

ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO.1 OF 2007

BETWEEN:

THE ATTORNEY-GENERAL OF ANTIGUA AND BARBUDA

Appellant

and

HILROY HUMPHREYS

Respondent

Before:

The Hon. Mr. Brian Alleyne, SC
The Hon. Mr. Denys Barrow, SC
The Hon. Mr. Hugh A. Rawlins

Chief Justice [Ag.]
Justice of Appeal
Justice of Appeal

Appearances:

Mr. Justin Simon Q.C., Mr. Kendrickson Kentish and Mr. George Lake for the Appellant
Dr. Henry Browne, Mr. Arthur Thomas and Mr. Kelvin John for the Respondent

2007: March 23;
April 16.

JUDGMENT

[1] **ALLEYNE, C.J. [AG.]:** Until the enactment and coming into effect of Act No. 13 of 2004 the procedure leading up to the issue of a criminal indictment in Antigua and Barbuda was governed by the provisions of Part III of the Magistrates Code of Procedure Act, CAP. 255 of the Laws of Antigua and Barbuda. This Act provided for the conduct of a preliminary inquiry as a necessary prerequisite to the issuing of an indictment against a person accused of an indictable offence. Section 42 of the Act reads;

42. Whenever any charge has been brought against any person of an offence not triable summarily a preliminary inquiry shall be held as hereinafter provided.

- [2] Some time in the summer of 2004, following a general election in Antigua and Barbuda which resulted in a change of government, the newly-appointed Attorney-General began a programme of reform in respect of criminal procedure. One area which concerned the new government was the pace of criminal proceedings and preliminary inquiries in particular.¹
- [3] The Parliament of Antigua and Barbuda enacted Act No. 13 of 2004 providing, *inter alia*, for the abolition of the preliminary inquiry procedure and substituting therefor a new procedure categorized as 'paper committals'. This new procedure required the prosecution to file witness statements together with a list of exhibits in the Magistrates Court, and to serve these on the accused person, who would be at liberty, but not obliged, to file his own witness statements and exhibits. No provision is made for cross-examination of witnesses, but the accused person or his counsel could make a no case submission based on the witness statements.² By section 58 of the Act as amended, the examining Magistrate was empowered to, among other things, '(a) dismiss the charge, and, if the accused person is in custody, make an order for his release.' By subsection (2) of the section, the Magistrate must, on application, consider a no case submission by or on behalf of the accused person.
- [4] The respondent, in his affidavit in support of his application for a number of declarations challenging the constitutional validity of the Magistrates Code of Procedure (Amendment) Act No. 13 of 2004 (hereinafter the amending Act), alleged that on or about 19th June 2003 the Commissioner of Police laid a number of criminal complaints against him before the Magistrates Court alleging conspiracy to defraud the Medical Benefits Board of Control of the sum of \$15,000.00, conspiracy to defraud the said Board of \$9,509.15, and conspiracy to defraud the said Board of \$25,811.00. All complaints were issued prior to the enactment of the amending Act.

¹ Paragraphs 9 and 10 of affidavit in response, page 74 of record of appeal.

² Sections 45(3) and 48(2) of the Act as amended.

- [5] On or about 26th May 2005, after the amending Act came into effect, the respondent appeared before the Magistrate to answer the complaints. Counsel for the respondent and his co-accused thereupon submitted to the Magistrate that the amending Act under which the committal proceedings would be governed is unconstitutional, null and void and of no effect and in particular contravenes the respondent's constitutional rights provided for under sections 15(1) and 15(2)(e) of the Constitution.³ Counsel requested that the Magistrate refer the question to the High Court for decision in accordance with the provisions of the Constitution. On 30th June 2005 the Magistrate determined that the question was vexatious and frivolous and refused to refer the matter. The respondent applied to the High Court by way of Fixed Date Claim.
- [6] The respondent, in his affidavit in support of his application for a number of declarations challenging the constitutional validity of the amending Act No. 13 of 2004, alleged that the amending Act, in particular by depriving the appellant of the right to cross examine prosecution witnesses in the committal proceedings on pending criminal charges, offends the fair trial provisions of the Constitution of Antigua and Barbuda 1981 and was not passed in compliance with section 47 of the Constitution.⁴
- [7] The appellant alleged in the affidavit in response that the pace of preliminary inquiries was in some cases 'laborious and time-consuming', involving protracted hearings, typically putting 'a strain on the resources of the police and the courts'. This caused a backlog of cases in the Magistrates Court, and the respondent was of the view that this 'would inevitably lead to a loss of public confidence in the

³ Respondent's affidavit in support of application made by Fixed Date Claim in the High Court, page 72 of appeal record.

⁴ This section makes provision in subsection (5), in respect of legislation that purports to amend entrenched provisions of the Constitution, that such legislation shall not be submitted to the Governor-General for his assent unless there has been an interval of not less than 90 days between the introduction of the bill in the House and the beginning of the proceedings in the House on the second reading; and after it has been passed by both Houses of Parliament, it has been approved on a referendum by not less than two-thirds of all the votes validly cast on that referendum.

judicial system and damage the rule of law'. There was no rebuttal of these allegations.

[8] The appellant further asserted⁵ that 'since the enactment of Act 13 of 2004 preliminary inquiries have proceeded efficiently and expeditiously', and that once the inquiring Magistrate has committed the accused to stand trial, the Director of Public Prosecutions determines whether or not the accused should be indicted. If an indictment is issued, the trial proceeds before a judge and jury as before. The appellant, in the affidavit in response in the High Court, asserted that it is the process of the trial in the assizes that 'ensures that the accused enjoys a fair trial', and that the enactment has 'improved the quality of justice which is dispensed by our judicial system'. The appellant urged that the application be dismissed with costs.

[9] In a lengthy judgment containing 145 paragraphs, the learned trial judge declared 'the entire amending Act' unconstitutional. The Court's order was in the following terms:

Order

It is hereby ordered and declared as follows:

1. Part III of the Magistrate's Code of Procedure Act Cap.255 prior to its amendment continued procedural or secondary rights which give effect to some substantive rights in the Constitution in relation to a person charged with a criminal offence.
2. Sections 4, 5, 6, 7, 13, 15, 16, 17, and 19 of the Magistrates Code of Procedure (Amendment) Act 2004 No.13 are in conflict with sections 2, 15 (2) (e) and 47 (2) of the Constitution and are thus unconstitutional, null and void and of no effect.
3. Section 1 (2) of the Magistrate's Code of Procedure (Amendment) Act 2004 No.13 is unconstitutional in that it offends the letter and flouts the spirit of Chapter II of the Constitution and in particular section 15 (4) thereof insofar as it gives that Act retrospective effect by

⁵ Paragraph 14, page 75 of record.

reference to pending criminal proceedings and is therefore unconstitutional, null and void and of no effect.

4. Under the test of severance if the offending provisions of the Act are removed a meaningful enactment or residue will not survive and therefore the entire Act is declared unconstitutional.
5. The Defendant will pay the Claimant costs in the amount of \$7000.

[10] At the hearing of the appeal and prior to the commencement of argument, in response to an inquiry by the Court, learned lead counsel for the respondent indicated that he did not seek to support paragraphs 2 and 4 of the learned trial judge's order appearing after paragraph 144 of the judgment. Counsel indicated that it is his submission that the issue of unconstitutionality of the amending Act arises only in relation to persons who, prior to the coming into effect of the amending Act, had been charged with a criminal offence of the type referred to in section 42 of the amending Act, that is to say an offence not triable summarily.

[11] Learned counsel submitted that in light of the facts adverted to at paragraph 4 of this judgment, the respondent is a person who, at the date of coming into effect of the amending Act, had been charged with offences not triable summarily, and thus is a person in relation to whom the provisions of section 15(2) have been, are being or are likely to be contravened. Learned counsel therefore submitted that he has the necessary *locus standi* in relation to this matter. However, counsel conceded that the Parliament of Antigua and Barbuda is empowered to make law abolishing preliminary inquiries or other parallel legislation relating to steps preliminary to the holding of a trial of indictable charges without the necessity to observe the formalities of section 47 of the Constitution. It was his submission that the same act may offend the Constitution in relation to one person but not necessarily in relation to others.

[12] The appellant had submitted very full written submissions supported by three volumes of authorities. The respondent had not supplied the court with written

submissions. The court, in the circumstances, invited counsel for the respondent to address the issues of whether the provisions of section 15 of the Constitution relate only to a criminal trial, and whether a preliminary inquiry falls within that category. Counsel agreed that those issues, and the issue of retroactivity of the amending Act, were the only matters which needed to engage the attention of the Court.

[13] Section 15(2) of the Constitution reads as follows;

Every person who is charged with a criminal offence-

- a. shall be presumed to be innocent until he is proved or has pleaded guilty;
- b. shall be informed orally and in writing as soon as reasonably practicable, in language that he understands, of the nature of the offence with which he is charged;
- c. shall be given adequate time and facilities for the preparation of his defence;
- d. shall be permitted to defend himself before the court in person or by a legal practitioner of his own choice;
- e. shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and
- f. shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge, and except with his own consent the trial shall not take place in his absence-
 - i. except where, under the provisions of any law entitling him thereto, he is given adequate notice of the charge, the date, time and place of the trial or continuance thereof and afforded a reasonable opportunity of appearing before the court;
Provided that where the foregoing conditions have been complied with, and the court is satisfied that owing to circumstances beyond his control he cannot appear, the trial shall not take place or continue in his absence; or
 - ii. unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to

be removed and the trial to proceed in his absence.

- [14] It is not disputed that the respondent is a person charged with a criminal offence to whom the subsection refers. However, it is accepted that the presumption of innocence is not in any way affected by the amendments introduced by the amending Act. The requirement for the person accused to be informed as soon as reasonably practicable, in language that he understands, of the nature of the offence with which he is charged is preserved. Likewise, the respondent does not complain that his right to be given adequate time and facilities for the preparation of his defence, or that his right to defend himself before the court in person or by a legal practitioner of his choice, is affected. The requirement that he be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial is not affected; nor is there any question of limiting the right to be present at his trial beyond the terms of the section of the Constitution.
- [15] The right to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution as guaranteed by subsection (2)(e) of section 15 of the Constitution is not in issue.
- [16] That leaves the residual question which falls under paragraph (e) of subsection (2) of section 15 of the Constitution. Can it be said that the right to be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court is adversely affected?
- [17] Under the amending Act no distinction is made between the facilities provided for the prosecution and those provided for the defence to obtain the attendance and carry out the examination of witnesses. In both cases written statements and

exhibits are allowed to be filed and served on the other party⁶. In both cases where the Magistrate contemplates committing for an indictable offence other than the offence charged, he or she shall give both the prosecution and the accused person an opportunity to show cause, by way of submissions *only*, why the order should not be made.⁷ Under section 58(2), introduced into the Act by section 17 of the amending Act, the prosecution and the defence have equal rights to show cause, by way of submissions only, why the order contemplated by the Magistrate should not be made.

[18] It is clear from the above that there is no alteration of the specific or express rights that section 15 of the Constitution protects.

Retrospective effect

[19] Learned counsel for the respondent submitted that at the time that the amending Act came into effect the respondent had a vested statutory right in having his charges considered at a preliminary inquiry held 'as hereinafter provided'.⁸ The retrospective effect of the amending Act is to be found in section 1(2), which provides;

'This Act shall apply to legal proceedings pending on the commencement of this Act and legal proceedings instituted on or after the commencement of this Act.'

[20] In particular, learned counsel argued that the respondent was entitled to the substantive right to cross examine prosecution witnesses at the preliminary inquiry. He argued that sections 51 to 56 of CAP. 255 had conferred on the respondent vested statutory rights. The right to cross examine⁹, counsel argued, gave the respondent the opportunity to introduce issues into the evidence on the basis of which the magistrate might come to the conclusion that the prosecution

⁶ Section 7 of the amending Act, section 42A and B of the Act as amended; section 21 of the amending Act amending section 71 of the Act.

⁷ Section 13 of the amending Act, introducing section 48(2) into the Act.

⁸ Section 42 of the Magistrates Code of Procedure Act CAP. 255.

⁹ *Ibid.* section 52.

has not established a *prima facie* case, might dismiss the charge and make an order for the release of the respondent.¹⁰ Counsel argued that the amending Act deprived the respondent of this possibility, and thereby operated to his prejudice. He submitted that at the time the charges were laid against the respondent these rights were vested and mandatory, and could not be taken away in relation to him except by legislation complying with the requirements of section 47 of the Constitution.

- [21] Counsel conceded that no-one has a vested right in a fixed form of preliminary inquiry, and that the right to examine and cross-examine witnesses is adequately provided for and protected in the trial before the judge and jury. He agreed that there is no constitutional rule that one is entitled to 'two bites of the cherry'.

Fair hearing

- [22] Section 15(1) of the Constitution of Antigua and Barbuda states in the following terms;

If any person is charged with a criminal offence then, unless the charge is withdrawn, he shall be afforded a fair hearing within a reasonable time by a independent and impartial court established by law.

This section confers on persons charged with a criminal offence the right to be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

- [23] The appellant in the affidavit filed in response to the claim asserted that in relation to the nascent programme of reform in respect of criminal procedure, one concern was the pace of criminal proceedings and preliminary inquiries in particular. The amending Act, the deponent claimed, was enacted to give effect to some of the proposed reforms, including provision for 'paper committals'. Prior to the enactment of the amending Act, the affidavit declared, the pace of preliminary

¹⁰ *Ibid.* section 55 and 58.

inquiries was laborious and time-consuming and in some cases the hearing would be protracted and would typically put a strain on the resources of the police and the courts, causing a backlog of cases in the Magistrates Court. The affidavit asserted that this state of affairs inevitably would lead to a loss of public confidence in the judicial system and damage the rule of law.

[24] The affidavit further asserted that since the enactment of the amending Act preliminary inquiries have proceeded efficiently and expeditiously.¹¹ The respondent (claimant) did not demur. On the uncontroverted evidence, therefore, the amending Act, far from prejudicing the respondent's right to a hearing within a reasonable time, sought to and succeeded in enhancing that right.

[25] It is not suggested that the amending Act had the effect of undermining the independence or impartiality of the Magistrates Court, which is the court established by law charged with the responsibility and the jurisdiction to conduct preliminary inquiries, whether styled as such or as 'committal proceedings'. Nevertheless, the respondent maintained his challenge that the amendments introduced into the preliminary inquiry process offended the protections afforded by section 15(1) of the Constitution.

[26] Counsel for the respondent relied on the case of **Halstead v Commissioner of Police**¹². In that case the trial judge found, *inter alia*, that section 8 of the Constitution of Antigua (the Associated Statehood Constitution of 1967), subsection (1) of which is identical in substance and effect to subsection (1) of section 15 of the independence Constitution of 1981¹³, did not apply to preliminary inquiries. On appeal, Peterkin J.A. disagreed with this view. His Lordship said

'I regard a preliminary inquiry as part and parcel of the trial of an indictable offence. It may well, and quite often does, result in the discharge of the person accused. The same rules apply to the taking of evidence at the preliminary stage of the hearing into the charge brought

¹¹ Paragraphs 9 to 14 of affidavit in response, page 74 and 75 of Record of Appeal.

¹² [1978] 25 WIR 522.

¹³ S.I.1981 No. 1106

against the accused person as in the final stages in order to ensure that he gets a fair hearing. It is precisely this which section 8(1) says he shall be afforded, and it is not difficult to call to mind instances in which his rights under the section could be infringed at the preliminary stage. In my opinion the rights afforded by section 8 to a person charged with a criminal offence apply to all stages of the hearing into that charge, and are enforceable by section 15 in the event of an infringement.¹⁴

[27] The learned Attorney-General for the appellant questioned the correctness in law of the learned Justice of Appeal's dictum that a preliminary inquiry is part and parcel of the trial of an indictable offence. Counsel for the respondent pointed out that this court is bound by that judgment on the principle of *stare decisis*. In my view it is unnecessary to consider the correctness or otherwise of Justice of Appeal (as he then was) Peterkin's dictum. It seems to me that the issue does not impact on this case either way. There is no doubt that the Magistrates Court, after as before the passage of the amending Act, is an independent and impartial court established by law.

[28] In **Halstead**, the issues apparently centred around complaints concerning delays in the conduct of the preliminary inquiry and the alleged wrongful admission of evidence at the preliminary inquiry. What the learned Justice of Appeal held was that, in the context of that case, the provisions of section 8(1) of the Constitution, providing for a fair hearing, apply equally to a preliminary inquiry as they do to the trial before the judge and jury. There can be no quarrel with that proposition. I am of the view, however, that in the instant case, provisions of the Act do not in any way prejudice the right of the respondent to a fair hearing. The respondent is entitled to challenge the admissibility of any evidence tendered by the prosecution, and to make all legal submissions with regard to delays in the prosecution of his case, the impact that this may have on the fairness of his trial, whether a *prima facie* case has been made out against him on the evidence tendered, and any other ground in law which might bring an end to the proceedings. The issue of the status of the preliminary inquiry as part of the trial is altogether irrelevant.

¹⁴ [1978] 25 WIR at page 524.

[29] The remaining question under section 15(1) of the Constitution is whether the amending Act has the effect, or even the potential, of prejudicing the respondent's right to a fair hearing. To answer this question one must determine what are the essentials of a fair hearing in the context of the constitutional provisions.

[30] Some of the elements of a fair trial are:

- The presumption of innocence
- The right to be informed as soon as reasonably practicable in a language that he understands and in detail, of the nature of the offence charged
- Adequate time and facilities for the preparation of his or her defence
- The avoidance of prejudicial pre-trial publicity¹⁵
- Determination within a reasonable time
- The right to defend himself before the court in person or, at his own expense, by a legal practitioner of his or her own choice
- Trial by an independent and impartial court established by law
- The right to be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before the court, and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution
- The right to have without payment the assistance of an interpreter if he cannot understand the language used at the trial
- The right to have the trial take place in his presence unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence
- The right with certain specific exceptions prescribed by law and ordered by the court, to have his trial held in public

¹⁵ MacAlister and others v Associated Newspapers Limited [1954] S.L.T 14

- The right to have, within a reasonable time after judgment and upon payment of a reasonable fee as prescribed by law, a copy of any record of the proceedings made by or on behalf of the court
- Immunity from conviction of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence; and no penalty shall be imposed for any criminal offence that is severer in degree or description than the maximum penalty that might have been imposed for that offence at the time it was committed
- The right not to be tried for an offence of which he has been convicted or acquitted or for any other criminal offence of which he could have been convicted at the trial, save on the order of a superior court in the course of an appeal or review proceedings relating to the conviction or acquittal
- The right not to be tried for a criminal offence if he has been pardoned for that offence
- The right not to be compelled to give evidence at her trial¹⁶

[31] There is no suggestion in this case that the amendments introduced by the amending Act affects any of the above rights, either in general or in relation to the respondent. The amending Act does not prejudice the respondent's rights as set out in section 15 of the Constitution, even to the extent that he might be said to have had substantive vested rights in a preliminary inquiry 'as hereinafter provided', i.e. as at the date of the charge being laid.¹⁷

Power of Parliament to make law

[32] Section 46 of the Constitution of Antigua and Barbuda vests in Parliament the power, '*subject to the provisions of this Constitution*', to make laws for the peace, order and good government of Antigua and Barbuda. It seems to me that this provision should be interpreted as affirming the sovereignty of Parliament in the

¹⁶ Substantially extracted from section 15 of the Constitution.

¹⁷ Section 42 of the Magistrates Code of Procedure Act, CAP. 255.

legislative realm, subject *only* to the limitations of those powers imposed by the Constitution. The Constitution has preserved and guaranteed to Parliament the plenitude of legislative authority, limited only by those provisions of the Constitution that impose such limitations.

[33] In the context of this case, it seems to me that the Constitution falls well short of limiting the powers of Parliament to do what it has done by the amending Act. The amending Act does not offend the limitations imposed on the powers of Parliament by section 15 of the Constitution, and in my view the respondent's challenge to the legislation cannot succeed.

[34] In the result, while I find no fault with paragraph 1 of the learned judge's order in this matter, I would hold that the learned judge was wrong in his declaration that the amending Act is unconstitutional. The appeal is allowed, and the order of the learned trial judge is set aside.

[35] The general rule on costs is that the unsuccessful party will be ordered to pay the costs of the successful party¹⁸. However, the Court has a discretion under **Civil Procedure Rules** Part 64.6(2), *inter alia*, to make no order as to costs. On the other hand, Part 56.13(6), which applies specifically to cases of the nature of the present case, makes specific provision in the following terms;

The general rule is that no order for costs may be made against an applicant for an administrative order unless the court considers that the applicant has acted unreasonably in making the application or in the conduct of the application.

[36] In the circumstances of this case, I see no reason to depart from this specific general rule.

¹⁸ CPR 2000, Part 64.6(1).

[37] In the Court below the learned trial judge ordered costs in the sum of \$7,000.00 against the appellant. That order is set aside, and with regard to the costs of the appeal, each party will bear his own costs.

Brian Alleyne, SC
Chief Justice [Ag.]

I concur.

Denys Barrow, SC
Justice of Appeal

I concur.

Hugh A. Rawlins
Justice of Appeal