IN THE SUPREME COURT OF BERMUDA

CIVIL JURISDICTION

2020: 243

IN THE MATTER OF THE RIGHT TO TRIAL, PURSUANT TO SECTION 6 (1) OF THE CONSTITUTION

AND IN THE MATTER OF THE CROWN'S POWER TO STANDBY JURORS PURSUANT TO SECTION 519(2) OF THE CRIMINAL CODE ACT 1907

BETWEEN:

WOLDA SALAMMA GARDNER

Applicant

- and -

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

Respondents

Before: **Hon. Chief Justice Hargun**

Representation: **The Applicant in Person**

Shakira J. Dill-Francois, Deputy Solicitor General for the Respondents

Date of Hearing: **25 October 2021**

Date of Judgment: **3 December 2021**

JUDGMENT

Application to set aside a conviction for murder following a declaration by the Supreme Court in an earlier case that section 519 (2) of the Criminal code, allowing the Crown to stand-by jurors, was in breach of section 6 (1) of the Bermuda Constitution; whether such an application can properly be made to the Supreme Court under section 15 (1) of the Constitution; whether such an application should be made to the Court of Appeal under section 17 (1) of the Court of Appeal Act 1964

Hargun CJ

Introduction

1. On 28 July 2015, following conviction for premeditated murder, the Applicant was sentenced to life imprisonment with 25 years to be served before consideration for parole. He is currently an inmate at Her Majesty's Prison, Westgate Correctional Facility in Sandys Parish.

2. 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) 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**").

3. At the conclusion of the hearing in the *Trott* case on 17 July 2020, the Court declared that section 519 (2) of the Code is inoperative to the extent that it allowed for the disparity

between the number of stand-by challenges to the Crown, and 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 and the Crown's right to challenge jurors gives rise to a real possibility that the jury may be biased in favour of the Crown. Such a state of affairs offends the appearance of impartiality on the part of the jury which is 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 provision of section 519 (2) of the Code are inconsistent with the fundamental right to a fair trial established by section 6 (1) of the Constitution.

4. The declaration made by the Court in the *Trott* case was suspended pending the passing of the legislation to give effect to it for a period of three months. On 24 July 2020 the Legislature passed Criminal Code Amendment (No 2) Act ("**the Amending Act**") which amended section 529 (1) of the Code so as to comply with the Constitution. 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."*

5. Following the decision of this Court in *Trott* the Applicant commenced the present proceedings by Originating Summons dated 6 August 2020. In the Originating Summons the Applicant seeks several orders from the 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 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.

The Judgment of the Court of Appeal in Leveck Roberts

6. Following the delivery of the Supreme Court judgment in *Trott* the Court of Appeal heard three appeals in March 2021 in the matters of *Leveck Roberts* (Case No: Crim 2020/4); *Quincy Brangman* (Case No: Crim 2020/8); and *Khyri Smith-Williams* (Case No: Crim 2020/9). In these three cases that 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.

7. In *Roberts* the appellants, relying upon the Supreme Court judgment in *Trott*, argued that in all three cases there had not been a fair trial because of an appearance of bias or a want of equality of arms, and as a result they have suffered fundamental injustice and an infringement of their constitutional rights. They all sought to have their convictions set aside.

8. In a judgment handed down on 11 June 2021 Clarke P stated at [21] that having regard to the submissions of the parties based upon the judgment in *Trott* that the appeals 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 preemptory 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 retrospective abrogation of rights directed specifically against the defendants in particular criminal proceedings?

9. In considering these issues and in particular in considering the issue 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 Clarke P reviewed many relevant authorities including *R v English* [1993] CanLll 3373 (NL CA) (Newfoundland Court of Appeal); *R v Bain* [1992] 1 S.C.R. 91 (Supreme Court of Canada); *R v Sarson* [1996] 2 RCS 22 (Supreme Court of Canada); *R v Bestel* [2014] 1 WLR 457 (Court of Appeal of England and Wales); *Cadder v HM Advocate* [2010] 1 WLR 2061 (The Supreme Court of the United Kingdom); *A v The Governor of Arbour Hill Prison* [2006] IESC 45 (Supreme Court of Ireland); *R v Canto* [2015] ABCA 306 (Court of Appeal of Alberta); *R v Grant* [2018] JMCA 13 (Court of Appeal of Jamaica); *Ruddock v The Queen* [2016] UKPC 7 (Privy Council); *R v Johnson* [2016] EWCA Crim 1613 (Court of appeal of England and Wales);and *R v Chouan* [2020] ONCA 40 (Court of Appeal for Ontario and the Supreme Court of Canada).

10. Having reviewed the judgment of the Supreme Court in *Trott,* and the authorities referred to above, the Court of Appeal in *Roberts* held as follows:

    (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* cited by the Court of Appeal at paragraph 33).

    (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 unraveling 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 that the fact that the decision went to 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).

The Applicant's case

11. The Applicant made his own presentation to the Court by reading the written submissions he had filed on 1 September 2021 and the reply submissions dated 21 October 2021. In these written submissions the Applicant acknowledges that in the *Roberts* case the Court of Appeal has held that following the Supreme Court decision in *Trott*, the proper approach for the Court of Appeal to take is that the *Trott* decision should not, subject to rare exceptions, affect closed cases, i.e, cases where the defendant has already exhausted all avenues of appeal in relation to his conviction.

12. However, the Applicant argues that the approach mandated by the Court of Appeal in *Roberts* is confined to the exercise of the Court of Appeal's discretion whether or not to reopen the appeal under section 17 (1) of the Court of Appeal Act 1964 ("**the 1964 Act**"). The Applicant argues that this approach has no application to a case which is commenced pursuant to section 15 (1) of the Constitution invoking the Supreme Court's original jurisdiction. It is the case of the Applicant that the distinction between an appeal to the Court of Appeal under section 17 (1) of the 1964 Act, relying upon the Supreme Court's decision in *Trott*, and proceedings in the Supreme Court under section 15 (1) of the Constitution, relying upon the same decision in *Trott*, leads to the application of different approaches to the consequences of *Trott* and different results in relation to closed cases. The Applicant contends that these proceedings are not an appeal against his conviction but instead are enforcement proceedings of his fundamental rights under the Constitution.

13. The premise of this argument is that the Court of Appeal's decision in *Roberts* is confined to the consideration of the issue whether to reopen an appeal under section 17 (1) of the 1964 Act. The Applicant then invites this Court to consider afresh the approach it should

take in relation to its earlier decision in *Trott* that the practical effect of section 519 (2) of the Code was to deprive a defendant of his fundamental right to a fair trial established by section 6 (1) of the Constitution.

14. The Applicant submits that the proper approach this Court should take following its decision in *Trott* is that all previous convictions which are tainted with the objectionable provision of section 519 (2) should be set aside by this Court if any application is brought pursuant to section 15 (1) of the Constitution seeking to enforce the applicant's fundamental right under section 6 (1) of the Constitution. It is a fundamental aspect of the Applicant's submission that the declaration made by this Court in *Trott* that section 519 (2) of the Code breached the defendant's fundamental right to a fair trial has retroactive effect on all previously decided cases without any limitation or qualification.

15. First, the Applicant points to the terms of section 15 (1) of the Constitution providing that any person who alleges any of the foregoing provisions of this Chapter "*has been*" contravened may apply to the Supreme Court for redress. The Applicant contends that this language expressly provides for retrospective application of the unconstitutionality in the Constitution.

16. Secondly, the Applicant submits that by its terms section 15 (1) makes it plain that the right to make an application to the Supreme Court for redress is "*without prejudice to any other action with respect to the same matter which is lawfully available."* The Applicant contends that the fact that he may be able to appeal against his conviction under section 17 (1) of the 1964 Act, cannot be held against him.

17. The Applicant refers to paragraph 104 of the judgment of Clarke P in *Roberts* where the Court of Appeal held that in considering the issue of retroactive application, a decision holding a statutory provision to be unconstitutional the court must take into account three different sets of interests: (a) the interests of the accused; (b) the public interest in good order, finality, certainty and closure; and (c) the interests 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 Applicant contends that this statement by the Court of

Appeal concerning the scope of retroactive effect of a decision impugning the constitutional validity of a statutory provision is not one of general application. The Applicant submits that this statement can only properly apply to the Court of Appeal's exercise of its discretionary power to reopen a closed case under section 17 (1) of the 1964 Act.

18. The Applicant submits that no relevant "*public interest*" constraints can arise in his application to enforce his fundamental rights to a fair hearing under section 6 (1) of the Constitution. He relies upon the judgement of Gonsalves JA [AG] in *Tyson v R* [2018] 5 LRC 270, Eastern Caribbean Court of Appeal, at [91] holding that the defendant's right to a fair trial by an independent and impartial tribunal cannot be permitted to be limited by reference to public interest. The Applicant argues that public interest is clearly catered for in the provisions setting out fundamental rights given that section 1 provides that "*subsequent provisions of this Chapter affording protection to the aforesaid rights and freedoms subject to such limitations of the protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of said rights and freedoms by any individual does not prejudice the rights the rights and freedoms of others or the public interest*."

19. In summary, the Applicant argues that the Bermuda Constitution does not give effect to any finality principle and the finality principle is not to be found in any of its provisions. On the contrary, retroactive application of a decision impugning a statutory provision is recognised by the term "*has been*" in section 15 (1) the Constitution. Furthermore, the Applicant contends that he is not challenging "*a final decision announced by judicial tribunal*" which concerns the finality principle but is challenging the constitutional validity of the law which selected the body of persons to pronounce the decision (section 519 (2) of the Code).

Discussion

20. In considering the Applicant's submissions it is essential to keep firmly in mind the distinction made by Murry CJ in *Arbour Hill* at [87] between the making of a declaration

that a particular statutory provision infringes the fundamental rights enshrined in the Constitution and its retroactive effect on the cases which have already been determined by the courts.

21. By its decision in *Trott*, this Court declared that section 519 (2) of the Code infringed the fundamental right to a fair hearing before an independent and impartial tribunal enshrined in section 6 (1) of the Constitution. That ruling was not challenged in the Court of Appeal in *Roberts* and remains good law.

22. However, this Court made no determination in relation to the separate issue relating to the retroactive effect of the *Trott* decision on cases which had already been determined by the courts. This was recognised by the Court of Appeal in *Roberts* at [101].

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*"".

24. The Court of Appeal recognised that there could be exceptions to the above stated rule in exceptional circumstances (paragraph 115).

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 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.

27. The Court is unable to accept the Applicant's submission that the extent to which a previous decision of the Court declaring a statutory provision invalid and/or inoperative has retrospective effect depends upon whether the applicant elects to challenge the conviction in a closed case by way of application under section 15 (1) of the Constitution or argue the same constitutional point by way of appeal to the Court of Appeal under section 17 (1) of

the 1964 Act. Any such distinction is bound to bring the criminal justice system into disrepute.

28. The Court also does not accept that there is a meaningful distinction between proceedings to challenge a conviction in a closed case by way of appeal (such as the appeal in *Roberts*) and proceedings under section 15 (1) of the Constitution seeking to set aside a conviction in a closed case (as is the case here). In both cases the applicant is relying upon the constitutional invalidity of a statutory provision which played a part in the conviction in a closed case. The Court does not accept the Applicant's contention that in the *Roberts* appeals the appellants were not relying upon the breach of their Constitutional rights. It is plain that all three appellants in Roberts were arguing that they did not receive a fair hearing by an independent and impartial tribunal guaranteed by section 6 (1) of the Constitution, as held by the Supreme Court in *Trott*. The Court does not accept the Applicant's contention that he is not challenging a decision of the court in a closed case. By paragraph (vi) of the Originating Summons the Applicant is plainly seeking an order quashing the guilty verdicts handed down and adjudicated by the Supreme Court in his case (No.11 of 2013).

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.

30. Given that both the Supreme Court and the Court of Appeal are bound to apply in substance the same test in considering the present challenge to the Applicant's conviction the Court accepts Ms. Dill-Francois' submission, on behalf of the Respondents, that the Court should dismiss the present application on the basis that the Applicant has an alternative means of legal redress. Ms. Dill-Francois relies on the proviso to section 15 (1) that "*the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate*

means of redress or have been available to the person concerned under any other law". In *Attorney General of Trinidad and Tobago v Ramanoop* [2005] UKPC 15, the Privy Council has emphasised at [17] 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.

31. In the ordinary case where an applicant seeks to challenge and set aside a criminal conviction following a trial in the Supreme Court the appropriate procedural route to make that challenge is by way of an appeal under section 17 (1) of the 1964 Act. Given that the Applicant gains no juridical advantage by proceeding with his application under section 15 (1) of the Constitution, the Court considers that the appropriate course for the Applicant to take, if he wishes to pursue the constitutional challenge based upon the decision in *Trott*, is that he should do so by way of an application for leave to appeal to the Court of Appeal under section 17 (1) of the 1964 Act. Accordingly, the Applicant's application for relief sought in the Originating Summons dated 6 August 2020 is hereby dismissed. Nothing said in this judgment should be construed as affecting any application the Applicant may elect to make to the Court of Appeal to reopen his appeal based upon the facts and circumstances relied on in these proceedings.

Dated this 3rd day of December 2021.

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NARINDER K HARGUN
CHIEF JUSTICE