on the record for the Applicant, applications were made, including an application for a delay of the trial due to the issue of pre-trial publicity. Throughout the trial of the case, counsel on behalf of the Applicant noted what he referred to as the issue of non-disclosure, inclusive of the non-production of the acknowledged immunity agreements, and during the cross-examination of Mr. Basden, the extent of the documents which he produced as a result of the production order served on BEC. However counsel did not formally apply for discovery of any of these items, either prior to or during the hearing of the matter. He did flag, or as he described it, laid down a marker, on the issue of the immunity agreements and the documents produced by Mr. Basden, but made no applications in respect of same.

33. In those circumstances, I am constrained to agree with counsel on behalf of the Respondent that the application, initially raised immediately upon the return of the jury's verdict and at the point that the court, in compliance with section 183 of the CPC called upon the accused as to whether he had anything to say why sentence should not be passed upon him according to law, amounts to an abuse of the process of the court. That initial application was framed in terms of a motion in arrest of judgment, as referenced in paragraph three (3) (ibid) of the affidavit in support of the Notice of Motion; although counsel also specifically referenced Articles 22 and 28 of the Constitution.

34. Having disavowed further reliance on the motion in arrest of judgment, the application fits squarely within a constitutional application and to which the principles of such applications, as stated in **Jaroo**, apply. I see no basis for accepting the applicant's submissions that the principle in **Jaroo** (indeed the very proviso to Article 28(2) of the Constitution) is not applicable to this matter. In my view, this is the classic case for the application of the said principle, because there was patently an opportunity for the applicant to make an application for discovery, even during the trial of the matter; the assertion that it would not be feasible for such an application to be made during the hearing of the trial must be misconceived, as a court may be required on any number of occasions during a trial, to hear applications as to the admissibility of evidence, in addition to an infinite variety of other applications, limited only by the legal ingenuity of

counsel.

35. The legal effect of this application, as submitted by the Respondent, a submission with which I agree, is that the Applicant has waited to see the outcome of this trial, and at the point of verdicts unfavourable to him, seeks to have the trial court of those matters, immediately determine that there has been a denial of the applicant's due process rights in that trial, without even formally earlier seeking a ruling on the issues now raised, even if then marked. That not only places, as already indicated, this application classically within the proviso to Article 28(2), but properly considered, would be a charter for effectively introducing a level of appellate (constitutional) review of the trial by the actual trial judge. I decline the invitation to introduce any such procedure or conduct any such review. On the authorities as I understand them, I find this application to be an abuse of the process of the court and dismiss same as such.

36. Having dismissed the application, I would however also observe that even if the proviso to Article 28(2) were not applicable, on the authorities on discovery and disclosure which have been cited before me and which I have considered above, I do not find that there has been a breach of any of the applicable principles in this matter. There is no disclosure requirement for unused material which required the Crown to provide the information referenced in the application to the defence in this matter. The Immunity agreements were similarly not the subject of any application for discovery. In these circumstances, the application is dismissed in its entirety.

Dated this 17th day of June 2016

Bernard Turner
Justice