

[2018] CCJ 19 (AJ)

**IN THE CARIBBEAN COURT OF JUSTICE**

**Appellate Jurisdiction**

**ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS**

CCJ Appeal Nos. BBCR2017/002  
BB Criminal Appeal No. 7 of 2014

**BETWEEN**

**JABARI SENSIMANIA NERVAIS**

**APPELLANT**

**AND**

**THE QUEEN**

**RESPONDENT**

**AND**

CCJ Appeal No. BBCR2017/003  
BB Criminal Appeal No.

**BETWEEN**

**DWAYNE OMAR SEVERIN**

**APPELLANT**

**AND**

**THE QUEEN**

**RESPONDENT**

[Heard together on 25<sup>th</sup> day of January 2018]

**Before The Right Honourable  
and the Honourables**

**Sir Dennis Byron, President  
Mr Justice Saunders  
Mr Justice Wit  
Mr Justice Hayton  
Mr Justice Anderson  
Mme Justice Rajnauth-Lee  
Mr Justice Barrow**

**JUDGMENT SUMMARY**

*This summary is not intended to be a substitute for the reasons of the Caribbean Court of Justice or to be used in any later consideration of the Court's reasons.*

- [1] Jabari Sensimania Nervais and Dwayne Omar Severin (“the Appellants”), each sought leave to appeal to the Caribbean Court of Justice on the basis that his conviction was unsafe and the mandatory sentence of death was unconstitutional. The CCJ granted leave to appeal and leave to appeal as poor persons. The appeals against convictions which were heard separately were dismissed. The appeals against sentence were heard together and are the subject of this summary.
- [2] Before examining the issues, the CCJ considered the background against which the appeals were to be determined. The CCJ noted that when the appeals were heard at the Court of Appeal, the late DPP, Mr. Charles Leacock QC, arguing on behalf of the State, urged the court to find that the imposition of the mandatory death penalty for convictions of murder in Barbados, without mitigation and individual sentencing, was patently unconstitutional. While the Court of Appeal acknowledged that the mandatory death penalty was inconsistent with and in violation of international human rights law and was an inhuman and degrading punishment, the law that provided for it predated the Constitution and was accordingly saved from challenge as had been decided by the Privy Council in *Boyce and Joseph v The Queen*<sup>1</sup>. This was a decision by which that court was bound until such time as the decision was overruled by the CCJ.
- [3] The CCJ concluded that Mr. Leacock’s submissions raised two important points; 1) that a mandatory death penalty without the opportunity to individualise the sentence to fit the particular circumstances of the offence or offender, contravened provisions of the Constitution; and 2) that Barbados had accepted that it had an obligation to modify its legislation to remove the mandatory imposition of the death penalty in conformity with provisions of the Inter American Convention of Human Rights (“the Convention”) which it had ratified. Examining these propositions, the CCJ found that Barbados had accepted and had given undertakings to the Inter American Court of Human Rights (“the IACtHR”) to comply with its ruling in *Boyce et al v Barbados*<sup>2</sup> and *Dacosta Cadogan v Barbados*<sup>3</sup> that the mandatory death penalty violated Article 2 of the Convention and that section 26 of the Constitution violated in particular the right to seek judicial protection against violations of the right to life.<sup>4</sup> Further, in compliance

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<sup>1</sup> [2004] UKPC 32

<sup>2</sup> Judgment of November 20, 2007 (Preliminary Objection, Merits, Reparations and Costs)

<sup>3</sup> Judgment of September 24, 2009 (Preliminary Objections, Merits, Reparations, and Costs)

<sup>4</sup> *Ibid*

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with these rulings, the Cabinet of Barbados had caused to be introduced in the House of Assembly legislation to, *inter alia* remove the provision authorising the mandatory sentence of death in section 15 of the Constitution; amend section 26 to redefine the effect of the existing law in relation to the fundamental rights provisions and to abolish the mandatory imposition of the penalty for death for the offence of murder.<sup>5</sup>

[4] The CCJ also noted that Barbados had given similar undertakings before it in the appeal against sentence of Clyde Anderson Graze (‘‘Graze’’) in 2009 where a consent order had been issued adjourning the hearing until such time as the State of Barbados had complied with the IACtHR decision of *Boyce et al v Barbados* in relation to the mandatory death penalty and the immunising effect of section 26 of the Constitution on existing laws. The CCJ noted that while the parties had not taken advantage of the opportunity to submit a joint paper *inter alia* on the State of Barbados’s position on the mandatory death penalty, the information presented indicated that of the 31 persons sentenced to death between the period 2000-2017, not one person had been executed. In fact, of those 31 persons, 27 had had their sentences commuted to life imprisonment and of those, 24 have had the remainder of their sentence remitted and have been released from prison. In view of this, the CCJ found it was indisputable that Barbados had through its actions acknowledged that the mandatory sentence of death under section 2 of the OAPA and the immunising effect of section 26 violated its obligations under international law and had given undertakings to the IACHR and to the CCJ to rectify these violations which was reflected in the Barbados Privy Council’s consistent commutation of the mandatory death penalty sentence when imposed.

[5] Against this background the CCJ considered the first issue of the enforceability of section 11 of the Constitution. The CCJ held that section 11 was separately enforceable. In coming to this conclusion, the CCJ rejected the Crown’s contention that section 11 was a preamble. The Crown had relied on *Newbold v Commissioner of Police & Ors*<sup>6</sup> and the line of authorities decided by the Privy Council which supported this view. The CCJ examined this line of authorities and found that they gave an unusual meaning of the word ‘‘preamble’’. Relying on the definition of preamble by Halsbury<sup>7</sup>, the CCJ found that the location of section 11 militates against it being categorised as a preamble as it is not a preliminary statement at the beginning

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<sup>5</sup> Cabinet Note (2014) 73/AG.2, M.P. 2800/8/9/8 Vol. I, January 30, 2014

<sup>6</sup> (2014) 84 WIR 8

<sup>7</sup> Halsbury’s Law of England, 3rd Edition, Vol. 31, p.370

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of the Constitution. Instead, section 11 is found in the substantive portion of the Constitution. This is buttressed by the fact that Barbados has a preamble which is located before section 1 of the Constitution which embodies the fundamental values and the philosophy on which the Constitution was based.

[6] Next the CCJ examined section 11 of the Constitution and found that it is divided into two parts. The first, commenced with the word “whereas” and stated the rights to which the people of Barbados are entitled in clear and unambiguous terms. It is the only place in the Constitution that declared those rights. The CCJ reviewed the Privy Council decisions of *Olivier v Buttigieg*<sup>8</sup> from Malta and *Société Union Docks v Government*<sup>9</sup> from Mauritius which had started the judicial debate on the preamble point where their Lordships had held respectively, that where the provision began with “whereas” it was preambular in nature and where it did not, it was separately enforceable. The CCJ considered the provisions in the Maltese and Mauritius Constitutions and held that it could not see any reason to attribute such different meanings to the sections. In such circumstances, the CCJ held that it could find no justification for attributing a meaning which deprived section 11 of any binding effect. The second part of section 11 declared sections 12-23 shall have effect for the purpose of affording protection to *those* rights and freedoms subject to such limitations of that protection as are contained in *those provisions*, being limitations designed to ensure that the enjoyment of the rights conferred in section 11 does not prejudice the rights and freedoms of others or the public interest. The CCJ held that the language was clear and unambiguous; section 11 declared the rights and sections 12-23 afforded protection for those rights subject to such limitations as they authorised.

[7] The CCJ also rejected the Crown’s contention that section 11 was a preamble because it was excluded from sections 24 and 26 of the Constitution. The CCJ found that in relation to section 26, an interpretation which is least restrictive and affords every citizen of Barbados the full benefit of the fundamental rights and freedoms should be given. The CCJ then considered section 24 and held that from the words of the section, it could be seen that the Constitution itself envisaged that section 24 was not the only method of seeking redress. Relying on the earlier decision of *A-G v Boyce and Joseph*,<sup>10</sup> the CCJ reiterated that independently of section 24, the Court had an inherent power to grant relief which was underscored by the words

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<sup>8</sup> [1966] 2 All ER 459

<sup>9</sup> [1985] AC 585

<sup>10</sup> [2006] CCJ 3 (AJ)

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“without prejudice” in section 24 (1) and the proviso which immediately followed subsection 24 (2).

- [8] The CCJ then considered the second issue of whether section 2 of the OAPA breached section 11 (c) of the Constitution. The Court examined the reach and content of the right to protection of the law and found that right to protection of the law was the same as due process which connotes procedural fairness and invoked the concept of the rule of law. Protection of the law is therefore one of the underlying core elements of the rule of law which is inherent in the Constitution and affords every person, including convicted killers, adequate safeguards against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power.
- [9] The CCJ found that the mandatory death penalty deprived a court of the opportunity to exercise the quintessential judicial function of tailoring the punishment to fit the crime. The CCJ was of the view that the right to protection of the law or due process included the right to a fair trial. The trial process did not stop at conviction of the accused, as sentencing and mitigation were congruent components of a fair trial. As such, the principle of a fair trial must be applied to the sentencing stage and includes the right to appeal or apply for review by a higher court prescribed by law. The right to a fair trial as an element of protection of the law is one of the corner stones of a just and democratic society without which the rule of law and public faith in the justice system would inevitably collapse. The CCJ therefore held that the mandatory nature of death penalty in section 2 of the OAPA placed it in violation of the right to protection of the law as guaranteed by section 11 (c) of the Constitution.
- [10] The CCJ considered the third issue, whether section 2 of the OAPA could be modified. The CCJ rejected the Crown’s proposition that was espoused in the Privy Council case of *Boyce and Joseph* where their Lordships held that section 26 (1) precluded the Court from holding anything contained in or done under the authority of any existing law to be inconsistent with the human rights sections of the Constitution. So that section 1 is ousted and the occasion to modify never arises. The CCJ examined section 26 of the Constitution and found that it was an unacceptable diminution of the freedom of the newly independent people who fought for that freedom with unshakable faith in fundamental human rights. Further, it was incongruous that the same Constitution which guaranteed that every person in Barbados is entitled to certain fundamental rights and freedoms, would deprive them in perpetuity from the benefit of those rights purely because the deprivation existed prior to the adoption of the Constitution. Such a

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restrictive meaning could not be ascribed to section 26, as to do so would forever frustrate the basic underlying principles that the Constitution is the supreme law and that the judiciary is independent.

[11] The CCJ also rejected the Crown's contention that section 4(1) of the 1966 Independence Order was spent and could not be relied on to modify section 2 of the OAPA. What was spent in the Independence Order was the Governor General's extraordinary law-making power to make such amendments as were necessary to bring existing law into conformity with the Constitution. Subsection 4(1) did not impose any period of limitation on the general power to modify. Section 4 (1) of the Independence Order prescribed a mandatory direction to construe the existing laws to bring them into conformity.<sup>11</sup> The method of bringing into conformity is not limited to modification and adaptation, but it includes the wide powers of qualifications and exceptions. No existing law is excluded from the requirement of being brought into conformity. The Constitution is the supreme law and the laws in force at the time when it came into existence must be brought into conformity with it. Accordingly, the CCJ held that where there is a conflict between an existing law and the Constitution, the Constitution must prevail, and the courts must apply the existing laws as mandated by the Independence Order with such modifications as may be necessary to bring them into conformity with the Constitution.

[12] Having found section 2 of the OAPA to be inconsistent with section 11 (c) of the Constitution, the appeals could have accordingly been determined. However, for completeness, a fourth issue was considered; whether section 2 of the OAPA breached sections 12(1), 15(1) and 18(1) of the Constitution. In relation to sections 12(1), the CCJ found that the mandatory death penalty breached the right to not be deprived of life save in execution of the sentence of a court in respect of a criminal offence, as it reduced the Court's sentencing role to rubberstamping the dictates of the Legislature and therefore breached the doctrine of separation of powers. The CCJ also found that the right to a fair trial as guaranteed by section 18(1) and the right not to be subjected to inhuman or degrading treatment as guaranteed by section 15 (1) were also breached. In relation to section 15(1), the CCJ relying on *Bowe and another v R*<sup>12</sup>, found that the mandatory death penalty for the crime of murder pursuant to section 2 of the earlier Offences Against the Person Act of 1868 was modified in 1966 when Barbados became

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<sup>11</sup> *Bowe v The Queen* [2006] UKPC 10, [2006] 1 WLR 1623, [25]

<sup>12</sup> *Ibid*

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independent so that when the mandatory death penalty was reintroduced in the 1994 Act, what was saved was the discretionary sentence of death for the crime of murder. Thus, at the time of the 2002 amendment to section 15 of the Constitution, there was never a mandatory sentence of death for the crime of murder in Barbados. Accordingly, the amendments made to section 15 of the Constitution were inapplicable to the instant appeals. The CCJ observed that in such circumstances, it was unnecessary to rule on the Constitutionality of the 2002 amendment especially as there were no such submissions before the Court.

[13] In a concurring judgment, Justice Anderson agreed that the mandatory death penalty could not properly be imposed on the Appellants. However, he disagreed with the majority's position that: 1) section 11 of the Constitution was independently enforceable and; 2) that section 4 of the 1966 Independence Order could be used to modify section 2 of the OAPA. He was of the view that when the Chapter of the Constitution which addresses the Bill of Rights is examined, what emerges from the underlying structure is that section 11 was not intended to be enforceable independent of the rest of the Chapter. Section 11 is a perambulatory declaration of the rights and freedoms to which every person in Barbados is entitled. These rights are elaborated in sections 12-23 with section 24 providing a remedy for breach of those provisions; no remedy is specified for breach of section 11. He noted that this position is supported by several past decisions and was authoritatively affirmed in *Newbold v Commissioner of Police & Ors*<sup>13</sup>.

[14] Justice Anderson also found that the majority could not properly rely on section 4 (1) of the Independence Order to modify section 2 of the OAPA. He was of the view that it was difficult to believe that section 4 (1) of the colonial Independence Order was intended to be a permanent source of power for modification, adaptation or qualification of laws saved by the Constitution. When Barbados became independent the Constitution created a new legal order which was "unchallengeable by any colonial legislation not saved by the Constitution." In this new legal order, the Constitution had no rival. As such, a clause in the pre-Independence Order could not prevail over provisions in the Constitution. Justice Anderson also found that there were practical difficulties in using the Independence Order since section 4 (1) required that the right being asserted must have crystallised at the date of independence. The section could therefore not protect those rights which emerged after independence.

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<sup>13</sup> Supra (n.6)

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- [15] In those circumstances, Justice Anderson would have allowed the appeal on the basis that the power to sentence was an exclusively judicial power which was protected against legislative encroachment in the form of section 2 of the OAPA by the separation of powers doctrine. He considered this approach to be more consistent with facilitating respect for, and adherence to, the ongoing evolution in the protection of human rights regarding permissible sentences.
- [16] Accordingly, the appeals were unanimously allowed, and the Court ordered that the Appellants be expeditiously brought before the Supreme Court for resentencing. Further, the Court by a majority, declared that Section 2 of the OAPA was inconsistent with sections 11 (c), 12 (1) 15 (1) and 18 (1) of the Constitution of Barbados to the extent that it provides for a mandatory sentence of death.

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