Neutral Citation Number: [2022] CA (Bda) 22 Civ

Case No: Civ/2022/02

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS ORIGINAL CIVIL JURISDICTION
THE HON. CHIEF JUSTICE
CASE NUMBER 2020: No. 243

Dame Lois Browne-Evans Building
Hamilton, Bermuda HM 12

Date: 18/11/2022

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL SIR MAURICE KAY
and
JUSTICE OF APPEAL DAME ELIZABETH GLOSTER

- -

Between:

WOLDA SALAMMA GARDNER

Appellant

- and -

(1) THE DIRECTOR OF PUBLIC PROSECUTIONS
(2) THE ATTORNEY-GENERAL

Respondents

Bruce Swan, Bruce Swan & Associates, for the Appellant

Shakira Dill-Francois, of the Attorney-General's Chambers for the Respondent

Hearing date(s): 2 June 2022

- -

APPROVED JUDGMENT

CLARKE P:

1. On **21 March 2013** the appellant was charged with the premediated murder on 25 December 2012 of Malcom Augustus ("murder 2") and also with using a firearm to commit an indictable offence. After a trial in the Supreme Court which lasted from **30 March to 24 April 2015** he was convicted by a majority of 11 to 1 of premeditated murder and sentenced to life imprisonment with a 20-year tariff and also convicted, by the same majority, of the firearms offence and sentenced to 20 years' imprisonment to run concurrently with the 20-year tariff set for the life sentence.

2. When the appellant was sentenced for these offences he was already serving a life sentence with a 25 year tariff for an earlier murder ("murder 1") of which he had been convicted. The 20 year tariff life sentence for murder 2 was set to run concurrently with the 25 year tariff life sentence already being served for murder 1 and the determinate 20 year sentence in relation to murder 2 was set to run concurrently with the 20 year tariff life sentence for murder 2, but consecutively to the 25 year tariff life sentence for murder 1.

3. In **June 2016** the Appellant was granted leave to appeal against his conviction and sentence but his appeal against sentence was adjourned pending the outcome of the Crown's appeal to the Privy Council in relation to murder 1.

4. On **30 January 2017** the appellant's appeal against conviction was dismissed by the Court of Appeal.

5. Thereafter the appellant's appeal against his conviction for murder 1 was successful and a retrial was ordered. As a result, he was no longer subject to any sentence for murder 1. The result was that the appellant was left with life imprisonment for murder with a 20-year tariff with which the 20-year determinate sentence was to be concurrent. On the hearing of the appeal against sentence the prosecution submitted that the resulting sentence was manifestly inadequate. On **8 March 2017** the Court of Appeal agreed and ordered that the determinate 20-year sentence be served consecutively to a tariff period of 25 years. The appellant is currently an inmate at Her Majesty's Prison, Westgate Correctional Facility in Sandy's Parish.

6. On **12 June 2019** the appellant's application for permission to appeal to the Privy Council was refused.

7. At no stage did the appellant take the point, which could have been taken (see below), that his trial was unconstitutional because of the discrepancy between his entitlement and that of the Crown to challenge other than for cause/standby potential jurors.

8. As is apparent, the appellant has exhausted the appeal process, subject to any application to the Court of Appeal to re-open his appeal, which has not been made.

9. In an earlier case of *Jahmico Trott v Director of Public Prosecutions* (Civil Jurisdiction 2020 No. 123), the Applicant challenged the constitutional validity of the jury selection process set out in section 519 (2) of the *Criminal Code Act 1907* ("the Code"), which granted the Crown the right to stand-by any juror until such time as their name was called a second time, while the accused was

only allowed three peremptory challenges. In that case the Applicant argued that section 519(2) of the Code infringed the accused's right to be tried by an independent and impartial jury as guaranteed by section 6(1) of the Bermuda Constitution Order 1968 ("the Constitution").

10. At the conclusion of the hearing in the *Trott* case on **17 July 2020,** the Court declared that section 519(2) of the Code was inoperative to the extent that it allowed for the disparity between the number of stand-by challenges afforded to the Crown, and the challenges without cause afforded to the accused. The reasons for that order are set out in the judgment of the Court dated **24 August 2020**. In paragraph 59 of that judgment, the Court concluded that the disparity between the accused person's right of peremptory challenge and the Crown's right to standby jurors gave rise to a real possibility that the jury might be biased in favour of the Crown. Such a state of affairs offended the appearance of impartiality on the part of the jury which was an essential element of the fundamental right to a fair hearing by an independent and impartial tribunal guaranteed by section 6(1) of the Constitution. It followed that the provisions of section 519(2) of the Code were inconsistent with the fundamental right to a fair trial established by section 6(1) of the Constitution.

11. The declaration made by the Court in the *Trott* case was suspended for a period of three months pending the passing of legislation to remedy the situation. On **24 July 2020** the Legislature passed the *Criminal Code Amendment (No 2) Act* ("the Amending Act") which amended section 519(1) of the Code so as to comply with the Constitution by providing for the accused and the Crown to have equal rights of standby (of not more than five persons if the offence was punishable with a mandatory life sentence and in any other case not more than three).

12. Section 5 of the Amending Act provided:

> *"Saving*
> *5 (1) The method of the challenge of jurors under section 519 of the principal Act before the coming into operation of this Act is not invalidated by reason only of the amendment to section 519 of the principal Act.*
>
> *(2) Accordingly, no conviction shall be quashed solely on the ground that it resulted from a trial in which the Crown stood by more potential jurors than a defendant, or defendants together, were able to challenge without cause."*

13. Following the decision of this Court in *Brangman, Roberts and Smith-Williams* the now appellant commenced the present proceedings by Originating Summons dated **6 August 2020**. In the Originating Summons the appellant sought several orders from the Supreme Court including:

> *"(i) A declaration that the Applicant's trial by jury in this Court under Criminal Jurisdiction case numbered 11 of 2013 was unfair ab initio because the jury which tried the said case was duly empanelled under the provisions of section 519 of the Code whereby inter alia, the Crown exercised its purported right thereunder and stood by numerous jurors without showing cause therefor as*

> *compared to the Applicant who used [the] mere three challenges available to him.*
> *(ii) A declaration that the Applicant's right to a fair trial under section 6(1) of the Constitution has been breached because of how the jury was empanelled at his trial.*
>
> *(iii) An order quashing the guilty verdict handed down and adjudicated by the said Court in the said case 11 of 2013 and an order for a retrial by a jury in a manner according to law."*

Leveck Roberts

14. In **March 2021**, following the delivery of the judgment of the Chief Justice in *Trott*, we heard three appeals in the cases of *Leveck Roberts* (Case No: Crim 2020/4); *Quincy Brangman* (Case No: Crim 2020/8); and *Khyri Smith-Williams* (Case No: Crim 2020/9)

15. In his judgment the Chief Justice summarised the characteristics of those cases in terms which I gratefully adopt:

> "*In these three cases the defendants were convicted and appealed to the Court of Appeal and their appeals were dismissed. Roberts was convicted of premeditated murder and using a firearm to commit an indictable offence; and was sentenced to life imprisonment with 25 years to be served before consideration for parole. He appealed to the Court of Appeal and his appeal against conviction was dismissed on 12 May 2017. Brangman was convicted of attempted murder and using a firearm during the commission of an indictable offence. He was sentenced to 15 years' imprisonment for the offence of attempted murder and a consecutive sentence of 10 years' imprisonment for the firearms offence. On 17 November 2011 his appeal against conviction was dismissed by the Court of Appeal. A subsequent appeal to the Privy Council was dismissed on 6 October 2015. On 16 October 2018 Smith-Williams was convicted of premeditated murder and using a firearm while committing that offence. His appeal against conviction was dismissed by the Court of Appeal on 25 July 2019."*

16. In each of the three cases the appellants contended that they had not had a fair trial because there was an appearance of bias arising from the fact that the Crown had had the right to standby jurors without limit, whereas the accused could only stand by three without cause; and the Crown had, in their cases, stood by more than three prospective jurors[1]. They submitted that they had suffered

[1] In the present case Mr Bruce Swan, for the appellant submitted to us that any trial at which the Crown could have stood by more than the 3 allowed to the defence was unconstitutional, even if the Crown did not stand by more than 3; and that, as a result, all trials conducted prior to the change in the law were unconstitutional and the convictions therein should be set aside. It is not necessary to decide this point, since in Mr Gardner's case there were, we were told, 11 standbys by the Crown, of whom 9 were later challenged for cause or formally excused. I would observe that, if this submission was well founded, the conviction in every trial prior to July 2020 would fall to be set aside. It would also mean that there would be an absolute right to have the conviction set aside, when the power to grant redress is

a fundamental injustice and an infringement of their constitutional rights and sought to have their convictions set aside.

17. In a judgment handed down on **11 June 2021** we dismissed the appeals in *Brangman* and *Roberts*. We allowed the appeal in Smith-Williams but only on the grounds of new evidence. In my judgment I said at [21] that the submissions of the parties raised a number of issues including the following:

(i) Does the principle of finality apply and does the Court have the power to re-open an appeal? If so, what is the test which the Court of Appeal should apply in deciding whether to re-open these appeals?

(ii) What, on its true construction, is the effect of section 5 of the Amending Act ("the saving provision")? How does it apply, if at all, to a case concluded before it was enacted in which there was a disparity between the number of stand-bys exercised by the Crown and the number of peremptory challenges afforded to the accused ("the relevant disparity")?

(iii) If, on its true construction, section 5 precludes reliance by the accused on a relevant disparity, is that inconsistent with the accused's constitutional rights?

(iv) Was section 5 of the Amending Act, if otherwise effective to preclude a challenge on the grounds of the relevant disparity, a breach of the separation of powers because it was a retrospective abrogation of rights directed specifically against the defendants in particular criminal proceedings?

18. In considering these issues, and in particular the issue as to what extent a declaration by the court that a provision of the law is unconstitutional has a retroactive effect on cases which have already been determined by the courts. In my judgment I reviewed a large number of relevant authorities which the Chief Justice listed at [9] of his judgment. I will not repeat the list.

19. At [10] of his judgement the Chief Justice summarised what was held in *Roberts,* in terms which, again, I gratefully adopt:

> *"(i) The Supreme Court in Trott made no decision, in terms, that its declaration should not be taken to apply to past cases; and did not address the question as to whether its decision should apply to appeals in closed cases, which question was neither before it nor for it. It is, however, incumbent upon the Court of Appeal to address that question (paragraph 101). When a provision in a statute is declared unconstitutional a distinction must be made between the making of such a declaration and its retroactive effect on cases which have already been determined by the courts (paragraph 87 in the judgment of Murray CJ in Arbour Hill[2] cited by the Court of Appeal at paragraph 33).*

discretionary and any redress falls to be decided on a case by case basis taking into account all the circumstances of the case: *Solomon Marin v The Queen* [2021] CCJ 6 (AD) BZ at [110].

[2] A v Governor of Arbour Hill Prison [2006] IESC 45

(ii) The need for finality in criminal (and other) litigation is plain and well established. If the accused has had his appeal determined and has failed to set aside either his conviction or sentence the effect of setting either of them aside after a later second appeal, may wreak havoc with the administration of criminal justice and cause great injustice to victims and others. There is a strong public interest in not unravelling a series of past cases. Retrying a case years after the event may raise insuperable problems on account of lapse of time, unavailability of witnesses, loss of exhibits and the like (paragraph 22).

(iii) Cases reviewed by the Court of Appeal show that different courts have approached the question of finality in different ways and with differently formulated exceptions, particularly when considering the effect of a later decision that the statute or a provision thereof was unconstitutional (paragraph 92).

(iv) Courts in Bermuda should adopt the approach taken in Arbour Hill and Cadder (paragraph 102). The Court of Appeal accepted that, as held by the Supreme Court of Ireland in Arbour Hill, there is no principle of constitutional law that cases which have been finally decided and determined on foot of a statute which was later found to be unconstitutional must invariably be set aside as null and of no effect. This conclusion was reached in relation to the Irish Constitution, but the Court of Appeal saw no reason why a different approach should be adopted in relation to the Constitution of Bermuda (paragraph 105). The decision in Arbour Hill, which itself considers authorities from many other jurisdictions, confirms the unwisdom, potential injustice, and detriment to the public interest to which the opening of closed cases may give rise, including cases where a decision has subsequently been reached that a statute or provision is unconstitutional. The fundamental basis of the case is that there should be no retroactivity in relation to the courts' decisions on the unconstitutionality of a statute (subject to a very limited exception) (paragraph 110).

(v) The Supreme Court of the United Kingdom recognised in Cadder that in considering the exercise of the court's discretion whether to reopen an appeal, it is important to bear in mind that the court must take into account three different sets of interests: (a) the interest of the accused; (b) the public interest in good order, finality, certainty and closure; and (c) the interest of the victim's family and others, who will be understandably disturbed, if not appalled, at the prospect of everything going back, years later, to square one. The courts which have considered the problem have realised that any solution may appear harsh on someone; but those courts that have dealt with constitutional challenges have decided that the right approach is that their decision

should not, subject to rare exceptions, affect closed cases, even if the change in the law concerns the method of jury selection, the unconstitutionality of a statute, or a breach of the Human Rights Convention (paragraph 104).

(vi) The decision that the disparity between the Crown's statutory right of stand-by and the accused's right of peremptory challenge gave rise to the real possibility of bias and inequality of arms and, therefore, an unfair trial, and that, to the extent that section 519 (2) allowed for such a disparity it was unconstitutional ought, ordinarily, to be held not to permit an appeal in closed cases (paragraph 102).

(vii) There may be wholly exceptional circumstances in which a subsequent decision as to the unconstitutionality of a statute or provision should be applied to a closed case. Such a case would have to be wholly exceptional; and the fact that the decision went to the constitutionality of a statute or provision, including one relating to jury selection, would not, of itself, make the circumstances wholly exceptional (paragraph 115).

(viii) The Supreme Court in Trott held that it was not necessary to show actual bias in order to establish the potential unconstitutionality of section 519 (2); and the fundamental importance of the fairness of the trial, which has been regarded as requiring that there should not even be an appearance of bias. However, the question before the Court of Appeal was a different one, namely whether there should be an exception to the principle of finality and, if so, what criterion to apply. In determining that question the Court is obliged to consider three different interests involved and not just the interest of the accused. The appropriate way of balancing those three interests, in a case such as the present, is to adopt the Arbour Hill/Cadder approach and its very limited exception (paragraph 117).

(ix) In relation to section 5 of the Amendment Act we should proceed on the basis that Parliament did not intend section 5 to have the effect that an appeal can never be reopened, or a conviction set aside if there had been a relevant disparity. Section 5 provided a strong steer in terms of the right direction to take, namely that the mere fact of disparity is not a sufficient ground for allowing an appeal (paragraph 136)"

20. In the Supreme Court the now appellant appeared in person. It was apparent to us in hearing the appeal that that may have been no disadvantage. During the course of the proceedings before us he sought to terminate the services of his counsel and to continue representing himself. In the event we heard all of Mr Swan's submissions and then heard from the appellant, who impressed us with his ability to formulate his case.

21. The principal submission that was made to the Chief Justice and repeated before us was that *Roberts* was a case in which the question was whether the Court of Appeal should exercise its undoubted discretion to reopen an appeal under section 17(1) of the Court of Appeal Act 1964 ("the 1964 Act"), and our decision in *Roberts* should be confined to such a situation. By contrast, in the present case the appellant seeks relief under section 15(1) of the Constitution and invokes the Supreme Court's original jurisdiction in order to enforce his fundamental rights thereunder. The correct approach in the case of an application under section 15 of the Constitution is that any previous conviction obtained where the Crown had a right of standby of more than three must be set aside; or, at any rate, that should be done if the Crown in fact stood by more than 3.

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22. Sections 15 (1) & (2) of the Constitution provide:

> "(*1*) *If any person alleges that any of the foregoing provisions of this Chapter 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 subsection (1) of this section; and (b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3) of this section, 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 foregoing provisions of this Chapter to the protection of which the person concerned is entitled:*
>
> *Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law."*

23. The appellant points to the fact that section 15(1) of the Constitution provides that any person who alleges that the foregoing provision of the Chapter "*has been*" contravened may apply for redress. Thus, the language expressly provides for retrospective application to acts which have subsequently been held to be unconstitutional. Further the reference to the right to make an application for redress being "*without prejudice to any other action with respect to the same matter which is lawfully available"* shows that the fact that the appellant might be able to appeal under section 17(1) of the 1964 Act is no bar to his present claim. The reference in my judgement to the need to take into account three different sets of interest is not to be regarded as of universal application. It is only relevant to the power of the Court of Appeal to reopen a closed case. No relevant "public interest" restraints can apply to any attempt to enforce the fundamental right to a fair hearing. Further, the Constitution does not give effect to any finality principle. In any event what is being challenged is not "a final decision announced by a judicial tribunal" but the constitutional validity of the law which selected the body of persons who were to pronoun the decision (i.e. the jury).

The judgment of the Chief justice

24. In his judgment the Chief Justice said that, in considering the applicant's submission it was essential to keep firmly in mind the distinction made by Murray CJ in *Arbour Hill* at [87] between (i) the making of a declaration that a particular statutory provision infringes the fundamental rights enshrined in the Constitution and (ii) its retroactive effect on cases which have already been determined by the courts. He referred to the fact that in *Trott* the Supreme Court had declared that section 519(2) of the Code infringed the right to a fair hearing – a ruling which was not challenged in the Court of Appeal; but observed that the Court had made no determination in relation to the separate issue relating to the retroactive effect of the *Trott* decision on cases which had previously been determined.

25. As to that question, he observed [23]:

> "*The Court of Appeal in Roberts, in the judgement of Clarke P, carried out a comprehensive analysis of the cases dealing with a decision's retroactive effect on past cases and concluded that the approach taken by the Supreme Court of Ireland in Arbour Hill should represent the legal position in Bermuda. According to the decision in Arbour Hill there is no principle of constitutional law that cases which have been finally decided and determined on foot of a statute which was later found to be unconstitutional must invariably be set aside and of no effect (paragraph 105 of Roberts). The Court of Appeal in Roberts also noted at [106] that in Arbour Hill the Court referred to and relied on the fact that when its decision in Burca v Attorney General [1976] IR 38 struck down as unconstitutional a statute governing the selection of juries in criminal cases, it did not mean that "the tens and thousands of jury decisions previously decided by juries that were selected under a law that was unconstitutional should be set aside." It also held that, save in exceptional circumstances, any approach other than the one it adopted "would render the Constitution dysfunctional and ignore that it contemplates a set of rules and principles designed to ensure "an ordered society by the rule of law"".*

26. As is apparent, the Court of Appeal recognised that there could be exceptions to the above in exceptional circumstances. It is not correct to say that the decision of the Court in *Roberts* precludes any application to re-open the appeal and, if appropriate, grant relief.

27. The basis upon which the Chief Justice dismissed the application was as follows:

> *"25 The above stated statements of principle in the judgment of Clarke P in Roberts constitute ratio of that decision and are binding on this Court. The Court does not accept that those statements in the judgment of Clarke P are not statements of general application and are to be confined to the narrow exercise of discretion under section 17 (1) of the 1964 Act. In this regard it is to be noted that the decision of the Supreme Court of Ireland in Arbour Hill, which the Court of Appeal adopted in Roberts, was not concerned with the issue of*

> *whether an appeal should be reopened in a closed case (as was the case in Roberts). The application in Arbour Hill was an application for an order pursuant to Article 40.4.1 of the Irish Constitution directing the applicant's release from custody on the grounds that his detention in accordance with the terms of imprisonment imposed upon him following his conviction was unlawful, since section 1.1 of the Criminal Law Act 1935 had been declared inconsistent with Constitution pursuant to Article 50. The application in Arbour Hill was in the same category as the present application under section 15 (1) of the Bermuda Constitution.*
>
> *26. Even if the Court took the view that the decision in Roberts was not strictly binding, the Court would unhesitatingly follow the decision of the Court of Appeal given the comprehensive analysis and compelling public interest rationale set out in the judgment of Clarke P. The Court of Appeal squarely addressed the issue [of] the extent to which an earlier decision of the court declaring that a statutory provision breached a fundamental right guaranteed by the Constitution could affect earlier cases which have been finally decided. This was a separate and different issue from the narrow question of jurisdiction relating to whether the Court of Appeal could ever reopen closed cases under section 17 (1) of the 1964 Act."*

28. The Chief Justice did not accept that the extent to which a decision of the Court declaring a statutory provision invalid and/or inoperative had retrospective effect depended on whether the challenge to the conviction was by way of application under section 15(1) of the Constitution or by way of appeal to the Court of Appeal under section 17(4) of the 1964 act. Any such distinction, he held, would bring the criminal justice system into disrepute. I agree.

29. The Chief Justice also did not accept that there was any meaningful distinction between proceedings to challenge a conviction in a closed case by way of appeal and proceeding under section 15(1) of the Constitution seeking to set aside a conviction in a closed case. In both cases the applicant was relying on the constitutional invalidity of a statute which had played a part in the conviction in a closed case. He did not accept the applicant's contention that in the *Roberts* appeals the appellants were not relying on the breach of their constitutional rights. Neither do I. The whole basis of the appeals in *Roberts* was that the appeals should be allowed because the constitutional rights of the appellants had been infringed.

30. As the Chief Justice observed [29]:

> "*The Court of Appeal confirmed in Roberts that it has the implicit power to reopen a closed case under section 17 (1) of the 1964 Act and it may do so if (i) the circumstances are exceptional and make it appropriate to reopen the decision notwithstanding the rights and interests of other participants and the importance of finality; (ii) there is no other effective remedy; and (iii) the accused would suffer substantial injustice if it did not do so. As set out above, the Supreme Court is bound to apply the same test in closed cases in relation to any application under section 15 (1) of the Constitution. "*

I agree.

31. In those circumstances the Chief Justice accepted the submission of Ms Dill-Francois on behalf of the Respondents that he should dismiss the application before him on the basis that the Applicant had an alternative means of legal redress in that he could apply to the Court of Appeal for his case to be re-opened. Ms Dill-Francois had relied on the provision in section 15 2) of the Constitution that "the *Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law*". He referred to the case of *Attorney General of Trinidad and Tobago v Ramanoop* [2005] UKPC 15, in which the Privy Council emphasised at [25] that where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which makes it appropriate to take that course. That was a case where the Constitution did not have a provision such as that contained in section 15(2) of the Constitution.

32. The Chief Justice held that in an ordinary case where an applicant sought to challenge and set aside a criminal conviction following a trial in the Supreme Court the appropriate procedural route to make that challenge was by way of an appeal under section 17(1) of the 1964 Act[3]. Since the applicant would gain no juridical advantage by proceeding with his application under section 15(1) of the Constitution, the appropriate course for the Applicant to take, if he wishes to pursue his constitutional challenge based upon Trott was to apply for leave to appeal to the Court of Appeal under section 17(1).

33. In my judgment, the Chief Justice was right for the reasons that he gave.

Selassie and another v R

34. The appellant submits that the Chief Justice was in error on a number of grounds. The first is that he ignored the Privy Council case of *Selassie and another v R* [2013] UKPC 29.

35. In that case Mr Selassie had been convicted of a premeditated murder. The then Chief Justice has passed upon him the mandatory sentence of life imprisonment and directed that he should not be eligible for release on licence until he had served 35 years. The Court of Appeal reduced the period of 35 years to 28 years. Mr Pearman had been convicted of murder. Greaves J passed upon him the mandatory sentence of life and directed that he should not be eligible for release on licence until he had served 25 years. The Court of Appeal reduced the period of 25 years to 21 years.

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36. The question before the Board was to what extent sections 286A(2) and 288(1) of the Code were unconstitutional. Section 286A(2) provides:

[3] The adoption of such a route would not contravene the principle that the Bermuda Constitution does not provide an original jurisdiction to the Court of Appeal to consider questions relating to the contravention of section 2-13 thereof: see *Solomon Marin v The Queen* [2021] CCJ 6 (AJ) BZ at [141] – [147], and where it does so the remedies available are the same as may be granted by the Supreme Court. The Court of Appeal may consider such constitutional questions on an extant or reopened appeal (upon the reopening of which the appeal will become extant again).

> *"Any person who is convicted of premeditated murder shall be sentenced to imprisonment for life without eligibility for release on licence until the person has served twenty-five years of the sentence."*

37. Mr Selassie contended that the effect of the above subsection was that the direction as to his ineligibility for release on licence could not extend beyond his service of 25 years of his sentence.

38. Section 288(1) of the Code provides that the sentence for murder (as opposed to premediated murder) shall be imprisonment for life:

> *"Provided that where any person is sentenced under this section, such person shall, before any application for his release on licence may be entertained or granted by the Parole Board established by the Parole Board Act 2001, serve at least fifteen years of the term of his imprisonment":*

39. Mr Gardner contended that the effect of the proviso was that the direction as to ineligibility for release on licence could not extend beyond his service of 15 years of his sentence.

40. In relation to section 288(1) of the Code, the Court of Appeal in *Robinson v The Queen* [2009] CA (Bda) 8 Crim had held that, in purporting to disable the court from fixing a period of less than 15 years prior to eligibility for release, the proviso in section 288(1) of the Code was repugnant to section 5(1)(a) of the Constitution, which provides:

> "*No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases:*
>
> *(a) in execution of the sentence or order of a court...in respect of a criminal offence of which he has been convicted..."*

41. The Court of Appeal held, in paragraph 18, that the section was unconstitutional insofar as it purported to impose a minimum 'tariff' period of 15 years for all cases of murder, regardless of the circumstances of the individual case and offender. When Mr Robinson appealed (unsuccessfully) absent his conviction to the Board the Crown did not cross appeal against the Court of Appeal's conclusion that the proviso in section 288(1) of the Code was unconstitutional in disabling the Court from fixing a period of less than 15 years prior to eligibility for release.

42. The Board agreed that *Robinson* was correctly decided.

43. In Mr Selassie's case the Court of Appeal took the view that the fixed period of 25 Years in section 286A(2) of the Code was unconstitutional in the light of the decision in *Robinson* under section 288(1), and rejected the argument that the term of 25 years was intended to be a maximum period. In relation to Mr Pearman the Court concluded that *"following the decision of the Court in Robinson and Selassie"*, the judge had a discretion to specify a period of more than 15 years.

44. The Board concluded at [15] that the parties before it was correct to submit that, <u>as a matter of construction</u>, the sections specified maximum periods, unalterable by the Court. The Crown

contended that the sections were unconstitutional in purporting to disable a court from specifying longer periods, the Board identified the central question for it in the following terms:

> "*18. So the Board reaches the heart of these appeals: granted that sections 286(A)(2) and 288(1) of the 1907 Act are unconstitutional and therefore void to the extent that they purport to specify minimum periods prior to eligibility for release, are they also unconstitutional and therefore void to the extent that they purport to specify maximum periods? Section 2 of the 1865 Act, set out in para 9 above*[4]*, shows that no blanket extrapolation from the former proposition can justify an affirmative answer to that question: for it is "to the extent of [their] repugnancy [with the Constitution], but not otherwise" that the sections are void."*

45. The Board took the view that the Crown's contention was wrong. The analysis fell to be made through "*the prism of deprivation of liberty*". The aim of Article 5(1) was "*to ensure that no one should be dispossessed of [his] liberty in an arbitrary fashion*". As to that:

> "*An arbitrary provision, such as the specification of a minimum period, which deprives a person of his liberty (or, in this case, of the chance of regaining it), irrespective of the circumstances, offends against article 5(1) and, more relevantly, against section 5(1) of the Constitution. An arbitrary provision, such as the specification of a maximum period, which disables a court from depriving a person of his liberty (or, in this case, of the chance of regaining it) for longer than the specified period, even in the light of the circumstances, is entirely, and inversely, different. Maximum periods, albeit usually of terms of imprisonment rather than of periods prior to eligibility for release, are written across large tracts of criminal legislation. There is no vice in them".*

46. Accordingly, the Board advised Her Late Majesty that both appeals should be allowed to the extent of reducing the periods of imprisonment to be served prior to eligibility for release on licence to 25 Years in the case of Mr Selassie, and 15 years in the case of Mr Pearman.

47. In effect, therefore the decision of the Privy Council was that, as a matter of construction, the relevant sections provided for maximum sentences and, insofar as they did so, they were not unconstitutional. Since the sentences were unlawful, as being greater than, on their true construction, the statutory provisions permitted they fell to be reduced on appeal.

48. I cannot see how this case casts any light on the question that arises in this appeal. The appellant relies on it as showing an application of section 6 of the 1865 Act that the provision of an Act

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[4] Section 2 of the Colonial Laws Validity Act 1965 provides: *"Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative."*

which is repugnant to an order made under the authority of the United Kingdom Parliament is void, but only to the extent of such repugnancy and not otherwise. But in fact, the decision in the case was as to the construction of the relevant sections and the fact that, as properly construed, they were not repugnant to the Constitution. It was in the *Roberts* case that a repugnancy to the Convention had been found to exist. Further the case tells us nothing about the approach to be taken by the court in relation to closed cases in where a constitutional breach is later established.

Cases relating to the Constitutions of independent states

49. The next submission is that case law interpreting the Constitutions of independent states should not be used to interpret the provisions of the Constitution. Reliance is placed on the recent decision of the Privy Council in the same sex marriage case – *AG v Ferguson and others* [2022] UKPC 5 – in which the Board had to consider the relevance of cases decided in Canada in relation to the Canadian Charter of Rights and Freedoms, which had, in section 2, a provision expressing the fundamental freedom of conscience and religion which was to be interpreted in accordance with section 27 which provided that the Charter should be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

50. The Charter had no equivalent to section 8 of the Bermuda Constitution which spelt out the protection afforded to the right and the limitations on its enjoyment. Thus, as the Board said [50]:

> "*The Canadian Charter is structured differently from the Bermudian Constitution and the latter has no provision like section 27 of the Charter. The Charter contains the statement of the right to freedom of conscience and religion in section 2 but has no equivalent to section 8 of the Constitution which spells out the protection afforded to the right and the limitations imposed on its enjoyment. Thus, in Bermuda, in contrast to the interpretation of the Canadian Charter, the analysis of the protection given to freedom of conscience and religion in Bermuda turns on the interpretation of section 8 of the Constitution. Under that section coercion by a government of an individual to affirm a specific religious belief (expressly or by implication) or to take part in a specific religious practice against his or her will, or otherwise interfere with his or her enjoyment of freedom of conscience, would infringe the protection which it conferred. But legislation which had a religious purpose but did not have such an effect would not so infringe section 8 because there would be no interference with an individual in his or her enjoyment of freedom of conscience."*

51. In those circumstances the Board found the Canadian cases to which it was referred, in relation to the alleged invalidity of laws passed for a religious purpose, to be of no assistance in the interpretation of the Constitution. That was, however, a case in which the Board held that judgments from courts which have held that the enactment of legislation for a religious purpose was constitutional do not provide a template for other common law jurisdictions, including Bermuda, in which society has developed differently. (In any event the Board held that the Domestic Partnership Act was not passed for a religious purpose but in order to end the dispute in Bermudian society over same-sex marriage.).

52. I cannot regard this authority as providing any assistance on the question which we had to decide in *Roberts*, namely what approach the Court should take in relation to closed cases in respect of which there had been, after closure a decision that there had been a constitutional infringement. It affords no reason to depart from the approach which I outlined in *Roberts,* even if it was open to me to do so[5]. In that case I said at [105]:

> "*I would accept that, as the Court held in Arbour Hill, there is no principle of constitutional law that cases which have been finally decided and determined on foot of a statute which was later found to be unconstitutional must invariably be set aside as null and of no effect. That was, of course, a conclusion in relation to the Irish Constitution; but I see no reason why a different approach should be adopted in relation to the Constitution of Bermuda.*[6] *Further, whilst the Bermuda Constitution (like the Irish one) does not in terms address the question of finality, it operates in respect of a legal system which recognises that principle, and it embodies concepts which derive from the HRC, which applies to Bermuda. The ECHR in exercising its jurisdiction to protect fundamental rights under the Convention has itself held that the principle of legal certainty is necessarily inherent in the Convention: Marckx v Belgium [1979] 2 EHRR 330*."

53. In addition, it does not seem to me that the persuasive force of the *Arbour Hill* case is diminished by reason of the fact that the Irish Constitution is the constitution of a fully independent state and does not have the equivalent of section 15 of the Bermuda Constitution.

Adequate means of redress

54. The next point is as to the existence of adequate means of redress other than by an application under section 15. As to that it seems to me that, as the Chief Justice held, the appellant did have adequate means of redress by way of an application to the Court of Appeal for leave to reopen his appeal against conviction. That means of redress was adequate because, as we held in *Robarts*, (a) constitutional law does not require that cases which have been finally decided and determined on the footing of a statute which was later declared to be unconstitutional must inevitably be set aside; and (b) the Court should not, in relation to a closed case, set a conviction aside save in a wholly exceptional case. In such a case the setting of aside of a conviction can be obtained by seeking leave to reopen the appeal. Accordingly, the provision to section 15 of the Constitution applies.

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[5] Mr Brown submitted that Roberts was inconsistent with the subsequent Privy Council case of *Duncan and Jokhan v AG of Trinidad and Tobago* [2021] UK PC 17 where the Board declared that there was a violation of the appellants' rights. In that case the Court of Appeal had – wholly unjustifiably – given a loss of time direction which meant that the appellants' time in prison waiting for the appeal to be heard did not count towards their sentence. The violation consisted of the fact that the Attorney General, when asked, more than 8 years after the hearing of the appeal, to arrange their release, failed to do so. I do not regard that case as inconsistent with *Roberts*, which proceeded on the basis that the correct route to follow was to seek to reopen the appeal, in circumstances where a setting aside of the conviction was far from inevitable.

[6] I have not ignored the fact that under the Irish Constitution the general principle is that a declaration of the invalidity of a law applies to the parties in the litigation or related litigation in which the declaration is made and, in the absence of wholly exceptional circumstances, only prospectively. As I have held, a similar reluctance to retrospection should apply in relation to closed cases in Bemruda.

55. Further, as we held in *Roberts*:

> "*the fact that the decision went to the constitutionality of a statute or provision, including one relating to jury selection, would not, of itself, make the circumstances wholly exceptional (as is apparent from the fact that courts which have decided that statutes are not in accordance with the constitution have, nevertheless decided that they do not apply to closed cases) To quote Arbour Hill "the grounds upon which a court declares a statute to be unconstitutional, or some extreme feature of an individual case, might require, for wholly exceptional reasons related to some fundamental unfairness amounting to a denial of justice, that verdicts in particular cases or a particular class of cases be not allowed to stand.". The use of the phrase "wholly exceptional" was intended to convey that the hurdle was very high; and it should not, in my view, be watered down in application. That exception ("the Arbour Hill exception") was not, in Arbour Hill, held to be applicable, even though the statute under which the accused was convicted was held to be unconstitutional. Nor was any exception applied in Burca, which concerned an unconstitutional composition of the jury, or in English which concerned the disparity of standbys in the jury selection procedure, or in Cadder, which held that an accused was entitled to access to a solicitor before being questioned by the police."*

56. The appellant submits that he has no other means of redress as there is no guarantee that his case will be re-opened. This submission is misplaced. In order to have some *means* of redress there must be a route by which the appellant can obtain a remedy if he is entitled to it. It is not necessary to show that, if he avails himself of the means of redress, he is bound to obtain it.

Conclusion

57. As is apparent I have, in this judgment, set out substantial passages of the judgment of the Chief Justice, which, in turn, summarises my judgment in *Roberts*, by which the Chief Justice was bound and which he correctly followed (without hesitation). This result is not surprising. It would be a very curious result if, by bringing an application under section 15 of the Constitution the applicant could circumvent the obstacles in his path presented by the judgment in *Roberts* if he were to seek to re-open the appeal – a route which, not surprisingly, did not suggest itself to the experienced advocates who appeared on behalf of the appellants in *Roberts*.

58. The Chief Justice said that nothing in his judgment should be construed as affecting any application that the Applicant might elect to make to the Court of Appeal to reopen his appeal based upon the facts and circumstances relied on in these proceedings. Nor should anything in this judgment be construed as having that effect. But any such application would, in order to be successful, have to fall within the type of exceptional circumstance to which the Court in *Roberts* referred. Given that of the 11 whom the Crown stood by, 9 were subsequently removed for cause or excused, such an application would not be without difficulty.

KAY JA:

59. I agree.

GLOSTER JA:

60. I, also, agree.