EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCRAP2013/0008

BETWEEN:

ALCEDO TYSON

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste — Justice of Appeal
The Hon. Mde. Gertel Thom — Justice of Appeal
The Hon. Mr. Anthony Gonsalves, QC — Justice of Appeal [Ag.]

Appearances:

Mr. Patrick Thompson for the Appellant
Mrs. Tiffany R. Scatliffe Esprit, Principal Crown Counsel and
Mr. O'Neil St. A. Simpson, Crown Counsel, for the Respondent

2017: January 31;
November 20.

Criminal appeal - Jurisdiction of the Court of Appeal – Whether on a criminal appeal the Court of Appeal has jurisdiction to entertain as a ground of appeal a constitutional point not taken in the High Court – Section 31 of the Virgin Islands Constitution Order 2007 - Section 41 of the West Indies Associated States Supreme Court (Virgin Islands) Act – Whether a constitutional point not taken in the High Court arises properly on appeal – Right to a fair trial - Whether appellant's constitutional right to a fair trial has been contravened – Crown's unlimited right to stand by jurors – Constitutionality of section 27 of the Jury Act – The principle of equality of arms – Whether unlimited right to stand-by jurors justifiable in the public interest- Impartiality of tribunal – Whether actual bias necessary to establish that the appellant had an unfair trial.

On 24th June 2013, the appellant, Alcedo Tyson, was convicted of the offence of murder. He was sentenced on 12th July 2013 to a term of life imprisonment without the possibility of

parole. At his trial, the Crown stood by 21 potential jurors. The appellant appealed against his conviction on 8 grounds. The first and only ground considered by the Court is that the Crown's unlimited right to stand-by jurors made his trial unfair and was in breach of his constitutional right to a fair trial. This point was not taken by the appellant at his trial in the High Court. Therefore, the issue arose as to whether the Court of Appeal has jurisdiction to entertain a constitutional point that had not been raised in the court below.

On the issue of jurisdiction, the appellant argued that since section 41 of the **West Indies Associated States Supreme Court (Virgin Islands) Act** gives the Court of Appeal the discretion, if necessary or expedient in the interest of justice, to exercise any or all of the powers conferred by section 32 of that Act, it follows that the Court of Appeal has the power to make such order as the High Court might have made or ought to have made as the circumstances of the case requires. Further, that the Court of Appeal's extensive powers on the hearing of civil appeals apply mutatis mutandis to the hearing of criminal appeals. Notably, the appellant submitted that section 31(2) of the Act provides that the power of the Court of Appeal under the section may be exercised notwithstanding that no notice of appeal or respondent's notice had been given in respect of any particular part of the decision of the High Court or by any particular party to proceedings in that court. The Court of Appeal is thus empowered to make such order as the nature of the case requires and consequently the Court of Appeal is empowered to hear and determine ground 1 of his amended notice of appeal.

In response, the Crown submitted that the Court of Appeal does not possess the jurisdiction to entertain the constitutional ground of appeal. It was submitted that section 31(2) of the **Virgin Islands Constitution Order 2007** provides that in alleged contraventions of the Constitution, the High Court has original jurisdiction. Further, that section 31(7) of the Constitution provides that the High Court is the appropriate forum to refer challenges that relate to the enforcement of the Constitution. It was submitted that in matters of enforcement of constitutional provisions, the Court of Appeal and the Privy Council only have appellate jurisdiction.

As it relates to the substantive ground of appeal, the basis of the appellant's contention is that: (i) section 27 of the **Jury Act**, which provides the Crown with the unlimited right to stand-by jurors, is unconstitutional as it offends the equality of arms provision enshrined in section 16 (the fair hearing provision) of the **Virgin Islands Constitution**; (ii) the Crown's unlimited right to stand-by jurors is likely to lead the fair-minded observer to find that the selection of an independent and impartial tribunal was biased; (iii) that once the appellant's right to a fair trial was breached, the appellant's conviction ought to be set aside.

In response, the Crown argued that: (i) any imbalance resulting from the unlimited right of stand-by is justified, proportionate and reasonable as the right of stand-by is required in the public interest to ensure that a competent and impartial jury is selected; (ii) the right of stand-by is dichotomous from a successful challenge of a juror for cause, and (iii) the Crown has consistently used its right of stand-by in a reasoned and responsible manner and there was no evidence presented at trial or before this Court which substantiates that any prejudice or actual bias was employed in the jury selection process.

Held: allowing the appeal, setting aside the conviction and sentence and remitting the matter to the court below for retrial, that:

1. On a proper construction of section 31(7) of the **Virgin Islands Constitution Order 2007** ("**Constitution Order**"), questions arising as to the contravention of any of the provisions of Chapter 2 of the **Constitution Order**, in what are substantively non-constitutional proceedings in the Court of Appeal, can be determined within the non-constitutional proceedings by the Court of Appeal without the necessity of bringing a separate constitutional application before the High Court. In the instant case, the Court of Appeal does have jurisdiction under section 31(7) of the **Constitution Order** to entertain the first ground of appeal, that is, a constitutional point which was not taken in the High Court if it properly arises on appeal. When a constitutional point arises on a criminal appeal, once it is a challenge that goes to either the validity of the conviction when made or the lawfulness of the sentence when passed, it may be raised for the first time and dealt with on appeal.

   Section 31 of the **Virgin Islands Constitution Order 2007** applied**; Ong Ah Chuan v Public Prosecutor** [1981] AC 648 applied; **Runyowa v The Queen** [1967] 1 A.C. 26 applied; **Mohama Kunjo s/o Ramalan v Public Prosecutor** [1979] A.C. 135 applied. **Bowe (Junior) & Anor v R** 2006 UKPC 10 applied; **Walker v The Queen** [1994] 2 A.C. 36 distinguished; **Hunte and Khan** [2015] UKPC 33 distinguished.

2. The principle of equality of arms centers on achieving basic and reasonable proportionality as it has been accepted that it is not possible to achieve a perfect equality between the parties. Therefore, not all inequalities will result in a breach of the principle of equality of arms and amount to a violation of the constitutional right.

3. The Crown's unlimited right of stand-by is not justifiable in the public interest as section 28 of the **Jury Act** allows the Crown to challenge a juror for a cause if, in the opinion of the presiding judge, it is improper or inadvisable for the juror challenged to be impaneled. Therefore, the Crown would not be disadvantaged in the selection of a competent jury by the removal of the unlimited right of stand-by.

   R v Andre Penn BVIHCR2009/0031 (delivered 18th February 2015, unreported) applied; **Craig Alexander Bain v Her Majesty the Queen and The Attorney General of Canada** [1992] 1 S.C.R. 91 applied; **Porter v McGill** [2001] 2 A.C. 357 applied; **The Queen v Kerris Phipps BVIHCR2009/0026** (delivered 18th November 2010, unreported) disapproved.

4. The tribunal must be independent and impartial but must also be perceived to be independent and impartial.

Millar v Dickson [2002] 3 All ER 1041 considered; **Porter v Magill** [2002] 2 A.C.357 considered.

5. Section 27(b) of the **Jury Act** is unconstitutional due to the extreme disparity it creates in the jury selection process. The section permits the infringement of the principle of equality of arms by making the position of the accused extremely weaker than that of the Crown. Further, section 27(b) infringes the substantive fundamental right to a fair trial by an impartial court as the perception of bias in the selection process may result in the perception of bias during the trial. In this case, the Crown stood by 21 potential jurors without ascribing any cause. It is likely that a fair minded and informed observer would conclude that there was a real possibility of bias in the actual jury selection process of this trial and consequently in the performance of the jury and the trial itself. Therefore, the appellant's constitutional right to a fair trial by an impartial court was infringed.

   Section 27(b) of the **Jury Act,** Cap. 30, Revised Laws of the Virgin Islands 1991 applied; **R v Andre Penn** BVIHCR2009/0031 (delivered 18th February 2015, unreported) applied.

JUDGMENT

[1] **GONSALVES JA [AG.]**: On 24th June 2013, the appellant was convicted of the offence of murder contrary to section 150 of the **Criminal Code 1997** after a trial before Mr. Justice Redhead. At a sentencing hearing conducted on 12th July 2013 the appellant was sentenced to a term of life imprisonment without the possibility of parole. The appellant has appealed his conviction and sentence and relies on 8 grounds. Ground 1 is expressed as follows:

> "The appellant's trial was unfair and in breach of his constitutional right to a fair trial insofar as Section 27 of the Jury Act which permitted the Crown the unlimited right to stand by jurors was unconstitutional as it offended the equality of arms provision enshrined in the section 16 fair trial provisions of the BVI Constitution. At the appellant's trial the Crown stood by 21 potential jurors which was likely to lead the fair minded observer to find that the selection of an independent and impartial tribunal was biased in view of the Crown's unlimited right to stand by jurors."

[2] It is common ground that this point was not taken by the appellant in the High Court and the immediate question is whether this Court has jurisdiction to entertain a constitutional point that had not been taken in the court below.

The Appellant's Submissions on Jurisdiction

[3] The appellant submitted that the Court of Appeal's jurisdiction to hear criminal appeals is derived from the **West Indies Associated States Supreme Court (Virgin Islands) Act**[1] ("**Supreme Court Act**") which sets out the powers of the Court of Appeal on the hearing of appeals, both civil and criminal.

[4] The appellant developed his argument as follows. Section 41 of the **Supreme Court Act** provides that in addition to the powers of the Court of Appeal in criminal cases the Court has the supplementary powers more fully described in section 41. Section 41 is phrased in discretionary terms and provides that "For the purposes of an appeal in any criminal cause or matter the Court of Appeal may, if they think it necessary or expedient in the interest of justice (a) exercise any or all of the powers conferred by section 32 on the Court of Appeal other than those contained in paragraph 32(f) in any criminal cause or matter".

[5] Section 41(b) of the **Supreme Court Act** provides that in the exercise of its discretion the Court of Appeal may, if it thinks necessary or expedient in the interest of justice, exercise in relation to the proceedings of the Court any other powers which may for the time being be exercised by the Court of Appeal on appeals in civil matters.

[6] According to the appellant, section 41(b) of the **Supreme Court Act** must by necessity include and incorporate the power of the Court of Appeal under section 31 of the **Supreme Court Act**. Section 31 sets out the powers of the Court of Appeal when hearing civil appeals and provides, inter alia, that the Court of Appeal shall have power to "confirm, vary, amend or set aside the order or make such order as the High Court might have made or to make any order which ought to have been made and to make such further or other order as the case may require."

[1] Cap. 80, Revised Laws of the Virgin Islands 1991.

[7] Crucially, says the appellant, section 31(2) of the **Supreme Court Act** provides that the power of the Court of Appeal under the foregoing provisions of section 31 may be exercised notwithstanding that no notice of appeal or respondent's notice had been given in respect of any particular part of the decision of the High Court or by any particular party to proceedings in that court. Section 31(2) further provides that the Court of Appeal may make any order on such terms as the Court of Appeal thinks just to ensure the determination on the merits of the real question in controversy between the parties.

[8] Based on the foregoing, the appellant sought to draw the following conclusions:

(a) The Court of Appeal's extensive powers on the hearing of civil appeals apply mutatis mutandis to the hearing of criminal appeals.

(b) The Court of Appeal's extensive powers on the hearing of civil appeals gives the Court the power to make such order as the High Court might have made or ought to have been made, or crucially as the nature of case requires.

(c) The Court of Appeal's extensive powers to make such orders on the hearing of civil appeals extend to situations where the Court thinks it fit to make such order (as it thinks fit) to determine the merits of the question in controversy between the parties.

(d) These extensive powers give the Court of Appeal ample jurisdiction to entertain ground 1 of the appellant's further amended notice of appeal as the Court of Appeal has a broad and supervening discretion to exercise its powers as it thinks fit and expedient in the interests of justice.

[9] The appellant submitted that ground 1 of the appellant's further amended notice of appeal requires the Court of Appeal to exercise its discretion in favour of hearing and determining the constitutional point. The appellant suggests that the point in controversy, as outlined in the competing arguments by the appellant and

respondent, gives rise to a point of some importance and the Court of Appeal is amply empowered to hear and determine this point.

[10] The appellant concluded his argument by submitting that the Court of Appeal's wide powers set out above demonstrate that the Court's discretion on the hearing of criminal appeals is analogous to its powers on the hearing of any civil appeal and these powers include a power to hear and determine points both not raised in the court below and also points which could have been raised in the court below. The Court of Appeal is thus empowered (to make) such order as the nature of the case requires and consequently the Court of Appeal is empowered to hear and determine ground 1 of his amended notice of appeal.

The Respondent's Submissions on Jurisdiction

[11] The Crown's response was simply that this Court does not possess the jurisdiction to entertain this ground of appeal.

[12] According to the Crown, section 41 of the **Supreme Court Act** on which the appellant seeks to rely, allows for the Court of Appeal in criminal proceedings to rely on the powers that are granted under section 32 of the **Supreme Court Act** which deals with the admissibility of additional evidence, at the appellate level, that was not before the court below, but that these provisions do not address the hearing of a constitutional matter that was never before the court below.

[13] The Crown further submitted that the jurisdiction of the court in contravention of the **Constitution** is stated in the **Constitution**, and that the **Supreme Court Act**, as with all other legislation must be read in light of the **Constitution**. Section 31 of the **Virgin Islands Constitution Order 2007** ("**Constitution Order**") deals with alleged contraventions and the enforcement of the **Constitution**. Section 31(2) specifically provides that in alleged contraventions of the **Constitution**, the High

Court has original jurisdiction. In making this point the Respondent relied on paragraph 851 of **Volume 13 of Halsbury's Laws of England**[2], which states:

> "Where the Constitution of a British overseas territory makes provision for fundamental rights and freedoms, it also provides that if any person alleges that any of the rights and freedoms specifically protected has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme (or High) Court for redress. That court has original jurisdiction by virtue of the Constitution of each such territory to hear and determine any application made by such a person and, unless satisfied that adequate means of redress are or have been available to that person under some other law, may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of those provisions to the protection of which the person concerned is entitled."

[14] The Crown submitted further that section 31(7) of the **Constitution** provides that the High Court is the appropriate forum to refer such challenges that relate to the enforcement of the **Constitution**, and that the Court of Appeal and the Privy Council have only appellate jurisdiction as stated in section 31(9) of the **Constitution**.

[15] In support of its position, the Crown relied on the Privy Council decisions of **Hunte and Khan v the State** [3]and **Walker et al v the Queen**.[4]

Analysis

[16] This is a constitutional matter. The conferment of any jurisdiction on the Court of Appeal to hear and determine any original constitutional application must be found in statute. The appellant argues that section 31 of the **Supreme Court Act** vests this Court with the necessary jurisdiction. The powers of the Court of Appeal under section 31 to "confirm, vary, amend, or set aside the order or make such order as the High Court might have made or to make any order which ought to have been made and to make such further or other order as the case may require" are in

[2]Halsbury's Laws of England 5th Ed. Vol 13, p.755.
[3] [2015] UKPC 33.
[4] [1994] 2 AC 36.

relation to matters of which this Court has properly assumed jurisdiction in the first place as an appellate court. Section 31(2) speaks to the Court's powers on an appeal despite there being no notice of appeal or respondent's notice of any particular part of the decision of the High Court. It assumes the existence of a decision of the High Court on a matter sought to be appealed, but addresses the situation where there is no notice of appeal or respondent's notice on that point. Here there is no lack of any notice of appeal on ground 1 as a fact, but there is a lack of a decision of the High Court on the particular ground sought to be raised. Therefore, section 31(2) itself would offer no assistance to the appellant. The specific issue for determination is whether on a criminal appeal this Court has jurisdiction to entertain as a ground of appeal a constitutional point not taken in the High Court. A determination of this issue must necessarily commence with an examination of the relevant provisions of the **Constitution Order** which establish the respective jurisdictions of the High Court and the Court of Appeal in constitutional matters.

[17] Section 89 of the **Constitution Order** provides that "The Supreme Court Order 1967[5] shall continue to apply to the Virgin Islands as it applied immediately before the commencement of this constitution, and accordingly the High Court and the Court of Appeal of the Eastern Caribbean Supreme Court shall continue to have jurisdiction in the Virgin Islands."

[18] Section 9(2) of the **Supreme Court Order 1967** provides that the Court of Appeal shall have such jurisdiction to hear and determine appeals and to exercise such powers as may be conferred on it by the **Constitution** or any other law.

[19] Sections 31(1) and 31(2) of the **Constitution Order** state as follows:

> "31. (1) If any person alleges that any of the foregoing provisions of this Chapter[6] has been, is being or is likely to be contravened in relation to him or her (or, in the case of a person who is detained, if any other person

[5] S.I. 1967/223, amended by S.I. 1983/1108, 2000/3060
[6] Chapter 2-Fundamental Rights and Freedoms, Virgin Islands Constitution Order 2007.

alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter that is lawfully available, that person (or that other person) may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction-

(a) to hear and determine any application made by any person under subsection (1); and

(b) to determine any question arising in the case of any person that is referred to it under subsection (7),

and may make such declarations and orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the foregoing provisions of this Chapter to the protection of which the person concerned is entitled".

[20] Section 31(7) of the **Constitution Order** states as follows:

> "If in any proceedings in any court (other than the High Court, the Court of Appeal, Her Majesty in Council or a court-martial) any question arises as to the contravention of any of the foregoing provisions of this Chapter, the person presiding in that court may, and shall if any party to the proceedings so requests, refer the question to the High Court unless, in the opinion of the court in which the question arose, the raising of the question is merely frivolous or vexatious".

[21] Section 31(9) of the **Constitution Order** read as follows:

> "An appeal shall lie as of right to the Court of Appeal from any final determination of any application or question by the High Court under this section, and an appeal shall lie as of right to Her Majesty in Council from the final determination by the Court of Appeal of the appeal in any such case".

[22] Section 31(2) clearly states that it is the High Court that has original jurisdiction. Consequently, neither the Court of Appeal nor the Privy Council is vested with original jurisdiction. Both the Court of Appeal and the Privy Council are vested with appellate jurisdiction under section 31(9).

[23] However, under section 31(7), the **Constitution Order** expressly contemplates the possibility of questions as to the contravention of any of the provisions of Chapter 2 arising in any proceedings before the High Court, the Court of Appeal and the Privy Council. The provision allows for such matters arising in other

courts[7] to be referred to the High Court and the High Court is to determine such matters in accordance with section 31(8). By inference, this must mean that questions arising as to the contravention of any of the provisions of Chapter 2 in what are substantively non-constitutional proceedings in the High Court, can be determined within those proceedings without the necessity of bringing a separate constitutional application before the High Court. And constitutional questions arising in proceedings in the Court of Appeal or the Privy Council, can be determined by the Court of Appeal or the Privy Council as the case may be. On a purely literal interpretation, one is led to the conclusion that if a question as to the contravention of any of the provisions of Chapter 2 were to properly arise on an appeal before the Court of Appeal, such question not having been taken previously before the High Court, the Court of Appeal would have jurisdiction to hear and determine the question, and section 31(2) would not prevent the Court of Appeal from so acting.

[24] In this regard the question appears to be, when does a constitutional question not taken in the court below, properly arise on appeal? To answer this question, it is necessary to examine a number of decisions of the Judicial Committee on this point.

[25] The first decision for consideration is **Ong Ah Chuan v Public Prosecutor**.[8] In that case, each defendant had been charged with trafficking in a controlled drug contrary to section 3 of the **Misuse of Drugs Act 1973** (as amended). Both were convicted of trafficking and since section 29 of the Act provided for a mandatory death sentence for persons convicted of trafficking in more than 15 grams of heroin, both were sentenced to death. Their appeal to the Court of Criminal Appeal was dismissed. The defendants appealed to the Judicial Committee on the ground that on a proper construction of the Act, the convictions for trafficking were wrong. The Judicial Committee gave the defendants leave to raise two further grounds of

[7] Such as subordinate courts, e.g. the Magistrate's Court or the Industrial Court.
[8] [1981] A.C. 648. This authority was also relied on by the appellant.

appeal which had not been raised in the Court of Criminal Appeal. The first was that the provision in section 15 of the Act, that proof of possession of controlled drugs in excess of the minimum quantities stated in the section gives rise to a rebuttable presumption that such possession is for the purpose of trafficking, is inconsistent with the **Constitution**. The second was that the provision in section 29 and Schedule 2 for a mandatory death penalty for trafficking in controlled drugs in excess of the higher minimum quantities stated in that Schedule, is likewise inconsistent with the **Constitution**.

[26] When Counsel for one of the defendants initially sought to raise the point that the mandatory death sentence was not in accordance with law, Lord Diplock interjected that this was a new submission on which their Lordships had not had the benefit of the view of the Singapore Courts. Counsel's response was that where a new point is raised for the first time before the Judicial Committee it has jurisdiction to entertain it, particularly where, as was the case, there would be too great a delay if the defendant had to go back to the Court of Appeal to raise it (supposing it was open to him to do so) and the Judicial Committee is the only judicial body competent to entertain a challenge to the constitutionality of a penalty. He argued that so long as this point has been raised and is unresolved it will be an embarrassment to the Singapore Authorities, and that the Judicial Committee as the supreme court of Singapore ought to deal with it notwithstanding that the lower courts did not do so. Lord Diplock's response was, "If there is no statutory limitation a litigant may raise a point of the constitutionality of a statutory provision when it arises but their Lordships' difficulty is their reluctance to deal with such a point without the help of the Singapore courts."[9] Counsel for the defendant further submitted that cases had arisen where the Judicial Committee had dealt with such an issue, citing **Runyowa v The Queen**[10] and **Mohama Kunjo s/o Ramalan v Public Prosecutor.**[11] The argument was advanced that if the Judicial Committee may allow points to be taken which could on the facts have been taken

[9] [1981] AC 648 at page 656.
[10] [1967] 1 A.C. 26
[11] [1979] A.C. 135

below then *a fortiori* it can consider issues of constitutional law. Following those submissions, Lord Diplock allowed the defendants to take the point. In that case, no statutory limitation on the ability of the defendant to raise the constitutional point was identified and it appears that the defendants were allowed to take the point on that premise, there being no argument to the contrary from the Public Prosecutor.

[27] At page 14 of the judgment Lord Diplock stated:

> "It is only in most exceptional circumstances that their Lordships would permit a question of the constitutionality of an Act of the Singapore Parliament to be raised for the first time in the course of the hearing of an appeal by their Lordship's Board. Such a question is eminently one on which their Lordships would wish to have the benefit of the opinions of members of the judiciary of Singapore who are resident in the Republic and more familiar than their Lordships with local conditions there. But these are capital cases and their Lordships would be reluctant to dispose finally of the appeals so long as **any plausible argument against the convictions or sentences** (emphasis added) remain unheard, even though the argument was not thought of until the eleventh hour. Nevertheless if at the close of arguments on either of these constitutional points their Lordships had entertained any doubt as to the validity of provisions of the Drugs Act that relate to the convictions of the defendants, they would, before arriving at their judgment, have remitted the cases to the Court of Criminal Appeal to hear argument based on the constitutional points and to express their opinion on them for the benefit of this Board. However, as will appear, their Lordships have no such doubts; so this course is unnecessary".

[28] In that case, the Judicial Committee found no substance in either of the two eleventh hour contentions.

[29] The next case is **Walker v The Queen**.[12] In that case between 1982 and 1984 the defendants were convicted of murder and sentenced to death, which was the mandatory sentence. Their applications for leave to appeal against convictions were dismissed by the Court of Appeal in Jamaica. In 1992 and 1993 they were each granted special leave to appeal to the Judicial Committee. The appeals were

[12] [1994] 2 A.C. 36

against sentences of death. The ground of appeal was that execution after such a long delay would contravene the constitutional rights of the defendants. The Crown objected that the appeals were not within the jurisdiction of the Judicial Committee under sections 3 and 4 of the **Judicial Committee Act 1833**. The Judicial Committee dismissed the appeal for want of jurisdiction holding that the powers of the Judicial Committee were covered by the Acts of 1833 and 1844 which had superseded the royal prerogative in relation thereto and in the absence of a reference under section 4 of the **Judicial Committee Act 1833** the Judicial Committee could only act as an appellate court. The proceedings were not appeals against judgments of the Court of Appeal of Jamaica **and the lawfulness of the original convictions and sentences was not disputed** (emphasis added)**.** Accordingly, since the Judicial Committee could not decide as a court of first instance whether execution of the defendants would now infringe their constitutional rights, there was no jurisdiction to deal directly with their cases by way of an appeal against sentence.

[30] Counsel for the defendants argued that the Board was seised of the appeals and had jurisdiction to deal with them. Counsel also argued that an appellant should be able to raise a point on constitutionality at any stage of the proceedings, notwithstanding that it had not been raised in the courts below citing **Runyowa v The Queen**[13], **Mohamad Kunjo s/o Ramalan v Public Prosecutor** [14], and **Ong Ah Chuan v Public Prosecutor**[15]. Counsel further argued that even if these appeals against sentence or complaints in the nature of appeals against sentence were constitutional motions in disguise, the exceptional circumstances of the cases and the Board's role as final arbiter of justice should not deny the defendants the remedy sought.

[31] In response, Counsel for the Crown argued that in considering the Board's jurisdiction it was vital to distinguish between, on the one hand, an appeal from a

[13] See footnote 3.
[14] See footnote 4.
[15] See footnote 2.

decision of the Court of Appeal or any inferior court and, on the other hand, a challenge brought at first instance against an act of the executive. According to Counsel, the Board only had jurisdiction to entertain the former, not the latter. Complaints about the executive should be determined by the invocation of the original jurisdiction of the Supreme Court under section 25 of the Constitution by the commencement of proceedings by constitutional motions. Counsel further argued that for a constitutional challenge to conviction or sentence to be made for the first time on appeal to the Board **it must at least have been capable of affecting the decision under review** (emphasis added), citing **Runyowa v The Queen**, **Ong Ah Chuan v Public Prosecutor** and **Mohamad Kunjo s/o Ramalan v Public Prosecutor**. It could not be suggested that the mandatory death sentence was itself unconstitutional and the Board therefore had no jurisdiction to entertain the appeals.

[32] In **Walker**, the Board held that it had no jurisdiction to deal with the cases by way of an appeal against sentence. The proceedings were not in truth appeals against the judgments delivered by the Court of Appeal. There was no appeal against the sentence of death passed by the judges and if there had been, the Court of Appeal would have had no jurisdiction to alter the mandatory death sentence. The Board concluded that the defendants were seeking to have their sentences set aside on the constitutional grounds based on the delay that had occurred in the years following the decision of the Court of Appeal and that the Board was being invited to decide this question not as a matter of appeal but as a court of first instance and this the Board had no jurisdiction to do. **Walker** is therefore authority for the specific proposition that in an appeal against sentence, an argument that the executive act of carrying out the sentence after a period of delay would be unconstitutional, is not an issue that arises as a matter of appeal, but one that would require the Board to decide the question as a court of first instance, which the Board has no authority to do. It does not seek to question the validity of the sentence when passed. It would appear that the Board had rejected the appellants' broad argument that an appellant should be able to raise a point on

constitutionality at any stage of the proceedings notwithstanding that it had not been raised in the court below by imposing the requirement that if a point can be so raised it must be raised in a manner that questions **the legality of the conviction when made or the sentence when passed, and so requires the Board to exercise an appellate and not an original function** (emphasis added)**.** Lord Griffiths went on to distinguish **Ong Ah Chuan** by explaining that if the two constitutional arguments had been successful in that case, they would have shown that the trial court ought not to have convicted and that the sentence of death was unlawful. **This would suggest that the constitutional points taken in that case on appeal went to both the validity of the conviction and the lawfulness of the sentence when passed** (emphasis added).

[33] The next case is **Bowe (Junior) & Anor v R.**[16] In that case special leave was granted to the appellants to appeal against a judgment of the Court of Appeal of the Commonwealth of the Bahamas dated 10th April 2003 but only in respect of (a) the jurisdiction of the Court of Appeal, (b) the constitutional history in the Bahamas as it differs from that of other Caribbean States, and (c) the constitutionality of the executive act of carrying out a mandatory death sentence. The two appellants were separately convicted of murder, sentenced to death, and their respective appeals against conviction were dismissed by the Court of Appeal. **Both appellants petitioned the Board seeking leave to challenge the constitutionality not of the sentence of death passed upon them, (the death penalty being explicitly recognized and preserved in successive constitutions of the Bahamas) but of the mandatory requirement that sentence of death be passed on adults (other than pregnant women) convicted of murder** (emphasis added). The Board directed that the hearing of the petitions be treated as the hearing of the appeals, that the order of the Court of Appeal affirming the appellant's sentences (but not the sentences themselves) be set aside and that the cases be remitted to the Court of Appeal of the Bahamas for reconsideration of the matter of sentence. It was recognized that the case raised

[16] 2006 UKPC 10.

important constitutional questions which had not been raised in the Bahamas before and which ought first to be considered by the Court of Appeal. The issues were not however considered by the Bahamas Court of Appeal which held by a majority that it had no jurisdiction to entertain the appeals. It was that finding that led to the grant of special leave to appeal referenced above.

[34] Before their Lordships, the Crown did not seek to support the judgment of the Court of Appeal on the jurisdiction issue, and the appellants adhered to their submission, advanced unsuccessfully in the Court of Appeal, that that court did have jurisdiction, resulting in this not being a live issue before the Board. However, their Lordships considered the matter to be too important to be resolved by concession, and were of the opinion that any misunderstanding should be dispelled. Their Lordships then proceeded into an analysis of the jurisdiction of the Court of Appeal. Their Lordships found that the decision of the majority on the Court of Appeal was based, in the judgment of Sawyer P., on the following major propositions:

(1) Subject to exceptions in the case of those under the age of 18 at the time of the killing or pregnant at the date of sentence, section 312 of the **Penal Code of the Bahamas** (now section 291) requires sentence of death to be passed on any defendant convicted of murder.

(2) The Court of Appeal has no jurisdiction to entertain an appeal against a mandatory sentence.

(3) Any challenge to the constitutionally of the mandatory life sentence laid down by section 312 could not be relied on by a defendant in the criminal proceedings but must be the subject of a separate constitutional motion in the Supreme Court.

[35] It is with the third proposition that we are here concerned. Their Lordships' analysis of the third proposition proceeded as follows:

"10. The Court of Appeal's third proposition rested in the main on article 28 of the 1973 Constitution scheduled to the Bahamas Independence Order 1973 (SI 1973/1080). This Constitution contained in Chapter III provisions for the protection of certain fundamental rights and freedoms of the individual, which were the subject of specific provision in articles 15-27. These articles were followed by article 28, directed to the enforcement of the rights previously specified. Article 28 provides:

> "28. (1) If any person alleges that any of the provisions of Articles 16 to 27 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.
>
> (2) The Supreme Court shall have original jurisdiction
>
> (a) to hear and determine any application made by any person in pursuance of paragraph (1) of this Article: and
>
> (b) to determine any question arising in the case of any person which is referred to it in pursuance of paragraph (3) of this Article,
>
> and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of the said Articles 16 to 27 (inclusive) to the protection of which the person concerned is entitled:
>
> Provided that the Supreme Court shall not exercise its power under this paragraph if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law.
>
> (3) If, in any proceedings in any court established for The Bahamas other than the Supreme Court or the Court of Appeal, any question arises as to the contravention of any of the provisions of the said Articles 16 to 27 (inclusive), the court in which the question has arisen shall refer the question to the Supreme Court.
>
> (4) No law shall make provision with respect to rights of appeal from any determination of the Supreme Court in pursuance of this Article that is less favourable to any party thereto than the rights of appeal from determinations of the Supreme Court that are accorded generally to parties to civil proceedings in that Court sitting as a court of original jurisdiction.

(5) Parliament may make laws to confer upon the Supreme Court such additional or supplementary power as may appear to be necessary or desirable of enabling the Court more effectively to exercise the jurisdiction conferred upon it by paragraph (2) of this Article and may make provision with respect to the practice and procedure of the Court while exercising that jurisdiction."

The majority of the Court of Appeal read this article as precluding it from entertaining a challenge to the constitutionality of a sentence provision on an appeal against sentence in criminal proceedings. Redress must be sought in a separate application to the Supreme Court. The Board cannot accept these conclusions for two main reasons. First, they are inconsistent with the decision of the Board in Chokolingo v Attorney-General of Trinidad and Tobago [1981] 1 WLR 106, 111-112. Secondly, they are inconsistent with article 28. Subsection (1) of the article makes plain that the right of application to the Supreme Court for redress is "without prejudice to any other action with respect to the same matter which is lawfully available**". Thus the right of application to the Supreme Court is not provided as a unique or exclusive procedure** (emphasis added), an interpretation made still clearer by the proviso to subsection (2). The provision in subsection (3) for reference to the Supreme Court applies only where the question arises in proceedings in any court "other than the Supreme Court or the Court of Appeal": **the inescapable inference is that if the question arises in proceedings in one or other of those courts, it shall be resolved in that court in those proceedings** (emphasis added). In concluding otherwise the Court of Appeal majority fell into error.

11. The Board cannot accede to the suggestion that it lacked jurisdiction to entertain this constitutional challenge and remit the case to the Court of Appeal. It is true that the Board held, in Walker v The Queen [1994] 2 AC 36, that it had no jurisdiction to rule on the challenge there made. It so ruled because the sentence was constitutional when passed, and it was only the passage of time after sentence which was said to render it unconstitutional. **That was not an issue which could be determined on an appeal against sentence**.(emphasis added) The Court of Appeal was wrong to treat that case as analogous with the present, since the appellants **do contend that the sentences passed upon them, because mandatory, were unconstitutional when passed.** (emphasis added)

12. The Board is satisfied that the Court of Appeal had jurisdiction to entertain these appeals and regrets that it has not, in the event,

> enjoyed the benefit of the Court of Appeal's opinions on the important issues at stake."

[36] The rationale of the Board appears to be that inherent in an appeal against sentence is the question of the validity of the sentence which includes the constitutionality of the sentence when it was passed. It is subsumed and properly arises within the sentence appeal. But an argument that the passage of time after sentence rendered the carrying of the sentence into effect unconstitutional, does not affect the validity of the sentence when passed, and is not available on an appeal against an otherwise lawful sentence. It is a completely separate and free standing constitutional charge that would require a separate constitutional application to the High Court.

[37] Up until this point, it would appear that **Ong Au Chuan**, **Walker** and **Bowe** would have established as a general principle that if a constitutional point arises on a criminal appeal, once it is a challenge that goes to either the validity of the conviction when made or the lawfulness of sentence when passed, it may be raised for the first time and dealt with on appeal.

[38] The next and most recent authority on this issue is **Hunt and Khan v The State**.[17] In that case both appellants sought leave to appeal against sentence of a mandatory death penalty on the grounds that: (a) it would now be unconstitutional for the sentence of death which was passed on each them to be carried out, and (b) that the Board had the necessary jurisdiction to order commutation of their sentences. In relation to the second ground, the appellants argued that the Board being seized of their appeal against conviction, it had jurisdiction to order commutation of the sentences in accordance with its decision in **Ramdeen v The State of Trinidad and Tobago**.[18] The respondent did not dispute proposition (a), but submitted that the Board had no jurisdiction to order commutation of the sentences. The respondent however accepted that the High Court would have

[17] [2015] UKPC 33.
[18] [2014] UKPC 7; [2015] AC 562.

jurisdiction to order commutation of the sentences on an application made under section 14(1) and (2) of the **Constitution of Trinidad and Tobago**.

[39] Section 14(1) of the **Constitution of Trinidad and Tobago** provided as follows:

> "For the removal of doubts it is hereby declared that if any person alleges that any of the provision of this Chapter has been, is being, or likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress by way of originating motion."

[40] Section 14(2) gives the High Court original jurisdiction to hear and determine any such application, and to give such directions as may be appropriate for the enforcement of the protection to which the person concerned is entitled under the provisions of Chapter 1 of the **Constitution of Trinidad and Tobago**.

[41] The respondent's argument was that the Board did not have an original jurisdiction comparable to the original jurisdiction of the High Court recognized or conferred by section 14(1) and (2) of the **Constitution of Trinidad and Tobago**, and that to order commutation of a lawfully passed sentence is beyond its jurisdiction as an appellate body reviewing the trial proceedings, as distinct from the jurisdiction which the Board would have if it were hearing an appeal from an application to the High Court based on the unconstitutionality of carrying out the sentence.

[42] Lord Toulson, delivering the judgment of the majority, determined that the earlier decision of the Board in **Ramdeen** was wrong, and that the Board did not have jurisdiction to order commutation of the sentence. In considering the Board's jurisdiction, Lord Toulson made the following observations:

(a) The Board's jurisdiction is statutory.

(b) Since Trinidad and Tobago became a republic, the continuing jurisdiction of the Board derives from section 109 of the Constitution.

(c) Subsections 6 and 7 of section 109 provide that any decision of the Judicial Committee is to be enforced as if it were a decision of the Court of Appeal and that, in relation to any appeal in any case, the Committee is to have all the jurisdiction and powers possessed in relation to that case by the Court of Appeal. It was therefore necessary to see what were the powers of the Court of Appeal in that case.

(d) Section 99 of the Constitution provided that there is to be a Supreme Court of Judicature consisting of a High Court of Justice and a Court of Appeal "with such jurisdiction and powers as are conferred on those courts respectively by this constitution or any other law."

(e) The principal statute is the **Supreme Court of Judicature Act 1962**. Sections 42 to 65 concern criminal appeals from the High Court. Appeals against sentence are dealt with in section 43 (c) and 44 (3) which provide:

> "A person convicted on indictment may appeal under this Act to the Court of Appeal…with the leave of the Court of Appeal against the sentence passed on his conviction, unless the sentence is one fixed by law."
>
> "On an appeal against sentence the Court of Appeal shall, if it thinks that a different sentence should have been passed, quash the sentence passed at the trial, and pass such other sentence warranted in law by the verdict whether more or less severe, in substitution therefore as it thinks ought to have been passed, and in any other case shall dismiss the appeal."

[43] Then Lord Toulson's analysis continued as follows:

> "54. The separation of the jurisdiction of the Court of Appeal, as an appellate body in criminal proceedings, from any decision as to whether a sentence of death lawfully imposed in those proceedings should be carried out is also reflected in section 64 of the 1962 Act. This provides:
>
> "(1) Nothing in this Act shall affect the prerogative of mercy.

> (2) The President on the advice of the Minister [meaning the Minister designated under 87(3) of the Constitution] on the consideration of nay petition for the exercise of the President's power of pardon having reference to the conviction of a person on indictment or to the sentence, other than sentence of death, passed on a person so convicted, may at any time [refer the case or some point arising in it to the Court of Appeal]"

55. The sentence of death passed on the appellants was fixed by law: Offences Against the Person Act 1925, section 4. **If it were argued that the law purportedly imposing a mandatory death sentence was itself unconstitutional, the Court of Appeal would have jurisdiction to entertain an appeal against such a sentence on the ground that it was not a lawful sentence at all: Bowe v The Queen [2006] UKPC 10, [2006] 1 WLR 1623.** (emphasis added) But in this case there is no dispute that the sentence imposed on the appellants was lawful and mandatory.

56. It follows that the Court of Appeal had **no jurisdiction** (emphasis added) under the Supreme Court of Judicature Act to **entertain an appeal against sentence,** (emphasis added) and in point of fact it did not do so. Therefore if the Board were now to grant leave to appeal against sentence and to order commutation of the sentence imposed on the appellants, it would be a) granting an appeal when there was no decision of the Court of Appeal to appeal against, and b) making an order which the Court of Appeal would have no jurisdiction to make.

57. This analysis is supported by the decision and reasoning of the Board in Walker v The Queen [1994] 2 AC 36, which was decided by the same constitution and on the same day as Pratt's case. The appeal in Pratt was from a decision of the Court of Appeal in Jamaica, upholding the dismissal by the High Court of an application for constitutional redress under section 25(2) of the Jamaican Constitution, which was materially identical to section 14(2) of the Constitution of Trinidad and Tobago. In Walker the application was for leave to appeal against the death sentences without any application being made for redress under section 25 of the Constitution. The argument was advanced that the jurisdiction of the Privy Council was wide enough to enable a point on constitutionality to be raised at any time in the proceedings, notwithstanding that it had not been raised in the courts below.

58. The Board held that the present jurisdiction of the Judicial Committee is an appellate jurisdiction and that it has no jurisdiction to examine the case directly by way of an appeal against sentence. Lord Griffiths said at [1994] 2 AC 43-44:

> "These proceedings are not in truth appeals against the judgments delivered by the Court of Appeal. There was no appeal against the sentence of death passed by the judges and if there

had been the Court of Appeal would have had no jurisdiction to alter the mandatory death sentence…

Their Lordships are being invited to decide this question [the constitutionality of carrying out the death penalty after a lengthy period of delay] not as a matter of appeal but as a court of first instance; and this they have no jurisdiction to do. The question of whether or not execution would now infringe the constitutional rights of the defendants has not been considered by a Jamaican court. The jurisdiction of the Privy Council to enter upon this question will only arise after it has been considered and adjudicated upon by the Jamaican courts."

[44] It is important to note that Lord Toulson suggested that the approach in **Bowe** was correct and was outside what was being determined in **Hunte and Khan**.[19] Lord Neuberger, agreeing with Lord Toulson stated at paragraph 76:

> "….the mere fact that the Board is seized of a criminal case because it is entertaining an appeal against conviction or sentence does not give it any jurisdiction to order commutation of a lawfully passed sentence of death on the ground that it would be unconstitutional for that sentence to be carried out."

[45] So in both **Walke**r and **Hunte and Khan**, what was specifically being submitted on appeal was an argument that the carrying out of a mandatory sentence after a period of delay would be unconstitutional. That argument could not arise within any such appeal as it did not seek to question the validity of the conviction or the lawfulness of the sentence when passed. Lady Hale's position[20] in **Hunte and Khan** that where an appeal is properly before the Board **for some other reason**, (emphasis added) the Board should not close its ears to the argument that it would be unconstitutional to carry out the sentence, did not find approval with the majority. A similar position had been advanced unsuccessfully by Counsel for the defendants in **Walker**.[21] Although Lady Hale's broad position was not accepted by the majority, it would appear however that the recognition of the correctness of

[19] See paragraph 55.
[20] See paragraph 102.
[21] See page 4.

Bowe by Lord Toulson in **Hunte v Khan**[22], Lord Toulson's indication that there was no difference between himself and Lady Hale up to paragraph 95 of the judgment, with Lady Hale distinguishing and preserving **Ong Ah Chuan** at paragraph 89 and **Bowe** at paragraph 93, and the implied approval of **Ong Ah Chuan** by Lord Griffiths in **Walker** at page 8 establish the position that where there are constitutional issues raised on a criminal appeal for the first time that go to the validity of the conviction when made or the lawfulness of the sentence when passed, the Court of Appeal does have jurisdiction to entertain those issues.

[46] Based on the foregoing, I am of the opinion that this Court does have jurisdiction under section 31(7) of the **Constitution Order** to entertain ground 1 of the amended grounds of appeal as it goes to the validity of the conviction.[23]

The Constitutional Point
The Appellant's Submissions

[47] Substantively, the appellant complains that his trial was unfair and in breach of his constitutional right to a fair trial insofar as section 27(b) of the **Jury Act** which permitted the Crown the unlimited right to stand by jurors was unconstitutional as it offended against the equality of arms provision enshrined in the section 16 fair trial provisions of the **Constitution Order**. At the appellant's trial the Crown stood by 21 potential jurors. According to the appellant, this was likely to lead the fair minded observer to find that the selection of an independent and impartial tribunal was biased in view of the Crown's unlimited right to stand by.

[48] Section 16(1) of the **Constitution Order** provides "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."

[22] At paragraph 55.
[23] For a similar result see the earlier decision of this Court in R v Pigott 88 WIR 299, at paragraphs 24 and 27.

[49] Section 27 of the **Jury Act**[24] provides that "When a common jury is being impaneled for the trial in the High Court of any person or persons charged with any treason, felony or misdemeanor:

(a) the person charged, or each of the persons charged, may peremptorily and without assigning cause challenge any number of jurors not exceeding three;

(b) the Crown shall have the same right as, at the commencement of this Act, it has in England, to ask that jurors stand by until the panel has been "gone through" or perused".

[50] At the appellant's trial the names of 37 jurors were called as part of the jury selection exercise. The Crown exercised its right of standby under Section 27(b) of the **Jury Act** in relation to 22[25] of the members of the jury array. The appellant peremptorily challenged three members of the jury array. The learned trial judge excused three jurors and nine jurors were selected to try the appellant's case.

[51] The appellant's principal contentions can be summarized as follows:

(a) The equality of arms concept within a constitutionally guaranteed fair trial essentially provides that neither party is (to be) placed at a disadvantage in relation to its opponent. If it is accepted that there is almost never a true equality of arms between the individual and the State then any imbalance must be justified, proportionate and reasonable.

(b) The Crown stood by 22 potential jurors without assigning a cause. The Crown did not utilize any of their challenges for cause. Those circumstances were likely to lead the fair-minded observer to find that the selection of an independent and impartial tribunal was biased in view of the Crown's unlimited right to stand by jurors.

[24] Cap.36, Revised Laws of the Virgin Islands 1991.
[25] The appellant's skeleton alternated between 21 and 22.

(c) Section 27(b) which gives the Crown the unlimited right to stand by jurors in the array without assigning a cause while limiting the defendant to three peremptory challenges is grossly disproportionate.

(d) The test for whether any tribunal is independent and impartial is whether the fair minded and informed observer would conclude that there was a real possibility of bias. See **Porter v Magill.**[26]

[52] In support of his contentions the appellant relied on the decision of Ramdhani J in the BVI case of **R v Andre Penn.**[27] In that case, the court ruled, relying heavily on the Canadian case of **Craig Alexander Bain v Her Majesty the Queen and The Attorney General of Canada** [28] that the Crown's right of unlimited standby under section 27(b) of the **Jury Act** was inconsistent with the equality of arms principle enshrined in section 16 of the **Constitution Order**.[29]

[53] The appellant concluded his submission on this point by suggesting that once it is accepted that section 27(b) created a significant imbalance and that imbalance went to the root of the selection process for the jurors who tried the appellant's case, then it must be accepted that the appellant's right to a fair trial by an independent and impartial tribunal was breached. And once the appellant's constitutional right to a fair trial was breached, the appellant's conviction ought properly to be set aside on this basis.

The Respondent's Submissions

[54] In response, the Crown, quite correctly I think, did not oppose the appellant's submission that the equality of arms principle applied to his right to a fair hearing.

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[26] [2002] 2 A.C. 357.
[27] BVIHCR2009/031 (delivered 18th February 2015, unreported).
[28] [1992] 1 S.C.R. 91.
[29] The court there also found an infringement of the constitutional requirement that the tribunal be fair and impartial. See paragraph 84.

The Crown instead sought to justify its right of stand by granted under section 27(b). Its approach appeared to be premised on an implied acceptance that the section does in fact give the Crown an advantage thereby creating an inequality of arms between the individual and the state, but that the resulting imbalance was justified, proportionate and reasonable. According to the Crown section 27(b) of the **Jury Act** is constitutional for the following reasons:

(a) The right of stand-by is required in the public interest to ensure that a competent and impartial jury is established;

(b) The right to stand-by is dichotomous from a successful challenge of a juror for cause; a fundamental misconception that forms the basis of the exception taken by the appellant to the use of the stand-by; and

(c) The Crown has consistently used its right of stand-by in a reasoned and responsible manner, and no evidence presented at the trial below or before this Court substantiates any fear that prejudice, stereotyping or other untoward sentiment was employed in the selection process. Similarly, no evidence has been presented to substantiate the assumption that a perceived or actual bias was generated through the selection.

The Principle of Equality of Arms

[55] Before I consider the reasons offered by the Crown for justifying the advantage that it impliedly accepts it enjoys under section 27(b), it would be useful to reflect upon the principle of equality of arms on which the appellant seeks to center his case.

[56] The equality of arms principle is a principle enunciated by the European Court of Human Rights as part of the right to a fair trial under Article 6 of the **European Convention on Human Rights**. It is described as a fundamental principle of a

fair trial[30]. The principle requires that there be a fair balance between the opportunities afforded the parties involved in litigation. In **Bulut v Austria** [31] the European Court of Human Rights defined the concept as: *"*that both in criminal and non criminal cases everyone who is a party to such proceedings shall have a reasonable opportunity of presenting his case to the court under conditions which do not place him at a substantial disadvantage vis-a-vis his opponent." In **Rowe and Davis v The United Kingdom** the Court stated: "It is a fundamental aspect of the right to a fair trial that criminal proceedings…should be adversarial and that there should be an equality of arms between the prosecution and the defence.*"*[32] According to Malgorzata Wasek-Waiderek, *"*In a criminal trial where the accused's liberty or even life may be deprived, a high level of fairness and equal treatment is thereby required. In criminal cases in which the state is involved and where the prosecution enjoys vast resources and advantages, it is only the principle of equality of arms that helps the accused vindicate his or her case. It is not permissible to say that justice has been done if the accused is punished proportionately and rightly but not "fairly" i.e., without giving the proper opportunities to present his case, to defend himself and receive sufficient information and legal aid.*"*[33] The **European Convention on Human Rights and the Right to Direct Petition** were extended to the BVI on 28th September 2009.[34] In construing section 16 of the **Constitution Order**, the Court would have to consider what norms have been accepted by the BVI as consistent with the fundamental standards of humanity, and in so doing it would be relevant to take

[30] Delcourt v Belgium [1970] 11 ECHR (17th January 1970) para.21; Kaufman v Belgium, (Application. No. 10938/85, 50 Eur. Comm H.R. Dec & Rep 98, 115 (1986)

[31]ECHTR No. 17358/90. See also: Foucher v France (18th March 1997), Platakou v Greece (11th January 2001), Bobek v Poland (17th July 2007).

[32] Rowe and Davis v The United Kingdom No. 28901/95, ECHGR 2000-11 at paragraph 560.

[33] "The Principle of "Equality of Arms" in Criminal Procedure Under Article 6 of the European Convention on Human Rights and Its Functions in Criminal Justice in Selected European Countries: A Comparative View" Leuvene University Press, 2000, cited in an article by Shajeda Aktar and Dr. Rohaida Binti Nordin, Equality of Arms: A Fundamental Principle of Fair Trial Guarantee Developed by International and Regional Human Rights Instruments"

[34] Andre Penn v The Queen at para 66, footnote 11.

into account the international instruments incorporating such norms which apply to the BVI.[35] This was accepted in both **Kerris Phipps**[36] and **Andre Penn**.[37]

[57] The principle accepts that it is not possible to ensure a perfect equality between the parties. Instead it centers on achieving basic and reasonable proportionality as it has been accepted that there can never be a complete equality of arms. Therefore, it follows that not all inequalities will result in a breach of the principle of equality of arms[38]. Any disadvantage/inequality suffered may or may not be sufficient to amount to a violation of the right.

The Crown's Public Interest Argument

[58] Returning to the reasons advanced by the Crown, under the public interest argument, the Crown submitted that the operation of the stand-by provision has always been informed by a practical and prudent appreciation of the nascent challenges of the jury system. In explaining this point, the Crown relied on the case of **R. v Mason**[39] where Lawton LJ stated:

> "For centuries the law has provided by enactment who are qualified to serve as jurors, and has left the judges and the parties to criminal cases to decide which members of a jury to try a particular case. To this extent the random selection of jurors has always been subject to qualification. Defendants have long had rights to peremptory challenges and to challenges for cause; prosecuting counsel for centuries have had the right to ask that a member of the panel should stand by for the Crown and to show cause why someone should not serve on a jury; and trial judges, as an aspect of their duty to see that there is a fair trial, have had a right to intervene to ensure that a competent jury is empaneled……In our judgment, the practice of the past is founded on common sense. A juror may be qualified to sit on juries generally but may not be suitable to try a particular case."

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[35] See Patrick Reyes v The Queen, Privy Council Appeal No. 64 of 2001 at paragraph 27.
[36] See paragraph 21.
[37] See paragraph 65. See also Capital Bank Investment Limited v Caribbean Central Bank and Sir K. Dwight Venner, GDAHCVAP2002/0013 and GDAHCVAP2002/0014 (delivered 10th March 2003, unreported) paras 11-13; Minister of Home Affairs v Fisher [1979] 3 All ER 21 at 25.
[38] Ankerl v Switzerland ECtHR (23rd October 1996), App. No. 17748/91.
[39] [1980] 3 All ER 777, 781.

[59] The Crown also relied on the case of **R v John Paul Thomas Jude McCann**[40] where the English Court of Appeal rejected a ground of appeal that the Attorney General's right of stand-by was unconstitutional. Further reliance was also placed on the BVI case of **The Queen v. Kerris Phipps**[41] in which both authorities[42] were cited and where Joseph-Olivetti J stated that the mere fact that the right of stand-by was exclusive to the Crown did not render it capable of challenge. Specific reference was made to paragraph 28 of that decision, where the learned judge stated:

> "I am satisfied that the right of stand-by is a right given to the Crown in the public interest to ensure a competent and impartial jury, as it is recognized that although the Jury Act sets out qualifications for persons eligible to serve as juror, there are cases where some persons although qualified would not be suitable to serve on a particular case."

[60] Specific reference was also made to paragraph 32 of the judgment where the learned judge stated:

> "For the forgoing reasons in my judgment, section 27 (b) of the Jury Act is not unconstitutional, as it is a reasonable measure in the public interest, and thus permissible by Articles 9[43] and 12[44] of the Constitution. Therefore, Section 27(b) does not infringe a defendant's right to a fair trial or equal treatment before the law."

[61] At paragraph 15 of the Crown's written submissions, the Crown argued as follows:

> "When the Jury Act (Cap 136) was originally passed by the Legislative Council of the Territory, it was to ensure that juries were fair. It is our respectful submission that stand-by is a necessity in this Territory, bearing in mind that it is a very small jurisdiction where there are close familial ties between the accused, witnesses and jurors. In the past year, up to very recently, matters had been declared mistrials as a result of relatives of accused, virtual complainants and of other witnesses have been placed

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[40] (1991) 92 Cr App R 239.

[41] BVIHCR2009/0026 (delivered 18th November 2010, unreported).

[42] That is R v Mason and R v John Paul Thomas Jude McCann.

[43] The third paragraph of Article 9 reads "Whereas it is recognized that those fundamental rights and freedoms apply, subject to respect for the rights and freedoms of others **and for the public interest**, (emphasis added) to each and all of the following, namely-…"

[44] Article 12 reads "12(1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Subject to such limitation as are prescribed by law, equality includes the full and equal enjoyment of all rights and freedoms."

on juries and they have failed to notify the trial judge or counsel of this fact."

[62] The Crown also argued under this head, that there is nothing to suggest that the exercise of the standby led to a violation of the appellant's constitutional rights.

[63] The Crown's public interest justification is premised on the argument that the superior position enjoyed by the Crown in the jury selection process is reasonably justifiable in a democratic society in the public interest. It is clearly premised on the reasoning applied by Joseph-Olivetti J in **R v Kerris Phipps** where after reviewing articles 9, 12 and 16 of the **Constitution Order**, the learned judge stated:

> "From the foregoing articles it is clear that the right to a fair trial which includes the right to a trial by jury is one of the fundamental rights and freedoms guaranteed by the Constitution and comes under the article concerned to secure the protection of the law. It is equally certain from the specific wording of the provisions themselves that these individual rights and freedoms are not absolute but that they are subject to the enjoyment of the like rights and freedoms of others and to limitations prescribed by law in the public interest".[45]

[64] Joseph-Olivetti J went on at paragraph 20 to ask:

> "Does this right (of stand by) derogate from the Defendant's right to a fair trial and to equal protection under the law as guaranteed to him by the Constitution in that it infringes on or affects the Defendant's right to trial by jury as it gives the Crown an unfair advantage in jury selection?"

[65] At paragraph 28 of the judgment Joseph-Olivetti J answered her own question as follows:

> "I am satisfied that the right of stand by is a right given to the Crown in the public interest to ensure a competent and impartial jury as it is recognized that although the Jury Act sets out qualification (sic) for persons eligible to serve as jurors there are cases where some persons although qualified would not be suitable to serve on a particular case. The Constitution by Article 9 permits reasonable limitations on fundamental rights and freedoms as provided in the Constitution in the public interests (sic). And Article 12 specifically says that the right is subject to such limitations as

[45] At paragraph 13.

> are prescribed by law. Therefore, in my judgment, the right of stand by given by section 27(b) of the Jury Act is not unconstitutional simply because it is not shared by the defence."

[66] Assuming for the purpose of the present discussion only, that the fundamental right to a fair trial (which includes trial by an independent and impartial tribunal) could be subject to public interest limitations as suggested by Joseph-Olivetti J, the Crown would certainly have to demonstrate that the aim of the right of stand-by is legitimate and that there is a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. According to the Crown, the stand-by right is justifiable because it empowers the Crown to empanel a competent jury by being able to stand by a person who is qualified to sit on juries generally, but who may not be suitable to try a particular case. It seeks, says the Crown, to address cases where there may be a legitimate reason why a juror ought not to sit on a panel, but that reason would not ground a successful challenge for cause. In the case of **Mason** Lawton LJ gave an example as follows:

> "An example put to counsel for the applicant during argument shows this. X is charged with unlawfully wounding a gamekeeper whilst out poaching. The prosecution's case is that he was a member of a gang at the material time. When the jury comes to be empaneled one member of the panel is found to have a number of convictions for poaching (not amounting to disqualifications) all in the petty sessional division where the gamekeeper worked. In our judgment, to allow such a man to serve on that jury would be an affront to justice. He would be unlikely to be impartial; and although he would be only one of twelve, he could be expected to press his point of view; and its effect on his fellow jurors would depend on his persuasive powers and their receptiveness to suggestion. The prospect of the case being tried according to the evidence would, in our judgment, be materially reduced".

[67] To test the Crown's argument, it is necessary to consider the scope of a challenge for cause in the first place under the **Jury Act**. For it is only if circumstances exist that may not be captured under the provisions governing challenges for cause, but which would nonetheless strongly suggest unfitness to serve on a jury, that the Crown's right of stand-by may be arguably justified. Section 4 of the **Jury Act** sets

out the qualification for common jurors and, states that a person so qualified, "shall, unless exempted or disqualified under the provisions of section 6 and 7, be liable to serve as a common juror." Section 6 exempts the persons described in the First Schedule from serving either as a common juror or a special juror. Section 7 disqualifies certain persons from serving either as common jurors or as special jurors, namely (a) aliens who have not been previously domiciled in the Territory for at least 10 years, (b) persons disabled by unsoundness of mind, or by deafness, blindness or other permanent infirmity of body; (c) persons who have been previously convicted of treason, felony, or infamous crime, and have not received a free pardon; and (d) persons who cannot read or write the English language and understand the same when spoken. Section 28 of the **Jury Act** reads as follows:

> "28(1) When the jury is being impaneled for the trial of any proceeding, any juror, whose name has been drawn as hereinafter provided, may be challenged for cause by any of the parties to the issue, and, where any such challenge is made, the same shall be inquired into by the presiding Judge, who after hearing any evidence which may be adduced, may allow, or disallow such challenge, and the decision of the Judge, as to what is or is not sufficient cause, shall be final.
>
> (2) In this section "cause" means **anything** which, in the opinion of the presiding Judge, renders it **improper, or inadvisable** (emphasis added), that the person challenged should be impaneled for the trial of the proceeding." (emphasis added)

[68] The Court has found no decision that defines the phrase "improper or inadvisable" as used in the **Jury Act**. The Crown did not address the Court on section 28(2) and consequently the Court was not assisted with a working or any other definition of those words.[46] The **Concise Oxford English Dictionary**[47] defines the word "improper" to mean "not in accordance with accepted standards of behavior, indecent or unseemly" and defines the word "inadvisable" to mean "likely to have unfortunate consequences - unwise". Based on these definitions, the range of situations and circumstances for which a juror may be successfully challenged for

[46] Neither did the appellant.
[47] Judy Pearsall: The Concise Oxford English Dictionary (10th ed., Oxford University Press 2002).

cause appears to be infinite. It would appear to me that a challenge that is premised on "anything" which "renders it improper or inadvisable" that a particular person should sit on the jury contemplates and encompasses a raft of endless scenarios. Take for example the case of the fictitious poacher with the less than disqualifying criminal record alluded to by Lawton LJ in **Mason**, where His Lordship concluded, "In our judgment to allow such a man to serve on that jury would be an affront to justice". That very conclusion would suggest that the facts of that case would support a successful challenge for cause under the BVI **Jury Act** in that it would surely be "improper or inadvisable" for such a person to be permitted to serve on that jury. In some other jurisdictions where an argument has been made (but not necessarily successfully) in favour of the constitutionality of the right of stand-by, it has been premised predominantly on the fact that the applicable statutory grounds for challenges for cause are limited by definition. The stand-by is then seen as a solution to the problem of potential jurors who cannot be removed for cause but whose service on the jury would be otherwise undesirable.[48]

[69] Bearing in mind the width of the challenge for cause provision, the proffered rationale for the existence and constitutional validity of the Crown's right of stand-by is obliterated as a ready alternative for achieving the same result is already afforded. Although no reference was made to section 28(2) of the **Jury Act**, the foregoing appears not to have been lost on Ramdhani J in **Andre Penn** when, in commenting on the examples given by the Crown to justify its right of stand-by, he stated at paragraph 79 of the judgment "All of the reasons given by the Director that generally ground the use of this right of standby really fall within the "challenge for cause" arena". In similar vein I refer to the submission of the Crown set out at paragraph 61 above. It is unclear what precise point the Crown was making there but there appeared to be a suggestion that in small communities the potential problems associated with the existence of jurors with close familial ties to

[48] See dissenting judgment of Gonthier J in Craig Alexander Bain and The Attorney General of Canada [1992] 1 S.C.R. 91 at pages 23, 37 and 39.

parties in a criminal case would be properly remedied by the Crown's use of its right of stand-by. The difficulty with this argument is that this would clearly be one of the scenarios that would undoubtedly fall within a party's right to challenge, for example on the basis of perceived bias[49], thus removing any need for a right of stand-by.

[70] Consequently, the first reason advanced by the Crown to justify the right of stand-by is rejected. Although this was described by the Crown as its first reason to support the constitutionality of section 27(b), it is really its only reason. The other two "reasons" advanced by the Crown are not independent reasons, but are subsumed under the public interest argument and merely seek to bolster that argument. With the public interest argument being rejected, they can carry no weight on their own. However, there is some merit in addressing these arguments if only for the purpose of demonstrating that they would have provided no assistance to the Crown in any event.

The Dichotomy between Stand-by and Right of Challenge

[71] The Crown's second "reason" for the constitutionality of section 27(b) was that the appellant's concerns regarding the right of stand-by adopt a more fanciful hue when it is properly understood that the ability to place a juror on stand-by cannot be likened to a successful challenge of that juror. According to the Crown, when a juror is successfully challenged that juror is completely removed from consideration. But when a juror is placed on stand-by that juror is only removed from the selection process when a successful challenge for cause is mounted. Therefore, argued the Crown, it is not merely possible but more likely than not that a juror who is asked to stand by may eventually serve on the final panel when selected. The Crown relies on the **Kerris Phipps** case where Joseph-Olivetti J stated:

> "A juror who is asked to stand-by is not disqualified and is eligible to be elected once the panel has been gone through. If at that stage the Crown

[49] Not that the test here is lack of indifference, as it is elsewhere, but that bias or the reasonable perception thereof would no doubt make it "improper or inadvisable" for a person to serve on a particular jury.

wishes to exclude a stand-by juror, then it is required to show cause. Thus standing by a juror is not a peremptory challenge.[50]"

[72] The Crown further submitted that it is therefore implausible to argue that the Crown could employ their right of stand-by to influence the composition of the jury by reference to arbitrary criteria such as race, gender or other bias. The Crown continued, expressing itself in very strong language, that the appellant's arguments that the Crown's standing by 21 potential jurors "was likely to lead the fair minded observer to find that the selection of an independent and impartial tribunal was biased is not merely vacuous in its lack of merit but vulgar in its defamatory speculation."

[73] The Crown's arguments in this regard are unconvincing. Firstly, the Crown appears to be conflating the reasonable apprehension of a real possibility of bias with proof of actual bias. Secondly, the Crown's argument fails to address the reality of the situation. By exercising its right of stand-by, the Crown may be able to empanel a jury without ever having to return to consider any persons already stood by. To that extent, the stand-by can and does in practice operate as a form of peremptory challenge. In **Bain** Stevenson J reasoned that "The peremptory challenge is "purely subjective" and a stand by, which can be exercised until the whole panel has been called, is its equivalent. The Crown in exercising its stand by power, can achieve a peremptory challenge, effectively deferring a challenge for cause or peremptory challenge. The stand by is not a "deferred challenge for cause" because, with large panels, a juror who is stood by will not be recalled in many cases." In **Andre Penn** Ramdhani J stated in similar fashion at paragraph 63 of the judgment, 'I agree with Mr. Lynch that the likelihood of any of the stand-bys being recalled is almost zero where the panel comprises such large numbers as the present where the Crown stops tactically well short of the entire array, the stand-bys effectively operate as peremptory challenges. The provision therefore seems weighed in favour of the Crown."

[50] At paragraph 29.

[74] This Court agrees with the positions expressed by Stevenson J and Ramdhani J. Consequently, this submission by the Crown is also rejected.

Exercise of Right of Stand-by in a Responsible Manner

[75] The Crown's final argument or "reason" in support of the constitutionality of its right of stand-by was that there is a presumption that the Crown would use its right of stand-by in a responsible manner. The Crown sought to draw support for this proposition from the words of Lawton LJ in **Mason**, that "We would expect that them to act responsibly and not to request a stand by unnecessarily."[51]

[76] But in an adversarial system, (by its very nature, but moreover, especially considering the existence of the challenge for cause regime for achieving an independent and impartial jury), is the accused to be forced to accept that he must rely on the prosecution acting in good faith and not abusing the powers granted it? In **Andre Penn**[52] Ramdhani J. observed:

> "It is really no answer to having a system of jury selection which gives one side an unfair advantage to say that prosecutors are expected to act properly and that they in fact act properly and remove potential jurors for all good reasons. I have no doubt that the present team of prosecutors before this Court comprises only of proper ministers of justice, acting their competent best. That however really does not address the problem. I am in full agreement with Cory J of the Canadian Supreme Court when he said[53]:
>
> > "At the outset, I would agree that the Crown Attorneys play a very responsible and respected role in the conduct of criminal trials. It is true that the Crown never wins or loses a case. Yet Crown Attorneys are mortal. They are subject to all the emotional and psychological pressures that are exerted by individuals and the community. They may act for the best motives. For example they may be moved by sympathy for a helpless victim, or by contempt for the cruel and perverted acts of an accused: they may be may be influenced by the righteous sense of outrage of the community at the commission of a particularly cruel and vicious crime. As a rule

[51] At page 783.
[52] At paragraph 82.
[53] Bain v The Queen and The Attorney General [1992] 1 S.C.R. 91 at page 102.

> the conduct and competence of Crown Attorneys is exemplary. They are models for the bar and the community. Yet they, like all of us, are subject to human frailties and occasional lapses."
>
> The failure of section 27 cannot be corrected by having prosecutors who are proper and competent…"

[77] This Court agrees. Additionally in **Bain**, Cory J on this issue further stated at page 19:

> "Unfortunately it would seem that whenever the Crown is granted statutory power that can be used abusively then, on occasion, it will indeed be used abusively. **The protection of basic rights should not be dependent upon a reliance on the continuous exemplary conduct of the Crown, something that is impossible to monitor or control** (emphasis added). Rather the offending statutory provision should be removed."

[78] At page 76 in **Bain**, Stevenson J in similar vein expressed his concern as follows:

> "While I agree that the stand-by may be used beneficially, **I do not think that we can rely on professed good intentions to uphold such a disparity** (emphasis added). An example of the use of the power to tailor the jury selection is found in the recent case of R. v Pizzacalla (1991) 5 O.R. (3d) 783. The Crown acts within an adversarial forum. It is not unreasonable to think that there are times when the Crown's challenges or stand bys are motivated by an anxiety to secure a conviction rather than a strict quasi-judicial interest in the fairness of the trial".

[79] With the greatest respect to Lawton LJ, the admonition by Lord Prosser that a person's confidence in his own integrity is not, and cannot be regarded as, a guarantee,[54] is quite applicable here. Our confidence in the Crown's integrity simply cannot constitute a guarantee. Simply put, this Court agrees with the position in **Bain** and adopted in **Andre Penn** on this point. In **Kerris Phipps**, this particular point did not arise in the judgment, other than tangentially at paragraph 17. But I find it extremely noteworthy, that Joseph-Olivetti J had serious cause for concern about the manner in which the Crown might exercise its right of stand-by, as was demonstrated in the very case before her. I refer now to her remarks made

[54] Starrs v Procurator Fiscal (1999) 8 BHRC 1, at 30, cited in Millar v Dickson [2002] 3 All ER 1041 at paragraph 9.

at paragraphs 33 and 34 of her judgment. Having found the right of stand-by to be constitutionally permissible, she stated:

> "[33] However, I am constrained to remark that the potential for abuse exists and this ought to be guarded against. One expects that the right would be reasonably and properly exercised.
>
> [34] For example, when the case resumed after this ruling was given the defence peremptorily challenged three jurors. In selecting their replacement the Crown Counsel asked 28 more prospective jurors to standby and in some cases appeared to simply look at the person before asking him/her to standby and some were actually to walk to the jury box before being asked to standby. The entire panel of 57 gone through and then the first person called was allowed to sit. The court observed the unsettling effect of this procedure on the public and in particular on waiting jurors even though they had been made aware of the Crown's right of standby at their jury orientation session. A scenario such as this begs the question whether the right is being properly exercised in all instances."

[80] In response to the clearly troubling situation that unfolded before her, Joseph-Olivetti J appears to have found some comfort in relying on the words of Lawton LJ that "It is expected that prosecuting counsel would act responsibly and not request a stand-by unnecessarily." However this occurrence was, in my opinion, a perfect reminder of the fact that the right of stand by does in fact present an opportunity for abuse by prosecutors.[55] When it comes to ensuring a fair trial by an independent and impartial court, the possibility of abuse of the Crown's right of stand-by cannot be assuaged by a reliance on the Crown to act responsibly. For this reason, this argument by the Crown is also rejected.

The Right to a Fair Trial and Public Interest Limitations

[81] As stated, the Crown's approach in resisting this appeal was to take the position that section 27(b) of the **Jury Act** does not infringe the Claimant's constitutional rights, because the right to stand-by is required in the public interest to ensure that a competent and impartial jury is empaneled. Inherent in this position is the proposition that the constitutionally guaranteed right to a fair trial (as against the

[55] No adverse assertion or implication whatsoever is intended against the Crown in that case.

component right to equality of arms) can lawfully be subject to public interest limitations. This line of thinking emanated from the **Kerris Phipps** case and invites a review of that case on that particular point. In **Kerris Phipps** Joseph-Olivetti J referred to Articles 9, 12 and 16 of Chapter 2 of the **BVI Constitution** in the following manner:

> "[9] "Article 9 provides:- **"Whereas every person in the Virgin Islands is entitled to the fundamental rights and freedoms of the individual:…Whereas it is recognized that those fundamental rights and freedoms apply, <u>subject to respect for the rights and freedoms of others</u> and for the public interest, to each and all of the following namely-(a) life, equality, liberty, security of the person and the protection of the law; …Now, therefore, it is declared, that the subsequent provisions of this chapter shall have effect for the purposes of affording protection to the aforesaid rights and freedoms, and to related rights and freedoms, subject to such limitations of that protection <u>as are contained in those provisions</u>, being limitations designed to ensure that the enjoyment of protected rights and freedoms by the individual does not prejudice the rights and freedoms of others or the public interest.** (emphasis added)
>
> [10] Article 12, captioned, "Equality before the law", provides**: - "(1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) <u>Subject to such limitations as are prescribed by law, equality includes the full and equal enjoyment of all rights and freedoms</u>"**. (emphasis added)
>
> [11] Article 16, captioned, **"Provisions to secure protection of law", provides: -16 (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."**(emphasis added)
>
> [12] Article 16(2) reads: - "Every person who is charged with a criminal offence shall…(g) when charged on indictment in the High Court have the right to trial by jury."
>
> [13] From the foregoing articles it is clear that **the right to a fair trial** (emphasis added**)** which includes the right to trial by jury is one of the fundamental rights and freedoms guaranteed by the Constitution and comes under the articles concerned with the

> provisions to secure the protection of law. It is equally certain from the specific wording of the provisions themselves that **these individual rights and freedoms are not absolute but that they are subject to the like rights and freedoms by others and to limitations prescribed by law in the public interest**." (emphasis added)

[82] Having established that premise, and having also found that the Crown's right of stand-by was not merely a rule of practice but a right in law, Joseph-Olivetti J proceeded to ask the question at paragraph 20, "Does this right derogate from the Defendant's right to **a fair trial** (emphasis added) and to equal protection under the law as guaranteed to him by the Constitution in that it infringes on or affects the Defendant's right to trial by jury as it gives the Crown an unfair advantage in jury selection?"

[83] The learned judge then went on at paragraphs 21 through 23 of her judgment to review the public interest argument which was said to underpin the Crown's right of stand by and to distinguish the decision of the Grenada High Court in **R v Kevon Bishop and Neolan Charles**.[56] Joseph-Olivetti J went on at paragraph 28 of her judgment to state:

> "I am satisfied that the right of stand by is a right given to the Crown in the public interest to ensure a competent and impartial jury as it is recognized that although the Jury Act sets out qualification (sic) for persons eligible to serve as jurors there are cases where some persons although qualified would not be suitable to serve on a particular case. The Constitution by Article 9 permits reasonable limitations on fundamental rights and freedoms as provided in the Constitution in the public interests (sic). And Article 12 specifically says that the right is subject to such limitations as are prescribed by law. Therefore, in my judgment, the right of standby given by section 27 (b) of the Jury Act is not unconstitutional simply because it is not shared by the defence."

[84] Having established her legal premise, Joseph-Olivetti J went on at paragraph 29 to state as follows:

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[56] GDAHCR2008/0125 (delivered 6th November 2009, unreported).

> "In my view there is **no significant inequality** (emphasis added) as a defendant has a say in jury selection as well. A defendant has three peremptory challenges, that is, three challenges without attributing any cause. Once a peremptory challenge is exercised that juror is disqualified from sitting on that case. In addition to the peremptory challenges the defendant can make any number of challenges for cause. On the other hand, the Crown has no peremptory challenges, but instead it can exercise the right of stand-by until the panel is perused and challenge for cause. A juror who is asked to stand by is not disqualified and is eligible to be elected once the panel is gone through. If at that stage the Crown wishes to exclude a stand –by juror then it is required to show cause. Thus standing by a juror is not the same as a peremptory challenge."

[85] At paragraph 30 Joseph-Olivetti J concluded:

> "In the final analysis, I am satisfied that any advantage enjoyed by the Crown by the exercise of their right of stand by is not so great as to be prejudicial to an accused person and that the right of stand-by given to the Crown is undoubtedly a reasonable measure in the interest of the public and a such is permissible under Articles 9 and 12 of the Constitution"

[86] With the greatest respect to the learned judge, much of what she has said above is unsupportable.

[87] Firstly in determining that the Crown's right of stand by does not create an advantage so great as to be prejudicial to an accused person, the learned judge premised her balancing exercise and her conclusion on her findings that (a) the right of stand by was in fact reasonably required in the public interest, and (b) there was no significant inequality in the jury selection, bearing in mind that the accused had a right of three peremptory challenges and the Crown had none but had the right of stand by which was, in her opinion, not a right of peremptory challenge. As has already been explained, the public interest justification falls away when the breadth of the challenge for cause provision in the **Jury Act** is considered. And the suggestion that the right of stand by does not operate as a form of peremptory challenge simply does not withstand scrutiny as it does not reflect the reality of the situation. So both factual pillars upon which the learned judge rested her analysis are in the opinion of this Court not sustainable.

[88] But I think there is a more fundamental problem with Her Ladyship's analysis and this occurs in paragraph 28 where she stated, "The Constitution by Article 9 permits reasonable limitations on fundamental rights and freedoms as provided in the Constitution in the public interests. And Article 12 specifically says that the right is subject to such limitations as are prescribed by law. Therefore, in my judgment, the right of stand by given by section 27(b) of the **Jury Act** is not unconstitutional simply because it is not shared by the defence." The difficulty with this is that it generalizes and therefore misapplies sections 9 and 12 of the BVI **Constitution Order**.

[89] Section 9 of the BVI **Constitution Order** is declaratory. For our purposes the relevant section reads as follows, "Now, therefore, it is declared that the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms, and to related rights and freedoms, subject to such limitations of that protection **as are contained in those provisions,** (emphasis added) being limitations designed to ensure that the enjoyment of the protected rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest." The limitations contemplated by section 9 are limitations contained **within** (emphasis added) the particular guaranteed rights provisions themselves. For example, section 14(1) establishes that no person shall be subjected to slavery, servitude, or forced labour. Section 14 (2) goes on to state that the term "forced labour" shall not include labour required in certain defined circumstances. Section 15(1) establishes that every person has the right to liberty and security of the person. Section 15(2) goes on to state that no person shall be deprived of his personal liberty save as may be authorized by law in any of the cases therein specified. Section 16(1) states that 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. Unlike sections 14 and 15, section 16 does not contain within it any limitations on the fair hearing, independence and impartiality guarantees set out in section 16(1). Thus, the

statement by Joseph-Olivetti J in paragraph 28 of her judgment that "The Constitution by Article 9 permits reasonable limitations on fundamental rights and freedoms as provided in the Constitution in the public interests" could have had no application to the constitutionally guaranteed right of a fair trial by an independent and impartial court established under section 16. It must be remembered that as pointed out by Joseph-Olivetti J at paragraph 5 of her judgment, the defendant's argument there was "… that section 27(b) of the **Jury Act** which gives the Crown the right of standby is unconstitutional as infringing the Defendant's **right to a fair trial and to equal treatment under the law** (emphasis added) as guaranteed to him by the constitution." So, section 16 of the **Constitution Order** was directly in play.

[90] In relation to section 12, that section reads "12-1 Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Subject to such limitations as are prescribed by law, equality includes the full and equal enjoyment of all rights and freedoms." It is my opinion that the limitations contemplated by section 12(2) would operate to limit the section 12 rights. I do not think that they can, by way of a cross wind, operate so as to limit or infringe upon the section 16 rights. What was before Joseph–Olivetti J as explained in paragraph 5 of her judgment was a claim based on both section 16(1) (fair trial-which would include trial by an independent and impartial court) and on equal treatment under the law.[57] Consequently when Joseph-Olivetti J made her determination as explained in paragraph 28 of her judgment I am forced to the conclusion that Her Ladyship was addressing both the defendant's fair trial right under section 16(1) and his "equality before the law" right under section 12. In that case, I do not think that the application by Her Ladyship of the section 12 (2) limitation to the fair trial right guaranteed under section 16(1) was correct. It is accepted that section 16(1) of the **Constitution Order** is modeled on article 6(1) of the **European Convention on Human Rights** ("**European Convention")**.[58] In **Millar v Dickson** [59] a case

[57] Which by paragraph 20 of her judgment Her Ladyship equated with a claim under the equal protection guarantee.
[58] See cases at footnote 23.

where reliance was placed by the appellant on article 6(1) of the **European Convention**, Lord Bingham delivering the lead judgment of the Privy Council stated at paragraph 16, **"…**and it is in my view clear from authority that the right of an accused in criminal proceedings to be tried by an independent and impartial tribunal is one which, unless validly waived, **cannot be compromised or eroded."**(emphasis added) At paragraph 52 of the judgment Lord Hope stated: **"**The right which a person has under art 6(1) of the **European Convention** to a hearing by an independent and impartial tribunal is fundamental to his right to a fair trial. **Just as the right to a fair trial is incapable of being modified or restricted in the public interest, so too the right to an independent and impartial tribunal is an essential element if the trial is to satisfy the overriding requirement of fairness.**" (emphasis added)

[91] So, to the extent that Joseph-Olivetti J was of the position that the **Constitution Order** permitted a defendant's right to a fair trial by an independent and impartial tribunal to be limited in the public interest, I respectfully disagree. As it appears that the same argument underpins the foregoing submissions of the Crown in this case also, similarly I am unable to accept them here.

The Constitutionality of Section 27(b)

[92] It would almost appear, bearing in mind the Crown's approach to defending against ground 1, that upon our rejection of the Crown's public interest justification argument, that it would be a *fait accompli* that section 27(b) would be unconstitutional as infringing section 16(1) of the **Constitution Order**. However, this should not be left to implication. The premise of the appellant's submission in ground 1 was that section 27(b) of the **Jury Act** which permitted the Crown the unlimited right to stand by jurors was unconstitutional as it offended against the equality of arms provision enshrined in the section 16 fair trial provisions of the **Constitution**. This was a challenge to the constitutionality of the provision itself without any consideration of how it was actually applied to the appellant. In the

[59] [2002] 3 All ER 1041.

jury selection process, the unlimited right of standby provided by section 27(b) places the Crown in what I am convinced is a vastly superior position when compared with the accused's right of 3 peremptory challenges only, both sides having unlimited challenges for cause. This superior position of the Crown raises an issue of bias in that selection process. The test for bias is whether the fair minded informed observer having considered the facts, would conclude that there was a real possibility that the tribunal was biased.[60] It is now accepted that there is no difference between the test for apparent bias and the requirements of an independent and impartial tribunal under article 6 of the **European Convention**.[61]The characteristics of the fair minded and informed observer are now well settled: he must adopt a balanced approach and will be taken to be a reasonable member of the public, neither unduly complacent or naïve nor unduly cynical or suspicious.[62]

[93] I do believe that a fair-minded observer, knowledgeable of the pertinent aspects of the criminal trial system and particularly the operations of the jury selection process, would perceive a real possibility of bias in favour of the Crown in the potential application of section 27(b).[63] While I accept that the provision here under scrutiny must be considered against its own constitutional context, I find support for my first-mentioned belief in **Bain**. In that case section 563(1) and (2) of **Criminal Code**[64] provided the Crown with the ability to stand by 48 prospective jurors and challenge 4 peremptorily, while the accused possessed only 12 peremptory challenges. This was described as a discrepancy of 4.25 to 1. Against that backdrop Cory J concluded, "The implementation of the impugned provisions

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[60] Applying Porter v McGill and approved by the Privy Council in Kearney v Her Majesty's Advocate [2006] UKPC D1.

[61] Lawal v Northern Spirit Ltd. [2003] UKHL 35, [2004] 1 All ER 187

[62] See footnote 59.

[63] Applying Porter v McGill and approved by the Privy Council in Kearney v Her Majesty's Advocate [2006] UKPC D1

[64] "(1) The prosecutor is entitled to challenge four jurors peremptorily, and may direct any number of jurors who are not challenged peremptorily by the accused to stand by until all the jurors have been called who are available for the purpose of trying the indictment.
"(2) Notwithstanding subsection (1), the prosecutor may not direct more than forty-eight jurors to stand by unless the presiding judge for special cause shown, so orders".

would lead a reasonable person, fully apprised of the extensive rights the Crown may exercise in the selection of the jury, to conclude that there was an apprehension of bias."[65] At page 17 Cory J stated, "I do not suggest that the ideal of absolute equality is required by the Canadian Charter of Rights and Freedoms. However, a discrepancy of 4.25 to 1 in favour of the Crown seems to be so unbalanced that it gives an appearance of unfairness or bias against the accused. The impugned provisions permit the Crown to obtain a jury that would at the very least appear to be favourable to its position rather than an unbiased jury." I think that the same reasoning is properly applicable to the present case. In **Bain,** the ratio was 4.25 to 1. In this case, the situation is more egregious as the Crown's right of stand by is unlimited with the accused having only 3 peremptory challenges. I am of the opinion that section 27(b) is unconstitutional. Due to the extreme disparity it creates in the jury selection process, it permits the infringement of the principle of equality of arms by making the position of the accused extremely weaker than that of the Crown. Further, apart from simply infringing the principle of equality of arms as a fair trial component, I am also of the opinion that section 27(b) infringes the substantive fundamental right to a fair trial by an impartial court. I do believe that the perception of bias in the jury selection process would contaminate and lead to a real perception of bias in relation to the trial itself. The two would be inextricably linked. I agree with Cory J when he stated in **Bain**[66] that where the jury by its manner of selection would appear to favour the Crown over the accused, the effect was that the whole trial process would be tainted with the appearance of bias and overwhelming unfairness. In the Canadian Supreme Court case of **R. v. Barrow**,[67] Chief Justice Dickson, commented in similar vein as follows:

> "The selection of an impartial jury is crucial to a fair trial… The accused, the Crown, and the public at large all have the right to be sure that the jury is impartial and the trial fair; on this depends public confidence in the administration of justice. Because of the fundamental importance of the selection of the jury and because the *Code* gives the accused the right to

[65] At page 16.
[66] [1992] 1 RSC 91 at 103.See also Gonthier J. in Bain that "the jury is the court, together with the judge" at page 55
[67] [1987] 2 C.R. 694 at page 710

participate in the process, **the jury selection should be considered part of the trial for the process,** (emphasis added) the jury selection should be considered part of the trial for the purposes of s. 577(1) [now s. 650]".

[94] Having found that section 27(b) is unconstitutional because of the disparity that it provides for, it is still necessary to consider how that provision was utilized by the Crown in relation to the appellant's case. In this case, the Crown stood by 21 potential jurors without ascribing any cause. I am of the opinion that a fair minded and informed observer would conclude that there was a real possibility of bias in the actual jury selection process of this trial and consequently in the performance of the jury and the trial itself. I do believe that a fair minded and informed observer would ask what possible reason could there be for standing by 21 potential jurors, no cause being assigned, other than the Crown seeking, on whatever grounds, to empanel a jury sympathetic to its case.[68] This must not be interpreted as suggesting that this is in fact what happened–we are here concerned with perception. In this case, the accused's constitutional right to a fair trial by an impartial court was infringed.[69]

Whether Actual Bias Necessary

[95] In what appeared to be back-up position, the Crown argued that the appellant had not shown that the exercise of the stand-by right led to a violation of his constitutional rights. This appeared to be a suggestion from the Crown that (a) it was necessary for the appellant to demonstrate that there was actual bias on the part of the jury, and (b) also that when the trial was looked at as a whole, in relation to overall fairness, the appellant suffered no injustice. This approach was very similar to that adopted by the Solicitor General in **Millar v Dickson**. In that case each of four defendants was the subject of criminal proceedings before a temporary sheriff. Each had either pleaded guilty to or been convicted of criminal charge before temporary sheriffs. By all accounts, the outcome of the individual cases would have been no different if the proceedings had been held before

[68] This should not be understood as casting any factual aspersions whatsoever on the Crown.
[69] An analysis that requires a consideration of the number of stand- bys made could very well descend into a numbers game rife with speculation.

permanent sheriffs. Subsequent to the conclusion of proceedings, the High Court in another case held that a temporary sheriff was not an independent and impartial tribunal for the purposes of a right to a fair hearing under art 6(1) of **the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950**, which applied. The defendants then argued that their prosecution had been unlawful. On appeal to the Privy Council the Solicitor General accepted that the decision that a temporary sheriff was not an independent and impartial tribunal for the purposes of art 6(1) was correct, but that notwithstanding, the defendants had received fair trials. The Solicitor General argued that the rights under art 6, save for the right to a fair trial, were not absolute; it was proper to consider the right allegedly infringed in the context of all the facts and circumstances of the case as whole, and to weigh the alleged infringement against the general interest of the public. The ultimate issue, he argued, was one of overall fairness, viewing the proceedings as a whole. In fact one of the defendants had pleaded guilty. Therefore, he argued, whatever theoretical defects to which the appointments of the respective sheriffs were subject, none of them was said to have shown any lack of independence or impartiality and none of the accused could show that he or she had, in the event, suffered any injustice.

[96] Lord Bingham's response was as follows:

> "With these last submissions of the Solicitor General I have much sympathy. There is indeed nothing to suggest that the outcome of any of these cases would have been different had the relevant stages of the prosecution been conducted before permanent instead of temporary sheriffs. There is no reason to doubt that the conduct of all the temporary sheriffs involved was impeccable, and no reason to suppose that any of the accused suffered any substantial injustice. But I cannot accept that the outcome of the *Starrs*' case would have been different had the challenge been raised after the trial in that case was concluded, and it is in my view clear from authority that the right of an accused in criminal proceedings to be tried by an independent and impartial tribunal is one which, unless validly waived by the accused, cannot be compromised or eroded."

[97] Lord Bingham proceeded to refer to the case of **Locabail (UK) Ltd v Bayfield Properties Ltd** [70] where the English Court of Appeal stated:

> "2. In determination of their rights and liabilities, civil or criminal, everyone is entitled to fair hearing by an impartial tribunal. That right, guaranteed by the [convention], is properly described as fundamental. The reason is obvious. All legal arbiters are bound to apply the law as they understand it to the facts of individual cases as they find them. They must do so without fear or favour, affection or ill-will, that is without partiality or prejudice. Justice is portrayed as blind not because she ignores the facts and circumstances of individual cases but because she shuts her eyes to all considerations extraneous to the particular case.
> 3. Any judge (for convenience, we shall in this judgment use the term "judge" to embrace every judicial decision maker, **whether judge lay justice or juror**) (emphasis added) who allows any judicial decision to be influenced by partiality or prejudice deprives the litigant of the important right to which we have referred and violates one of the most fundamental principles underlying the administration of justice. Where in any particular case the existence of such partiality or prejudice is actually shown, the litigant has irresistible grounds for objecting to the trial of the case by that judge (if the objection is made before the hearing) or for applying to set aside any judgment given. Such objections and applications based on what, in the case of law, is called "actual bias" are very rare, but partly (as we trust) because the existence of actual bias is very rare, but partly for other reasons also. The proof of actual bias is very difficult, because the law does not countenance the questioning of a judge about extraneous influences affecting his mind; **and the policy of the common law is to protect litigants who can discharge the lesser burden of showing a real danger of bias without requiring them to show that such bias actually exists.**" (emphasis added)

[98] At paragraph 62 of the judgment, Lord Hope explained that the Solicitor General's argument was that "All there was in this case was a perception that the temporary sheriffs lacked independence. But the reality was that they did not lack independence in fact. Their judgment was unaffected, and there were no grounds for saying that the verdicts of guilty were unsafe or the sentences imposed excessive. The appellants were unable to show that they would derive any real benefit from being retried or sentenced again. He invited us to hold that the decisive factor in these cases was ...that the use of temporary sheriffs in these cases made no difference in fact to the result."

[70] [2000] 1 All ER 65, at pages 69-70.

[99] Lord Hope's answer to this was set out at paragraph 63 as follows:

> "In my opinion, this argument overlooks the fundamental importance of the convention right to an independent and impartial tribunal. These two concepts are closely linked, and the appearance of independence and impartiality is just as important as the question whether these qualities exist in fact. Justice must not only be done, it must be seen to be done. The function of the convention right is not only to secure that the tribunal is free from any actual personal bias or prejudice. It requires this matter to be viewed objectively. The aim is to eliminate any legitimate doubt as to the tribunal's independence and impartiality."

[100] After reviewing a number of authorities, Lord Hope further explained at paragraph 65 letter j:

> "If there are grounds which would be sufficient to create in the mind of a reasonable man a doubt about a judge's impartiality, the inevitable result is that the judge is disqualified from taking any further part in the case. **No further investigation is necessary, and any decisions he may have made cannot stand.** (emphasis added) **The Solicitor General's submission that the matter, <u>if raised after the event</u>, should be considered in the light of all the facts bearing on the question whether there was a fair trial is contradicted by this line of authority**." [71] (emphasis added)

[101] Admittedly, not every infringement of a constitutional right during a trial will automatically be so unfair as to deprive an accused person of a fair trial[72]. But if the Court determines, as this Court has, that a trial tribunal lacked impartiality, undoubtedly the accused would have been deprived of a fair trial and any resulting conviction must be quashed.[73] In **Porter v McGill** Lord Hope stated:

> "The rights to a fair hearing, to a public hearing and to a hearing within a reasonable time are separate and distinct rights from the right to a hearing before an independent and impartial tribunal established by law. This means that a complaint that one of these rights was breached cannot be answered by showing that the other rights were not breached. Although the overriding question is whether there was a fair trial, it is no answer to a

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[71] See also United States v Cuauhtémoc Gonzalez-Lopez 548 U.S. 140- Justice Scalia-" It is true enough that the purpose of the rights set forth in that Amendment (6th) is to ensure a fair trial: but it does not follow that the rights can be disregarded so long as the trial is, in the whole, fair." A finding that denial of the right of choice to counsel was a structural error, requiring reversal without harmless error analysis.

[72] See Hunt and Khan v The State at paragraphs 23 and 28.

[73] Attorney General's Reference No. 2of 2001 [2003] UKHL 68, Millar v Dickson [2002] 3 All ER 1041, [2001] UKPC D4; Porter v Magill [2002] 2 AC, 357; Millis v HM Advocate [2002] 3 WLR 1597, 1603 at paragraph 12.

> complaint that the tribunal was not independent or was not impartial to show that it conducted a fair hearing within a reasonable time and that the hearing took place in public: see Miller v Dickson 2001 SLT 998, 994 D-E per Lord Bingham of Cornhill and my own observations in that case at p 1003 C-F".

[102] In the circumstances, the determination of this Court on this ground alone is sufficient to dispose of this appeal and it is unnecessary to consider the other grounds. The order of this Court is that the appellant's conviction and sentence are hereby set aside. Pursuant to this Court's power under Article 16(4) of the **Constitution Order**, the matter is remitted to the High Court for the appellant to be retried.

Crown in a Disadvantageous Position Due to Lack of Peremptory Challenges

[103] In its arguments the Crown submitted that removing its right of stand-by in its entirety would place it in a disadvantageous position, as the **Jury Act** does not afford the Crown the right to any peremptory challenges. According to the Crown, even constricting the right to stand-by in part would itself result in an inequality of arms.

[104] In **Andre Penn**, the High Court found, that despite the fact that all of the reasons that had been given by the Crown to justify the right of standby really fell within the challenge for cause arena[74] that there still remained some degree of utility in allowing the Crown a right of stand by[75]. The High Court there found that the Crown's overwhelming right to remove persons from the jury without giving any reason gave rise to a reasonable apprehension of partiality and that that imbalance offended against section 16(1) of the **Constitution Order**. The High Court's answer to this was to construe section 27 of the **Jury Act** with what it considered to be the necessary adaptations and modifications as were necessary to bring it into conformity with the **Constitution Order**, relying on the authorities

[74] See paragraph 79 of that judgment.
[75] See paragraph 93 of that judgment.

stated therein.[76] Wishing to preserve a restricted right of stand-by, and wishing to ensure that the Crown was on a similar footing with an accused in relation to peremptory challenges, the court there stated at paragraph 95 of the judgment:

> "For the purpose of this trial section 27 of the Jury Act is therefore to be construed as follows:
>
> When a common jury is being impaneled for the trial in the High Court of any person or persons charged with any treason, felony or misdemeanor-
>
> (a) the person charged, or each of the person charged, and the Crown in relation to each Defendant, may peremptorily and without assigning cause challenge any number of jurors not exceeding three;
>
> (b) The Crown shall have the right to ask that jurors stand by only with the consent of the defendant or the defendants as the case may be, or in exceptional cases."

[105] The High Court went on to give some guidance as to what would be regarded as exceptional cases for the purposes of the exercise of the stand by right of the prosecution. Drawing on the **Attorney General's Guidelines on the Crown Right of Stand-By in the UK ("Attorney General's Guidelines")**, the High Court suggested that exceptional cases would include cases involving treason, terrorism and national security. In so doing, no explanation was offered as to what exactly constituted the "degree of utility" that underpinned the decision to allow the Crown to retain a restricted right of standby. In relation to the so called "exceptional cases", the potential for abuse is in my opinion only exacerbated by the fact that the state can cast a very wide net in relation to what it classifies as matters of national security. Further, it is highly arguable that any likely reason that would justify the exercise of a right of stand-by in a national security case, would also ground a successful challenge for cause. In essence, the Crown has made out no argument before this Court (apart from simply referring to the **Attorney General's Guidelines**) and I have seen no argument on this point in **Andre Penn** to justify the retention of even a restricted right of stand-by for cases of national security. In a report entitled "National security and secret evidence in legislation and before

[76] San Jose Farmers' Cooperative v The Attorney General (1991) 43 WIR 63; Attorney General of St. Christopher, Nevis and Anguilla v Reynolds (1979) 43 WIR 108.

the courts: exploring the challenges"[77], the authors explore how the notion of national security can be invoked to determine the classification of information and evidence as "state secrets" in court proceedings and whether such laws were "fundamental rights and rule of law compliant." This case does not involve the use of intelligence information. But the finding of that study that in the majority of the applicable member states under consideration the judiciary was significantly hindered in effectively adjudicating justice and guaranteeing the rights of the defence in national security cases should serve as a warning to this Court against preserving the Crown's right of stand-by in so called exceptional cases. Any argument that the danger that any perception of a real possibility of bias would be outweighed by the national security interests of the state, would provide little solace to an accused seeking to defend himself and might run headlong into the pronouncement by Lord Hope in **Millar v Dickson** that the right to a fair trial, of which independence and impartiality are fundamental elements, is an absolute right incapable of being modified or restricted in the public interest. If there is to be any attempt to retain a security based right of stand by in a manner that does not impinge on the right to a fair trial, such a scheme must be left to Parliament. In the oral submissions before this Court the Crown indicated that the practice in jury selection in the BVI post **Andre Penn** was to apply section 27 with the modifications set out in **Andre Penn**. This is a matter that should be properly addressed by the legislature going forward, but to the extent that the Crown has raised this issue before this Court, this Court would support the practice of applying the modifications of section 27 of the **Jury Act** as set out in **Andre Penn**, but excluding the new section 27(b). The resulting position is similar to that which obtains in number of other jurisdictions.[78]

The Order

[106] In conclusion, the order of the Court is as follows:

(1) The appellant's conviction and sentence are hereby set aside.

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[77] Study for the LIBE Committee, Directorate –General for Internal Policies, European Parliament, by Prof Didier Bigo, Dr. Sergio Carrera, Mr. Nicholas Hernanz and Dr. Amandine Scherrer-2014.

[78] Jamaica Jury Act s. 33(3), Jury Act 1977, New South Wales.

(2) Pursuant to this Court's power under Article 16(4) of the **Constitution Order**, the matter is remitted to the High Court for the appellant to be retried.

I concur.
Davidson Kelvin Baptiste
Justice of Appeal

I concur.
Gertel Thom
Justice of Appeal

By the Court

Chief Registrar