EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA

IN THE HIGH COURT OF JUSTICE

SLUHCV 2010/0909

BETWEEN:

KAIM SEXIUS

Claimant

and

THE ATTORNEY GENERAL OF SAINT LUCIA

Defendant

Appearances:
Mr. Andie George and with him Mr. Ermin Moise for the Claimant
Mr. Deale Lee and with him Ms. Cagina Foster for the Defendant

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2011: September 29th;
2012: October 2nd

JUDGMENT

[1] **WILKINSON J.:** The Claimant filed his fixed date claim form on October 8th 2010, and therein he sought the following orders:

(1) A declaration that section 909 of the Criminal Code 2004 is unconstitutional and infringes the Claimant's rights under sections 8(1) and 8 (7) of the Saint Lucia Constitution Order 1978.

(2) A declaration that the Claimant ought not to be mandated to file a defence statement in keeping with his constitutional right to silence.

(3) A declaration that defence statements made pursuant to rule 11.1(3)(c) of the Criminal Procedure Rules 2008 are not mandatory.

(4) A declaration that the drawing of any adverse inferences with or without the leave of the Court pursuant to section 912(1) of the Criminal Code 2004, by any party to criminal proceedings as a result of the Claimant failing to file and serve a defence statement is incompatible with the protection afforded to the Claimant under the Saint Lucia Constitution Order 1978.

(5) A declaration that the disclosure obligations placed on the Prosecution ought not to be subject to the Claimant making a defence statement.

(6) A declaration that the Claimant ought not to be obliged to make a defence statement pursuant to section 909 of the Criminal Code 2004.

(7) An order that the order made by the Honourable Justice Kenneth Benjamin for the Claimant to file and serve a defence statement in Case No.646 of 2009 be stayed until the final determination of this matter.

(8) Any further order or declaration which the Court deems fit.

(9) That the Defendant bears the costs of this Claim.

There were matters set out as grounds in the fixed date claim and they were:

(1) That the Claimant has a right to a fair hearing under section 8(1) of the Constitution of Saint Lucia 1978 (hereinafter "the Constitution").

(2) That the Claimant has a right not to be compelled to give evidence at his trial under section 8(7) of the Constitution.

(3) That the Claimant has a constitutional right to remain silent prior to and during his trial without such silence being used as a determination of his guilt.

(4) That the mandatory provisions of section 909 of the Criminal Code 2004 (hereinafter "the Criminal Code") are inconsistent with the Claimant's

constitutional rights referred to above.

(5) As a result of this requirement the Claimant is deprived of his right and or safeguards as afforded to him in accordance with sections 8(1) and 8(7) of the Constitution.

(6) It is submitted that the enactment of section 909 of the Criminal Code was outside the permitted boundaries of the legislative powers of Parliament and is therefore in violation of the Constitution and ought therefore to be declared null and void.

[2] At this juncture, the Court observes that the Claimant filed a document titled fixed date claim and it was drawn in the format of a notice of application notwithstanding that CPR 2000 rule 56.7(1) and (2) provide that the format ought to be by way of fixed date claim form (Form 3) with the title "Originating Motion". Nonetheless, several cases including that of this Court say that inaccuracies of this nature ought not to be a hindrance to the Claimant's case – see **Hannigan v. Hannigan**[1] and **Grenada Building and Loan Association v. Grenada Co-operative Bank Limited**[2]

[3] The Claimant filed an affidavit in support of his fixed date claim form. The Defendant did not file an affidavit in reply. The Parties agreed prior to trial that there would be no cross-examination and that the suit could proceed on legal submissions on the relevant sections of the Constitution, the Criminal Code and the Criminal Procedure Rules 2008 (hereinafter "the Criminal Procedure Rules").

The Claimant's evidence:

[4] The Claimant deposed that on or about May 28th 2009, he was arrested and charged with the attempted murder of Mr. Janick Henry. The sufficiency hearings and case management conferences took place on February 26th 2010, April 12th

[1] [2000] 2 FCR 650, CA
[2] GDAHCV 2009/0122 para.14

2010, and September 20th 2010 respectively. At the time of his arrest, he was informed by his Attorney-at-Law that he had a right to remain silent both prior to and during the course of the trial against him. He was further informed by his Attorney-at-Law that his right was contained in sections 8(1) and 8(7) of the Constitution as well as section 584(2)(a) of the Criminal Code.

[5] On about April 12th 2010, during the case management conference the Honourable Justice Kenneth Benjamin who presided over the hearing ordered that a defence statement be filed by the Claimant and served on the Director of Public Prosecutions. He did not file and serve the defence statement and again on September 20th 2010, during the case management conference the Honourable Justice Benjamin again ordered that a defence statement be filed and served by the Claimant on the Director of Public Prosecutions by October 1st 2010. The Honourable Justice Benjamin also indicated that adverse inferences may be drawn by the Court in accordance with section 912(1) of the Crirninal Code if the Claimant failed to file and serve his defence statement. The Claimant was informed by his Attorney-at-Law that this order was made pursuant to section 909 of the Criminal Code and that the wording of section 909 of the Criminal Code Lucia made it mandatory that he file a defence statement setting out (a) in general terms the nature of his defence, (b) the matters on which he took issue with the prosecution, and (c) setting out in the case of each such matter, the reason why he took issue. His Attorney-at-Law also informed him that the mandatory requirement was contrary to his constitutional rights (a) to a fair hearing as outlined in section 8(1) of the Constitution, and (b) to not be cornpelled to give evidence at trial in accordance with section 8(7) of the Constitution. He added that the drawing of inferences was incompatible with the protection afforded him under section 584(2)(a) of the Criminal Code.

Issue

[6] Whether sections 909 and 912 of the Criminal Code and rule 11.1(3) (c) which compels the preparation and filing of a defence statement in the Court and delivery of the said defence statement to the Prosecutor before trial, infringes the

Claimant's constitutional rights granted by sections 8(1), 8(2)(a) and 8(7) of the Constitution.

The Claimant's submissions

[7] Counsel submitted that the approach to be taken by the Court in addressing the issues raised should be in three (3) stages:

(a) 1st determine that there is a constitutional right to silence;

(b) 2nd determine whether the legislation complained of breached that right;

(c) 3rd if there had been a breach then determine the relief to which the Claimant was entitled.

[8] Counsel submitted that section 8 of the Constitution provided for the Claimant's fundamental rights and as such any change to the section and the rights therein could only be brought about by compliance with section 120 of the Constitution and not by any other law such as the Criminal Code or the Criminal Procedure Rules.

[9] In relation to the Claimant's case, there were three (3) principles emanating from the section 8 and they were (a) the right to a fair hearing, (b) the right of every person charged to be presumed to be innocent, and (c) the right of an accused not to be compelled to give evidence at his trial. These rights he said although separate they touched and concerned each other.

[10] In the criminal justice system, the right to silence was observed at three (3) stages firstly, during police questioning, secondly, at the pre-trial stage and thirdly, at the trial. This case concerned to a right to silence in the last two (2) stages. The pre-trial right to silence existed at common law and it was well established as a fundamental right. This fundamental right was now written into the Constitution and it was also set out in the Criminal Code 2004 at section 584(2)(a). In addition, not only was the pre-trial right to silence recognized under section 584(2) (a) but there was also recognized that there was to be no inference drawn from the Claimant exercising his right to remain silent at arrest.

[11] Before the new dispensation under the Criminal Procedure Rules and the Criminal Code (as amended), at a criminal trial, the Claimant would have had three (3) options: (a) to remain silent, (b) to give an unsworn statement from the dock, or (c) to give a sworn testimony. Under the new dispensation, the Claimant has only two (2) options: (a) stay silent, or (b) give sworn testimony.

[12] Counsel said that interestingly enough when a judge informed an accused of his right to remain silent at the trial, he was also informed that his silence could not be used against him if he chose to remain silent during the trial.

[13] Section 909 of the Criminal Code and rule 11.1(3) (c) of the Criminal Procedure Rules Counsel said sought to address matters at the stage between arrest and trial. Pursuant to section 909 and rule 11.1(3)(c) during the sufficiency hearing Justice Benjamin was required to make an order for a defence statement. This order compelled the Claimant to file a defence statement. The situation was compounded by section 912 (1) (a) of the Criminal Code which allowed with or without the Court's leave for adverse inferences to be drawn by any party if the Claimant failed to give a defence statement.

[14] There was a dilemma here in that prior to trial there was a right to silence, and at trial there was a right to silence but in between the two (2) stages, the Claimant lost his right to silence pursuant to section 909 and rule 11.1(3) (c).

[15] A further irony Counsel added, was that if the Claimant decided to stay silent at the trial but had as compelled by section 909 to do, filed a defence statement prior to the trial, his defence statement could be used at the trial as evidence as it could be read to the jury. The Claimant's right to silence from arrest through to trial would therefore be lost. Use of the Claimant's defence statement at trial would be a breach of section 8(7) of the Constitution since it would be compelling the Claimant to give evidence against himself at the trial.

[16] Counsel said that he interpreted the right to be silent at the trial in the face of evidence presented by the Prosecution as really what was provided for by section 8(7) of the Constitution and if this was breached by the defence statement then it

could lead to the Claimant not being given a fair trial. In this regard he referred the Court to **S v. Thebus & Anr**[3], a South African case. He said that it was clear from the authorities that when an accused was asked to disclose his defence by a mandatory requirement before trial it breached his silence and this in turn breached his constitutional right to silence.

[17] The making of a defence statement he submitted created a potential situation for self incrimination since the accused must contend with the nature of his defence statement in circumstances where the Prosecution had failed to discharge its own burden of proof.

[18] The mandatory provisions of section 909 also ran contrary to Claimant's constitutional right to a fair hearing. The Claimant on looking at other provisions in the Criminal Code, was not contending that notice of any of the special defences such as alibi was a breach of any of his constitutional rights as there was a distinction to be drawn between an accused who for example wished the raise the defence of alibi and an accused who simply wished to exercise his right to remain silent and not raise a defence at all. It was only fair that if the Claimant was going to raise something in his defence which was entirely within his personal knowledge that in such a case he gives notice of it before trial. This is what the legislation dealing with special defences perceived. A distinction could be drawn between a defence statement and a notice disclosing for example an alibi defence. The disclosure of alibi did not require the Claimant to present the details required in a defence statement.

[19] Referring to **Frank Errol Gibson v. The Attorney General**[4] Counsel said that there was a distinction to be drawn between the disclosure required in that case and the disclosure in a defence statement made pursuant to section 909. The Court in that case said that an accused may be silent if he wished but in a case where he intends to call an expert it would not be fair to him to withhold the expert's report from the prosecution. The distinguishing feature was that section

[3] (CCT 36/02) [2003] ZACC 12; 2003 (6) SA 505 (CC);
[4] CCJ Appeal No. CV1 of 2010, BB Civil Appeal No.8 of 2007.

909 made it mandatory for all accused to give a defence statement and it was buttressed by section 912 which goes even further than **Gibson**[5] in that inferences may be drawn if the defence statement is not filed and served.

[20] All in all Counsel said a right to a fair hearing must include a right to be silent and a right against self-incrimination. So in other words, notwithstanding the Defendant's Counsel submissions as it relates to drawing inferences, it is the mere fact that it is possible for adverse inferences to be drawn which makes section 912 of the Criminal Code incompatible with the Constitution.

[21] Counsel submitted that since the Constitution was the supreme law, it stood to reason that section 909(1), 909(2) and 912(1)(a) should be declared void.

The Defendant's submissions

[22] Counsel for the Defendant said that he concurred with Counsel for the Claimant on the two (2) issues identified and wished to propose a 3rd, it being that the Court had to determine the nature of the remedies available to the Claimant.

[23] Citing **R v. Director of Serious Fraud Office Ex. parte Smith**[6] he said that all the immunities although related they were independent of each other and perhaps most important, at common law, the immunities were subject to encroachment by statute. On a comparison of section 8(7) of the Constitution with the various rights to silence identified at common law in **Ex. parte Smith**[7] it was clear that only the 4th right and to some extent the 6th right were within the ambit of the protection of section 8(7) of the Constitution.

[24] He submitted that while the Claimant's Counsel drew reference to provisions in the Constitution of South Africa, it was clear that the South African Constitution provided separately for the right to pre-trial silence and the right not to be compelled to give evidence at trial. In contrast, the framers of the Saint Lucia

[5] Ibid
[6] [1993]AC 1.
[7] Ibid.

Constitution only elevated from the common law the Claimant's right not to be compelled to give evidence at his trial to the status of a fundamental right. In support of this proposition he referred the Court to the **Minister of Home Affairs v. Fisher**[8].

[25] The first step to be undertaken was examination of the expressed words. It was to be noted that they all referred to a person concerned with a criminal trial and all indicated that such a person was not to be compelled to give evidence. At the time the Constitution was framed, the framers were well aware of the common law rights to silence and so had it been their intention to elevate all of the common law rights to the status of fundamental rights it would have been a simple matter, they needed to merely state that there was a right to silence and there would have been incorporated the six (6) rights identified by Lord Mustill in **R v. Director of Serious Fraud Office Ex. parte Smith**[9]. On a clear interpretation of the section 909 and rule 11.1(3) (c) an accused could not be compelled to give evidence at trial. The meaning or definition of the word evidence, it did not fit with the requirement of the section 909 or rule 11.1(3)(c). Section 909 required the accused to (a) set out in general terms the nature of his defence, (b) the matters of the prosecution with which he took issue, and (c) the reasons why he took issue. This was merely a requirement of identification of the issues to be determined by the Court. The Court had to determine what were the live issues at the trial and evidence would be lead to prove or disprove the matter. Therefore, if for example the Claimant claimed he had an alibi and did not commit the alleged crime, this was an issue before the court and evidence would have to be led to make out that defence

[26] Counsel submitted that the authorities show that the right to silence is not an absolute right and so one has to look at the degrees. The Claimant's contention was that his pre-trial right to silence and his right against self incrimination are protected by section 8(1) of the Constitution, a right to a fair trial. Section 8(1)

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[8] [1980]AC 319
[9] Ibid.

established three (3) rights (a) a right to a fair hearing, (b) a right to trial within a reasonable time, (c) a right to trial before an impartial tribunal established by law. There was no complaint about the 2nd and 3rd rights.

[27] The protections underlying the right to a fair hearing arose because of the general disparity in resources at the State's disposal as compared to that of an accused. So practices, procedures, immunities and other rights arose to safeguard and secure a fair trial. Some were now enshrined in the Constitution while others remained at common law or were set out in the Criminal Code for example section 584 (2) (a). It was significant and to be noted that the right to pre-trial silence at arrest was set out in the Criminal Code and not in the Constitution therefore the implication is that it is not a fundamental right.

[28] Counsel referred the Court to **The State v. Brad Boyce**[10] where he said it was held that the right to a fair trial meant trial under the law as it is at the time of trial and that there is no constitutional protection for any particular form of procedure. He also referred the Court to **Hilroy Humphreys v. Attorney General of Antigua and Barbuda**[11] where the Privy Council said that the committal proceedings procedure which replaced the preliminary inquiry procedure was constitutional. Relying on those two (2) cases, all rights which are not fundamental can be amended, abridged, restricted or even abolished by ordinary statute.

[29] Counsel submitted that bearing in mind the definitions of the right to silence at common law, the difference between the definitions and the stated right to silence included in the Constitution and his submissions on the right to pre-trial silence, the right to pre-trial silence does not form one of the fundamental rights. Indeed, he said, there has been a long tradition of an accused being required to give notice of his defence in the case of alibi. Reference was had to **Williams v. Florida (No. 927)**[12] where he said the United States Supreme Court on

[10] [2006] UKPC 1
[11] [2008] UKPC.
[12] 399 U.S. 78

considering the constitutional requirement of an accused to provide notice of alibi in the face of the 5th amendment to the Constitution which basically provides that no person shall be compelled to be a witness in any criminal case against himself, the Court held that the right was not an absolute right. There were exceptions to the right.

[30] The authorities he said clearly show that the issue is really one of timing. It is expected that if an accused intends to put forward a positive defence that at some point, he will be required to bring it to the notice of the prosecution. He is not entitled to keep secret his defence, particularly if it is a defence that falls within the special defences category. He observed that in **Thebus**[13] the Court there addressed the issue of alibi and showed the justification for notice of alibi. The effect of section 909 and rule 11.1(3) (c) served merely to extend the requirement of notice to similar situations.

[31] The changes in law regarding pre-trial disclosures were permissible because as he posited the right to pre-trial silence was not a fundamental right but a right at common law. At the end of the day, what had to be looked at was the effect and or aim of section 909 and rule 11.1(3)(c) and from them the question arising was do they tend to promote fairness in the trial or would they unduly prejudice the Claimant. The aim of the defence statement requirement was to make the process more efficient by enabling all parties to know what matters of fact were in issue and to more expeditiously deal with matters. Society as a whole had an interest in preliminary matters being dealt with efficiently and there was also an inherent benefit to the Claimant in having the matter dealt with expeditiously.

[32] He referred to **Frank Errol Gibson v. The Attorney General**[14] where in a unanimous decision, the Court took what he described as an unprecedented step

[13] Ibid
[14] CCJ Appeil No. 1 of 2010, BB Civil Appeal No.8 of 2007.

to order a defendant to disclose an expert report if he intended to call the expert as his witness at the trial.

[33] In response to the Claimant's submission that there was a clear potential for self-incrimination based on the requirements of section 909 and rule 11.1(3)(c) he said that a defence statement did not remove the Claimant's option of making a no case submission at the end of the prosecution's case and it did not prevent the Claimant from pursuing defences that arose out of the prosecution's case in chief. The important point according to **Moosa Osman & Anr. v. The Attorney General for the Transvaal**[15] was that a choice could not be forced upon the Claimant. Further, what went into the defence statement was a matter for the Claimant as he would determine the manner in which he wished to conduct his defence.

[34] In dealing with the matter of what inferences could be drawn pursuant to section 912 (1), he said that on the surface while this would seem to be against the presumption of innocence an inference would only go to the matter of the Claimant's credibility and the Judge's role was to determine what inference was to be drawn and its weight. The Court was referred to **R v. Daha Essa** [16] where the issue was whether section 11 of the Criminal Procedure Investigations Act 1996, in the United Kingdom violated Art. 6 of the European Convention on Human Rights which was identical to section 8(1) of the Constitution and it was held that it did not. So like **R v. Daha Essa**[17]section 912(1) similarly provided for commenting or indeed drawing of an adverse inference against the Claimant for failure to comply with section 909, but section 912(1) was subject to judicial control. A judge is responsible for directing the jury as to what inferences could be drawn and the weight to be given to them. This is what occurs with any other inference that may be properly drawn.

[35] For a similar consideration and drawing of inference from silence, he referred the Court to Art.6 of the European Charter on Human Rights and the case of **John**

[15] Case CCT 37/97.
[16] [2009] EWCA Crim.43
[17] Ibid.

Murray v. The United Kingdom[18]. Here the Court held that the drawing of an inference from the conduct of an accused was not automatically a breach of the protection of a fair trial. The legality of drawing of adverse inference depended on each case.

[36] Counsel submitted that on the authority of **Murray**[19] and **Essa**[20] there was no automatic breach of section 8(1) of the Constitution by the drawing of an adverse inference against the Claimant. An improperly drawn inference or improper direction would properly for the basis of a criminal appeal.

[37] On the issue of what was the appropriate relief, the Court was reminded that there was a presumption of constitutionality which operates in relation to all Acts of Parliament. This principle was enunciated in **Attorney General of Trinidad and Tobago v. Mootoo**.[21] Further, the Court in **Attorney General of the Gambia v. Jobe**[22] even went so far as to place a positive duty on the Court in interpreting legislation to imply such necessary amendments, restrictions, additions as are necessary to ensure the constitutionality of the Acts of Parliament. The Claimant also had a threshold to reach in order to impugn the law by virtue of section 120 of the Constitution. Counsel believed that the Defendant had made out a case that section 909 and rule 11.1(3)(c) did not infringe the fundamental rights of the Claimant but if the Court was of the view that the provisions were too wide in effect, it was open to the Court to imply such restrictions on operations as were necessary to render the provisions constitutional and this included severing such parts of the enactment as necessary.

[38] Finally, referring to the matter of Claimant's Counsel submission that a defence statement once given was evidence or could be used as evidence since it could be read to a jury, Counsel for the Defendant referred the Court to the definition of the word evidence in Phipson 14th ed. Para.1-03 and submitted that a defence

[18] (1996) 22 EHRR 29.
[19] Ibid
[20] Ibid
[21] [1976] 28 WIR 304
[22] [1984] AC 689.

statement was analogous to pleadings in a civil case when one examined the requirements of section 909. He did not deny that the statement could be read to the jury despite there being no provision for it in the Criminal Code.

The law

[39] The Constitution provides:

> "8. (1) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.
>
> (2) 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) ...
>
> (7) A person who is tried for a criminal offence shall not be compelled to give evidence at the trial.
>
> 120. This Constitution is the supreme law of Saint Lucia and, subject to the provisions of section 41 of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.

[40] The Criminal Code 2004 provides:

> **Bringing a person arrested before Court**
>
> 584. (1)...
>
> (2) If a person arrested is to be questioned, he or she shall be informed –
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> > (a) that the person has the right to remain silent, without such silence being a consideration in the determination of guilt or innocence; and
> >
> > (b)...
>
> **Voluntary disclosure by accused**
>
> 909. (1) Subject to any guidelines as the Director of Public Prosecutions may from time to time issue, at the trial of an accused for an offence, the

accused shall, where the prosecutor has complied with section 908 give a defence statement to the prosecutor; and to the Court.

(2) For the purposes of this section a defence statement is a written statement –

(a) setting out in general terms the nature of the accused's defence;

(b) indicating the matters on which he or she takes issue with the prosecution; and

(c) setting out in the case of each such matter, the reason why he or she takes issue with the prosecution.

(3) If the defence statement discloses a special defence the accused must give particulars of the defence in the statement including –

(a) the name and address of any witness the accused believes is able to give evidence in support of the special defence if the name and address are known to the accused when the statement is given;

(b) any information in the accused possession which might be of material assistance in finding any such witness, if his or her name and address are not given.

(4) The defence shall make a defence statement as soon as is practicable after the prosecution complies or purports to comply with section 908 or section 913 as the case maybe....

Faults of disclosure by accused

912. (1) Where the defence –

(a) fails to give a defence under section 908; (should read 909)

(b) gives a defence after undue delay following the disclosure by the prosecution;

(c) sets out inconsistent defences in a defence statement given under section 909;

(d) at his or her trial puts forward a defence which is different from any defence set out in a defence statement given under section 909;

(e) at his or her trial, adduces evidence in support of a special defence without having given particulars of the defence in a statement given under section 909;

(f) at his or her trial, calls a witness in support of a special defence without having complied with section 909(3);

the Court or, with the leave of the Court, any other party, may make such comment as appears appropriate or the Court or jury may draw such inferences as appear proper in deciding whether the accused committed the offence concerned.(My emphasis)

(2) A person shall not be convicted of an offence solely on an inference drawn under subsection (1)

[41] The Criminal Procedure Rules 2008 provides:

"**Case management conference**

11.1(1) Immediately following the arraignment of the defendant or at such other time as may be fixed by the Judge, the Judge may make case management orders, as required.

(2)...

(3) At the case management conference, the judge shall make an order scheduling further events in the case, including:

(a) the date by which the Director of Public Prosecutions must disclose to the defendant any prosecution material which has not previously been disclosed;

(b) the date by which the defendant must plead an alibi or any other special defence;.

(c) the date by which the defendant must give the defence statement required by law..."

Disclosure by defence

11.3 (1) Where the defendant intends to plead and give evidence of a special defence, he or she shall give notice of such defence to the court and to the prosecutor by the date fixed in the Scheduling Order and shall make available to the prosecutor, on the date set by the court, any information which might be of material assistance, including:

(a) the name and address of any witness the defendant believes is able to give evidence in support of the special defence if the name and address are known to the defendant when the statement is given;

(b) any information in the defendant's possession which might be of material assistance in finding any such witness, if his or her name and address are not given.

(2) Where the defendant intends to plead alibi, he or she shall give notice of such defence to the court and to the prosecutor by date fixed in the scheduling order and shall make available to the prosecutor, on the date set by the court, information as to the particulars of time and place and of the witnesses by whom he or she proposes to prove the alibi.

In the Criminal Code section 6 (1) special defence is defined as:

"**special defence**" includes the defence of alibi, duress, automatism, necessity, insanity or any defence tending to affect the question of liability of the accused;"

In the Criminal Procedure Rules special defence is defined as:

"**special defence**" means the defence of alibi, automatism or insanity.

[42] A similarity is observed between the Criminal Code and the Criminal Procedure Rules in their requirement for disclosure of special defences.

[43] Several South African cases were cited to the Court and so for ease of reference the relevant provisions of section 35 of the South African Constitution are cited:

Section 35 Arrested, detained and accused persons

(1) Everyone who is arrested for allegedly committing an offence has the right-

(a) to remain silent;
(b) to be informed promptly –

(i) of the right to remain silent; and
(ii) of the consequences of not remaining silent;

(c) not to be compelled to make any confession or admission that could be used in evidence against that person;...

(3) Every accused person has a right to a fair trial, which includes the right-

(a) ...;

(h) to be presumed to be innocent, to remain silent, and not to testify during the proceedings; ...

(k) not to be compelled to give self-incriminating evidence;...

(5) Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice."

[44] In **R v. Director of Serious Fraud Office Ex parte Smith** [23]Lord Mustill identified some six (6) immunities captured by the common law "right to silence". He said:

"I turn from the statutes to "the right of silence". This expression arouses strong but unfocused feelings. In truth it does not denote any single right, but rather refers to a disparate group of immunities, which differ in nature, origin, incidence and importance, and also as to the extent to which they have already been encroached upon by statute. Amongst these may be identified:

(1) A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions posed by other persons or bodies.

(2) A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer question the answers to which may incriminate them.

(3) A specific immunity, possessed by all persons under suspicion of criminal responsibility whilst being interviewed by police officers or others in similar positions of authority, from being compelled on pain of punishment to answer questions of any kind.

(4) A specific immunity, possessed by accused persons undergoing trial, from being compelled to give evidence, and from being compelled to answer questions put to them in the dock.

(5) A specific immunity, possessed by persons who have been charged with a criminal offence, from having questions material to the offence

[23] [1993] AC 1. [1992} 3 ALL ER 456.

addressed to them by police officers or persons in similar position of authority.

(6) A specific immunity (at least in certain circumstances, which it is unnecessary to explore), possessed by accused persons undergoing trial, from having adverse comment made on any failure (a) to answer questions before the trial, or (b) to give evidence at the trial. (My emphasis)

Each of these immunities is of great importance, but the fact that they are all important and that they are all concerned with the protection of citizens against the abuse of powers by those investigating crimes makes it easy to assume that they are all different ways of expressing the same principle, whereas in fact they are not. In particular it is necessary to keep distinct the motives which have caused them to become embedded in English law; otherwise objections to the curtailment of one immunity may draw a spurious reinforcement from association with other, and difference, immunities commonly grouped under the title of a "right to silence". Thus, for example, it is clear that the fourth and sixth of the "rights to silence" which are the subject of much current controversy, are wholly unconnected with the present appeal"[24](My emphasis)

[45] Counsel for the Claimant referred the Court to **S v. Thebus and Anr.**[25] and it being helpful, the Court takes the liberty in citing several paragraphs as they address the issue of pre-trial silence and that of whether disclosure of an alibi during pre-trial is a breach of the right to silence and if on failure to disclose there ought to be consequences (the principles can be applied to most if not all special defences). In **Thebus and Another**[26] there was an appeal against the judgment of the Supreme Court of Appeal (SCA) confirming the convictions of the two (2) appellants on one count of murder and two (2) counts of attempted murder. The issues were (a) whether in regard to both appellants, the SCA failed to develop the common law doctrine of common purpose in conformity with the Constitution, as required by section 39(2), and thereby failed to give effect to their rights of dignity, freedom of the person and a fair trial, which included the right to be presumed innocent and (b) whether the negative inference drawn from the first appellant's

[24] Ibid p 10 to 11.
[25] (CCT36/02) [2003] ZACC 12; 2003 (6) SA 505 (CC);
[26] Ibid.

failure to disclosure his alibi defence before trial had infringed his right to silence. His Lordship Moseneke J said:

> "[42] I now turn to the appellants' claim that their conviction under the doctrine of common purpose denied them the right to be presume innocent. Section 35(3)(h) accords to every accused person the right to a fair trial, which includes the right to be presumed innocent. In **S v. Bhulwana: S v. Gwadiso**[27] O'Regan J speaking for the Court, held that: 'The presumption of innocence is an established principle of South African law which places the burden of proof squarely on the prosecution. The entrenchment of the presumption of innocence is s.25(3) (c) must be interpreted in this context. It requires that the prosecution bear the burden of proving all the elements of a criminal charge. A presumption which relieves the prosecution of part of that burden could result in the conviction of an accused person despite the existence of a reasonable doubt as to his or her guilt. Such a presumption is in breach of the presumption of innocence and therefore offends s. 25 (3) (c).'
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> [52] The central issue raised by this appeal is whether an adverse inference may be drawn from a failure to disclose an alibi prior to trial. In this regard three questions arise, being whether it is permissible to: (a) draw an adverse inference of guilt from the pre-trial silence of an accused, (b) draw an inference on the credibility of the accused from pre-trial silence and (c) cross examine the accused on the failure to disclose an alibi timeously, thus taking into account his or her responses.
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> [53] The pre-trial right to silence under section 35(1)(a) must be distinguished from the right to silence during trial protected by section 35(3)(h). This Court has authoritatively pronounced on constitutional claims premised on the right to silence during trial. From the various dicta it appears that the objective of the right is to secure a fair trial. Thus though procedural, this protection is an integral part of the substantive right to a fair trial. The protection of pre-trial silence is buttressed by the constitutional requirement under section 35(1)(b) to inform an arrested person promptly of the right to remain silent and the consequences of not remaining silent. (My emphasis)
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> [54] The right to remain silent before and during trial and to be presumed innocent are important interrelated rights aimed ultimately at protecting the fundamental freedom and dignity of an accused person. This protection is important in an open and democratic society which cherishes human dignity, freedom and equality. (My emphasis)
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> [55] The protection of the right to pre-trial silence seeks to oust any compulsion to speak. Thus, between suspicion and indictment, the

[27] [1995] ZACC 11; 1996 (1) SA 388.

guarantee of a right to silence effectively conveys the absence of a legal obligation to speak. This "distaste of self-incrimination," as Ackermann J put it, is a response to the oppressive and often barbaric methods of the Star Chamber and indeed to our own dim past of torture and intimidation during police custody. It is therefore vital that an accused person is protected from self incrimination during detention and police interrogation which may readily lend itself to intimidation and manipulation of the accused...(My emphasis)

[57] In our constitutional setting, pre-trial silence of an accused person can never warrant the drawing of an inference of guilt. The rule is of common law origin. In **R v. Mahelele and Anr**[28] Tindall JA relying on the English decision of **R. Leckey**[29] formulated the rule thus:

"... if the silence of the accused could be used as tending to prove his guilt, it is obvious that innocent persons might be in great peril: for an innocent person might well, either from excessive caution or for some other reason, decline to say anything when cautioned. And I may add that an accused person is often advised by his legal advisers to reserve his defence at the preparatory examination. It would, also, in my opinion, have been a misdirection to say that the silence of the accused was a factor which tended to show that their explanation at the trial was concocted. (My emphasis)

[58] It is well established that it is impermissible for a court to draw any inference of guilt from the pre-trial silence of an accused person. Such an inference would undermine the rights to remain silent and to be presumed innocent. Thus, an obligation on an accused to break his or her silence or to disclose a defence before trial would be invasive of the constitutional right to silence. An inference of guilt from silence is no more plausible than innocence. The majority of the US Supreme Court in **Doyle v. Ohio**[30] reminds us that "every post arrest silence is insolubly ambiguous". To hold otherwise, the mandatory warning under section 35(1)(b) will become a trap instead of a means for finding out the truth in the interest of justice...(My emphasis)

[60] An alibi defence has often generated judicial debate on whether it is an exception to the right to silence. In **R v. Cleghorn**[31] the peculiarity of an alibi defence is explained as follows:

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[28] 1944 AD 571

[29] 1944 1 All ER 80

[30] [1976]USSC 120; 426 US 610 at 618.

[31] 100 CCC (3RD) 393 para. 22.

'... there is good reason to look at alibi evidence with care. It is a defence entirely divorced from the main factual issue surrounding the corpus delicti, as it rests, upon extraneous facts, not arising from the res gestae. The essential facts of the alleged crime may well be to a large extent incontrovertible, leaving but limited room for manoeuvre whether the defendant be innocent or guilty. Alibi evidence, by its very nature, takes the focus right away from the area of the main facts, and gives the defence a fresh and untrammeled start. It is easy to prepare perjured evidence to support it in advance." ...(My emphasis).

[62] ....

[67] Firstly, the late disclosure of an alibi is one of the factors to be taken into account in evaluation the evidence of the alibi. Standing alone it does not justify an inference of guilt. Secondly, it is a factor which is only taken into consideration in determining the weight to be placed on the evidence of the alibi. The absence of a prior warning is, in my view, a matter which goes to the weight to be placed upon the late disclosure of an alibi. Where a prior warning that the late disclosure of an alibi may be taken into consideration is given, this may well justify greater weight being placed on the alibi than would be the case where there was no prior warning. In all the circumstances and in particular, having regard to the limited use to which the late disclosure of the alibi is put, I am satisfied that the rule is justifiable under section 36(1).

[68] The failure to disclose an alibi timeously is therefore not a neutral factor. It may have consequences and can legitimately be taken into account in evaluating the evidence as a whole. In deciding what, if any, those consequences are, it is relevant to have regard to the evidence of the accused, taken together with any explanation offered by her or him for failing to disclose the alibi timeously within the factual context of the evidence as a whole."

[46] In **Frank Errol Gibson v The Attorney General**[32] on the issue of whether disclosure of an expert report prepared at the behest of the accused and paid for by the State would infringe the accused right to silence, their Lordships said:

"[43] On question of the sharing of any report obtained by the defence as a result of funding provided by the State, both Courts below held that there was no obligation on the accused to make any such report available to the Crown...The legitimate interests of the accused that are served here are the right to silence, the right to avoid self-incrimination and the right to require the prosecution to prove its case... We adjudge that the defence was not obliged to disclose the contents of any report from the

[32] CCJ Appeal No. CVI of 2012/BB Civil Appeal No.8 of 2007.

expert if the latter was not going to be called to give evidence at the trial. But we decided that if the defence proposed to call the expert to give evidence then the defence was obliged to share his/her report with the Crown. (My emphasis)

[44] Nothing in our decision conflicts with the legitimate interests of the accused or with any constitutional right of his. On the contrary we consider that this part of our order further satisfies the overall objective of fairness. There is no right, constitutional or other, on the part to the defence to surprise the Crown with expert evidence in the middle of a trial. A fair trail is not one that is fair only to the accused. It is a fair trial that is fair to all. Even in the absence of legislation requiring such disclosure, it is competent for the Court to order it as a corollary to an order which the Court makes at the behest of the appellant so as to ensure the fairness of the trial."

Findings

[47] This Court bears always in mind when examining issues arising under section 8 of the Constitution, the guiding principle in **Attorney-General of Trinidad and Tobago v. Whiteman**[33] where Lord Keith of Kinkel said:

> "The language of a Constitution falls to be construed, not in a narrow and legalistic way but broadly and purposively, so as to give effect to its spirit, and this is particularly true of those provisions which are concerned with the protection of human rights."[34]

[48] The English authorities for example **Ex parte Smith**[35] show how the common law right to silence has over the years been eroded at the United Kingdom by various provisions in the Criminal Justice Act 1967[36], the Criminal Justice Act 1987[37], the Criminal Procedure and Investigations Act 1996[38], the Criminal Justice Act 2003[39],and the Criminal Justice and Immigration Act 2008[40]. It is this Court's view that through the various Acts it appears that the procedure at the United Kingdom

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[33] [1991] 2 AC 240
[34] Ibid. p.247E
[35] Ibid.
[36] Requirement for alibi notice.
[37] In serious or complex fraud cases a judge is allowed to order a defence statement once the prosecution has made out its case on serving their evidence and statement of case.
[38] Called for compulsory defence disclosure where a case was to be tried on indictment.
[39] Amended the disclosure provision in the 1996 Act to require that notice be given of any witnesses for the defence except alibi witness
[40] Requires a defendant to set out particulars of any matters of fact on which the defendant intends to rely in his defence.

in criminal matters is almost on parallel with civil matters so far as they relate to disclosure.

[49] The Court finds useful for assistance on its findings the statement of Sopinka J when delivering the majority judgment in the Supreme Court of Canada in **R v. Noble**[41]:

> "The right to silence is based on society's distaste for compelling a person to incriminate him-or herself with his or her own words.. The use of silence to help establish guilt beyond a reasonable doubt is contrary to the rationale behind the right to silence. Just as a person's words should not be conscripted and used against him or her by the state, it is equally inimical to the dignity of the accused to use his or her silence to assist in grounding a belief beyond a reasonable doubt. To use silence in this manner is to treat it as communicative evidence of guilt. To illustrate this point, suppose an accused did commit the offence for which he was charged. If he testifies and is truthful, he will be found guilty as the result of what he said. If he does not testify and is found guilty in part because of his silence, he is found guilty because of what he did not say. No matter what the nonperjuring accused decides, communicative evidence emanating from the accused is used against him. The failure to testify tends to place the accused in the same position as if he had testified and admitted his guilt. In my view, this is tantamount to conscription of self-incriminating communicative evidence and is contrary to the underlying purpose of the right to silence. In order to respect the dignity of the accused, the silence of the accused should not be used as a piece of evidence against his or her...
>
> If silence may be used against the accused in establishing guilt, part of the burden of proof has shifted to the accused. In a situation where the accused exercises his or her right to silence at trial, the Crown need only proved the case to some point short of beyond a reasonable doubt, and the failure to testify takes it over the threshold. The presumption of innocence, however, indicates that it is not incumbent on the accused to present any evidence at all, rather it is for the Crown to prove him or her guilty. Thus, in order for the burden of proof to remain with the Crown... the silence of the accused should not be used against him or her in building the case for guilt." (My emphasis)

The Court adopts wholeheartedly the sentiments expressed by Sopinka J.

[50] A similar note of caution was issued by Kirby P. in **R v. Birlut**[42] when he said:

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[41] [1997] 1 S.C.R. 874 paras. [75], [76]

[42] (1995) 39 N.S.W.L.R.1 at p.5 (New South Wales Court of Criminal Appeal).

> "Criminal procedure in our tradition is generally strict. The peril of liberty and the risk of reputation have imposed on criminal trials over the centuries a rigourous discipline so that procedural requirements are strictly complied with in the defence of the regularity of criminal process and the acceptability of its outcome. Rules of practical commonsense and flexibility, which have become increasingly acceptable in civil trials, must be viewed with reservation and care in the context of criminal trials. The fact that a point maybe "technical" is irrelevant. The strict application of the rule of law in criminal proceedings is the essence of the way in which, in our legal system, courts have defended the process. The comment that the argument raised unmeritorious is beside the point."(My emphasis)

[51] As the Court understands the authorities, the right to a fair hearing can capture all and anything that would in the eyes of the Court endanger the Claimant's right to a fair hearing at his trial. It is the right under which rights not prescribed in the Constitution or in any other statute of the State can be argued for. Indeed authorities such as **Herbert Ferguson v. The Attorney General of Trinidad and Tobago**[43] and **Hilroy Humphreys v. The Attorney General of Antigua and Barbuda**[44] and **Frank Errol Gibson v. The Attorney General**[45] show us under this right the balancing act that goes on to measure whether in the face of the challenged event, if a fair trial can still be pursued or whether there would be an infringement of the right. It is for this reason that the Claimant pins his argument of a right to silence between arrest and trial, the pre-trial period, under this section.

[52] The heading of section 909 must be a misnomer as it uses the word "voluntary" but the language of the section is "shall' and "must" thus making the requirements mandatory in nature. Further, the contents of the defence statement are prescribed and failure to comply in the providing a defence statement or to be honest in a defence statement opens the Claimant to the pain of section 912. It is the Court's view that there is nothing voluntary about those two (2) sections.

[53] Counsel for the Defendant was correct when he said that there was no provision either in the Constitution or in the Criminal Code for silence between arrest and

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[43] Privy Council No.11of 2000
[44] Privy Council No. 8 of 2008
[45] Ibid.

trial. Since this is so, it begs the question why, in circumstances outside of a special defence.

[54] The Court accepts, as does the Claimant that if there is an event covered under the description of a special defence and which would only be within the personal knowledge of the Claimant then it would be correct for him to disclose this or face the consequences at trial, this is **Thebus and Another**[46]. The Court further accepts that as in **Frank Errol Gibson v The Attorney General**[47] there could arise matters not covered either by the common law, the Constitution or any other law and which matters when disclosed would not be deemed an infringement of any Constitutional rights.

[55] Counsel for the Defendant sought to answer the Court's "why?" with the suggestion that the procedure at section 909 and rule 11.1(3) bought about a semblance of order and openness between the Parties as to the issues for trial and speed in the proceedings leading to the Claimant's trial.

[56] The follow on question from the Counsel's answer then is are these sufficient reasons to deny the Claimant what at least must be his common law right per Lord Mustill list, to say nothing between arrest and trial? The Court thinks not.

[57] There can be no doubt that the right to silence at arrest (section 584(2) of the Criminal Code) and the right not to be compelled to give evidence at his own trial (section 8(7) of the Constitution) are linked as both seek to protect the Claimant against self-incrimination. According to **Archbold**[48] the right to refuse to give evidence is an exercise of the privilege against self-incrimination. The privilege is tied to any piece of information or evidence on the basis that a prosecutor might wish to establish guilt or decide to prosecute based on it. The privilege covers documents, tapes, words uttered by the Claimant and any other matter which could if used incriminate him.

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[46] Ibid.
[47] CCJ Appeal No. CVI of 2012/BB Civil Appeal No.8 of 2007.
[48] Archbold 2012, para.15.362

[58] A close look is warranted of the requirements at section 909. There is a requirement for a statement first of all which sets out a defence, but then the statement must also go further and draw out of the Claimant the matters that he considers to be in dispute and as if that were not enough, he must set out for the prosecution the reason why he is disputing each matter that he disputes. In effect the Claimant is called upon to 'show his hand'. A truthful defence statement could therefore contain both admissions and denials. By having to set out the contentious issues there is in effect by the defence statement a burden or duty on the Claimant to show why he is not guilty. This in the Court's view immediately eases the burden on the prosecution. At this point in pre-trial it would appear that the proceedings would be on par with civil proceedings where there has been an exchange of pleadings.

[59] The non-existence of a right to silence or against self-incrimination between arrest and trial, the pre-trial period, appears in the Court's view to make nonsense of the right to silence at arrest and the right to not be compelled to give evidence at trial. It is always the Prosecutor's burden prove his case beyond a reasonable doubt by his witnesses, yet the Prosecutor is openly aided by section 912 where the Claimant pursues a route of silence from arrest through to trial by being able to make comment and the jury or the Court being able to draw inferences from the Claimant's silence. In other words, the Claimant's silence could come back to 'whip' him.

[60] A further scenario, is of course where a person such as the Claimant seeks to exercise his right at trial not to be compelled to give evidence but has pursuant to section 909 and under the pain of section 912 given a defence statement which the Prosecutor would have in his hand at trial and it could be read into the record of the proceedings whether as evidence or pleadings notwithstanding that the Claimant is determined to say nothing at his trial. This is obviously compulsion of the Claimant as he forced to make a statement via the Prosecutor and so his words become part of the record of the trial. It is like Justice Sopinka say, in such a situation the Prosecutor would not have proved the Claimant's guilt of his own

accord beyond a reasonable doubt but rather he would have been ably assisted by the defence statement and section 912.

[61] Another problem which the Court sees with the defence statement even if the defence statement were not used in the trial is that it could be used indirectly by the Prosecutor to fashion the State's case against the Claimant. This is a reality in civil cases.

[62] The threat of self incrimination is indeed a very real one and for these reasons the Court believes the Claimant's right to a fair hearing as provided for at section 8(1) of the Constitution and to be presumed innocent as per section 8(2)(a) would be breached if he was to prepare a defence statement pursuant to section 909 of the Criminal Code and or upon failure to do so then pursuant to section 912 be subjected to the pain of comments or inferences being drawn from his silence and which silence could ably assist the Prosecutor without him necessarily having proved his case beyond a reasonable doubt. For the same reasons the Court also finds that rule 11.1(3)(c) infringes the Claimant's right to a fair hearing.

Court's order

[63] (1) It is declared that sections 909 and 912 of the Criminal Code and rule 11.1(3) (c) of the Criminal Procedure Rules are incompatible with section 8(1) of the Constitution and are hereby declared null and void.

(2) Costs to be agreed on or before October 30th 2012, and thereafter to be referred to the Court within 30 days for decision.

Rosalyn E. Wilkinson

High Court Judge