IN THE CARIBBEAN COURT OF JUSTICE
APPELLATE JURISDICTION

ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS

CCJ Appeal No BBCR2023/002
BB Criminal Appeal No 12 of 2021

BETWEEN

THE BARBADOS DEFENCE FORCE **APPELLANT**

AND

DAVID ANTHONY HAREWOOD **RESPONDENT**

AND

REGIONAL SECURITY SYSTEM **AMICUS CURIAE**

Before: **Mr Justice Saunders, President**
Mr Justice Anderson
Mme Justice Rajnauth-Lee
Mr Justice Barrow
Mr Justice Jamadar

Date of Reasons: **26 July 2024**

Appearances

Mr Leslie F Haynes KC, Mr Noah M Haynes and Mr Kashawn K Woods for the Appellant

Mr Vincent D Watson for the Respondent

Mrs Melissa Yearwood-Stewart for the Amicus Curiae

Criminal law – Appeal – Military law – Legal certainty of statutory provision – Particulars of criminal charge – Whether s 75 of the Defence Act is legally certain – Whether particulars of the criminal charge were sufficient – Defence Act, Cap 159.

SUMMARY

This is an appeal against the decision of the Court of Appeal of Barbados ('CA') delivered on 27 June 2023, quashing the conviction of the Respondent which was handed down on 4 June 2019 by court-martial.

The Respondent was at all material times a commissioned officer of the Barbados Defence Force ('BDF') serving under the authority of the Barbados Coast Guard. In October 2018, an investigation into suspected criminal activity involving drug trafficking, money laundering, and gun trafficking within the Coast Guard division of the BDF was commenced and in furtherance of this the Respondent was interviewed. Arising out of disclosures which were made during his interview, the Respondent was charged and arraigned on 27 May 2019 on four (4) charges under s 75 of the Defence Act, Cap 159 ('the Act'). At the court-martial, Charges One and Two were dismissed as a consequence of a successful no case submission. However, on 4 June 2019, the court-martial panel unanimously ruled that the Respondent was guilty in respect of Charges Three and Four. The Respondent appealed to the Court of Appeal. On appeal, the dismissal of Charge Three was conceded during the hearing by the BDF, and the Court of Appeal found no legal or evidential bases for Charge Four and quashed the decision of the court-martial. The BDF then appealed to this Court.

In dismissing the appeal, the Court considered whether s 75 of the Act offended the rule of law and whether the particulars of the charges laid against the Respondent were in compliance with due process and fair hearing standards.

Section 75 of the Act provided as follows:

> Any person who, being subject to military law under this Act, does, or omits to do, any act or thing that is prejudicial to good order and military discipline is guilty of an offence and liable on conviction by court-martial to 2 years imprisonment or any less punishment provided by this Act.

Jamadar J, in delivering the reasons of the Court, found that the approach of the Court of Appeal to interpreting s 75 was too strict and restrictive, though the concerns that informed

it were well founded. Jamadar J considered s 75 against the test in *McEwan v Attorney General of Guyana.* The judge explained that a law expressed in broad terms does not necessarily mean that its breadth offends the rule of law requirements for clarity and legality. Jamadar J stated that what is essential is that the offence is defined and described with sufficient clarity to enable a person to assess whether their conduct is implicated and can render them liable to be prosecuted.

The purpose of s 75 of the Act was to maintain a disciplined armed force. Similar provisions exist in numerous jurisdictions and have been interpreted and applied without compromising the rights of military officers. Jamadar J noted that the language of s 75 is expressed with sufficient clarity to be capable of objective assessment and self-regulation. International military guidelines contain examples of what may constitute an offence falling under the section. Also, the open-endedness of the offence is academically acknowledged and its utility in a military context is accepted.

Following this reasoning, differing from the Court of Appeal, Jamadar J found that the language of s 75 of the Act did not offend due process, the protection of the law or the rule of law. It meets the constitutional standard of foreseeability, allowing members of the BDF to understand the consequences of and appropriately regulate their conduct.

In the current case, the particulars of Charge Four lacked sufficient particularity. In a s 75 charge, the constitutional requirements of due process, the protection of the law, and fundamental fairness must be satisfied in the statement of the particulars of the offence, given the broad and general wording of the statutory offence. The BDF was required to expressly allege every element and material detail of a charge with precise particularity.

Saunders P in his concurring Opinion reinforced that the Constitution of Barbados recognizes, even if inferentially, the uniqueness of court-martials and the resulting specialized procedures and rules that exist for the prosecution of service members for derelictions committed in the course of service. The military requires enforcement of the strictest discipline. Courts-martial are specifically designed to ensure that breaches of military discipline and the unique requirements of military life and service are

appropriately addressed, not by civilian Magistrates or Judges, but by military personnel. By excluding them from the remit of the normal criminal trial courts the Constitution recognises that courts-martial are best equipped to fulfil this role. However, court-martials are not exempt from a duty to abide by overarching constitutional values.

The appeal could not succeed as the charge, as laid, lacked the specificity, the particulars, necessary to allow the accused to properly defend himself. This defect implicated the constitutional right of the accused to the protection of the law. Where a person is charged, they must be told precisely what they are accused of, including the time, place, and manner of commission of the alleged offence. This clarity ensures that the defendant understands the nature of the charges and is able to prepare an appropriate defence. A well particularised charge also guides the tribunal in the presentation and evaluation of evidence, making it easier for all to focus on relevant facts and determine whether the alleged conduct matches the elements of the charged offence. From that standpoint, the charge laid here was not appropriately framed.

Saunders P further indicated that s 75 of the Act is an essential catch-all provision targeting conduct that undermines the maintenance of strict discipline. Service men and women ought to readily appreciate what conduct would disrupt the efficient operation or morale of the armed forces. The prosecution must satisfy the court-martial that the accused person must have known or had reasonable cause to believe that the impugned conduct was prejudicial to good order when it was engaged in. The court-martial must ultimately decide whether the conduct was objectively prejudicial and whether it was engaged in intentionally or recklessly.

Saunders P emphasised that s 75 is neither vague nor unconstitutional. Provided they are adequately particularised, charges laid under s 75 may be brought and are often conducive to maintaining discipline, unit cohesion and overall operational effectiveness.

The Court upheld the dismissal of the appeal albeit on different grounds and made no order as to costs.

Cases referred to:

A-G of Belize v Zuniga [2014] CCJ 2 (AJ) (BZ) (2014) 84 WIR 101; *A-G of Guyana v Thomas* [2022] CCJ 15 (AJ) GY, (2022) 101 WIR 403; *Ali v David* [2020] CCJ 10 (AJ) GY, (2020) 99 WIR 363; *Commissioner of Police v Alleyne* [2022] CCJ 2 (AJ) BB, [2022] 2 LRC 590; *Dottin's Academy Inc v Norville* [2021] CCJ 08 (AJ) BB, BB 2021 CCJ 2 (CARILAW); *Harewood v Barbados Defence Force* (BB CA, 27 June 2023); *Khan v The State* [2003] UKPC 79, (2003) 64 WIR 319 (TT); *Kolender v Lawson* 461 US 352 (1983); *Lassalle v A-G* (1971) 18 WIR 379 (TT CA); *Leung Kwok Hung v HKSAR* [2005] 3 HKLRD 164; *McEwan v A-G of Guyana* [2018] CCJ 30 (AJ) (GY), (2019) 94 WIR 332; *Nervais v R* [2018] CCJ 19 (AJ) (BB), (2018) 92 WIR 178; *Ontario v Canadian Pacific Ltd* [1995] 2 SCR 1031; *Parker v Levy* 417 US 733 (1974); *R v Addis* (1965) 49 Cr App Rep 95; *R v Armstrong* [2012] EWCA Crim 83; *R v Army Council ex p Ravenscroft* [1917] 2 KB 504; *R v Brandt* 2022 CM 4006; *R v Davies* [1980] Crim LR 582; *R v Dodman* (1998) 2 Cr App R 338; *R v France* (1898) 1 CCC 321; *R v Landy* [1981] 1 All ER 1172; *R v Lunn* (1993) 5 CMAR 157; *R v Quintner* (1934) 25 Cr App Rep 32; *R v Secretary of State for War, ex p Martyn* [1949] 1 All ER 242; *R v Spear* [2002] UKHL 31, [2003] 1 AC 734; *R v Tyler* (1992) 96 Cr App Rep 332; *R (Rybarczyk) v Military District Court of Poznan*, *Poland* [2013] EWHC 180 (Admin); *Sabapathee v State* [1999] 4 LRC 403.

Legislation referred to:

Barbados - Constitution of Barbados 1966, Defence Act, Cap 159; **United Kingdom** - Army Act 1955.

Other Sources referred to:

Camp P, 'Section 69 of the Army Act 1955' (1999) 149 NLJ 1955; Friedland M L, 'Military Justice and the Somalia Affair' (1998) 40 Crim LQ 360; Grady K, 'Disciplinary Offences at the Court Martial' [2016] Crim LR 714; 'Justice Through Court Martials' (UK Legal News Analysis, LexisNexis 24 October 2002); McBrien E J D, 'An Outline of British Military Law' (1983) 22 Mil L & L War Rev 9; Ministry of Defence, *Manual of Military Law Pt 1* (HMSO 1972); Office of the Judge Advocate General, 'Practice in the Service Courts Collected Memoranda' (Military Court Service, 1 September 2016) <https://www.judiciary.uk/wp-content/uploads/2020/08/practice-memo-ver-6-Sep16.pdf> accessed date 10 July 2024; Robinson T, Bulkan A, and Saunders A, *Fundamentals of Caribbean Constitutional Law* (2nd edn, Sweet and Maxwell 2021); Seetahal D S and Ramgoolam R, *Commonwealth Caribbean Criminal Practice and Procedure* (5th edn, Routledge 2019).

REASONS FOR DECISION

Reasons:

Jamadar J (Saunders P and Anderson, Rajnauth-Lee and Barrow JJ concurring) [1] – [36]

Disposition [55]

JAMADAR J:

Introduction

[1] There can be no doubt that in the military, officers must conform to certain standards and codes of behaviour and must be held accountable for related shortcomings. It ought to be self-evident as a general proposition, and it has been held to be so for eons, that behaviour that is inimical to good order and military discipline within the service may be properly the subject of inquiry, investigation and if necessary, disciplinary measures. Yet, in these proceedings the statutory ambit of this notion is contested. Thus, resolving this issue has far reaching consequences for how the military in Caribbean spheres will regulate its affairs and function in the future, the clarification of which the Appellant implored in this appeal.

[2] There can also be no doubt that in Barbados the Constitution is the supreme law and that all other laws are subject to its dictates, its standards, core values and principles.[1] Furthermore, in Barbados the rule of law prevails[2] and the protected fundamental rights include the protection of the law (and the inherent and accompanying right to due process).[3] Moreover, in Barbados, in what is known as the 'fair hearing' protection, s 18(2)(b) of the Constitution mandates that for criminal offences (as is apposite for disciplinary proceedings in court-martial proceedings[4]), a person charged 'shall be informed … in detail, of the nature of the

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[1] Constitution of Barbados 1966, s 1. See *A-G of Belize v Zuniga* [2014] CCJ 2 (AJ) (BZ), (2014) 84 WIR 101; *Ali v David* [2020] CCJ 10 (AJ) GY, (2020) 99 WIR 363; *Commissioner of Police v Alleyne* [2022] CCJ 2 (AJ) BB, [2022] 2 LRC 590.
[2] Preamble to the Constitution of Barbados 1966, cl (b). See *Dottin's Academy Inc v Norville* [2021] CCJ 08 (AJ) BB, BB 2021 CCJ 2 (CARILAW).
[3] Constitution of Barbados 1966, s 11(c). See *Nervais v R* [2018] CCJ 19 (AJ) (BB), (2018) 92 WIR 178.
[4] *R v Spear* [2002] UKHL 31, [2003] 1 AC 734; 'Justice Through Court Martials' (UK Legal News Analysis, LexisNexis, 24 October 2002).

offence charged.' These constitutional values are the lenses through which the issues that were contested before this Court must also be viewed.[5]

[3] This appeal specifically involves the Barbados Defence Act[6] ('the Act') and the jurisprudence on ordinary court martials. It raises issues of military law with a specific focus on s 75 of the Act and offences relating to conduct prejudicial to good order and military discipline,[7] for which there are no local precedents and is therefore of great importance for the Defence Forces in Barbados and the Caribbean. In particular, this appeal focuses on the constitutionality and *vires,* per se*,* of s 75, as well as the legal sufficiency of the charges and evidence in this matter.

Background

[4] The Respondent, was at all material times a commissioned officer of the Barbados Defence Force ('BDF') serving under the authority of the Barbados Coast Guard.[8] The Respondent's duties entailed, among other things, being in charge of over one hundred and twenty (120) soldiers, and fifteen (15) assets including vessels and the management of same on behalf of the Commanding Officer of the Barbados Coast Guard.

[5] In October 2018, pursuant to a Convening Order,[9] an investigation into suspected criminal activity involving drug trafficking, money laundering, and gun trafficking within the Coast Guard division of the BDF was commenced and in furtherance of this the Respondent was interviewed.[10] Arising out of disclosures which were made during his interview, the Respondent was charged and arraigned on 27 May 2019 on four (4) charges under the Act.[11]

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[5] *A-G of Guyana v Thomas* [2022] CCJ 15 (AJ) GY, (2022) 101 WIR 403 at [135] and [147].
[6] Defence Act, Cap 159.
[7] ibid. Section 75 states: 'Any person who, being subject to military law under this Act, does, or omits to do, any act or thing that is prejudicial to good order and military discipline is guilty of an offence and liable on conviction by court-martial to 2 years imprisonment or any less punishment provided by this Act.'
[8] *Harewood v Barbados Defence Force* (BB CA, 27 June 2023) at [21].
[9] See Defence Act (n 6), s 92.
[10] *Harewood* (n 8) at [21] – [23].
[11] Charge One: Communicated with the enemy contrary to section 36(2) of the Defence Act, Chapter 159. In that he, on a date unknown in January 2018, without lawful authority communicated with a known drug trafficker.

[6] At the court-martial, Charges One and Two were dismissed as a consequence of a successful no case submission.[12] However, on 4 June 2019, the court-martial panel unanimously ruled that the Respondent was guilty in respect of Charges Three[13] and Four.[14] As a consequence, the Respondent was sentenced to dismissal from the BDF and termination of his commission.[15] He appealed to the Court of Appeal. On appeal, Charge Three was conceded to be bad during the hearing by the BDF,[16] and the Court of Appeal found no legal or evidential bases for Charge Four and quashed the decision of the court martial.[17]

[7] In the reasoning of the Court of Appeal, Charges Three and Four were not proven to be offences within the meaning and scope of s 75.[18] In relation to Charge Four the court reasoned that: (i) there must be some framework defining what constitutes 'unauthorized' information gathering operations, (ii) there must be legal certainty that informs soldiers what is prohibited so that they may regulate their conduct,[19] (iii) the prosecution failed to unequivocally show a formal or informal standard operating procedure regarding reporting guidelines in the chain of command,[20] and (iv) the prosecution failed to discharge the burden of proving that the offences charged exist expressly and/or impliedly.[21]

Charge Two: Communicated with the enemy contrary to section 36(2) of the Defence Act, Chapter 159. In that he, between the 7th to 10th August 2018, without lawful authority, knowingly communicated with Akem Waithe also known as "Ellis" by cellular phone using Barbados cellular phone 836-3185.

Charge Three: Neglect to the Prejudice of Good Order and Military Discipline, contrary to section 75 of the Defence Act, Chapter 159. In that he, in the Island of Barbados on an unknown date in January 2018, being a Commissioned. Officer in the Barbados Defence Force, having knowledge of a threat to the life of a junior member of the Barbados Defence Force, namely, Ordinary Seaman Marlon Scott, neglected to inform his superiors of such a threat.

Charge Four: Conduct to the prejudice of Good Order and Military Discipline Contrary to Section 75 of the Defence Act, Chapter 159. In that he, without lawful authority between 1st January 2018, and 30th September 2018, at various places in Barbados conducted unauthorized information gathering operations, conduct unbecoming of a Commissioned Officer in the Barbados Defence Force.

[12] *Harewood* (n 8) at [27].

[13] Charge Three: neglect to the prejudice of good order and military discipline, contrary to section 75 of the Act, by neglecting to report a threat on the life of a junior officer.

[14] Charge Four: conduct to the prejudice of good order and military discipline contrary to section 75 of the Act, by conducting an unauthorised investigation.

[15] *Harewood* (n 8) at [28].

[16] ibid at [60].

[17] ibid at [103].

[18] ibid at [101].

[19] ibid at [100] 4 [sic].

[20] ibid at [100] 5 [sic].

[21] ibid at [100] 6 [sic].

[8] The BDF appealed the decision of the Court of Appeal to this Court. Before this Court, Charge Four was abandoned in oral submissions. As a consequence, on 26 April 2024 this Court dismissed the BDF's appeal with reasons to follow. In this Court's opinion the jurisprudential importance of some of the issues that were aired calls for clarification, including this Court's views on the reasoning of the Court of Appeal, all of which are discussed in the reasons which follow.

The Issues

[9] Before this Court the two issues that engaged counsel and that this Court was urged to give its views on concerned Charge Four and whether (i) s 75 of the Act offends the rule of law for legal uncertainty and vagueness (the *vires* of the section),[22] and (ii) the particulars of the s 75 charge laid against the Respondent were sufficiently clear to have the specific misconduct alleged brought to his attention with adequate particularity and in compliance with due process and fair hearing standards.[23]

[10] Section 75 of the Act states:

> Any person who, being subject to military law under this Act, does, or omits to do, any act or thing that is prejudicial to good order and military discipline is guilty of an offence and liable on conviction by court-martial to 2 years imprisonment or any less punishment provided by this Act.

Charge Four was stated as follows:

> Conduct to the prejudice of Good Order and Military Discipline Contrary to Section 75 of the Defence Act, Chapter 159. In that he, without lawful authority between 1st January 2018, and 30th September 2018, at various places in Barbados conducted unauthorized information gathering operations, conduct unbecoming of a Commissioned Officer in the Barbados Defence Force.

[11] As explained, the Court of Appeal raised concerns regarding the lack of a clear pre-existing framework defining what constitutes 'unauthorized information gathering operations' and additionally, the prosecution's failure to establish clear reporting

[22] See *McEwan v A-G of Guyana* [2018] CCJ 30 (AJ) (GY), (2019) 94 WIR 332 at [80] and following.
[23] *R v Quintner* (1934) 25 Cr App Rep 32. See also *R v Tyler* (1992) 96 Cr App Rep 332.

guidelines within the chain of command, which in its opinion further complicated the matter. The Appellant contended that the Act provides sufficient legal certainty and that the particulars of the misconduct charged against the Respondent were sufficient.

[12] This case underscores not only the intricacies of military law but also the importance of explaining the particulars of an offence in laying charges of a criminal nature. For the Appellant, what is at stake is a concern that if the reasoning of the Court of Appeal stands, then in order to prove an omission or act 'that is prejudicial to good order and military discipline' (a s 75 offence), which it insists is a necessary regulatory provision in the military, proof of some pre-existing prohibition for alleged offending conduct will be necessary. A situation that, it is contended, is untenable because s 75 is intended to be open-ended to facilitate matters that may arise from time to time that are prejudicial to good order and military discipline, but not necessarily anticipatorily proscribed. The Appellant contends that the Court of Appeal has too narrowly restricted the application of s 75 and that interpretation is detrimental to the effective running of the military.

[13] What these two issues address are first, the *vires* of s 75 per se, and second, how the particulars of a charge under s75 are integral to an offence under the section (and therefore by implication the sufficiency of Charge Four in this case). As will be discussed, these discrete issues are in fact two sides of a single coin.

[14] In passing it may also be important to note that before this Court no issue was taken with the jurisdiction of either the Court of Appeal or this Court to hear and determine this appeal, which is founded in the exercise of its criminal jurisdiction. The issue was dealt with at [45] to [48] of the judgment of the Court of Appeal. There is also agreement in relation to the burden and standard of proof in a court martial, the burden lies on the prosecution on a criminal standard of proof of guilt beyond a reasonable doubt. This issue was also dealt with in the judgment of the Court of Appeal at [49] to [52].

The Vires of s 75

[15] The Court of Appeal, in its analysis of the issues noted in relation to s 75:[24]

> It is impossible not to make the general observation here that **section 75** is drafted in vague and general terms that call for an interpretation of the term "prejudicial to good order and military discipline". Or alternatively, the lack of evidence of regulations, standing orders and an established practice or precedent that defines with some degree of legal certainty the meaning of the term "good order and military discipline" and conduct liable to attract the criminal sanction of two years imprisonment or in this case dismissal from the BDF.

[16] The Court of Appeal was sufficiently troubled by this issue, that it directed supplemental submissions be filed on whether, in light of the alleged vagueness of s 75, Charges Three and Four 'are military … offences within the meaning and scope of section 75 of the Act.'[25] Ultimately the Appellant would concede before the Court of Appeal that as a result of the sparseness of the particulars underpinning it, Charge Three was unsustainable but continued to argue that Charge Four was proper.[26]

[17] At the heart of the Appellant's argument, which the Court of Appeal rejected, was the contention that s 75 was intended to also cover charges that were not specifically identified in the Act or the Military Manual[27] (considered the two formal sources of military law), even if there was no written law, rule, regulation, standing order, precedent, or policy proscribing the charged behaviour(s). Before the Court of Appeal, it was agreed that there was no offence of 'unauthorized information gathering operations' to be found in the Act, the Military Manual, or contained in any written rule, regulation, or policy of the BDF.[28] However, and as the Court of Appeal summarised, the Appellant's contention is that not all duties imposed on

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[24] *Harewood* (n 8) at [56].
[25] ibid at [57].
[26] ibid at [60].
[27] The Military Manual refers to the United Kingdom's Ministry of Defence, *Manual of Military Law Pt 1* (HMSO 1972), widely considered a Commonwealth authority on military law and treated as such by the parties to this appeal. See also *Harewood* (n 8) at [4] and [21].
[28] See discussion in *Harewood* (n 8) at [68] to [81].

members of the military are expressly stated …, they can be necessarily implied[29] for the purposes of a charge under s 75. And, to constitute a legitimate Charge Four under s 75 what is essential is that the Respondent 'knew or ought to have known that he required specific orders to gather information in the way he admittedly did'.[30]

[18] In more general terms, the Appellant argues that what is required to constitute a legally *vires* but unspecified charge under s 75, is either the commission of a positive action or the omission or failure to discharge a duty imposed or reasonably to be assumed by military custom or convention or practice (as a species of implied military negligence),[31] that, for the purposes of s 75, was known or ought to have been known to be 'prejudicial to good order and military discipline.'

[19] The Court of Appeal was not persuaded by the Appellant's implied criminal offence construction of s75. It would opine:[32]

> In our view, in order to rely on an implied code of conduct it was incumbent on the prosecution to establish a policy and/or practice brought to the attention of members of the force or alternatively satisfy the court-martial on the criminal standard that the Appellant was fully aware that his conduct constituted a punishable offence under **section 75** of **the Act.**
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> It appears to us that there may be cause for a distinction between matters engaging the Force's powers of disciplinary control (offences against discipline) and "offences" (criminal), within the scope of **section 75** of **the Act** as having been established by regulations, standing orders, or service precedent.

[20] In our opinion the approach of the Court of Appeal to s 75 was too strict and restrictive, though the concerns that informed it are well founded. This Court, in *McEwan v Attorney General of Guyana*,[33] explained its general approach to vagueness in criminal laws, as follows:

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[29] ibid at [81].
[30] ibid at [85].
[31] ibid at [61] and [62].
[32] ibid at [94] and [95].
[33] *McEwan* (n 22) at [80] and [82].

> A penal statute must meet certain minimum objectives if it is to pass muster as a valid law. It must provide fair notice to citizens of the prohibited conduct.[34] It must not be vaguely worded. It must define the criminal offence with sufficient clarity that ordinary people can understand what conduct is prohibited.[35] It should not be stated in ways that allow law enforcement officials to use subjective moral or value judgments as the basis for its enforcement. A law should not encourage arbitrary and discriminatory enforcement.[36]
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> …
>
> It was suggested to us by the Solicitor General that any potential vagueness could be removed if, when a person is charged, details are given of the improper purpose that prompted the laying of the charge. This is not an effective solution to the problem. It seeks to cure the vagueness *after* the individual has been arrested for the offence. On the contrary, individuals require advance notice of any proscribed conduct so as to regulate their behaviour so as to avoid getting into trouble.

[21] In *McEwan* this Court found that the law in question in that case was 'hopelessly vague' and was unconstitutional as offending the rule of law. It was struck down.[37] However, the issue of statutory vagueness is more nuanced in practice. And an important distinction must also be drawn between a law that is so vaguely stated per se that it offends the rule of law, and a charge brought on a valid (albeit broadly stated) law that is not sufficiently precise and particularised.

[22] A law expressed in broad terms does not necessarily mean that it is vague and offends the rule of law requirements for clarity and legality.[38] Legislation creating criminal conduct may be intentionally and purposively open ended to avoid excessive rigidity and to cover emerging future circumstances. What is essential is that any criminal offence charged under that law is defined and described with sufficient clarity to enable a person to understand how their conduct violated the statute and rendered them liable to be prosecuted.

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[34] ibid citing *Ontario v Canadian Pacific Ltd* [1995] 2 SCR 1031.
[35] *McEwan* (n 22), citing *Kolender v Lawson* 461 US 352 (1983) at 357.
[36] ibid.
[37] *McEwan* (n 22) at [85], citing *Sabapathee v State* [1999] 4 LRC 403 at 412 (Lord Hope).
[38] See *Sabapathee v State* [1999] 4 LRC 403 at [17]-[19].

[23] In *Fundamentals of Caribbean Constitutional Law*,[39] the authors explain the relationship between legal certainty, due process, and the rule of law, as follows: 'A criminal statute will violate the due process right and, likewise, the right to the protection of the law if it is so vague that a citizen cannot regulate his or her conduct.[40] … The degree of certainty or precision expected depends on the circumstances.'[41]

[24] These legality requirements for certainty and clarity are heightened with laws that interfere with fundamental rights and in such situations the need for precision is enhanced. The test is one of sufficiency and is often expressed as 'sufficient clarity'.[42] This is a contextual and not an absolute standard. What is often determinative of legality, is an objective assessment of whether a person can regulate their conduct knowing with a reasonable degree of confidence whether their conduct will be considered criminal or not. To this extent, legal certainty requires a measure of reasonable foreseeability in relation to the consequences of a person's conduct.[43]

[25] Section 75 defines and describes as proscribed conduct 'any act or thing that is prejudicial to good order and military discipline'. This is its intention and purpose. In and of itself, this language is not, in our opinion, so hopelessly vague to offend due process, the protection of the law, and the rule of law. As explained in *R v Brandt*,[44] the purpose of the offence goes to the core need to maintain a disciplined armed force, which is the underlying justification for the breadth of the s 75 offence. A justification that the amicus appearing before this Court re-iterated. On the face of it, s 75 meets the sufficiency test requirements for its legality.

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[39] Tracy Robinson, Arif Bulkan and Adrian Saunders, *Fundamentals of Caribbean Constitutional Law* (2nd edn, Sweet and Maxwell 2021) para 6-014.
[40] ibid citing *Lassalle v A-G* (1971) 18 WIR 379 (TT CA) at 383 and *Khan v The State* [2003] UKPC 79, (2003) 64 WIR 319 (TT) at [10].
[41] ibid citing *Sabapathee* (n 38).
[42] *McEwan* (n 22).
[43] Robinson, Bulkan and Saunders (n 39) para 6-015. See also *Leung Kwok Hung v HKSAR* [2005] 3 HKLRD 164.
[44] 2022 CM 4006.

[26] In any event, the following four reasons prevail. First, similar provisions to s 75 exist in numerous other jurisdictions and have been interpreted and applied without compromising the stated fundamental rights of military officers.[45] Second, the language is expressed with sufficient clarity to be capable of an objective assessment and a reasonable measure of self-regulation. The proscribed conduct must be prejudicial, in the context of the military, to good order and discipline. Third, in the Military Manual there are examples given of what could constitute a s 75 offence. These are clearly illustrative and not exhaustive and include conduct such as the improper use of a vehicle or service property, improper possession of leave passes, and the wearing of badges of rank that have not been awarded.[46] These, self-evidently, can be prejudicial to and undermine good order and discipline in the military. No doubt there can be innumerable other examples and occurrences of conduct that can constitute an offence under s 75.[47] Fourth, academic writers acknowledge the open-endedness of s 75 and the difficulty for a person to know in advance whether their conduct falls within the section, but nevertheless accept its utility in the context of the military.[48]

[27] In our opinion, the pre-existence of a written law, rule, regulation, standing order, precedent, or policy proscribing the charged behaviour(s) is not necessary for laying a charge under s 75 of the Act. In this case, the Appellant clearly identified that the alleged offence was contrary to s 75 and purported to give particulars (a matter that will be considered presently). As such, the Respondent's constitutional right to notice of the charge, subject to the extent of the specificity of the particulars, has not been compromised. The essential elements of the charge are clear: the

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[45] The Act is modelled after the Army Act 1955 (UK). Section 75 exists in similar form in many pieces of Military legislation including the United Kingdom, Canada, United States, and Australia, among others. See for example in the UK, *R v Davies* [1980] Crim LR 582: a variety of offensive behaviours may be prosecuted under the UK equivalent of s 75 and these are not limited to an exhaustive list. Moreover, per *R v Armstrong* [2012] EWCA Crim 83, it is irrelevant that the conduct does not have the potential to become known to others within the military or that it was not in fact known until it was discovered on investigation. And as stated in *R (Rybarczyk) v Military District Court of Poznan, Poland* [2013] EWHC 180 (Admin), it is not a requirement of establishing an offence under the s 75 equivalent that it should be proved that a soldier realised that acts which objectively were prejudicial to good order and discipline amounted to conduct prejudicial to good order and discipline. In Canada and the United States, similar approaches have been taken. In Canada, *R v Lunn* (1993) 5 CMAR 157 at 166 essentially upheld that the equivalent to s 75 is not constitutionally too vague. See also Martin L Friedland, 'Military Justice and the Somalia Affair' (1998) 40 Crim LQ 360. In the United States, in *Parker v Levy* 417 US 733 (1974), the equivalent section to s 75 was held to be not unconstitutionally vague nor facially invalid because of overbreadth.

[46] See *Harewood* (n 8) at [72].

[47] See (n 45).

[48] Kate Grady, 'Disciplinary Offences at the Court Martial' [2016] Crim LR 714; Paul Camp, 'Section 69 of the Army Act 1955' (1999) 149 NLJ 1955. See also E J D McBrien, 'An Outline of British Military Law' (1983) 22 Mil L & L War Rev 9, 14.

alleged conduct must be proven, beyond a reasonable doubt, to be prejudicial to good order and military discipline in the context of the BDF, and the burden of proof is on the Appellant. To require, as a general rule, that a pre-condition for bringing a charge under s 75 is the pre-existence of a written law, rule, regulation, standing order, precedent, or policy proscribing the specific charged behaviour(s),[49] would undermine the intention, purpose and utility of s 75 in the scheme of the Act.

[28] Accordingly, applying the requirements for legal certainty, s 75, although drafted in broad and general terms, meets the constitutional standard of foreseeability which would allow members of the BDF to understand the consequences of and appropriately regulate their conduct to avoid censure. The nature of conduct amounting to an offence under s 75, is limited to actions/omissions which prejudice (undermine) good order and military discipline. Whether an offence has occurred is determined on an objective test, irrespective of how an accused subjectively perceived their conduct. Thus, it does not matter whether an accused perceived their conduct as culpable. Therefore, the conduct charged under Charges Three and Four need not have been contained in a pre-existing written law, rule, regulation, standing order, precedent, or policy, as the utility of s75 is to censure conduct which is objectively contrary to military standards, and which ought to attract military disciplinary measures even if not expressly proscribed. Thus, the view of the Court of Appeal seemingly to the contrary is to be reconsidered in this light.[50]

The Particulars of Charge Four

[29] The legitimate concerns of the Court of Appeal are adequately met in a s 75 charge if the elements of the charge are satisfactorily enumerated with sufficient particularity and clarity. This is also a part of due process, and the protection of the law, whereby an accused must be informed of the nature and cause(s) of an accusation. A charge is sufficient if it contains all the elements of the offence charged and fairly informs an accused with sufficient particularity of what they must

[49] In this case, and in relation to Charge Four, conducting unauthorised information gathering operations.
[50] *Harewood* (n 8) at [99] – [100].

answer so as to enable them to plead in response, and if not guilty, to properly prepare for and adequately defend the charge(s).

[30] A charge must therefore inform an accused of the precise details, or particulars, of the alleged misconduct that support the charge. These particulars should provide a clear and concise description of the alleged criminal act including details, say, about the time, place, and manner in which the offence was committed. Particulars must give the accused adequate notice of the charge(s) they face, enabling them if necessary, to prepare a defence. Particulars also assist in focusing the trial on the relevant facts and legal issues. Hence, they go to due process and the protection of the law.

[31] Indeed, in Barbados s 18(2)(b) of the Constitution mandates that for criminal offences (and therefore for disciplinary proceedings in court-martial proceedings under the Act[51]), a person charged 'shall be informed … *in detail*, of the nature of the offence charged.' (emphasis added). This provision encapsulates the constitutional mandates of fairness and due notification, that require a s75 charge to detail and make specific in the content of the particulars of the charge what is broadly stated (conduct that is prejudicial to good order and military discipline).

[32] These constitutional standards required the Appellant to expressly allege every element and material detail of a charge with precise particularity. Thus, an offence must be adequately described both in the statement of charge, and in the particulars of offence.[52] The degree of detail depends on the nature of the offence and circumstances of the charge. For example, in cases involving, say, complicated conspiracies, the particulars of offence should contain sufficient details such as will enable an accused and the adjudicating judicial officer to clearly know the nature of the prosecution's case, and to ensure fairness, to prevent the prosecution from shifting its ground during a trial without first applying for leave to amend the

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[51] *R v France* (1898) 1 CCC 321 at 328 (Wurtele J). See also Dana S Seetahal and Roger Ramgoolam, *Commonwealth Caribbean Criminal Practice and Procedure* (5th edn, Routledge 2019).
[52] *R v Quintner* (1934) 25 Cr App Rep 32. See also *R v Tyler* (1992) 96 Cr App Rep 332 (indictment, the particulars of which disclose a correct offence but widen the ambit of the offence, capable of amendment and not a nullity).

indictment.[53] A reviewing court is therefore entitled to narrowly interpret the language and specifications of the charge so as to protect the fundamental rights of an accused and to ensure a fair trial.

[33] In this matter, it is precisely a deficiency in the particulars of Charge Four that led the Appellant to withdraw its appeal, and rightly so, agreeing that Charge Four lacked sufficient particularity. The charge and particulars stated, were as follows:

> Conduct to the prejudice of Good Order and Military Discipline Contrary to Section 75 of the Defence Act, Chapter 159. In that he, without lawful authority between 1st January 2018, and 30th September 2018, at various places in Barbados conducted unauthorized information gathering operations, conduct unbecoming of a Commissioned Officer in the Barbados Defence Force. (footnote omitted)

[34] What was the nature and what were the details of the unauthorised information gathering operations that were allegedly conducted by the Respondent? How could the Respondent fairly and properly prepare to plead to or defend such an accusation? These are but two questions that demonstrate the conceded deficiency in particulars of Charge Four. It cannot be overstated, that in a s 75 charge, the constitutional requirements of due process, the protection of the law, and fundamental fairness will need to be satisfied in the statement of the particulars of the offence, given the broad and general wording of the statutory offence.

Conclusion

[35] Though we have held that s 75 satisfies the requirements of legal certainty, and that there is no need for the pre-existence of a written law, rule, regulation, standing order, precedent, or policy proscribing charged behaviour(s) as a pre-condition for laying a charge under s 75 of the Act (provided there is sufficiency of detail in the statement of the particulars of the offence), this is by no means to suggest that the BDF should not be strongly encouraged to

[53] See *R v Addis* (1965) 49 Cr App Rep 95; *R v Landy* [1981] 1 All ER 1172.

provide cogent guidance in relation to proscribed conduct that could result in a s 75 offence.[54] As a responsible military organisation we urge the BDF to take the care and time to create such written guides, standing operation procedures, and manuals, that are regularly updated, and conduct periodic education and training on these codes of conduct.

[36] It is our hope that the BDF will learn from this experience and will endeavour to ensure that their processes and procedures are clear and accessible and where any gaps are discovered they are remedied, for the guidance and benefit of their officers and the organisation as a whole.

SAUNDERS P:

[37] The accused, a Barbados Defence Force ('BDF') officer, was tried by court-martial for breaches of the Defence Act[55] ('the Act'). Two of the four offences charged were stated to be contrary to s 36(2) of the Act which criminalises 'Communicating with the enemy'. The other two offences, Charges Three and Four allegedly contravened s 75 of the Act. Section 75 speaks to 'Conduct to [the] prejudice of military discipline'. The four offences are specifically laid out at [5] footnote 11 of the judgment of Jamadar J.

[38] The first of the two s 75 offences charged the accused with neglect. The charge alleged that, having knowledge of a threat to the life of a junior member of the Defence Force, the accused had neglected to inform his superiors of the threat. The second of the s 75 offences alleged that, without lawful authority, the accused had conducted unauthorised information gathering operations and that this constituted conduct unbecoming of a commissioned officer in the BDF.

[39] The court-martial, ably presided over by Lieutenant Colonel Rohan Johnson of the Jamaica Defence Force, heard evidence and submissions in relation to all four

[54] Ideally this should be done in the form of written rules, regulations, standing orders, and policies.
[55] Cap 159 (n 6).

charges. The tribunal properly upheld a no case submission in relation to the s 36 charges. The court-martial accepted that an alleged drug trafficker, with whom it was claimed the accused had been in communication, did not fall within the compass of 'the enemy' as referenced in s 36. The court-martial, however, did find the accused guilty of both s 75 charges relating to conduct to the prejudice of military discipline. The sentence imposed on him was dismissal from the BDF.

[40] The accused appealed to the Court of Appeal against his conviction. His grounds of appeal revolved around three broad areas. First, he claimed that there was no or no sufficient evidence to support the s 75 charges. Indeed, he argued that the court-martial had wrongly refused to uphold his no case submission made at the end of the case for the prosecution. Secondly, he argued, in relation to the third charge, that the words that were said to have constituted the threat did not in fact constitute a threat at all and that, in any event, the evidence adduced did not establish that the threat (if indeed it was such) had not been reported. Thirdly, as to the second s 75 charge, it was submitted that the prosecution failed to provide a definition of what amounts to 'information gathering' or to prove that he had engaged in unauthorised information gathering. The accused also appealed against the sentence imposed on him.

[41] In treating with the appeal, the Court of Appeal effectively put to one side the grounds of appeal formally set out by counsel for the accused. The court decided to concern itself with what it regarded to be 'the more foundational or *in limine* issue of the offences charged themselves.' The Court of Appeal felt that this issue had to be settled before it could go on to consider a) the elements of the offences charged and b) whether there was a sufficiency of evidence to prove the commission of the offences beyond reasonable doubt.

[42] In looking at 'the offences charges themselves' the Court of Appeal reasoned that s 75 was 'vague' and that a consideration of this vagueness and of the charges laid under that section was potentially dispositive of the appeal. The Court of Appeal

was so concerned with the question of whether the accused was properly or appropriately charged that it invited the parties to file supplementary submissions on this issue. As a consequence of these further submissions, the prosecution accepted that the first of the s 75 charges (Charge 3) must be dismissed. The prosecution persisted in defending the conviction for unauthorised information gathering (Charge 4) but the prosecution's arguments on Charge 4 did not prevail.

[43] The Court of Appeal concluded that the prosecution had failed to establish that the s 75 offences 'exist in law or by implication'. Accordingly, the appeal of the accused was upheld. Both Charges, 3 and 4, were dismissed. The court therefore found it unnecessary to address either the grounds of appeal relating to the sufficiency of the evidence to support Charge 4 or the excessiveness or the disproportionality of the sentence.

[44] The prosecution appealed to this Court, the Court of Appeal's dismissal of the fourth charge. In the course of the proceedings before us, it was evident that the appeal had no prospects of success and counsel for the prosecution rightly agreed to withdraw the appeal. Counsel was however of the opinion that, given the broad views of the Court of Appeal on s 75 of the Act and charges laid under s 75, it was important that this Court should express itself on those matters.

[45] The Court of Appeal had indicated that because of the alleged 'vagueness' of s 75 it entertained grave doubts that a charge under that section could be maintained where there was no relevant law, regulation made pursuant to the Act, or stated military policy or practice against which unbecoming conduct of an accused could be assessed. According to the court:[56]

> [56] It is impossible not to make the general observation here that **section 75** is drafted in vague and general terms that call for an interpretation of the term "prejudicial to good order and military discipline". Or alternatively, the lack of evidence of regulations, standing orders and an established practice or precedent that defines with some degree of legal certainty the

[56] *Harewood* (n 8) at [56].

> meaning of the term "good order and military discipline" and conduct liable to attract the criminal sanction of two years imprisonment or in this case dismissal from the BDF.

[46] Regrettably, I cannot associate myself with these observations and the main purpose of this concurring judgment is to make clear some views on this matter. I start where all law and legality can usefully begin; with the Constitution.

[47] The Constitution of Barbados recognises as a distinct specie of criminal proceedings, even if only inferentially so, the uniqueness of courts-martial. Section 79A of the Constitution grants wide powers to the Director of Public Prosecutions to institute and undertake criminal proceedings against *any* person before *any* court, but the section carefully excepts courts-martial from this sweeping remit.

[48] Why does the Constitution make this exception for courts-martial? The Constitution does so because it recognises and accepts the peculiar nature of military service and the resulting specialised procedures and rules that must exist for the prosecution of service members for derelictions committed in the course of that service. The ordinary civil courts should be wary of trespassing the jurisdiction of a court-martial unless a person's fundamental rights are affected. See for example *R v Army Council, ex p Ravenscroft*[57] and *R v Secretary of State for War, ex p Martyn*[58].

[49] What distinguishes the military is that it is an institution that absolutely requires enforcement of the strictest discipline. The service has therefore had to develop a distinct culture, set of rules, standards and procedures geared at maintaining order and operational efficiency. Courts-martial are specifically designed to ensure that breaches of military discipline and the unique requirements of military life and service are appropriately addressed, not by civilian Magistrates or Judges but by military personnel. By excluding them from the remit of the normal criminal trial

[57] [1917] 2 KB 504 at 508.
[58] [1949] 1 All ER 242 at 243 (Goddard CJ).

courts the Constitution recognises that courts-martial are best equipped to fulfil this objective.

[50] Of course, courts-martial are not exempt from a duty to abide by overarching constitutional values. Soldiers do enjoy a basic right to the protection of the law; and this is why I agreed that the appeal here could not succeed. The problem in this case was not that s 75 was vague or that charges laid under it are inherently deficient in substance. The problem here was that the charge, as laid, lacked the specificity, the particulars, necessary to allow the accused to properly defend himself. This defect implicated the constitutional right of the accused to the protection of the law. Merely to accuse an officer that, without lawful authority, between 1 January 2018 and 30 September 2018, at various places in Barbados, the officer conducted unauthorised information gathering operations, was insufficient. Where were these 'various places'? In St Lucy? In Christ Church? In what manner did the accused conduct the alleged unauthorised information gathering operations? What exactly did the accused do and with whom and how?

[51] When a person is charged, even before a court-martial, it is important that they are told precisely what they are accused of, including the time, place, and manner of commission of the alleged offence. This clarity ensures that the defendant understands the nature of the charges and is able to prepare an appropriate defence. A well-particularised charge also guides the tribunal in the presentation and evaluation of evidence, making it easier for all to focus on relevant facts and determine whether the alleged conduct matches the elements of the charged offence. From that standpoint, the charge laid here was not appropriately framed.

[52] I emphatically agree with Jamadar J, however, that the pre-existence of a written law, rule, regulation, standing order, precedent, or policy proscribing the charged behaviour is unnecessary for laying a charge under s 75 of the Act. That section is an essential catch-all provision targeting misconduct that undermines the

maintenance of strict discipline. As pointed out by Jamadar J, variants of s 75 are to be found in military codes almost everywhere.

[53] Service women and men, steeped in the culture of the military, would or ought readily to appreciate (even if civilian trial and appellate judges might struggle with the concept) what conduct would disrupt the efficient operation or morale of the armed forces. Certainly, the prosecution must satisfy the court-martial that the accused person must have known or had reasonable cause to believe that the impugned conduct was prejudicial to good order when it was engaged in. And the court-martial must ultimately decide whether the conduct was objectively prejudicial (in other words, whether a reasonable service person would have contemplated that the conduct alleged was prejudicial) and whether it was engaged in intentionally or recklessly[59].

[54] While the military is encouraged to and will undoubtedly provide general guidance in the form of rules, written policies and protocols, it is impossible to specify beforehand every conceivable infraction that will undermine authority. The Court of Appeal was right to draw attention to the need for these s 75 offences to be properly particularised. On this basis the Court of Appeal was also right to dismiss those charges. But it must be emphasised that s 75 is not vague nor unconstitutional. A similar conclusion was reached by the Office of the Judge Advocate General in London when that Office offered the opinion that a similar provision is not incompatible with art 7 of the European Convention on Human Rights[60]. Provided they are adequately particularised, charges laid under s 75 may be brought and are often conducive to maintaining discipline, unit cohesion and overall operational effectiveness.

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[59] See *R v Dodman (*1998) 2 Cr App R 338.
[60] See Office of the Judge Advocate General, 'Practice in the Service Courts Collected Memoranda'(Military Court Service,1 September 2016) para 1.3 < https://www.judiciary.uk/wp-content/uploads/2020/08/practice-memo-ver-6-1Sep16.pdf> accessed 10 July 2024.

Disposition

[55] The following are the orders of the Court:

1. The appeal is dismissed.

2. No order as to costs:

/s/ A Saunders

Mr Justice Saunders (President)

/s/ /W Anderson

Mr Justice Anderson

/s/ M Rajnauth-Lee

Mme Justice Rajnauth-Lee

/s/ D Barrow

Mr Justice Barrow

/s/ P Jamadar

Mr Justice Jamadar