ABHAY KUMAR SINGH v DIRECTOR OF PUBLIC PROSECUTIONS and Anor (AAU0037 of 2003S)

COURT OF APPEAL — CRIMINAL JURISDICTION

WARD P, EICHELBAUM and PENLINGTON JJA

12, 16 July 2004

Criminal law — appeals — whether application for constitutional redress proper — Constitution of the Republic of Fiji ss 2(1), 26, 28, 28(1), 28(1)(f), 37, 41, 41(1), 41(2), 41(3), 41(4), 41(10) — High Court (Constitutional Redress) Rules 1998 O 18, rr 6(5), 7, 18.

In 2003, the Appellant was asked by Athai Khan (Khan) to represent him in a prosecution which he was charged of corruption. Before the trial of the case, the Appellant met the Complainant (the witness) who was to be a state witness in the corruption case and asked the witness to alter part of the evidence against Khan or to leave the country when the corruption case ended. The witness reported this to the police. The matter came before the Office of the Director of Public Prosecutions where the witness was asked to have another conversation with the Appellant and record the same in a small tape recorder without the Appellant's knowledge. The witness met the Appellant in two occasions. In one of their conversations, the Appellant appeared to have told the witness to present evidence that the witness left money with Khan without his knowledge. The conversations of the witness with the Appellant were later recorded in a CD Rom.

The Appellant was charged on three charges of attempting to pervert the cause of justice. However before trial, the Appellant by way of notice of motion, filed an application for constitutional redress under s 41 of the Constitution of the Republic of Fiji (the Constitution) in the criminal jurisdiction of the High Court and in the Criminal Registry of the High Court. The Appellant sought a declaration that the secret use of the tape recording device in recording his conversation with the witness was a breach of his fundamental rights under the 1997 Constitution of the Republic of Fiji and a stay of the criminal prosecution against him with a claim for damages. The application was served on the Attorney-General and the Director of Public Prosecutions.

Counsel for the Attorney-General and the Director of Public Prosecutions raised two preliminary objections: (a) that the application was deficient in form and substance and should have been filed in the civil registry of the court not the criminal registry; and (b) that there was an adequate alternative remedy of voir dire pursuant to the court's discretionary power to refuse relief under s 41(4) of the Constitution available during the criminal trial.

On 18 November 2003, the Appellant appealed and raised the following grounds: (a) that he was denied a fair and impartial hearing as a result of the summary dismissal of his application for constitutional redress; (b) that he was entitled to apply for constitutional redress despite the criminal charge against him; (c) that the application for constitutional redress has nothing to do with the criminal trial; (d) that the trial judge erred in not regarding s 41 of the Constitution; (e) that he was entitled to damages and the criminal court cannot grant damages; (f) that voir dire is not an adequate alternative remedy; (g) that the learned judge wrongly applied the relevance of the principle stated in *Richard Hinds v Attorney-General* (*Hinds*) to this case.

Held — (1) While the Appellant's application for constitutional redress was summarily dismissed, he cannot claim that he was denied a fair and impartial trial because a full hearing on the preliminary objections by the Respondent was conducted. The judge merely exercised his discretion in not continuing the application at that stage because there was yet to be a criminal trial in which he would have the opportunity to challenge the evidence against him.

(2) The contention of the Appellant that he was entitled to seek constitutional redress despite the criminal prosecution against him cannot stand because it would go beyond the principles laid down by the privy council. The Appellant still had an adequate alternative remedy while the application for constitutional redress is a collateral proceeding.

(3) The substance of the application for constitutional redress is relevant to trial of the criminal prosecution the matters of which are properly within the province of the trial judge. Thus, the continuance of the application for constitutional redress will result in the delay of the criminal process.

(4) The Appellant was wrong when he contended that the Constitution is the supreme law and prevails over existing law. He neglected to consider the context of the Constitution, Ch 4 in particular, which calls for the interpretation that the Constitution coexists with existing laws including common law and this had been consistently adopted by the privy council.

(5) While it is true that the criminal court cannot rule on the award of damages, the Appellant would likely, after trial, ask for damages in a separate proceeding if he obtained a favourable judgment that his constitutional rights were infringed in the criminal trial. The result of the proceeding would depend on the rights that have been breached or on any other aspects of the case and whether a person is entitled to compensation would be a matter for determination in that proceeding. Thus, the application for a stay of the criminal proceeding was not appropriate for a stay of proceedings in this case. The matter should have been dealt with at the criminal trial. However, there might be times where a stay of criminal proceeding is justified.

(6) The contention as to the voir dire was unacceptable. The privy council had been consistent in laying down the rule that where an adequate alternative remedy is available, an application for constitutional redress will be refused. Thus, in the event that there is an adequate alternative remedy but an application for constitutional redress still has been filed will be regarded as an abuse of process and considered as subversive of the rule of law. Cases cited that set out the relevant principles as a guide for the court to follow when considering s 41(4) of the Constitution. The voir dire as an adequate alternative remedy is consistent with s 28(1)(f) of the Constitution and would not infringe his constitutional rights.

(7) The relevant principles in the case of *Hinds* were applicable to the present case. However, the submission of the Appellant's counsel that Hind's application for constitutional redress had nothing to do with his trial was not correct because there was an alternative remedy available against Hind. Moreover, counsel failed to omit a portion of his submission on the case of *Hinds* where the privy council in that case held that: "… a claim for constitutional redress does not ordinarily offer an alternative means of challenging a conviction or judicial decision, nor an additional means where such a challenge, based on constitutional grounds, has been made and rejected. The appellant's complaint was one to be pursued by way of appeal against the conviction, as it was; his appeal having failed, the Barbadian courts were right to hold that he could not try again in fresh proceedings based on s 24".

Appeal dismissed.

Cases referred to

Boodram v Attorney-General of Trinidad & Tobago [1996] 2 LRC 196; *Director of Public Prosecutions v Jaikaran Tokai* [1996] AC 856; *Imperial Tobacco Ltd v Attorney-General* [1981] AC 718; [1980] 1 All ER 866; *Josefa Nata v State* [2004] FJHC 181; *Peters v Attorney-General* [2002] 3 LRC 32; *Hinds v Attorney-General* [2002] 4 LRC 287; *Sheikh Hassan v R* [1963] FLR 110; *Simpson v Attorney-General* [1994] 3 NZLR 667; *Thakur Prasad Jaroo v Attorney-General* [2002] 5 LRC 258; *Wong Kam-ming v R* [1980] AC 247; [1979] 1 All ER 939, cited.

Chokolingo v Attorney-General of Trinidad & Tobago [1981] 1 WLR 106; [1981] 1 All ER 244; *Harrikissoon v Attorney-General of Trinidad & Tobago* [1980] AC 265; *Maharaj v Attorney-General of Trinidad & Tobago (No 2)* [1979] AC 385; [1978] 2 All ER 670; *William Rosa v State* [2003] FJHC 196, considered.

G. P. Shankar for the Appellant

G. Allan for the first Respondent

J. J. Udit and *S. Sharma* for the second Respondent

Ward P, Eichelbaum and Penlington JJA. This is an appeal from a judgment of Shameem J wherein she summarily dismissed the Appellant's application for constitutional redress.

Background

The Appellant is a barrister and solicitor. He has a law practice at Nausori. In 2003 one, Athai Khan of the Land Transport Authority instructed the Appellant to act as his counsel in a prosecution against Khan on a charge of corruption. It is alleged by the state against the Appellant that ahead of Khan's trial in the Magistrates Court the Appellant approached the complainant in the corruption case (who was to be a state witness) on two occasions and asked him to change part of his intended evidence or to go overseas until the corruption case had concluded.

On 23 July 2003 the witness reported the Appellant's approach to him to the police. The matter was then referred to the office of the Director of Public Prosecutions. The witness was asked to speak to the Appellant and record the conversation on a small tape recorder which was to be concealed. The witness agreed to this request. As a result, later on 23 July, the witness met the Appellant on two occasions. In the course of one of the conversations between the Appellant and the witness (which was recorded on the concealed tape recorder) the Appellant told the witness that he should say in evidence that he, that is the witness, had left the money with the accused Athai Khan but without his knowledge. The Appellant referred to the service of a subpoena and indicated that the option of leaving the country was now no longer available.

Still later on the same day, 23 July, the tape was processed so that its contents were put on to a CD rom.

Two days later on 25 July 2003 the Appellant was brought before the Magistrates Court in Suva on three charges of attempting to pervert the cause of justice. The Appellant's trial is yet to take place. The prosecution intend to adduce evidence of the secretly taped conversations between the Appellant and the state witness in the corruption case.

The application for constitutional redress

On 6 November 2003 the Appellant filed an application under s 41 of the Constitution seeking constitutional redress. Section 41(1)–(4) provide:

> (1) If a person considers that any of the provisions of this chapter has been or is likely to be contravened in relation to him or her (or, in the case of a person who is detained, if another person considers that there has been, or is likely to be, a contravention in relation to the detained person), then the person (or the other person) may apply to the High Court for redress.
>
> (2) The right to make application to the High Court under subsection (1) is without prejudice to any other action with respect to the matter that the person concerned may have.
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> (3) The High Court has original jurisdiction:
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> (a) to hear and determine applications under subsection (1); and
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> (b) to determine questions that are referred to it under subsection (5); and may make such orders and give such directions as it considers appropriate.

(4) The High Court may exercise its discretion not to grant relief in relation to an application or referral made to it under this section *if it considers that an adequate alternative remedy is available to the person concerned*. [The emphasis is ours]

Additionally s 41(10) empowers the Chief Justice to make rules. The High Court (Constitutional Redress) Rules 1998 were made and duly gazetted pursuant to this power. Under r 6(5), the Director of Public Prosecutions and the Attorney-General are entitled to appear and be heard in the case of a criminal matter. The application concerned the secret use of the tape recorder and the intended evidence of the recorded conversation between the Appellant and the state witness. The application was by way of notice of motion. It was intituled in the Criminal Jurisdiction of the High Court and filed in the Criminal Registry of the High Court. The Appellant sought the following orders:

(a) For a declaration that the use of the secret recording device against the Applicant by the 1st Respondent or his agents or servants was in breach of the applicant's fundamental right under 1997 Constitution of the Republic of Fiji and as such should be excluded from using the said secret recording in the pending criminal trial against the applicant;

ALTERNATIVELY

(b) For a declaration that the unlawful recording of Applicant's private conversation with his client or unlawful recording of the Applicant's voice constituted an unlawful search and seizure within section 26 of the Constitution of the Republic of Fiji and as such should not be used against the Applicant in pending criminal trial.

ALTERNATIVELY

(c) For a declaration that the unlawful recording of Applicant's private conversation with his client were in breach of the Applicant's right to personal privacy, including the right to privacy of personal communication within section 37 of the Constitution of the Republic of Fiji and as such should not be used against the Applicant in pending criminal trial.

(d) For a declaration that the 1st Respondent through his servants or agents abused their powers and authority in arranging or setting up the entrapment against the Applicant with a view to unlawfully prosecute the Applicant.

Additionally the Appellant sought a stay of the criminal prosecution against him, unspecified general and special damages, costs and such further orders as the court may deem just.

The Appellant relied on ss 26, 28 and 37 of the Constitution. Section 26 deals with unreasonable search and seizure; s 28 deals with the rights of charged persons; and s 37 deals with the right of privacy.

The motion was supported by an affidavit from the Appellant which exhibited, inter alia, copies of police statements from the state witness and the police officers who were concerned with the secret tape recording of what the Appellant said to the state witness and vice versa.

The application was served on the Attorney-General and the Director of Public Prosecutions.

The hearing before Shameem J

On 13 November 2003 the Appellant's application was called before Shameem J. All the parties, that is, the Appellant, the Attorney-General and the Director of Public Prosecutions were represented by counsel. At the outset counsel for the Attorney-General and the director raised two preliminary objections: first, that the application was deficient in form and substance. It was argued that the application was in the wrong form and that it should have been

intituled and filed in the civil registry of the court instead of the criminal registry. As well it was argued that the court did not have jurisdiction to hear the application — a civil application — and give the relief sought.

Second, it was contended that an adequate alternative remedy was available, namely, a voir dire during the forthcoming criminal trial of the Appellant. The Attorney-General and the director relied on the court's discretionary power to refuse relief under s 41(4) (which we have set out above) if an adequate alternative remedy was available. It was submitted that constitutional relief was therefore premature and inappropriate and that the application was an abuse of the process of the court.

The judge then heard full argument on the preliminary objections.

Counsel for the Appellant argued against the objections. He contended that the court had jurisdiction and that the Appellant was entitled, as of right; to bring an application under s 41 of the Constitution for constitutional redress and that the holding of a voir dire, during the criminal trial was not an adequate alternative remedy even if the evidence was subsequently ruled inadmissible.

The judge's ruling

The judge gave her ruling on 18 November 2003. She upheld the preliminary objection based on s 41(4) and summarily dismissed the application. In summary, Shameem J held:

(1) that the Appellant had correctly filed the application in the criminal jurisdiction of the court and the court did have jurisdiction to hear the application;

(2) that any order on the application would usurp the role of the judge conducting the criminal trial and would fragment the criminal process;

(3) that the Appellant has an adequate alternative remedy in that he is entitled to canvass the matters raised at his criminal trial by way of an application to challenge the admissibility of the impugned conversations on a voir dire;

(4) that the application concerned the admissibility of evidence and it was accordingly premature to deal with the matters raised in the application for constitutional redress;

(5) that it was entirely inappropriate for a judge to rule on the admissibility of criminal evidence when the trial itself may well be heard by another judge;

(6) that it was inappropriate to rule on the admissibility of criminal evidence without giving both the state and the accused an opportunity to call and lead evidence, in a voir dire on the circumstances in which the impugned evidence was taken;

(7) that the ruling of a judge on an application for constitutional redress would not be binding on the judge who presided over the criminal trial.

In reaching her conclusions Shameem J cited the decision of the privy council in *Hinds v Attorney-General* [2002] 4 LRC 287 (*Hinds*) and the decision of the House of Lords in *Imperial Tobacco Ltd v Attorney-General* [1981] AC 718; [1980] 1 All ER 866.

The appeal to this court

On 24 November 2003 the Appellant filed a petition of appeal in this court. It contained seven grounds of appeal. They are:

(a) That the Learned judge erred in law when she dismissed the Appellant's application without allowing him to argue his case under section 41 of the Constitution.

(b) That the Learned Judge erred in law when she failed to hold that the Constitution is the Supreme law of this Country and as such it overrides the holding of a Voir Dire during the Trial Proper, the procedural rules laid down by the Chief Justice of Fiji.

(c) That the Learned Judge erred in law when she held that the Appellant's application was not under constitutional redress.

(d) That the Learned Judge erred in law when she failed to allow to the Appellant to argue the matter in respect of the breaches of his rights under the constitution and the Human Right Commission Act.

(e) That the Learned Judge erred in law when she held that the present application would usurp the role of the judge conducting the trial in the matter, would fragment the criminal process and would be inappropriate considering the Applicant's rights to canvass the same objections during the trial.

(f) That the Learned Judge erred regarding section 41 of the Constitution.

(g) That the Learned Judge erred in applying the principal stated in *Richard Hinds v Attorney-General* privy council appeal No 28 of 2001 as relevant to the present case.

Written submissions

Counsel for the Appellant and counsel for the Respondents filed extensive written submissions. When the case was called before us on 12 July 2004 it was agreed by all counsel that the court should determine the appeal on the basis of those submissions. We have therefore proceeded on that basis and, of course, without the benefit of any oral argument.

Two preliminary points

Before we deal with the appeal proper we refer to two preliminary points which were raised by counsel for the Attorney-General in this court. They were:

(a) alibi; and

(b) the correct form of the proceedings.

(a) Alibi

In the Appellant's submissions Mr Shankar referred on three occasions to the point that the Appellant intended to plead the defence of alibi at his trial. The Attorney-General took the point that that defence and the alleged breaches of the Appellant's rights under the Constitution by the secret use of a tape recorder were mutually exclusive. Either he was the speaker or he was elsewhere at the time of the recording and that as the result the appeal should be dismissed summarily as being hypothetical, academic or moot.

In response Mr Shankar informed us that the defence of alibi was only raised in respect of the first two charges and not in relation to the charge arising out of the impugned evidence resulting from the secret use of the tape recorder. That intimation therefore dealt with the Attorney-General's first preliminary point.

(b) Correct form of the proceedings

Earlier in this judgment we described the intituling and the filing of the Appellant's notice of motion for constitutional redress. Shameem J noted that under s 41(3) of the Constitution (which we have earlier set out) the High Court has original jurisdiction to hear an application for constitutional redress. She also noted the provisions of the High Court (Constitutional Redress) Rules 1998, made by the Chief Justice in pursuance of the power conferred on him by s 41(10) of the Constitution. Those rules provide that an application for

constitutional redress shall be by way of motion and supporting affidavit and that in the case of a criminal matter the Director of Public Prosecutions and the Attorney-General are entitled to appear and be heard. See r 6(5).

We have already referred to the jurisdictional point that was taken before Shameem J to the effect that the court did not have jurisdiction because the Appellant's motion had been filed in the criminal jurisdiction of the court whereas so it was submitted, it should have been filed in the civil jurisdiction as it was in the nature of a civil proceeding. In response, Shameem J stated that "the logical place for the filing of such papers is the criminal court", given that the application related to a criminal case. She cited two other criminal cases where the filing had been in the criminal jurisdiction of the High Court. See *William Rosa v State* [2003] FJHC 196 and *Josefa Nata v State* [2004] FJHC 181. Shameem J went on to say:

> There are always cases which might appear to have a hybrid quality. Habeas corpus applications for instance might not appear to be either civil or criminal. However for such cases the good sense of the civil and criminal registries will no doubt prevail in the choice of the appropriate court in which to place such applications.
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> In this case, the Applicant seeks declarations in relation to the admissibility of evidence destined for a criminal trial. The criminal High Court was and is the right place to file such an application. Further the remedies available to the High Court under the Constitution and under rule 3 of the Redress Rules are available to a criminal judge of the High Court, provided the application is one for constitutional redress.

In this court the Attorney-General submitted that the filing of the application for constitutional redress in the criminal jurisdiction of the High Court was improper and that the jurisdiction in respect of constitutional redress was in accordance with the practice and procedure in force in relation to *civil proceedings* in the High Court. The Attorney-General relied on r 7 of the High Court (Constitutional Redress) Rules 1998 which provide:

> 7. Except as otherwise provided in these rules the jurisdiction and powers conferred on the High Court in respect of applications made by any person in pursuance of either section 41(10) or section 120 (4) of the Constitution are to be exercised in accordance with the practice and procedure (including any rules of Court) for the time being in force in relation to civil proceedings in the High Court, with any variations the circumstances require

Accordingly, the Attorney-General submitted before us that Shameem J fell into error in holding that the logical place for the filing of the Appellant's application was the criminal jurisdiction of the High Court. Having made that submission, the Attorney-General accepted that there was nothing to stop a criminal judge from hearing a constitutional redress application while sitting in the civil jurisdiction of the High Court. The Attorney-General invited this court to make a definitive ruling as to the proper jurisdiction for the filing of an application for constitutional redress. The Attorney-General hastened to make it clear that irrespective of his criticism of the judge on this procedural point he nevertheless supported and accepted her summary rejection of the Appellant's application for constitutional redress as a criminal trial was pending.

We now set out our view. An application for constitutional redress even if it pertains to a criminal matter should be filed in the civil jurisdiction of the High Court. Rule 7 of the High Court (Constitutional Redress) Rules 1998 is plain in its terms. The jurisdiction to deal with a constitutional redress application is to be in accordance with the practice and procedure of the High Court in relation to civil proceedings. It necessarily follows that the High Court Rules 1988 also

apply to such an application. In turn, it necessarily follows that in a proper case (and the Attorney-General argues that this was one) the court is empowered to summarily dismiss an application for constitutional redress if one of the grounds set out in O 18 r 18 can be satisfied. That rule authorises a summary dismissal of a proceeding where:

(a) the proceeding does not disclose a reasonable cause of action;
(b) the proceeding is scandalous, frivolous or vexatious;
(c) the proceeding may prejudice, embarrass or delay the fair trial of the proceeding;
(d) the proceeding is otherwise an abuse of the process of the court.

We conclude that although Shameem J dealt with the Appellant's application under the criminal jurisdiction and dismissed that application she would have been entitled to employ O 18 r 18 to reach the same result.

The case for the Appellant

To some extent the grounds of appeal overlap. The extensive submissions of Mr Shankar covered each ground of appeal. We have carefully considered those submissions.

Mr Shankar's basic submission was that Shameem J wrongly exercised her discretion in summarily dismissing the Appellant's application for constitutional redress. We now set out a summary of the essential points put forward by Mr Shankar in support of the appeal. In parenthesis we refer to the grounds of appeal to which the points appear to relate. Mr Shankar contended:

(1) that the application for constitutional redress should not have been summarily dismissed. (Grounds (a)(c)(d)). Counsel argued that as the result of the summary dismissal of the application the Appellant had been denied his constitutional right to a fair and impartial hearing of that application and that there had been a breach of the rules of natural justice.

(2) that where a constitutional right has been infringed (as the Appellant alleges here) then he is entitled under s 41 of the Constitution to seek constitutional redress and obtain a declaration to that effect *irrespective* of the criminal prosecution which has been launched against him. (Grounds (b)(d)(e)(f)). The Appellant relies on s 2(1) of the Constitution which states that it is the supreme law of Fiji and that as such it guarantees the fundamental rights of its citizens and overrides the existing law.

(3) that the application for constitutional redress is an application under s 41(1) which is *separate from and nothing to do with the criminal trial.* (Grounds (b)(f)(g)). This is because, so it is argued, the right existed *before* the criminal prosecution was initiated.

(4) that the Appellant is entitled to the declarations which he seeks as a matter of law on the material presently before the court. (Grounds (a)(e)(f)) The Appellant argues that the impugned evidence was unlawfully obtained in breach of his rights under the Constitution, that he was entrapped at the material time and that he is entitled to a remedy for the breaches which occurred.

(5) that the criminal trial is not an appropriate forum for the determination of the breaches of the Appellant's constitutional rights. (Grounds (a)(d)(f)). The Appellant argues that he has sought damages and that a criminal court cannot order such a remedy in his favour.

(6) that as to the voir dire the Appellant argues (Ground (f)):

(a) that a voir dire is not an adequate alternative remedy within s 41(4);

(b) that it is inconsistent with s 28(1)(f) of the Constitution (the right of a person charged to adduce and challenge evidence and not to be a compellable witness against himself); and

(c) that it is a threat to the Appellant's right to silence.

(7) that the judge was wrong when she applied *Richard Hinds v Attorney-General* privy council appeal No 28 of 2001. (Ground (g)). The Appellant argued that that case can be distinguished as *Hinds'* application had nothing to do with his previous criminal trial.

The case for the Respondent

The case for the Attorney-General and the Director of Public Prosecutions in this court, was relatively simple. Apart from the preliminary point as to the correct form of proceedings to which we have referred above, the Respondents supported the judge's ruling summarily dismissing the Appellant's application for constitutional redress.

The Respondents contended that the forthcoming criminal trial of the Appellant was the proper forum for the Appellant to raise all the issues which were relevant to the admissibility of the impugned evidence arising out of the secret tape recorder incident — whether it was unlawfully obtained in breach of the Appellant's rights and fundamental freedoms under the Constitution; whether it was improperly and unfairly obtained; whether the Appellant was, as he alleges, "entrapped".

The Respondents submitted that at the criminal trial the Appellant would have the opportunity in a voir dire to challenge the admissibility of the impugned evidence and that ultimately it was in the discretion of the trial judge as to whether the evidence should be excluded or admitted, and if so, under what conditions.

The Respondents relied on s 41(4) of the Constitution and contended that that criminal trial (including a voir dire) was an adequate alternative remedy justifying the refusal of constitutional relief and the summary dismissal of the Appellant's application. Generally as to a voir dire, see *Sheikh Hassan v R* [1963] FLR 110 at 116 per Tuivaga J. See also *Phipson on Evidence*, 13th ed, para 22-10.

The Respondents repeated the arguments put before Shameem J (i) that the application was an abuse of process; (ii) that if allowed to proceed it would require a judge to determine matters relevant to but outside the Appellant's criminal trial; (iii) that the application would unduly fragment the criminal process and prejudice the criminal trial with parallel proceedings involving identical issues being determined, possibly, by a judge other than the trial judge; (iv) that in any event the findings on the constitutional redress application would not be binding on the trial judge; (v) that the issues raised by the constitutional redress application were not questions of law but raised disputed questions of fact which required resolution in accordance with the established common law procedure of a voir dire.

In making these submissions the Respondents helpfully referred us to and relied on a number of cases in the privy council. Most of them emanated from Caribbean jurisdictions. They dealt with the availability of constitutional redress where there were or had been parallel proceedings and where their Lordships had concluded that there was an adequate alternative remedy. Mr Shankar also referred to some of these cases.

We are most grateful to counsel for their researches. The cases cited have assisted and clarified our deliberations. We note that the privy council has consistently laid down that where an adequate alternative remedy is available then constitutional redress will be refused. It has regarded an application for constitutional relief in these circumstances as an abuse of process and as being subversive of the rule of law which the Constitution is designed to uphold and protect. These cases set out the relevant principles for the court to follow when considering and applying s 41(4) of the Constitution.

The line of cases goes back 25 years. The issue was first considered by Lord Diplock (obiter) in *Maharaj v Attorney-General of Trinidad & Tobago (No 2)* [1979] AC 385 at 399; [1978] 2 All ER 670 at 680 where his Lordship said:

> It is true that instead of, or even as well as, pursuing the ordinary course of appealing directly to an appellate court, a party to legal proceedings who alleged that a fundamental rule of natural justice has been infringed in the course of the determination of his case, could in theory seek collateral relief in an application to the High Court under section 6(1) with a further right of appeal to the Court of Appeal under section 6(4). The High Court, however, has ample powers, both inherent and under section 6(2), to prevent its process being misused in this way;

In *Harrikissoon v Attorney-General of Trinidad & Tobago* [1980] AC 265, the Appellant was transferred in his employment without the required 3 months' notice. Instead of availing himself of the review procedure available in the Regulations, the Appellant applied to the High Court for constitutional redress. He sought a declaration that his rights had been violated. He was unsuccessful in the High Court, the Court of Appeal and the privy council. In delivering the opinion of their Lordships, Lord Diplock said at AC 268; WLR 64:

> The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action. In an originating application to the High Court under section 6(1), the mere allegation that a human right or fundamental freedom of the applicant has been or likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.

In *Chokolingo v Attorney-General of Trinidad & Tobago* [1981] 1 WLR 106; [1981] 1 All ER 244 the Appellant had been committed to prison for 21 days for contempt. He did not appeal against that committal. Two-and-half years later, he made an application for constitutional redress seeking a declaration that his committal was unconstitutional and in breach of human rights and fundamental freedoms. This applicant was also unsuccessful in all courts. In dismissing the appeal to the privy council Lord Diplock stated at WLR 111–12; All ER 248–9:

> Acceptance of applicant's argument would have the consequence that in every criminal case, in which a person who had been convicted alleged that the judge had made any error of substantive law as to the necessary characteristics of the offence, there would be parallel remedies available to him: one by appeal to the Court of Appeal, the other by originating application under section 6(1) of the Constitution to the High Court with further rights of appeal to the Court of Appeal and to the Judicial Committee. These parallel remedies would be also cumulative since the right to apply for redress

> under section 6(1) is stated to be "without prejudice to any other action with respect to the same matter which is lawfully available". The convicted person having exercised unsuccessfully his right of appeal to a higher court, the Court of Appeal, he could nevertheless launch a collateral attack (it may be years later) upon a judgment that the Court of Appeal had upheld, by making an application for redress under section 6(1) to a court of co-ordinate jurisdiction, the High Court. To give to Chapter 1 of the Constitution an interpretation which would lead to this result would, in their Lordship's view, be quite irrational and subversive of the rule of law which it is a declared purpose of the Constitution to enshrine.

We note that Mr Shankar cited portion of this passage in his submissions but that he omitted the last sentence which we consider highly relevant to the proper application of s 41(4) and the application of the Constitution as a whole.

In *Hinds* — one of the cases cited by Shameem J in her ruling — the appellant had been charged with and convicted of arson in a trial where his application for legal representation was refused by the trial judge. The Court of Appeal dismissed his appeal. The appellant then applied for constitutional redress. Section 24 of the Constitution of Barbados contains a provision which is similar to s 41(4). In dismissing the appellant's application the privy council held:

> As it is a living document, so must the Constitution be an effective instrument. But Lord Diplock's salutary warning remains pertinent: a claim for constitutional redress does not ordinarily offer an alternative means of challenging a conviction or judicial decision, nor an additional means where such a challenge, based on constitutional grounds, has been made and rejected. The appellant's complaint was one to be pursued by way of appeal against the conviction, as it was; his appeal having failed, the Barbadian courts were right to hold that he could not try again in fresh proceedings based on s 24.

And finally there is the recent case of *Thakur Prasad Jaroo v Attorney-General* [2002] 5 LRC 258. Once again the privy council reaffirmed the earlier authorities to which reference has been made. It held:

> Their Lordships wish to emphasise that the originating motion procedure under s 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.

Other relevant cases to which we were referred by the Respondents were *Director of Public Prosecutions v Jaikaran Thokai* [1996] AC 856; *Boodram v Attorney-General of Trinidad & Tobago* [1996] 2 LRC 196 and *Peters v Attorney-General* [2002] 3 LRC 32.

Our consideration of the competing submissions

We now consider the competing submissions of counsel. By way of introduction we summarise the relevant circumstances:

(1) The Appellant is facing three criminal charges.

(2) His trial is yet to take place. In the light of our judgment delivered today in Criminal Appeal No AAU0009.2004S that trial will take place in the High Court before a judge and assessors.

(3) The application for constitutional redress concerns impugned evidence arising from the secret use of a tape recorder to record the Appellant's conversation with a state witness. The Appellant alleges that the evidence was obtained unfairly, improperly and unlawfully and in breach of his constitutional rights and that he was "entrapped" at the material time and that accordingly the evidence is inadmissible.

(4) There are unresolved issues of facts between the prosecution and the Appellant in relation to the obtaining of the impugned evidence.

(5) The trial judge at the Appellant's trial will be able to hold a voir dire, on an application by the Appellant, to determine the admissibility of the impugned evidence.

(6) If the evidence is ruled admissible and the Appellant is convicted on the charge to which the impugned evidence relates the Appellant has a right of appeal.

Perhaps what we have set out is a statement of the obvious. But once stated it becomes abundantly clear that the Appellant has an adequate alternative remedy within s 41(4) of the Constitution and that Shameem J was fully entitled to exercise her discretion summarily to dismiss the Appellant's application. Applying the principles so firmly established by the privy council in the line of authority set out above to the circumstances of this case the Appellant's application for constitutional redress was an abuse of process and was properly dismissed.

In reaching our conclusion we have considered but have not been persuaded by the arguments put forward by Mr Shankar. In deference to his careful submissions we now set out our reasons for the rejection of his arguments.

First we are unable to accept the submission that the Appellant was denied a fair and impartial hearing when the judge summarily dismissed the application for constitutional redress. There was a full hearing on the preliminary objection by the Respondents that the application should be summarily dismissed. The Appellant was heard on that matter. The judge was justified as we have held in exercising her discretion and stopping the application at that point. The criminal trial is yet to take place. At that trial the Appellant will have the opportunity of challenging the impugned evidence. Even if the impugned evidence is ruled admissible after a voir dire where the Appellant has called evidence against the admission of the impugned evidence he can still call the latter evidence before the assessors.

Second Mr Shankar's contention that the Appellant is entitled to seek constitutional redress irrespective of the criminal prosecution which has been brought against him is contrary to the principles laid down by the privy council. The Appellant has an adequate alternative remedy. The application for constitutional redress is a collateral proceeding.

Third the Appellant's contention that the Constitution is the supreme law and overrides the existing law is fallacious. It fails to take into account the context in which the Constitution, particularly Ch 4, should be interpreted. Where possible the interpretation adopted must be one which leads to the co-existence of existing law (including the common law) with the provisions of the Constitution. That has been the approach consistently adopted by the privy council.

Fourth the Appellant's submission that the application for constitutional redress has "nothing to do with the criminal trial" is both surprising and unacceptable. While we have held that the application is a collateral proceeding the substance of the application has everything to do with the forthcoming criminal trial. As Shameem J found (and we are in complete agreement with that finding) the Appellant's application will fragment the criminal process and it will delay it. The Appellant in his application is seeking rulings on matters which are properly within the province of the trial judge and, in any event, if he was to obtain those rulings they would not be binding on the trial judge.

Fifth it is simply not correct to treat a mere assertion of a breach of a fundamental right under the Constitution as a matter of law entitling the Appellant to a ruling in a separate proceeding ahead of his criminal trial. There are disputed questions of fact which require resolution in accordance with well-established common law procedures. An application for constitutional redress is not a suitable vehicle for the disposal of such issues. The proper forum is the criminal trial.

Sixth we refer to Mr Shankar's contention in relation to the remedy of damages. It is quite correct that a criminal court cannot order damages if a breach of a constitutional right is established. If in the criminal trial the Appellant obtained a favourable finding that one or more of his constitutional rights had been breached and that finding withstood an appeal, we recognise that the Appellant could, after the trial, seek damages in a separate proceeding. The fate of that proceeding would depend on the right or rights which had been infringed and all the other circumstances of the case. Whether the Appellant would be entitled to compensation, and if so, the extent of that compensation would be matters for determination in that proceeding. See *Simpson v Attorney-General* [1994] 3 NZLR 667.

Here we note that the Appellant in his application asked for a stay of proceedings. Plainly this is not an appropriate case for a stay. The matter of complaint must be dealt with at the criminal trial for the reasons already given. We do recognise however that there might be situations which would justify a stay of a criminal proceeding. Traditionally such an application has been considered by the trial judge ahead of trial. In this case we are not required and do not comment on whether and in what circumstances an application for constitutional redress seeking a stay of the criminal process ahead of trial would be appropriate, if at all.

Seventh we refer to Mr Shankar's arguments in connection with the voir dire. For the reasons already given we are unable to accept that the voir dire is not an adequate alternative remedy. It is certainly not inconsistent with s 28(1)(f) of the Constitution and it is not a threat to the Appellant's right to silence. It is a well-established rule of the criminal courts that in a voir dire an accused person if he elects to give evidence in the voir dire, cannot be asked as to the truth of the impugned admission *Wong Kam-ming v R* [1980] AC 247; [1979] 1 All ER 939.

And finally we are unable to accept Mr Shankar's submission that Shameem J was wrong to apply *Hinds*. The principles enunciated in that case are applicable to the present case. Mr Shankar attempted to distinguish it on the facts on the basis that *Hinds'* application had nothing to do with his criminal trial. That suggested distinction is misconceived. He too had an alternative procedure which was decisive against him in the opinion of the privy council.

Result

For the reasons given we dismiss the appeal against the ruling of Shameem J on 18 November 2003. We affirm her decision summarily dismissing the Appellant's application for constitutional redress.

We repeat our earlier finding (in response to the invitation of the Attorney-General for a ruling) that an application for constitutional redress even if it pertains to a criminal matter should be filed in the civil jurisdiction of the High Court. It is a civil proceeding which would be dealt with in accordance with

the Practice and Procedure of the High Court in relation to civil proceedings. See r 7 of the High Court (Constitutional Redress) Rules 1998.

Although the Appellant's application for constitutional redress ought to have been a civil proceeding it related to criminal matters. In the circumstances there will be no order as to costs.

Appeal dismissed.