SAINT LUCIA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.13 OF 2005

BETWEEN:

ATTORNEY GENERAL OF SAINT LUCIA

Appellant

and

LORNE D.C. THEOPHILUS

Respondent

Before:

The Hon. Mr. Brian Alleyne, SC	Chief Justice [Ag.]
The Hon. Mr. Denys Barrow, SC	Justice of Appeal
The Hon. Mr. Hugh A. Rawlins	Justice of Appeal

Appearances:

Mr. Anthony Astaphan, SC, with him Mrs. Georgis Taylor-Alexander and Mr. Renee Williams for the Appellant
Mr. Bryan Stephens for the Respondent

2005: October 25;
2006: March 20.

JUDGMENT

[1] RAWLINS, J.A.: The jurisdiction of the High Court to review legislation for constitutionality has been long established. In St. Lucia, this jurisdiction is implicit from the Supreme Law Clause;[1] section 40, which circumscribes the sovereign law-making power of the Legislature within the ambit of the provisions of the Constitution; section 41 which stipulates the manner in which the Legislature may amend the Constitution, and sections 16 and 105, which confer jurisdiction on the High Court to entertain applications for constitutional redress.

[1] Section 120 of the Constitution.

[2] The manner in which the High Court is enjoined to exercise its power to review legislation was succinctly summarized by this Court in Attorney General v Lawrence in the following words:[2]

> "In determining the question of constitutionality of a statute, what the court is concerned with is the competence of the legislature to make it, and not the wisdom or motives. The court has to examine its provisions in the light of the relevant provisions of the Constitution. The presumption is always in favour of constitutionality of an enactment, and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles."

This appeal

[3] The present appeal is from a decision in which a High Court judge held that section 593(4)(a) of the Criminal Code of St. Lucia, No. 9 of 2004, is inconsistent with section 3(4)) of the Constitution of St. Lucia. The judge also held that although section 593(4)(b) and section 593(5) of the said Code were not expressly challenged, these sub-sections were also affected and could not sensibly be severed from section 593(4)(a). He therefore struck down the whole of section 593(4) as well as section 593(5) of the 2004 Criminal Code as unconstitutional, null, void and of no effect.

[4] The main issue for determination on this appeal is whether sections 593(4)(a), of the 2004 Criminal Code is inconsistent with section 3(4) or, for that matter, with any other provision of Chapter 1 of the Constitution of St. Lucia. If the answer is in the affirmative, a further question that then arises would be whether the section could be saved by bringing it into conformity with the Constitution by the application of the presumption of constitutionality. If section 593(4)(a) cannot be thus saved, the question that would arise is whether the learned judge was correct when he held that sections 593(4)(b) and 593(5) of the 2004 Criminal Code cannot be successfully severed from section 593(4)(a) and should also be struck down First, however, a brief background to the case.

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[2] (1983) 31 W.I.R. at page 179j – 180a.

Background

[5] The Legislature of St. Lucia passed the 2004 Criminal Code on 17th February 2004. The Bill received the assent of the Governor General on 30th April 2004, and it came into effect on 1st January 2005.

[6] A complaint was lodged against the respondent, Mr. Theophilus, which alleged that he committed the offence of rape. Rape is an indictable offence under section 123(1)(a) of the 2004 Criminal Code. It is punishable by imprisonment for life.

[7] On 1st February 2005, Mr. Theophilus filed a Motion, by way of fixed date claim form. He asked the Court to declare that section 593(4) of the 2004 Criminal Code was inconsistent with various sections of the Constitution of St. Lucia, and was therefore unconstitutional, void and of no effect. A warrant was issued for his arrest on 4th February 2005. The magistrate before whom he appeared on that day refused to grant him bail on the ground that section 593(4) of the 2004 Criminal Code precluded her from granting bail. He applied for bail to the High Court. The judge granted him bail pending the determination of his Motion.

[8] On 28th February 2005, the judge determined, as a preliminary issue that sub-sections (a) and (b) of section 593(4) of the 2004 Criminal Code are to be read disjunctively rather than conjunctively. He held that read thus, the subsections purported to preclude the court from granting bail to persons who are charged with the offences specified in section 593(4)(a) as well as to persons who are convicted and sentenced to death or to imprisonment and who have given notice of their intention to appeal. The Motion was then heard and determined, and this appeal brought.

[9] The charge against Mr. Theophilus was subsequently withdrawn. In relation to him, therefore, this appeal is merely academic. However, the issue, which arises, remains one of great public importance. It is still necessary for the citizenry, as

well as for the organs of the State to know, with certainty, whether the impugned provisions are consistent with the Constitution or whether they are unconstitutional and therefore of no effect. The reproduction at this juncture of the relevant provisions, which are the focal point of the present case, would put the analysis, findings and decision of this Court into helpful context.

The relevant provisions

[10] Learned Counsel for Mr. Theophilus sought, in the main, to impugn section 593(4) of the 2004 Criminal Code for inconsistency with sections 1(a), 3 and 8(2)(a) of the Constitution. They all fall under Chapter I of the Constitution, which is under the rubric "Protection of Fundamental Rights and Freedoms".

[11] Section 1(a) provides:

> "(1) Whereas every person in St. Lucia is entitled to the fundamental rights and freedoms, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely –
>
> (a) life, liberty, security of the person, equality before the law and the protection of the law; …
>
> the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms of any person does not prejudice the rights and freedoms of others or the public interest.

[12] In section 3 of the Constitution, so far as relevant for the purpose of the present case, provides as follows:

> "(3) Any person who is arrested or detained –
> (a) for the purpose of bringing him before a court in execution of the order of a court; or
> (b) upon reasonable suspicion of his having committed, or being about to commit, a criminal offence under any law and who is not released, shall be brought before a court

without undue delay and in any case not later than seventy-two hours after such arrest or detention.

(4) Where any person is brought before a court in execution of the order of a court in any proceedings or upon suspicion of his having committed or being about to commit an offence, he shall not be thereafter further held in custody in connection with those proceedings or that offence save upon the order of a court.

(5) If any person arrested or detained as mentioned in subsection (3)(b) of this section is not tried within a reasonable time, then without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial, and such conditions may include bail so long as it is not excessive."

[13] Section 8(2)(a) of the Constitution enacts what is classically referred to as the presumption of innocence. It provides that every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty.

[14] The relevant legislative provisions, which the judge impugned, section 593(4) and 593(5) of the 2004 Criminal Code, provide:

"(4) Subject to subsection (5), a person –

(a) who is charged with murder, treason, rape or any offence under the Firearms Act, No. 9 of 2003 or the Drugs (Prevention of Misuse) Act, No. 22 of 1988 punishable on indictment by imprisonment of not less than five years;

(b) who has been convicted and sentenced to death or imprisonment in respect of any offences referred to in paragraph (a) and who has given notice of intention to appeal against his or her conviction;

shall not be granted bail."

"(5) Where the appeal in respect of a person referred to in subsection (4)(b) is not heard within a period of six months from the date of his or her conviction he or she may apply to the Court of Appeal for bail pending the determination of his or her appeal."

[15] Against this background, the question whether the learned judge erred when he held that section 593(4)(a) of the 2004 Criminal Code is inconsistent with section 3(4) of the Constitution will now be considered.

Inconsistency with section 3(4)

[16] The submissions, which Counsel for the parties made, and the reasoning of the judge will first be set out.

Submissions

[17] Mr. Stephens, learned Counsel for Mr. Theophilus, contended that under section 3(4) of the Constitution, a person who is charged with a criminal offence could only be held in custody "upon the order of a court". He insisted that section 593(4) of the 2004 Criminal Code was inconsistent with section 3(4) because, in effect, section 593(4) totally prohibits bail for the specified offences, including rape. Counsel said that this permits a person to be held in custody without an order of a court, and means that section 593(4) has taken away the discretion of the court to grant or refuse bail, which section 3(4) of the Constitution confers. This, he submitted, means that section 593(4) has vested the Executive, by way of the police, with the power to keep a person who is not convicted of a criminal offence in custody for indefinite periods for offences which were previously bailable.

[18] The reasoning and the decision by the High Court agreed with these basic submissions. The learned judge stated[3] that when section 3(4) of the Constitution provides that a person should only be held in custody "upon the order of the court", it must mean an order of the court in the exercise of judicial discretion in the same manner as it has always been exercised for centuries from the common law origins of the right to bail. He continued:

[3] At paragraph 11 of the Judgment.

> "…taking away the court's long held power to decide whether to order the continued detention of the accused or not in the cases referred to in S.593(4) would involve an impermissible trespass by the legislature on the existing authority of the judiciary, which is implicitly preserved by the Constitution (at least until the Constitution is expressly altered pursuant to Parliament's powers in S. 41 thereof). In the absence of binding authority it would therefore be my view that S.593(4) of the Code, by attempting to bind the hands of the court in certain cases to order continued detention, was inconsistent with S.3(4) of the Constitution."

[19] In his submissions, Mr. Astaphan, SC, learned Counsel for the State, referred to Attorney General of the Gambia v Momodou Jobe.[4]

Jobe

[20] The respondent, Jobe, was arrested on suspicion that he had stolen public monies, and for false accounting. He was remanded in custody by a Magistrate of the Special Criminal Court, which was constituted under the Special Criminal Court Act, 1979. Jobe applied for constitutional redress. He alleged, *inter alia*, that section 7 of the Special Criminal Court Act was inconsistent with the provisions of section 15 of the Constitution of the Gambia.

[21] Section 7 of the Special Criminal Court Act provided:

> "7. (1) Any person who is brought to trial before the Court shall not be granted bail unless the Magistrate is satisfied that there are special circumstances warranting the grant of bail.
>
> (2) Before bail is granted under this Act the accused shall be ordered-
>
> (a) to pay into court an amount equal to one third of the total amount of moneys alleged to be the subject matter of the charge or pledge properties of equivalent amount as guarantee; and
>
> (b) to find at least two sureties who shall pay into court an amount equal to one third of the total amount alleged to be the subject matter of the charge or pledge properties of equivalent amount as guarantee.

[4] [1985] LRC (Const.) 556.

(3) Any money or property paid into court or pledged under this Act shall be forfeited to the State in the event of the accused jumping bail."

[22] Sections 15(1)(e), 15(3), 15(4) and 15(5) of the Constitution of the Gambia are in identical terms to sections 3(1)(e), 3(3), 3(4) and 3(5), respectively, of the Constitution of St. Lucia. Mr. Astaphan sought to rely, in particular, upon the following statement by Lord Diplock, who delivered the decision of the Privy Council in **Jobe**:[5]

> "There is thus nothing in the Constitution which invalidates a law imposing a total prohibition on the release on bail of a person reasonably suspected of having committed a criminal offence, provided that he is brought to trial within a reasonable time after he has been arrested and detained. Section 7(1) of the Act which prohibits release on bail, not totally but subject to an exception if the Magistrate is satisfied that there are special circumstances warranting the grant of bail, cannot in their Lordships view be said to be in conflict with any provision of the Constitution."

[23] The learned trial judge held that the foregoing statement is not applicable to the present case for two reasons. The first was that the Privy Council did not appear to place any express reliance on the equivalent of section 3(4) of the Constitution of St. Lucia.[6] The second reason that he gave was that section 7(1) of the Special Criminal Court Act only imposed a conditional prohibition on the grant of bail, because it required a Magistrate to be satisfied that "special circumstances" warranted the grant of bail, whereas section 593(4)(a) of the 2004 Criminal Code seeks to impose a total prohibition on the grant of bail. He therefore found that the main issue for consideration in the present case was essentially different from that in **Jobe**.

[24] I agree that these are essential distinguishing considerations between **Jobe** and the present case. In the present case, the crux of the challenge to the constitutionality of section 593(4)(a) of the 2004 Criminal Code is the total

[5] At page 561 e-f of the judgment.
[6] Section 15(4) of the Constitution of the Gambia.

prohibition on the grant of bail, which this section provides, but which was absent in Jobe. The first sentence in Lord Diplock's statement reproduced at paragraph 22 of this judgment is not a statement of general principle of constitutional interpretation. In fact, the recent decision of the Privy Council in Devendranath Hurnam v The State[7] has given timely pause for reflection on the manner in which the relevant provisions of section 3 of the Constitution of St. Lucia should be interpreted.

Devendranath Hurnam

[25] Hurnam is not on all fours with the present case. As I have stated, the central question in the present case is the constitutionality of legislation, which imposes a total prohibition on the grant of bail for specified offences, including rape. In Hurnam, on the other hand, Their Lordships considered the question whether a magistrate should follow a practice that developed in Mauritius, of treating the seriousness of alleged offences and the heavy penalty that such offences attracted as conclusive reasons for refusing to grant bail. However, Hurnam is instructive notwithstanding this because of the detailed treatment and the clear pointers which the Privy Council afforded to the interpretation of constitutional provisions, which guarantee the right to personal liberty.

[26] In Hurnam, the appellant, a lawyer, was implicated by a client, Chetty, in very serious criminal activity. He was arrested and charged with two counts of conspiracy after Chetty alleged that Hurnam had conspired with him and another, Deelchand, to maim a judge and murder police officers. A Magistrate granted Hurnam bail, subject to conditions, which are essentially set out in the 1999 Bail Act of Mauritius. In doing so, the Magistrate recited the terms of section 4(2) of the 1999 Bail Act[8] and noted that Hurnam was charged with serious offences that

[7] [2005] UKPC 49, on appeal from the Supreme Court of Mauritius, delivered by Lord Bingham of Cornwall.
[8] Section 4(1) of the 1999 Act sets out matters which a court should take into consideration in deciding, it its discretion whether to refuse bail. The matters are similar to section 593(1) of the 2004 Criminal Code. Section 4(2) of the 1999 Act provides that in making a determination whether to refuse bail under section

carry heavy penalties. The Magistrate, however, went on to consider the nature of the evidence from the statements that were available to date. He observed that the police case hinged mainly on the allegations of Chetty who was an accomplice. He referred to statements that were made by another lawyer, who was related to Deelchand. The Magistrate stated that if the risk of interfering with witnesses or tampering with evidence was to carry any weight, it had to be an identifiable risk, supported by evidence.[9] It appears that there was no evidence that related to this.

[27] The Magistrate further considered the rationale of section 4(2) of the 1999 Bail Act and whether Hurnam would appear to stand trial. He also emphasized the discretionary nature of the grant or refusal of bail; noted that any statement by Deelchand would have also been that of an accomplice and concluded that having weighed the nature of the available statements, the presumption of innocence, which is contained in section 10(2)(a) of the Constitution of Mauritius,[10] should weigh more heavily in favour of Hurnam's release on bail.[11]

[28] The Supreme Court of Mauritius set aside the decision of the Magistrate. In doing so, that Court referred, *inter alia*, to section 5 of the Constitution of Mauritius, which protects the right to personal liberty. That Court also referred to the presumption of innocence and to section 4(1)(d) of the 1999 Bail Act, which confer a discretion on a judge or magistrate to refuse to release a person on bail, if that person is detained or charged or is likely to be charged with a serious offence. The Supreme Court held that the magistrate erred because he did not properly consider the seriousness of the offences, but chose instead "to embark … into a premature and detailed assessment of the probative value of the evidence".[12]

4(1), a court shall consider the nature of the offence and the applicable penalty; the character and antecedents of the person, and the nature of the evidence concerning the offence that is available, if these matters appear to the court to be relevant. Section 593(2) of the 2004 Criminal Code is similar.

[9] See paragraph 21 of the Judgment.

[10] Which is in identical terms to section 8(2)(a) of the Constitution of St. Lucia.

[11] See paragraph 22 of the Judgment.

[12] See paragraph 23 of the Judgment..

[29] In setting aside the decision of the Supreme Court, the Privy Council found that the magistrate had properly exercised his discretion under section 4 of the 1999 Bail Act. Lord Bingham stated that the magistrate, while not minimizing the seriousness of the offences with which Hurnam was charged, did not treat it as an all but conclusive reason for refusing bail. He noted that the magistrate had also considered the available evidence, but did not undertake an over-elaborate dissection of it. On the other hand, Lord Bingham also stated that the Supreme Court adopted the approach that was used under the repealed 1989 Bail Act. He found that that approach was inconsistent with the intent of the 1999 Bail Act and the jurisprudence of the European Court of Human Rights under the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms,[13] which protect the liberty of the subject.[14]

[30] It is noteworthy that section 8(d)(v) of the 1989 Bail Act, provided that a detained person "shall not be entitled to be released on bail" where his continued detention was necessary in view of the seriousness of the offence and the heavy penalty provided by law. Lord Bingham observed[15] that, under that provision, the Supreme Court of Mauritius had developed a practice of treating the seriousness of the offence and the heavy penalty provided as sufficient, without more, to justify the refusal of bail in serious cases. Their Lordships noted that the Supreme Court continued the practice under the 1999 Act so that the discretion, which was granted under section 4(1)(d) of the 1999 Act was all but emasculated.[16] It is noteworthy that Lord Bingham reiterated that constitutional provisions, particularly those that provide for the protection of fundamental rights and freedoms, are to be interpreted with greater generosity than other types of legislation, in order to

[13] Hereinafter referred to as "the European Convention".
[14] See paragraph 25 of the Judgment.
[15] At paragraph 8 of the Judgment.
[16] This section provides that a court **may** refuse to release a defendant or detained person on bail, where that person is charged or is likely to be charged with a serious offence.

render the rights meaningful. This was also the approach that guided the Privy Council, for example, in Hinds v R.[17]

[31] In Hinds and in Minister of Home Affairs v Fisher,[18] the Privy Council stated, additionally, that constitutions of the Westminster tradition (as is the Constitution of St. Lucia) are to be treated as instruments *sui generis*, paying respect to the actual language, the character and origin of the instrument, and the traditions and usages which have given meaning to that language. In this regard Lord Wilberforce stated:[19]

> "It can be seen that this instrument (the Bermuda Constitution) has certain special characteristics. (1) It is, particularly in Chapter I, drafted in a broad and ample style which lays down principles of width and generality. (2) Chapter I is headed 'Protection of Fundamental Rights and Freedom of the Individual'. It is known that this chapter, as similar portions of other constitutional instruments drafted in the post-colonial period, starting with the Constitution of Nigeria, and including the constitutions of most Caribbean territories, was greatly influenced by the European Convention for the Protection of Human Rights and Fundamental Freedoms. That Convention was signed and ratified by the United Kingdom and applied to dependent territories including Bermuda. It was in turn influenced by the United Nations Declaration of Human Rights 1948. These antecedents and the form of Chapter I itself, call for a generous interpretation avoiding what has been called 'the austerity of tabulated legalism', suitable to give to individuals the full measure of the fundamental rights and freedoms referred to."

[32] In Hurnam, the approach of the Privy Council reflected these principles of interpretation in relation to the constitutional right to personal liberty. Their Lordships stated, in effect, that the relevant provisions of section 5 of the Constitution of Mauritius,[20] would only be meaningful when read in the light of sections 3(a) and 10(2)(a) of that Constitution, as well as with the guidance

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[17] [1977] A.C. 195. In this case, in the absence of express provision, the Privy Council concluded that the separation of powers doctrine applies to the Constitution of Jamaica by implication.
[18] [1979] 3 All E.R. 21, at page 26.
[19] At page 25f-h. See also Vasquez v The Queen [1994] 3 All E.R. 674 (on appeal from the Court of Appeal of Belize), at paragraph 18, and de Freitas v Permanent Secretary of the Ministry of Agriculture, Fisheries, Lands and Housing [1998] 3 W.L.R. 675; [1999] 1 A.C. 69 (on appeal from the OECS Court of Appeal), at paragraph 6.
[20] Which are similar to section 3 of the Constitution of St. Lucia.

provided by decisions of the European Court of Human Rights on articles 5(1) and (3) and 6(2) of the European Convention.[21]

[33] Their Lordships found, on the basis of these guiding principles, that a detained person's entitlement to be released on bail arises from the general right to liberty, which is declared in sections 3(a) and detailed in section 5 of the Constitution of Mauritius, and the presumption of innocence provided in section 10(2)(a). They stated that these provisions promote the right and interest of a detained person to remain at liberty, unless and until convicted of a crime that is sufficiently serious to justify depriving the person of his or her liberty. They noted, however, that on the other hand, the community has a countervailing interest in ensuring that the course of justice is not thwarted or perverted by the flight of the person or by his interference with witnesses or committing other crimes while on bail awaiting the trial.[22] The result of these competing interests in any particular case can only be determined upon the exercise of discretion by a court.

[34] The ambit of section 3(4) of the Constitution of St. Lucia will be determined against this background.

The ambit of section 3(4)

[35] Mr. Astaphan submitted that sections 3(4) and 3(3) of the Constitution should be read together in order to put both into correct context. According to him, section 3(4) was intended to apply to what is often referred to as "the revolving door arrest" policy. It is intended to prevent the police and other detaining agencies from circumventing section 3(3) of the Constitution by detaining a person beyond the constitutionally permissible period. Mr. Astaphan submitted that section 3(4) is aimed at preventing the police from re-arresting a person after detaining the

[21] Sections 3(a) and 10(2)(a) of the Constitution of Mauritius are the declaratory provision of the general right to liberty and the presumption of innocence. They are similar to sections 1(a) and 8(2)(a) of the Constitution of St. Lucia.

[22] The manner and mode in which the interest of the community is protected in St. Lucia is within the discretion of the court in accordance with the provisions of section 593(1) and (2) of the 2004 Criminal Code.

person for seventy-two hours without charge, unless they obtain an order of the court. They may obtain such an order on the ground that investigations are continuing and the detained person would, if released, interfere with the investigations. Mr. Astaphan submitted, further, that if, as it seems, Lord Diplock's statement in Jobe,[23] is an authoritative statement on the interpretation of section 3 of the Constitution of St. Lucia, this section does not prohibit the Legislature from imposing a total prohibition on bail.

[36] At first blush, Mr. Astaphan's submissions seemed persuasive. However, it is clear that section 3(3) of the Constitution, in and of itself, prohibits the detention of a person in respect of the same offence for more than seventy two hours, unless the person is brought before a court. This is the provision that militates against the revolving door policy. It is usual that when a person who is charged with an offence is first brought up pursuant to section 3(3), the plea is usually taken on the charge. Appearance in court pursuant to this provision often affords a detained person the first opportunity to apply for bail and only the emergency powers provision of sections 14 and 15 of the Constitution permit derogation from section 3(3) rights.

[37] In the second place, section 3(4), in and of itself, clearly prohibits the continued detention of any person who is brought before a court pursuant to an order of a court or upon suspicion of having committed or being about to commit an offence "save upon the order of a court". Such an order is the exercise of a judicial discretion. This result becomes even more obvious when, on the guidance in Hurnam, section 3(4) is read with sections 1(a), 8(2)(a) and in the light of the decisions of the European Court of Human Rights on similar provisions in the European Convention.

[38] When, therefore, a person who is charged or detained applies for bail under the general right to liberty provided by section 3(4) of the Constitution, the court, in its

[23] Which is set out at paragraph 22 of this judgment.

discretion, may refuse or grant bail, guided by the matters set out in section 593(1) and 593(2) of the 2004 Criminal Code. No legislation may constitutionally impose a total prohibition on the exercise of this discretion. Thus it is noteworthy, for example, that while section 733(c) of the 1992 Criminal Code of St. Lucia precluded a magistrate from granting bail to any person who was charged with treason, treason-felony or murder, it did not prohibit a judge from admitting to bail a person charged with any of these offences. Section 593(4)(a) of the 2004 Criminal Code has not merely expanded the precluded categories under section 733(c) of the 1992 Criminal Code to include rape, firearm and drug offences, which are punishable on indictment by imprisonment for five years or more. It has enacted a total prohibition on the discretion of the court, which is conferred by section 3(4) of the Constitution to determine whether the detention of the person should continue, and therefore to make an order to grant or refuse bail. Section 593(4)(a) of the 2004 Criminal Code is therefore inconsistent with section 3(4) of the Constitution of St. Lucia. Can the presumption of constitutionality save it?

The presumption of constitutionality

[39] It is trite principle that the court will refrain from striking down a statutory provision, if the court can bring the provision into conformity with the constitution by making reasonable adaptations, additions or modifications to the provision.[24] The presumption requires the court, to paraphrase the words of Lord Hobhouse in Greene Browne v The Queen,[25] to identify the element of unconstitutionality in the impugned provision (section 593(4)(a) of the 2004 Criminal Code in the present case) and having done this, to determine whether the provision can be amended, adapted or modified to bring it into conformity with the Constitution, without affecting the meaning or purport of the provision.

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[24] See, for example, Permanent Secretary of the Ministry of Agriculture, Fisheries and Lands and Housing and Others v de Freitas, (1995) 49 WIR 77, per Sir Vincent Floissac CJ, at pages 78e-f and 79g-79j; Jobe, Supra, per Lord Diplock at page 566c-g; British American Insurance Company Ltd. v The Attorney General of Antigua and Barbuda, Antigua and Barbuda Civil Appeal No. 20 of 2002, per Sir Dennis Byron, CJ, at paras. 23-27; and Newton Spence and Peter Hughes v The Queen, St. Lucia Civil Appeal No. 14 of 1997 and St. Vincent and the Grenadines Civil Appeal 20 of 1998, per Sir Dennis Byron CJ, at pages 22-24, paras. 56-58.
[25] [2000] AC 45, at page 50.

[40] Mr. Astaphan suggested that section 3(5) of the Constitution is the provision that possibly speaks to the right of an arrested or detained person to be released on bail. He therefore suggested that section 593(4)(a) of the 2004 Criminal Code could appropriately be brought into conformity or consistency with section 3(5) of the Constitution by inserting the words: "and except as provided in section 3(5) of the Constitution Order 1978," in the controlling words of the first line of section 593(4) of the Code, just before the words "a person".

[41] Section 3(5) of the Constitution provides that where a person who is arrested or detained under section 3(3)(b) of the Constitution[26] is not tried within a reasonable time, the court shall release the person either unconditionally or upon reasonable conditions, including bail. The provision further enjoins the court to impose conditions that are reasonably necessary to ensure that the person appears for trial or for proceedings preliminary to trial. Whereas the general right to bail under section 3(4) accrues at an early stage of detention, section 3(5) rights accrue only when a court determines that a person who is detained has not been tried within a reasonable time.[27] These two sub-sections confer distinct and different rights to bail, as Lord Bingham indicated in Hurnam.[28]

[42] Since Mr. Theophilus sought to assert a right to bail from the time that he was detained, his application fell under section 3(4) of the Constitution because he was claiming a section 3(4) rather than a section 3(5) right. Since these sections confer different rights and section 593(4)(a) of the 2004 Criminal Code is inconsistent with section 3(4) of the Constitution, section 593(4)(a) cannot be saved by the presumption of constitutionality by amending it by inserting the

[26] Thus upon reasonable suspicion that he or she committed or is about to commit an offence.

[27] The question what is a reasonable time is to be decided with reference to all of the circumstances of the case, and, in particular, on the criteria adumbrated by the Supreme Court of the United States of America in Barker v Wingo (1972) 407 U.S. 514, which were accepted by this Court, for example, in O'Flaherty v Attorney General of St. Christopher and Nevis and Others (1986) 38 WIR 146, Bishop JA and approved by the Privy Council in Bell v The Director of Public Prosecutions and Another [1986] L.R.C. (Const) 392 and Flowers v The Director of Public Prosecutions [2000] 1 W.L.R. 2396. The court is to consider, in particular, the length of the delay; the reason for the delay; whether the defendant asserted his or her right to trial within a reasonable time, and the prejudice which the defendant is likely to suffer.

[28] See paragraph 15 of the Judgment.

exception suggested by learned Counsel relating to section 3(5) of the Constitution. The learned judge therefore correctly struck down section 593(4)(a) of the 2004 Criminal Code on the ground that it was inconsistent with section 3(4) of the Constitution. The question now, therefore, is whether the judge was also correct when he held that sections 593(4)(b) and 593(5) of the 2004 Criminal Code are also inconsistent with section 3(4) and should be struck down because they are not severable from section 593(4)(a).

Are sections 593(4)(b) and 593(5) severable?

[43] At first sight, it seems that section 593(4)(b) of the 2004 Code is inextricably bound to section 593(4)(a), because, compendiously, it seems, they totally prohibit the grant of bail. Closer consideration reveals, however, that section 593(4)(b) is intended to serve a different purpose from that of section 593(4)(a). This latter subsection seeks to prohibit the grant of bail before trial, while section 593(4)(b) seeks to prohibit it after conviction and the imposition of a prison sentence. A person who is convicted of a crime for which the appropriate sentence is imprisonment does not have a constitutionally protected right to personal liberty if he is sentenced to serve a term in prison. The deprivation of liberty by a sentence of a court in those circumstances is not "prejudicial" to the person.[29]

[44] More noteworthily, however, it is apparent that the purpose of section 593(4)(b) of the 2004 Criminal Code is inextricably linked to that of section 593(5), which confers an entitlement on a person who appeals against a conviction and sentence for an offence specified in section 593(4)(a) to apply to the Court of Appeal for bail if the appeal is not heard within six months of the conviction. These sections must therefore be read together. This is borne out by the fact they are cross-referenced in section 593(5). Together they do not impose a total

[29] Thus Lord Bingham stated in Hurnam, at paragraph 1, that the interest of the individual is to remain at liberty, until or unless the person is convicted of a crime that is sufficiently serious to justify depriving the person of liberty, because any loss of liberty, particularly if the person is subsequently acquitted or never tried will most likely prejudice the person's livelihood and family.

prohibition on bail for a person who is convicted and sentenced to serve a term of imprisonment and who appeals. Rather, they confer a right on a person whose right to liberty has been lost by virtue of his conviction and sentence, but the right is restored on a discretion, on the principle of a right to a speedy determination of the legality of his conviction and/or sentence. Sections 593(4)(b) and 593(5) are not therefore violative of section 3(4) of the Constitution of St. Lucia. In fact, they give effect to the purpose of section 3(5) and define the limit of 'a reasonable time' as six months from the date of conviction.

[45] In the foregoing premises, contrary to the findings of the learned trial judge, sections 593(4)(b) and 593(5) are severable from section 593(4)(a). They can be saved, notwithstanding that section 593(4)(a) has been struck down. Accordingly, the appeal is allowed in part, and the decision of the Judge of the High Court, by which he struck down sections 593(4)(a) of the 2004 Criminal Code on the ground that it is inconsistent with section 3(4) of the Constitution and therefore void and of no effect, is upheld. The decision of the High Court Judge by which he also struck down sections 593(4)(b) and 593(5) of the 2004 Criminal Code on the ground that they are not severable from section 593(4)(a) and are therefore also inconsistent with the provisions of section 3(4) of the Constitution, is set aside. There is no Order as to costs in this Court or in the High Court.

Hugh A. Rawlins
Justice of Appeal

I concur.

Brian Alleyne, SC
Chief Justice [Ag.]

I concur.

Denys Barrow, SC
Justice of Appeal