[2026] CCJ 7 (AJ) BZ

IN THE CARIBBEAN COURT OF JUSTICE
APPELLATE JURISDICTION

ON APPEAL FROM THE COURT OF APPEAL OF BELIZE

CCJ Appeal No BZCV2025/003
BZ Civil Appeal No 21 of 2021

BETWEEN

ANDREW AVELLINE BENNETT	**APPELLANT**

AND

GOVERNMENT OF THE UNITED STATES OF AMERICA	
ATTORNEY GENERAL OF BELIZE	**RESPONDENTS**

Before: **Mr Justice Anderson, President**
Mme Justice Rajnauth-Lee
Mr Justice Barrow
Mr Justice Jamadar
Mme Justice Ononaiwu
Mr Justice Eboe-Osuji
Mr Justice Bulkan

Date of Judgment: **15 May 2026**

<u>Appearances</u>

Mr Edward Fitzgerald KC and Mr Hector D Guerra for the Appellant

Ms Samantha Matute, Deputy Solicitor General for the Respondents

Evidence — Admissibility — Electronic communications — WhatsApp messages — Extradition proceedings — Judicial authorisation – Interception of Communications Act not in force – Decision per incuriam — Constitutional issues raised but not determined – Abuse of process alleged – Appellate discretion – Remittal to High Court.

SUMMARY

This appeal from Belize concerns the constitutionality of the use of WhatsApp messages as evidence in extradition proceedings against the Appellant. In 2017, the United States of America made a request for the extradition of Mr Bennett, an attorney at law, pursuant to the *Extradition Treaty* between the Government of the United States of America and the Government of Belize. The evidence on which the request was predicated included WhatsApp messages between the Appellant and a Special Agent from the United States Drug Enforcement Administration, in which the Appellant allegedly incriminated himself. This evidence was challenged by the Appellant who contended that its use without prior judicial authorisation was illegal and a criminal offence under the Interception of Communications Act, CAP 229:01 and violated his rights under the Belize Constitution. That argument was upheld both by the High Court and Court of Appeal. However, the courts decided there was other untainted evidence which supported the extradition request by the United States of America. On appealing this decision, the Appellant argued that the unlawfully obtained evidence vitiated the entire proceeding and to proceed with the extradition request with the remaining evidence would amount to an abuse of process.

At this Court, it was discovered at the stage of written submissions that the Interception of Communications Act only came into force in November 2023, after the dates of both the High Court and Court of Appeal cases. The CCJ accordingly declared that the reliance on that statute by the lower courts was an error in law or *per incuriam,* as historically described in a Latin expression.

The Appellant sought, notwithstanding this discovery, to have the CCJ decide the appeal on the basis that the use of the WhatsApp messages was unconstitutional on broader, generally recognised principles. The bench rejected that approach and determined that the asserted but not fully argued issue of unconstitutionality on a broader non-statutory basis could only be fairly resolved by remitting the matter to the High Court, giving the parties the fullest opportunity to pursue these arguments if they chose to do so.

Justice Eboe-Osuji added a concurring opinion, clarifying that, in his view, the appeal was being remitted to the High Court because of the importance of the questions posed by the CCJ Justices during the appeal hearing. He also discussed the importance of questions from the bench beyond the submissions of counsel, as well as the related doctrine of *jura novit curia*.

Having regard to the opinions expressed the Court ordered that the matter be remitted to the High Court.

Cases referred to:

A v France (1993) 17 EHRR 462; *Apsara Restaurants (Barbados) Ltd v Guardian General Insurance Ltd* [2024] CCJ 3 (AJ) BB; *August v R* [2018] CCJ 7 (AJ) BZ, [2018] 3 LRC 552; *Bagosora v Prosecutor* (Judgment) ICTR-98-41-A (14 December 2011); *Bank of India v Trans Continental Commodity Merchants Ltd* [1982] 1 Lloyd's Rep 427; *Bayarri v Argentina* (Preliminary Objection, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 187 (30 October 2008); *Bennett v Government of the United States of America* (BZ CA, 18 August 2023); *Bennett v Government of the United States of America* (BZ SC, 25 July 2021); *Carpenter v United States* 585 US 296 (2018); *Case Concerning the Payment in Gold of Brazilian Federal Loans Contracted in France* (*France v Brazil)* (Judgment) [1929] PCIJ Series A No 21; *Case of the Free Zones of Upper Savoy and the District of Gex (France v Switzerland)* (Judgment) [1932] PCIJ Series A/B No 46; *Case of the SS "Lotus*" (Judgment) [1927] PCIJ Series A No 10; *Corp of Hamilton v A-G of Bermuda* [2026] 1 LRC 272 (BM PC); *Fisheries Jurisdiction (Federal Republic of Germany v Iceland)* (Merits) (Judgment) [1974] ICJ Rep 175; *Fisheries Jurisdiction (United Kingdom v Iceland)* (Merits) (Judgment) [1974] ICJ Rep 3; *Gaertner v Minister of Finance* 2014 (1) SA 442 (CC); *García v Mexico* (Preliminary Objection, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 220 (26 November 2010); *Guerra v Italy* [1998] ECHR 14967/89; *Kambanda v Prosecutor* (Judgment) ICTR-97-23-A (19 October 2000); *Leach v Attorney General* BZ 2020 CA 26 (CARILAW), (17 December 2020); *Malone v United Kingdom* (1985) 7 EHRR 14; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*(Merits) (Judgment) [1986] ICJ Rep 14; *MM v Netherlands* (2004) 39 EHRR 19; *Muvunyi v Prosecutor* (Judgment) ICTR-2000-55A-A (29 August 2008); *Prosecutor v Al Jadeed [Co] SAL/New TV SAL (NTV)* (Judgment) STL-14-05/T/CJ (18 September 2015); *Prosecutor v Blaškić* (Judgment) IT-95-14-A (29 July 2004); *Prosecutor v Furundžija* (Judgment) IT-95-17/1-A (21 July 2000); *Prosecutor v Gbagbo* (Decision on Defence requests related to the continuation of the confirmation proceedings) ICC-02/11-01/11 (14 February 2014); *Prosecutor v Naletilić* (Judgment) IT-98-34-T (3 May 2006); *Prosecutor v Ntakirutimana* (Judgment) ICTR-96-10-A and ICTR-96-17-A (13 December 2004); *Prosecutor v Taylor* (Judgment) SCSL-03-01-A (26 September 2013); *Prosecutor v*

Vasiljević (Judgment) IT-98-32-A (25 February 2004); *R v Duarte* [1990] 1 SCR 30; *R v Jogee* [2017] AC 387; *R v Marakah* [2017] 2 SCR 608; *R v Mian* [2014] 2 SCR 689; *R v Mills* [2019] 2 SCR 320; *R (Privacy International) v Investigatory Powers Tribunal* [2020] AC 491; *R v Singer* 2026 SCC 8; *Tudor v Romania* [2013] ECHR 43543/09; *van Schijndel v Stichting Pensioenfonds voor Fysiotherapeuten* (Joined Cases C-430/93 and C-431/93) ECLI:EU:C:1995:185, [1995] ECR I-04705; *VK v An Bord Pleanála* (Case C-739/19) ECLI:EU:C:2020:988; WTO, *India: European Communities - Conditions for the Granting of Tariff Preferences to Developing Countries – Report of the Appellate Body* (7 April 2004) WT/DS246/AB/R; WTO, *United States: European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft: Recourse to Article 21.5 of the DSU by the United States – Report of the Appellate Body* (15 May 2018) WT/DS316/AB/RW; *Yuill v Yuill* [1945] 1 All ER 183.

Legislation referred to:

Belize – Belize Constitution Act, CAP 4, Extradition Act, CAP 112, Extradition Act 2023, Interception of Communications Act, CAP 229:01, Interception of Communications Act (Commencement) Order 2023; **Canada –** Canadian Charter of Rights and Freedoms.

Other Sources referred to:

Black's Law Dictionary (12th edn, Thomson Reuters 2024); Ferrari F and Cordero-Moss G (eds), *Iura Novit Curia in International Arbitration* (Juris 2018); Mann F A, 'Fusion of the Legal Professions?' (1977) 93 LQR 367; Möschel M, 'Jura Novit Curia and the European Court of Human Rights' (2022) 33 Eur J Int'l L 631; Sugihara T, 'The Principle of Jura Novit Curia in the International Court of Justice: With Reference to Recent Decisions' (2012) 55 Japanese YB Int'l L 77; *Words and Phrases Legally Defined* (6th ed, 2024).

JUDGMENT

Reasons for Judgment:

Barrow J (Anderson P and Rajnauth-Lee, Jamadar, Ononaiwu, Eboe-Osuji and Bulkan JJ concurring) [1] – [22]

Eboe-Osuji J (Jamadar and Bulkan JJ concurring) [26] – [48]

Disposition [23] – [25]

BARROW J:

Introduction

[1] The Appellant contends that the finding of breaches of his constitutional rights in obtaining evidence against him required the courts below to stay the underlying extradition proceedings as an abuse of process. The Appellant further contends that it was an error to hold that other untainted evidence justified refusing a stay. The capstone of the case for the Appellant is that the taint of unconstitutionality vitiated the entire proceedings and warranted a stay.

[2] By the end of oral argument, the direction of the appeal had been changed by questions from the bench into consideration of whether there had been the predicate violation of which the Appellant complained of his constitutional rights to freedom from unlawful search and seizure and protection of privacy.

The Underlying Proceedings

[3] The appeal is of a limited scope as is seen from the fact that it arises from the decision by the High Court upon a question referred to it by the Magistrates' Court pursuant to an application made by the Appellant, even before the substantive hearing of the extradition request. On or about 20 December 2017, the United States of America made a request for the extradition of Mr Bennett, an attorney at law, pursuant to Article 6 of the Extradition Treaty between the Government of the United States of America and the Government of Belize. That treaty had been duly incorporated into the Extradition Act, CAP 112 of the Laws of Belize. After Mr Bennett's arraignment, the Chief Magistrate stated certain questions for the determination of the High Court, which included whether the evidence relied on was obtained illegally and in breach of his right not to be subjected to arbitrary search,[1] and whether the proceedings were an abuse of process.

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[1] The omission of a claim of violation of the right to privacy did not deter the High Court's full consideration of that right.

[4] The High Court determined those questions by holding that the WhatsApp communication that formed part of the evidence in support of the extradition request was obtained in violation of ss 9 and 14 of the Constitution and, therefore, could not be considered by the Chief Magistrate in the extradition proceedings. Section 9 protects against arbitrary search and seizure and s 14 protects against unlawful or arbitrary interference with privacy. The court found, however, that there was adequate evidence to support the extradition request without reliance on the excluded evidence. It therefore held that the extradition proceedings were not an abuse of process and that they should be continued before the Chief Magistrate.

The Evidence

The Impugned Evidence

[5] The evidence that the United States proposed to adduce which was challenged included an affidavit from Joseph Ralph Pelz, a special agent of their Drug Enforcement Administration. That affidavit told of the special agent's communications with the Appellant over the period August 2014 to March 2015. That communication, which was initiated by the special agent, acting 'under cover', sought to engage the Appellant to facilitate and participate in laundering alleged proceeds from drug trafficking. The interaction between the two allegedly included the physical handing to the Appellant of USD250,000 in cash for him to send abroad by bank transfer and the arranging with him to launder USD5 million. The affidavit told of the establishment between the Appellant and the special agent of communications by using the digital messaging service, WhatsApp, and reproduced verbatim portions of messages allegedly exchanged between the two during March to June 2015.

[6] The WhatsApp messages were directly between the telephones of the special agent and the Appellant. No other person or device received, recorded or captured the messages.

The Other Evidence

[7] The High Court decided that there was no need to stay the extradition proceedings because apart from the evidence of the WhatsApp messages, there was sufficient evidence before the Chief Magistrate to allow the matter to proceed to a determination of the request. As summarised by the Court of Appeal,[2] that evidence included:

> a. A meeting between Mr Bennett, SA Pelz and one Ernest Raymond on 21 August 2014;
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> b. Mr Bennett allegedly requiring a fee to start a process for a money laundering scheme;
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> c. The alleged submission by Mr Bennett to Mr Pelz of wire instructions for payment of the fee;
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> d. Mr Bennett's alleged receipt of the fee;
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> e. A meeting between Mr Bennett and SA Pelz on 24 March 2015 allegedly to discuss matters incidental to the money laundering scheme;
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> f. The transportation by SA Pelz of US$250,000 to Belize on 20 May 2015 represented to be drug money needing to be laundered and the alleged presentation of the funds to Mr Bennett in a black back pack;
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> g. The observation and surveillance of Mr Bennett's movements;
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> h. Mr Bennett (having allegedly requested and received from SA Pelz SWIFT codes to enable him to do so) allegedly wiring the laundered funds in the cumulative amount of US$200,000 on and after 1 June 2015;
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> i. An alleged retention by Mr Bennett of US$50,000 purportedly as a 20% commission for laundering the funds.

The Court of Appeal

[8] On the appeal against the refusal of a stay, there was no cross appeal by the Respondents against the High Court's finding of violation of ss 9 and 14 of the

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[2] *Bennett v Government of the United States of America* (BZ CA, 18 August 2023) at [21].

Constitution and the Court of Appeal treated the finding of unconstitutionality as settled.

[9] The court considered the issue of whether the High Court erred in refusing a stay of the proceedings for abuse of process and held there was no error and dismissed the appeal. Dissatisfied, the Appellant appealed to this Court.

[10] However, subsequent to the decision of the Court of Appeal, and whilst the appeal was pending before this Court, there arose for consideration a revelation that destroyed the entire foundation of the decision by the Court of Appeal, and diverted the case into an entirely new direction.

Revelation

[11] The startling fact was revealed that the Interception of Communications Act ('ICA'), CAP 229:01, which was the bedrock of the lower courts' finding that evidence had been unconstitutionally obtained, had not been brought into force at the material time.[3] The ICA had been enacted in 2010 and amended in 2013 but had not been brought into force at the time the WhatsApp communications occurred in 2015 or at the time of the High Court and the Court of Appeal[4] decisions. The Act was only brought into force on 29 November 2023, by Statutory Instrument No 137 of 2023. The revelation was made by the Respondents in their written submissions before this Court in response to the written submissions of the Appellant. Thus, it was made after the Appellant had filed his grounds of appeal and had formulated and presented his case based on the decision of unconstitutionality upheld by the Court of Appeal.

[12] The effect of the mistake of law of treating the ICA as being in force was fundamental. The ICA made illegal and a criminal offence[5] the interception of

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[3] It is a standard but currently less used course for the National Assembly to enact or pass laws that provide in the Act, itself, that it shall come into operation (or commence) not on the date of its passing and assent by the Governor General but on a date that is to be decided and specified by the minister of government with responsibility for the subject matter with which the Act deals. That was provided in s 34 of the ICA.

[4] *Bennett* (n 2).

[5] CAP 229:01, s 3(1).

communication without prior judicial authorisation.[6] As the marginal note to s 14 of the Constitution conveniently expresses, the constitutional protection is against *unlawful* interference with privacy. In this case, the interference was made illegal by the ICA and hence unlawful and, so, unconstitutional.[7]

[13] The High Court (at [16]) relied on the Belize Court of Appeal decision in *Leach v Attorney General*,[8] which held that the interceptions of telephone communication between the Appellants and an undercover agent were in breach of the ICA and violated the constitutional rights of the Appellants against arbitrary search and seizure and their right to privacy. In that case, the Court of Appeal went on to hold that it was an abuse of the Magistrates' Court process, and the extradition proceedings were stayed. In the present case, the High Court decided at [20]:

> Relying on the guidance from *Leach and Knowles (supra)* I therefore hold that the WhatsApp communication used was in breach of the Claimant's constitutional rights guaranteed by sections 9 and 14 of the Constitution and cannot be relied on by the Magistrate.

General Principle of Unconstitutionality

[14] In his written submissions in reply, the Appellant argued that the failure to bring the ICA into commencement did not detract from his argument that the courts below adopted an overly narrow assessment of the abuse of process jurisdiction. He argued that there is a generally recognised principle of law, accepted in Belize and internationally, that the interception of communications without judicial oversight or authorisation will be a breach of constitutional or fundamental rights and cited as examples the following cases:

i. From the European Court of Human Rights: *Malone v United Kingdom* (1985) 7 EHRR 14; *A v France* (1993) 17 EHRR 462; *MM v Netherlands* (2004) 39 EHRR 19.

ii. From the Supreme Court of Canada: *R v Duarte* [1990] 1 SCR 30.

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[6] ibid ss 5, 6 provide for obtaining judicial authorisation in the form of an interception direction.
[7] *Bennett v Government of the United States of America* (BZ SC, 25 July 2021) at [20].
[8] BZ 2020 CA 26 (CARILAW), (17 December 2020).

iii. From the Constitutional Court of South Africa: *Gaertner v Minister of Finance* 2014 (1) SA 442 (CC).

[15] The Appellant also argued that the fact that Belizean law now criminalises the interception of communications without judicial authorisation underlines the abhorrence the law has for such conduct. Further, he argued that the Respondents failed to engage with the wider abuse of process jurisdiction. In this regard, he urged that the fact remains that the US authorities have acted in a way which flagrantly breached established constitutional and fundamental rights. He maintained that the lower courts failed to put such conduct in the balance and their approach to the abuse of process assessment was, therefore, fundamentally flawed.

[16] Significantly, the Appellant did not engage with the impact or the consequence upon the determination made in this case of the discovery that the legislation was not in force. While he argued that there existed a generally recognised principle that it is unconstitutional to intercept communication without obtaining judicial authorisation, the Appellant did not attempt to show its application to the law or the facts in this case.

[17] The cases on which the Appellant relied were decided in the period 1985 to 2002 and, as a matter of general knowledge, WhatsApp was invented some years later. In *Duarte v R*,[9] a Canadian case cited by the Appellant concerning the secret placing of audio-visual recording equipment in premises, decided long before the era of text messaging, it was discussed that the Canadian Charter of Rights and Freedoms should not be interpreted to protect the violation of privacy when one party to an oral conversation revealed what his interlocutor said to him, with no reliance on any recording or third party involvement or capture.[10] The case, which was later distinguished on this aspect,[11] is referred to only to illustrate the point that there was no discussion on the present appeal of whether the generally established principle of unconstitutionality, (referred to in [14] above) could be applied to the

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[9] [1990] 1 SCR 30.
[10] ibid at 48.
[11] *R v Mills* [2019] 2 SCR 320 at 326 (Martin J).

facts of this case. Nothing was identified that preserved the validity of the High Court decision, with the ICA inoperative, that the use by the intended recipient of the WhatsApp communication was unconstitutional conduct and that such evidence was *to be* excluded. The Respondent did not take this point.

Per Incuriam

[18] Counsel for the Appellant observed that the Respondent stated in written submissions that there was no appeal against the finding of unconstitutional conduct, indicating that it was an unexpected turn at the hearing when the bench raised questions about the very issue of unconstitutionality. However, with respect, the issue of unconstitutionality should have been seen as thrown wide open with the realisation that the ICA had not been brought into force. Inescapably, that made the finding of unconstitutionality *per incuriam*. The Latin term (meaning through lack of care) is used to refer to judicial decision made in ignorance of a binding statute or earlier decision. Such judgments are not binding precedents because they were reached through oversight of the state of law that would have otherwise led to a different conclusion.[12]

[19] It is to be regretted that neither party addressed the issue whether it is unconstitutional to rely on evidence of text messages, where there is no interference with communication in the manner that earlier cases held unconstitutional. The Appellant chose the approach of treating the now untenable finding of unconstitutionality as a decision on which he could still rely. He invited the Court simply to substitute the aforementioned general principle of unconstitutionality of interception without judicial authorisation for the finding of unconstitutionality based upon the illegality and criminality established by the ICA. As stated, the Appellant failed to argue why the Court should so find.

[20] To be clear, the case for the Appellant was that the requesting state in the extradition proceedings was proposing to rely on unconstitutionally obtained evidence and that

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[12] See 'Per Incuriam' *Words and Phrases Legally Defined* (6th ed, 2024).

the courts below, having decided that such evidence was unconstitutionally obtained, should have stayed the proceedings as an abuse of process. The case that unconstitutionally obtained evidence vitiated the entire proceeding and called for its stay can no longer be advanced because the finding of unconstitutionality must, as a matter of law, be set aside. Through a systemic error, the case stated at the request of the Appellant was erroneously decided and the Appellant was denied a true decision. The way to arriving at a true decision must now be decided.

A Reformulated Case of Unconstitutionality?

[21] In the particular circumstances of this appeal, we resist the temptation to consider a hypothetical, reformulated case that the Appellant would be invited to make and to which the Respondent would respond in post-hearing written submissions. That hypothetical reformulated case to be argued by the Appellant would be along the lines that it was unconstitutional to permit reliance on WhatsApp communication that was *not* criminally obtained and did *not* violate any directly applicable mandatory requirement for judicial authorisation.

[22] We resist the temptation of taking that course because such a consideration would lack the fully researched, informed and considered written submissions of counsel. It would lack the benefit of oral advocacy. It would lack the possible participation of interested parties,[13] including the private and public criminal bar and human rights organisations. It would lack the benefit of first instance and appellate judgments. And it would lack the full preparation and consideration that this Court brings to a properly presented appeal. In this regard, purely for perspective, reference may be made to the process through which the now well-developed jurisprudence of the Canadian Supreme Court on extending protection of fundamental rights was reached and still engages. It may be said the waters of the constitutional, philosophical and sociological issues in relevant cases are not calm in the minds of Canadian judges. The Canadian Charter of Rights and Freedoms

[13] See the list of parties to the Canadian case of *R v Mills* (n 11), which included as Interveners: The Director of Public Prosecutions, Attorney General of Ontario, Director of Criminal and Penal Prosecution, Attorney General of British Columbia, Attorney General of Alberta, Samuelson-Glushko Canadian Internet Policy and Public Interest Clinic, Canadian Civil Liberties Association, Criminal Lawyers Association and Canadian Association of Chiefs of Police. The gravity of the constitutional questions cannot be doubted.

was adopted only in 1982. It may be noted that beginning from *Duarte* (1990), the experience has been that trial judges would rule one way, the Court of Appeal would reverse them, and the Supreme Court would reverse the Court of Appeal in a split judgment – sometimes by a very slim majority.[14] That simply tells us that there is no straightforward answer to these questions.[15] There is a continuing obligation on judges, especially at the apex level, to reflect upon the role of courts in balancing individual rights and the rights of the collective. While Belize and the region will benefit from the process already (and still being) experienced in Canada, the United States of America and elsewhere, it is necessary that our own jurisprudential and regulatory circumstances be fully considered in our deciding how to interpret and apply our constitutional protections.

Disposition

[23] The High Court gave an answer to the question stated that was fatally flawed and cannot stand. Therefore, a proper question remains to be stated and answered. For the reasons stated, we consider it would not do full justice for this Court either to reformulate and answer the question or remit it to the Court of Appeal.

[24] In the circumstances, the decisions of the Court of Appeal and the High Court on the case stated are set aside and the Appeal before this Court falls away. The case stated is remitted to the High Court.[16] The Appellant shall be at liberty to pursue a determination of the case stated, including the constitutional issues raised, or not, as he chooses.

[25] There shall be no order as to costs.

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[14] *R v Marakah* [2017] 2 SCR 608, *R v Singer* 2026 SCC 8

[15] The Supreme Court of the United States of America in *Carpenter v United States* 585 US 296 (2018), in a case involving tracking a robbery suspect's location by reliance on his mobile telephone's connection with radio antennas (or cell phone towers), showed in a 5:4 majority decision that the debate on constitutional protection of privacy continues even today in their jurisprudence.

[16] *August v R* [2018] CCJ 7 (AJ) BZ, [2018] 3 LRC 552 is an instance of the CCJ not deciding an appeal but remitting it to the Court of Appeal to decide issues of the constitutionality of a mandatory minimum sentence of life imprisonment and the relevance or sufficiency of good character directions in criminal trials. The points had not been argued before the Court of Appeal and so were being raised before the CCJ for the first time. In that case, however, the CCJ retained jurisdiction over the appeal which remained pending and, after the Court of Appeal had made its decision on the two issues, the CCJ decided the substantive appeal.

EBOE-OSUJI J:

Introduction

[26] I have read in draft the lead judgment of Barrow J. I agree with it. I add this concurring opinion both to clarify and to underscore important dimensions of disposing of the appeal in that way. I also use the opportunity to share some cognate perspectives.

[27] It is true that at the hearing, Justices of this Court probed the context and the premise of the issues in this appeal. It may be that the exercise had the effect of re-characterising the appeal. In my view, however, those questions should have come as no surprise to the experienced counsel who appeared in the case. They were threshold questions, fundamental to the case stated for consideration before this Court. Counsel should have anticipated them, notwithstanding the views and judgments of the courts below.

[28] It is the very importance of those questions that made it necessary to remit the case to the High Court. In my view, the lead judgment must be understood in that light.

Jura Novit Curia - Incidence and Importance

[29] In the administration of justice, beyond the common law world, there is a doctrine captured in the expression *jura novit curia*. The Latin maxim means the court knows the law.[17] That doctrine holds that in deciding a question of *law*, the court is not limited by the submissions of the parties.

[30] I shall presently return to the broader subject of the *jura novit curia* as it operates in its captive jurisdictions. But I must first engage the tendency of some common law legal practitioners to suppose that the adversarial tradition precludes common law judges—even at the final appellate level—from resting their judgments on

[17] See definition of '*Curia novit jura*', *Black's Law Dictionary* (12th edn, Thomson Reuters 2024).

legal submissions that counsel in the case did not make. It is not clear that this supposition results from a conscious disavowal of the *jura novit curia* doctrine as such. Worse, perhaps, is that the rationale for any such rejection is seen by some as the product of the understanding of the common law approach as 'generally based on the assumption that the court has no independent knowledge of the law, that it is dependent upon the submissions advanced by counsel for the parties'![18] Another commentator 'put it affirmatively' in terms of 'the principle of judicial unpreparedness.'[19] Describing the principle, the commentator observed that '[i]n England counsel submits the law to the court which is assumed to know next to nothing about it.'[20] The infelicities of these understandings of the contemplated approach go without saying. There is, for one thing, the striking irony that it is judges that develop the common law and interpret legislation. Yet, we are told they must depend on counsel to inform them about that law. Without a doubt, the idea that judges in the common law world operate according to a principle of 'judicial unpreparedness'—or that without the assistance of counsel judges are 'assumed to know next to nothing' about the principles of law that apply to cases they adjudicate—obviously implicate serious misunderstanding somewhere. But a rule that is vulnerable to such hopeless misunderstanding is one that invites earnest reconsideration.

[31] Even without such misunderstandings, it can be said with confidence that the rule in question does not reflect reality. That reality rather is that judges of final courts of appeal in the common law world—including judges of this Court—do often base their judicial opinions (albeit quietly) on legal reasoning that did not flow from the submissions of the parties.[21] In other instances, they have drawn distinctions

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[18] See Joined Cases C-430/93 and C-431/93 *van Schijndel v Stichting Pensioenfonds voor Fysiotherapeuten* ECLI:EU:C:1995:185, [1995] ECR I-04705, Opinion of AG Jacobs, para 33. See also Case C-739/19 *VK v An Bord Pleanála* ECLI:EU:C:2020:988, Opinion of AG Pikamäe, para 64.

[19] See F A Mann, 'Fusion of the Legal Professions?' (1977) 93 LQR 367 at 369.

[20] ibid.

[21] See, for instance, *R (Privacy International) v Investigatory Powers Tribunal* [2020] AC 491 at [66], [71] (pointing out that judicial reasoning in two cases were not based on the submissions of the parties); *R v Jogee* [2017] AC 387 at [73] (where the UK Supreme Court appeared to have considered a topic not addressed in argument before them); *Corp of Hamilton v A-G of Bermuda* [2026] 1 LRC 272 (BM PC) at [88] (where the Privy Council explicitly acknowledged that a question had not be raised before them, nevertheless proceeded to give the answer it would have given had the question been raised before it); *R v Marakah* [2017] 2 SCR 608 at [150] (where a dissenting judge complained that a legal reasoning adopted by the majority was not based on the submissions of the parties); *Apsara Restaurants (Barbados) Ltd v Guardian General Insurance Ltd* [2024] CCJ 3 (AJ) BB at [423] (where a CCJ Judge noted that 'no side ha[d] advanced an argument' on a legal question that animated the judgment, and that 'the issue ha[d] been tabled by

between the comparative breadths of such unmooted legal reasonings, in order to assess whether they are proper in a given case.[22] It is possible that Bingham J (as he then was) reduced to a logical absurdity the idea that a common law judge is not free to decide a legal question beyond the submissions of the parties. 'Where a transaction is on its face manifestly illegal,' he said, 'the Court will refuse to enforce it whether the point is pleaded or not and whether either party raises the point or not, and even if the point arises for the first time on appeal. The reason for this rule is that the Queen's Courts may not be used to enforce unlawful contracts, whatever the wishes of the parties.'[23]

[32] As may soon become clear, it should be entirely proper to remove from the practice the sense of the forbidden fruit that some judges in the common law world feel when they partake in it. Elsewhere in the world, judges partake in it with a sense of authority.

[33] In its more fundamental operation as a useful doctrine in the administration of justice in continental Europe,[24] the *jura novit curia* doctrine requires the parties to do no more than marshal the facts at issue in the case. They are not required to address judges as to the applicable law. For, that is the remit—nay the duty—of the judges. Implicit in that approach is the notion of division of labour, according to which the parties (through their counsel) supply the facts and judges supply the law. That division of labour requires just as much industry and knowledge from the judges (for their own part) as from counsel for theirs. It is not enough that judges merely referee the disputes with minimal effort in the conduct of legal research.

[34] But the doctrine of *jura novit curia* has a hybrid version. It requires the parties also to make submissions on the legal matter of their case, though the judges retain the prerogative to decide the case on a different legal footing. An example of that

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some members of this panel'). Notably, *Apsara* is not the only CCJ judgment where the judges took up a legal point that the parties didn't argue.

[22] See *R v Mian* [2014] 2 SCR 689 at [28]–[35].

[23] See *Bank of India v Trans Continental Commodity Merchants Ltd* [1982] 1 Lloyd's Rep 427 at 429 (Bingham J).

[24] See Case C-739/19 *VK v An Bord Pleanála* ECLI:EU:C:2020:988, Opinion of AG Pikamäe, paras 63–65. See also Joined Cases C-430/93 and C-431/93 *van Schijndel v Stichting Pensioenfonds voor Fysiotherapeuten* ECLI:EU:C:1995:185, [1995] ECR I-04705, Opinion of AG Jacobs, para 33.

hybrid version is repeatedly stated in the judgments of the Appeals Chambers of the International Criminal Tribunal for Rwanda and that of the International Criminal Tribunal for the former Yugoslavia. In *Muvunyi v Prosecutor*, for instance, it is reprised as follows:

> Where a party alleges that there is an error of law, that party must advance arguments in support of the submission and explain how the error invalidates the decision. However, if the appellant's arguments do not support the contention, that party does not automatically lose its point since the Appeals Chamber may step in and, for other reasons, find in favour of the contention that there is an error of law.[25]

[35] The hybrid version is a very familiar doctrine in international arbitration practice,[26] although it may be stated differently. It is, as such, also a standard doctrine in the administration of international justice in general. It has been relied upon by the Inter-American Court of Human Rights,[27] the European Court of Human Rights,[28] international criminal courts and tribunals,[29] the Appellate Body of the World Trade Organisation,[30] the International Court of Justice,[31] and the Permanent Court of International Justice.[32]

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[25] See, for instance, *Muvunyi v Prosecutor* (Judgment) ICTR-2000-55A-A (29 August 2008) at [9].

[26] Franco Ferrari and Giuditta Cordero-Moss (eds), *Iura Novit Curia in International Arbitration* (Juris 2018).

[27] See *García v Mexico* (Preliminary Objection, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 220 (26 November 2010) at [59]. See also *Bayarri v Argentina* (Preliminary Objection, Merits, Reparations and Costs) Inter-American Court of Human Rights Series C No 187 (30 October 2008) at [94].

[28] See *Tudor v Romania* (App No 43543/09) ECHR 18 June 2013 at [55]. See also *Guerra v Italy* (App No 14967/89) ECHR 19 February 1998 at [44]. See also Mathias Möschel, 'Jura Novit Curia and the European Court of Human Rights' (2022) 33 Eur J Int'l L 631.

[29] See *Muvunyi* (n 25); *Prosecutor v Gbagbo* (Decision on Defence requests related to the continuation of the confirmation proceedings) ICC-02/11-01/11 (14 February 2014) at [14]. See also *Kambanda v Prosecutor* (Judgment) ICTR-97-23-A (19 October 2000) at [98]; *Bagosora v Prosecutor* (Judgment) ICTR-98-41-A (14 December 2011) at [16]; *Prosecutor v Ntakirutimana* (Judgment) ICTR-96-10-A and ICTR-96-17-A (13 December 2004) at [11]. See also *Prosecutor v Naletilić* (Judgment) IT-98-34-T (3 May 2006) at [119], and *Prosecutor v Blaškić* (Judgment) IT-95-14-A (29 July 2004) at [14]; *Prosecutor v Furundžija* (Judgment) IT-95-17/1-A (21 July 2000) at [35]; *Prosecutor v Vasiljević* (Judgment) IT-98-32-A (25 February 2004) at [6]. See also *Prosecutor v Taylor* (Judgment) SCSL-03-01-A (26 September 2013) at [439]. See also *Prosecutor v Al Jadeed [Co] SAL/New TV SAL (NTV)* (Judgment) STL-14-05/T/CJ (18 September 2015) at [58].

[30] See *European Communities - Conditions for the Granting of Tariff Preferences to Developing Countries – Report of the Appellate Body* (7 April 2004) WT/DS246/AB/R at [105]. See also *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft: Recourse to Article 21.5 of the DSU by the United States – Report of the Appellate Body* (15 May 2018) WT/DS316/AB/RW at [47].

[31] See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) (Judgment) [1986] ICJ Rep 14 at [29]; *Fisheries Jurisdiction (United Kingdom v Iceland)* (Merits) (Judgment) [1974] ICJ Rep 3 at [17]; *Fisheries Jurisdiction (Federal Republic of Germany v Iceland)* (Merits) (Judgment) [1974] ICJ Rep 175 at [18]. See also Takane Sugihara, 'The Principle of Jura Novit Curia in the International Court of Justice: With Reference to Recent Decisions' (2012) 55 Japanese YB Int'l L 77.

[32] See *Case of the SS "Lotus"* (Judgment) [1927] PCIJ Series A No 10 at 31; *Case of the Free Zones of Upper Savoy and the District of Gex (France v Switzerland)* (Judgment) [1932] PCIJ Series A/B No 46 at 138; and *Case Concerning the Payment in Gold of Brazilian Federal Loans Contracted in France* (*France v Brazil)* (Judgment) [1929] PCIJ Series A No 21 at 124.

[36] In *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, for instance, the ICJ said: 'For the purpose of deciding whether the claim is well founded in law, the principle *jura novit curia* signifies that the Court is not solely dependent on the argument of the parties before it with respect to the applicable law …'.[33] Earlier in the *Fisheries Jurisdictions* cases, the Court repeatedly rendered the same doctrine thus:

> It is to be regretted that the Government of Iceland has failed to appear in order to plead its objections or to make its observations against the Applicant's arguments and contentions in law. *The Court however, as an international judicial organ*, *is deemed to take judicial notice of international law, and is therefore required* in a case falling under Article 53 of the Statute, as in any other case, *to consider on its own initiative all rules of international law which may be relevant to the settlement of the dispute*. *It being the duty of the Court itself to ascertain and apply the relevant law in the given circumstances of the case*, *the burden of establishing or proving rules of international law cannot be imposed upon any of the parties*, *for the law lies within the judicial knowledge of the Court*. In ascertaining the law applicable in the present case the Court has had cognizance not only of the legal arguments submitted to it by the Applicant but also of those contained in various communications addressed to it by the Government of Iceland, and in documents presented to the Court.[34]

[37] A rationale often posited against autologous judicial reasoning within the adversarial legal tradition is the supposed need to leave the parties to their own 'strategic choices'.[35] It is, I'm afraid, a quite poor argument against judges who see a need to use the opportunity presented by their judgments to explain *the law* that should guide every subject of the jurisdiction. It is poorer still in a case that sounds in public law: such as criminal law, constitutional law, administrative law, tax law, and so on. It is not necessary to invoke the spectre of unequal aptitude of the parties (as regards good faith, work ethic and competence) to see why that rationale is unsatisfactory. It is enough that the law of the land is meant to guide all its subjects.

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[33] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) (Judgment) [1986] ICJ Rep 14 at [29].

[34] See *Fisheries Jurisdiction (United Kingdom v Iceland)* (Merits) (Judgment) [1974] ICJ Rep 3 at [17] (emphasis added). See also *Fisheries Jurisdiction (Federal Republic of Germany v Iceland)* (Merits) (Judgment) [1974] ICJ Rep 175 at [18].

[35] *Mian* (n 22) at [39].

Its proper or deeper understanding should then not depend on the 'strategic choices' that parties make in discrete disputes.

[38] In my view, the adversarial system is not undermined when an appellate court, especially the final court of appeal, bases its judgment on a *carefully considered* pronouncement on *the law* beyond the submissions of the parties. Such careful consideration would ordinarily include some thought to whether there was much else that counsel in the case might have meaningfully added had they been asked. In many cases, in my experience, counsel generally do not add very much to unaided judicial insights on the law. Unlike the factual circumstances of a dispute, which are unique to the case of the parties, the *law* that applies to a case is a matter of general interest to all subjects of the jurisdiction. It is the task of the judiciary to interpret and explain such laws.

[39] Restraint should surely urge judges to proceed with care even so, to avoid pronouncements (whether or not urged by counsel) that may have unforeseen consequences, as well as to minimise the risk of legal pronouncements that are premised on mistaken factual assumptions. It is also conversely possible that undue reticence can have undesirable consequences of its own. Where it is clear to the judges that the solution to the legal dispute lies in a *legal* reasoning that the parties had not seen fit to urge, it should not be wrong, from the perspective of the adversarial tradition, to employ that reasoning, not only for the purpose of resolving the dispute at hand, but also for the purpose of assisting society at large with a better understanding of the law that governs their lives. Given the reasonable presumption that the dispute before the court arose because the law was unclear to the parties and their legal advisers, judges may reasonably be reproached for falling short of their interpretative functions if they fail to clarify the law as best they can beyond the narrow precinct of the dispute at bar, using the opportunity it reasonably presented.

[40] All that is the point of *jura novit curia*. It has assisted the administration of justice for generations in continental Europe, in international arbitration and in the

administration of international justice. The administration of justice has also been assisted on those occasions that common law judges had followed the approach quietly. Justice will not systematically run off its tracks, if the doctrine is embraced more systematically and more candidly in the common law world.

Judges' Interrogation of Counsel

[41] Now we come to the related question of interrogation of counsel during an appellate hearing as was done in this appeal. In addition to the 'strategic choices' rationale, another resonant motif of judicial behaviour in the adversarial system is conveyed by Lord Greene MR's familiar metaphor, which counsels judges against descending into the arena of conflict, as its dust may cloud the judicial vision.[36] Judges are thus better off staying above the fray. But that pithy metaphor requires keeping in mind that Lord Greene was addressing a case in which a trial judge engaged in a 'prolonged' examination of a witness in a way that 'cover[ed] practically the whole of the crucial matter which [was] in issue.'[37] I note in passing that the *inquisitorial* approach that Lord Greene was reproaching in effect is the model of modern justice in continental Europe. There is no evidence that the approach has resulted in systemic miscarriage of justice there. To the contrary, many will insist that greater equality of arms is inherent in the model: as justice does not depend on the comparative means of parties or comparative abilities of counsel in a given case or on either side—that value will be lost if the judge merely sits without intervention to allow the abler side to win. That, however, is beside my point for now. It is rather that Lord Greene's anxieties are not self-evidently engaged when appeal judges probe, as they often do, experienced counsel who appear before them.

[42] These things are seldom straightforward even in the adversarial system. In *R v Mian*, the Canadian Supreme Court shows why.[38] We see that there are powerful arguments on both sides of the topic. A careful reading of *Mian* shows how difficult

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[36] See *Yuill v Yuill* [1945] 1 All ER 183 at 189B.
[37] ibid at 189C.
[38] *Mian* (n 22) at [28]–[60].

it is to draw sharp lines around questions that judges may or may not ask during a hearing. *Mian* shows that not all such questions are truly new, notwithstanding that the parties may not have engaged their essence beforehand. Amongst the questions that are not truly new are those that genuinely stem from the grounds of appeal or the issues already raised. Also, not truly new issues are questions that probe context, fundamentals, premises, background or backdrop, or broad implications that the case or the arguments of the parties raise. By the time all those factors are accounted for, it will be difficult to see what more scope there is in the average case for judges to raise issues that are truly new.

[43] Once more, it is difficult to draw sharp lines. Then again, *Mian* shows that judges are indeed, not precluded from asking questions that truly engage new issues; as long as the discretion is exercised sparingly and with care and with certain conditions observed—including an adjournment if necessary to allow counsel a fair opportunity to address the questions.

[44] Indeed, the nebulous contours of what is a truly new issue and what is not, as well as how to raise a truly new issue (which judges are not at any rate absolutely precluded from raising) are considerations that underscore the value of the *jura novit curia* doctrine.

[45] But that value of the doctrine does not lie in its extreme operation that relieves the parties from the obligation to make legal submissions. The hybrid version, generally encountered in the appellate case law of international criminal tribunals, is good enough. That version, as may be recalled, requires the parties to delineate their issues and to make legal submissions in relation to them. But judges retain the prerogative to decide the matter according to legal principles that are the most appropriate, whether or not the parties have addressed them.

<u>Importance and Remittal in the Present Case</u>

[46] Ultimately, it is not improper for judges to probe, during a hearing, the case of the parties beyond their set-piece submissions. Counsel appearing before the highest

court of appeal within their jurisdictions—especially before this Court—must come prepared to answer probing questions that go beyond their memorials. As the Canadian Supreme Court persuasively observed in *Mian*:

> Questions raised during the oral hearing may properly touch on a broad range of issues, which may be components of the grounds of appeal put forward by the parties, or may go outside of those grounds in an aim to understand the context, statutory background or larger implications. For example, an appellate court may pose questions as to the practical workings of a statutory regime. Absent any concerns about bias, questions raised during the oral hearing, whether linked directly or by extension to the grounds of appeal or not, are not improper (see *W. (G.)*, at para. 17). Such questions may be necessary for the court to gain a more complete understanding of the issues at hand.[39]

[47] Nothing more than that was done during the hearing of this appeal. Ordinarily, the deliberations of the Justices should proceed; with judgment rendered on the basis of the written submissions and those made at the hearing (including in response to questions from the bench), as well as any supplementary written submissions that the judges might see fit to invite.

[48] That notwithstanding, I share the view that in the particular circumstances of this appeal, as amply explained in Barrow J's lead judgment, it is appropriate to remit the case to the High Court, so that the parties and the courts below have the fullest opportunity to attend to those important constitutional questions—if the parties wish to engage them.

[39] See *Mian* (n 22) at [32].

/s/ W Anderson

Mr Justice Anderson, President

/s/ M Rajnauth-Lee

Mme Justice Rajnauth-Lee

/s/ D Barrow

Mr Justice Barrow

/s/ P Jamadar

Mr Justice Jamadar

/s/ C Ononaiwu

Mme Justice Ononaiwu

/s/ C Eboe-Osuji

Mr Justice Eboe-Osuji

/s/ A Bulkan

Mr Justice Bulkan