In the Supreme Court of Bermuda

CIVIL JURISDICTION
2020: No. 123

B E T W E E N:

JAHMICO TROTT

Plaintiff

-v-

DIRECTOR OF PUBLIC PROSECUTIONS

1st Defendant

-and-

ATTORNEY-GENERAL OF BERMUDA

2nd Defendant

Before: **Hon. Chief Justice Hargun**

Appearances: Mr Mark Pettingill of Chancery Legal Ltd for the Plaintiff
Ms. Shakira Dill-Francois, Deputy Solicitor General, for the Defendants

Date of Hearing: **17 July 2020**
Date of Judgment: **24 August 2020**

JUDGMENT

Whether section 519 (2) of the Criminal Code, allowing the Crown to stand-by jurors, is in breach of section 6 (1) of the Bermuda Constitution, providing for a hearing by an independent and impartial court established by law; whether the operation of section 519 (2) gives rise to an appearance of bias; whether the operation of section 519 (2) is in breach of the principle of equality of arms

HARGUN CJ:

Introduction

1. These proceedings concern a constitutional challenge to the validity of the jury selection process contained in section 519 (2) of the Criminal Code 1907 (the "**Code").** The issue for the Court is

whether section 519 (2) of the Code, which grants the Crown the right to stand down any juror until such time as their name is called a second time, while the accused is only allowed three peremptory challenges, infringes 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").**

2. At the conclusion of the hearing of this action on 17 July 2020 the Court made an Order that:

(1) For the reasons to be set out in the Judgment of the Court, section 519(2) of the Code is inoperative to the extent that it allows for a disparity between the amount of stand-by challenges to the Crown, and challenges without cause afforded to the accused.
(2) The above declaration is suspended pending the passing of the legislation to give effect to it for a period of three months.
(3) Liberty to apply in relation to costs.

3. I now set out the reasons which persuaded the Court to make the Order declaring that section 519 (2) of the Code is inoperative.

Procedural and factual background

4. The Plaintiff has been charged in the Supreme Court with five counts on indictment, namely, (1) attempted murder, (2) using a firearm whilst committing an indictable offence, (3) carrying a firearm with criminal intent, (4) corruption of a witness and (5) intimidating a witness.

5. The Plaintiffs trial was fixed to commence on Friday 6 March 2020, and on that date, Counsel representing the Department of Public Prosecutions (**"DPP"**) and Counsel representing the Plaintiff were provided with a list of 44 names that made up the jury ballot.

6. The Plaintiff maintained his not guilty pleas to all counts on the indictment, in the presence of all potential jurors in the pool, who were seated in the public gallery.

7. The presiding Judge addressed the potential jurors advising them, *inter-alia*, to consider whether a reasonable observer would find their presence on the jury to give rise to an appearance of bias,

and also to consider whether any of them held any views so strongly that they were unable to disregard them, irrespective of the facts and the law. Thereafter the jury selection began, during which Counsel for the DPP stood down a total of 10 jurors. Out of the 10, all of them appeared to be people from Afro-Caribbean descent and 9 of them were male. The Plaintiff is an Afro-Caribbean male.

8. On Monday, 9 March 2020, the Plaintiff's Counsel advised the presiding Judge that the Plaintiff intended to challenge the validity of the Crown's use of the right to stand-by. On 13 March 2020, the Plaintiff commenced these proceedings by filing an Originating Summons seeking the following relief:

(i) A declaration that section 519 (2) of the Code is unconstitutional, unlawful and inoperative in that it contravenes certain fundamental rights and freedoms under the Bermuda Constitution Order 1968, namely those rights contained in section 6 (8);

(ii) A declaration that section 519 (2) of the Code and the process of the Crown to have unlimited stand-by challenges to jurors without cause contravenes or is repugnant to certain fundamental rights at common law, including rights of natural justice, equality of treatment and the rule of law, and is an abuse of process;

(iii) A declaration that the fundamental principle of equality of arms and the constitutional right to a fair trial was contravened by the Crown at the criminal trial of the Plaintiff, in that the reasonably informed fair-minded observer would consider that the selection process of an impartial tribunal could be perceived to be biased; and

(iv) An Order that the un-sworn jury panel in the criminal trial *R v Jahmico Trott*, Criminal Jurisdiction No. 27 of 2017 and No. 10 of 2019 be dismissed and a fresh jury selected and empanelled.

9. At the hearing of this matter both Counsel agreed that the Court should approach this matter as a matter of principle and not based upon the allegations in relation to the motivations behind the selection of particular jurors. Accordingly, the result in this Judgment is dictated by the terms of section 519 (2) of the Code, and not by any consideration that the exercise of the right to stand-by was in any way abused in this case.

The Statutory Provisions

10. The constitutional provision relied upon at the hearing is section 6 (1) of the Constitution which 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."*

11. The qualification and liability for jury service, the circumstances in which a person is disqualified for jury service and the ability of the Revising Tribunal to prevent otherwise qualified persons from serving on a jury are set out in section 3 of the Jurors Act 1971 which provides:

> *"3 (1) Every person —*
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> *(a) who is not more than 70 years of age; and*
> *(b) who is registered as a parliamentary elector in a parliamentary register under the provisions of the Parliamentary Election Act 1978 [title 2 item 11],*
>
> *shall, unless disqualified by virtue of subsection (2), be qualified for, and (unless exempted or excused under or by virtue of any of the succeeding provisions of this Act) shall, if selected, be liable to, jury service.*
>
> *(2) A person shall be disqualified for jury service —*
>
> *(a) if he is unable to read and write the English language; or*
> *(b) if he is blind, deaf or dumb or is suffering from mental disorder; or*
> *(c) if he is for the time being detained in a prison or other place of detention or in a hospital and receiving treatment primarily for mental disorder; or*
> *(d) if he has, since he attained the age of sixteen years, been convicted (whether on indictment or otherwise) of an offence punishable with death or with imprisonment for a term of three years or more, or, if he has, at any time during the immediately preceding seven years, been convicted (whether on indictment or otherwise) of an offence punishable, for a first offence, with imprisonment for a term of twelve months or more, and —*
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> *(i) he has not received a pardon in respect of that conviction; or*
> *(ii) that conviction has not been quashed on appeal.*
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> *(3) Notwithstanding anything in the foregoing provisions of this section, a person otherwise qualified for jury service shall not be returned to serve as a juror unless the Revising Tribunal sitting in pursuance of section 8 certify that, in their opinion —*

(a) he is a person of reputed honesty, integrity and intelligence; and
(b) he is in all other respects a fit and proper person to serve as a juror."

12. Duties of the Revising Tribunal are further particularised in section 8 of the Jurors Act 1971 which provides that:

"8 (1) It shall be the duty of the Revising Tribunal to sit during such period as the Chief Justice may determine to scrutinize the preliminary list and to revise the list by deleting therefrom the names of persons whom the Revising Tribunal are not able to certify —

(a) to be, in their opinion, persons of reputed honesty, integrity and intelligence; and

(b) to be, in their opinion, fit and proper persons to serve as jurors.

(2) For the purpose of exercising their functions under this section the Revising Tribunal may summon any person named in the list to appear before them and may conduct such examination of that person as they think fit.

(3) A summons under subsection (2) shall be served personally.

(4) The Revising Tribunal may call upon the Registrar for such advice and assistance as they may deem necessary for the purpose of exercising their functions.

(5) Where the Revising Tribunal are able to certify that a person who is qualified for jury service as aforesaid is, by reason of his education, qualifications, occupation or experience, a fit and proper person to be a special juror, then the Revising Tribunal shall record that fact on the preliminary list.

(6) The Revising Tribunal, upon completion of their revision of the preliminary list in accordance with the provisions of this section, shall cause copies of the list as revised by the Revising Tribunal to be signed by the Chairman and forwarded to the Registrar."

13. Section 13 of the Jurors Act 1971 which deals with the selection of jurors to the panel of jurors and stand-by jurors provides:

"13 (1) The Registrar, on such date as the Chief Justice may by notice in the Gazette appoint, shall select in the manner hereinafter provided the panel of jurors for any session. (2) On the day appointed under subsection (1), the Registrar shall, in premises open to the public and in the presence of a justice of the peace nominated

by the Chief Justice, by means of a random number table or such other method as the Chief Justice may direct, select at random from among all the names on that day included in the approved list —
(a) thirty-six names, to comprise the panel of jurors for that session;
(b) thirty-six names, to comprise stand-by jurors for that session."

Peremptory challenges, challenges for cause and stand-by

14. Both the Crown and the accused person can challenge any juror for cause and the right to such a challenge is unlimited in number. However, in order to succeed in a challenge for cause the Judge will have to be satisfied that: (a) the person is not qualified by law to serve as a juror; or (b) the juror is not or may not be indifferent as between the Crown and the accused person (section 519 (4) of the Code).

15. In addition, the accused person arraigned on an indictment for an indictable offence may effectively challenge without cause (peremptory challenge) not more than three persons, who are drawn to serve as jurors in connection with his trial (section 519 (1) of the Code).

16. The main rationale for peremptory challenges is outlined by Blackstone, in his Commentaries on the Laws of England, Lewis ed., vol. 4, at p.353 and 1738:

"[The peremptory challenge] is grounded on two reasons. I. As everyone must be sensible what sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another, and how necessary it is that a prisoner (when put to defend his life) should have a good opinion of his jury, the want of which might totally disconcert him, the law wills not that he should be tried by any one man against whom he has conceived a prejudice, even without being able to assign a reason for such his dislike. 2. Because, upon challenges for cause shown, if the reasons assigned prove insufficient to set aside the juror, perhaps the bare questioning his indifference may sometimes provoke a resentment, to prevent all ill consequences from which the prisoner is still at liberty, if he pleases, peremptorily to set him aside."

17. The Crown is not allowed to exercise any peremptory challenges. However, the Crown is allowed to stand-by up to 36 potential jurors under section 519 (2) of the Code. Under this provision the Crown may stand down any juror (until the jury panel has been exhausted), and until such time as their name is called for a second time, at which stage the Crown can challenge for cause. The

accused person does not have the right to stand-by jurors and it is this disparity which the Plaintiff alleges produces the appearance of bias, so as to amount to an infringement of section 6 (1) of the Constitution.

18. The Crown's right to stand-by up to 36 potential jurors appears to have arisen as a matter of historical accident. The history of the Crown's right to challenge jurors is outlined by Stevenson J in the Supreme Court of Canada's Judgment in *R v Bain* [1992] 1 S.C.R.91. The Supreme Court (by majority) held that the Crown's practice of standing down potential jurors was contrary to the Canadian Charter of Rights and Freedoms. Stevenson J explained that the English common law originally granted the Crown an unlimited capacity peremptorily to challenge jurors while the accused was only allowed 35 peremptory challenges. This unlimited power led to abuses because the Crown would peremptorily challenge the whole array of jurors without qualifying 12 jurors. The trial was then postponed, and the accused kept in custody until the next session. An attempt was made to curtail this abuse in 1305 when a statute was passed which provided *"... but if they that sue for the King will challenge any of those Jurors, they shall assign of their Challenge a Cause certain, and the Truth of the same Challenge shall be enquired of according to the Custom of the Court; ..."* (An Ordinance for Inquests, 33 RD. 1, c.4).

19. Despite the fact that on the face of this provision the Crown had no power to challenge except for cause, it was interpreted to mean that the Crown need not assign the cause for its challenge until the panel was exhausted. Stevenson J presumes that the Courts felt they could not sanction eliminating the Crown's power to challenge absent cause while accused persons retained that ability and "*it was thus that the stand by was born."*

20. The more recent justification of the stand-by appears in the judgment of Hart J.A. in the Canadian case of *R v Johnstone* (1986), 26 C.C.C. (3d) 401 (N.S.S.C.A.D.), as follows at p. 412:

> "*The traditional reason for permitting the Crown to stand aside jurors as they were called to the book to be sworn was the limited size of a jury panel. If both the Crown and the accused had the number of peremptory challenges available to the accused the panel would soon become exhausted and the need for talesmen would arise. To prevent this problem the Crown was permitted to stand aside the juror rather than challenge him at that time, and this would permit the juror to remain on the panel*

until all of the members have been exhausted and then be recalled if a full jury had not been sworn. Those jurors who had been stood aside would then still be available to complete the jury without the need of talesmen: …"

21. In the United Kingdom whilst the Crown's right of stand-by still exists it has been the subject of guidelines issued by the Attorney-General since, at least, 1978. The current version, updated in 2012, notes that in 1988 the defence's right to challenge jurors without cause was abolished, the prosecution's right to do so was, however, retained. This means that the prosecution can object to a potential juror without giving any reason. It is recognised that this is an exceptional power and so the Attorney General has issued guidance to the prosecutors on its use.

22. In essence, the use of the right of stand-by in the United Kingdom is limited to those cases which involve national security or terrorism. The guidelines outline the circumstances in which it is appropriate for the prosecution to exercise this power and the procedure which is to be followed. The guidelines make clear that the authority to use this power is limited to the Attorney-General.

23. The guidelines provide that although the law has long recognised the right of the Crown to exclude a member of the jury panel from sitting as a juror by the exercise of the right to request a stand-by, or if necessary, by challenge for cause, it has been customary for those instructed to prosecute on behalf of the Crown to assert the right only sparingly and in exceptional circumstances. It is generally accepted that the prosecution should not use the right in order to influence the overall composition of the jury with a view to tactical advantage.

24. The guidelines provide that the circumstances in which it would be proper for the Crown to exercise its right to stand-by a member of the jury panel are:

    (a) where a jury check authorised in accordance with the Attorney General's Guidelines on Jury Checks reveals information, having regard to the facts of the case and the offences charged, to afford strong reason for believing that a particular juror might be a security risk, be susceptible to improper approaches or to be influenced in arriving at a verdict for the reasons given and the Attorney-General personally authorises the exercise of the right to stand-by;

(b) where a person is about to be sworn as a juror who is manifestly unsuitable and the defence agree that, accordingly, the exercise by the prosecution of the right to stand-by would be appropriate. An example of the sort of exceptional circumstances which might justify stand by is where it becomes apparent that, a juror selected for service to try a complex case is in fact illiterate.

Plaintiffs submissions

25. Mr Pettingill, for the Plaintiff, submitted:

(a) The process of jury selection in the current trial involving the exercise of standing down potential jurors pursuant to section 519 (2) of the Code, was not in accordance with section 6 of the Constitution which guarantees that any person charged with a criminal offence shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

(b) The Court is not concerned to determine whether or not there was any motivation by the prosecutor to "stack the deck" with regard to the make-up of the jury, but whether the selection process of the jury, involving the exercise of standing down potential jurors pursuant to section 519 (2) of the Code, would lead a fair-minded and informed observer to conclude that there was a real possibility that the jury so selected may not be impartial.

(c) The exercise of standing down 10 potential jurors pursuant to section 519 (2) of the Code was in breach of the fundamental principle of equality of arms enshrined in the European Convention for the Protection Human Rights and Fundamental Freedoms 1950 ("**ECHR**"), and which was essential in order to secure a "fair hearing" under section 6 (1) of the Constitution.

(d) In relation to the submission based upon appearance of bias on the part of the jury and the breach of the principle of equality of arms, the Plaintiff relies upon the decision of the Court of Appeal of the Eastern Caribbean Supreme Court (British Virgin Islands) in *Tyson v R* [2018] 5 LRC 270, where the court held that a similar right on the part of the Crown to stand-by potential jurors was in breach of section 16 (1) of the British Virgin Islands Constitution,

which also provided that any person charged with a criminal offence shall be afforded a fair hearing within a reasonable period of time and by an independent and impartial court established by law.

Defendants' submissions

26. Ms. Dill-Francois, for the Defendants, submitted:

(a) The Defendants, in principle do not seek to challenge these proceedings and the Minister of Legal Affairs has taken steps to amend the legislation to ensure that it is in fact consistent with the Constitution. Ms. Dill-Francois advised that it was anticipated that the legislation will be passed within the coming weeks.

(b) Rather than acceding to the relief sought by the Plaintiff, the Court should consider making a declaration in terms that: "*Section 519(2) of the Criminal Code is inoperative to the extent that it allows for a disparity between the amount of stand-bys afforded to the Crown and challenges without cause afforded to the accused."*

(c) Whilst the Defendants have taken the position that the declaration as outlined above is appropriate, the Defendants request that the Court suspend the declaration pending the passing of the legislation. This course was adopted by Kawaley CJ in *Bermuda Bred Company v Minister of Home Affairs* [2015] SC (Bda) 88 Civ (7 December 2015).

Discussion

27. Section 519 (2) of the Code is challenged on the two grounds: (a) its operation in the selection of the jury in a criminal trial, in terms of allowing the Crown to stand down unlimited potential jurors, would lead a fair-minded and informed observer to conclude that there was a real possibility that the jury may be biased; and (b) it offends against the equality of arms provision enshrined in section 6 (1) of the Bermuda Constitution. It is proposed to consider both of these arguments in turn.

Apparent bias on the part of the jury

28. The issue for the Court is whether the selection process for a jury in a criminal trial in Bermuda, which effectively grants the Crown 36 stand-bys while the accused person is allowed only 3 peremptory challenges, infringes upon the accused person's right to be tried by an independent and impartial court established by law as guaranteed by section 6 (1) of the Constitution.

29. As noted by Stevenson J in *Bain* the independence and impartiality of the tribunal by which an accused person is tried is a central feature of our criminal law that has long been recognised. The importance of this right in Bermuda is illustrated by its entrenchment in section 6 (1) of the Constitution. The Plaintiff argues that the system of selecting jurors contained within section 519 of the Code impairs the appearance of impartiality and is therefore unconstitutional. The Plaintiff's argument is directed at the disproportionate powers the Crown and the accused person have to remove potential jurors from the selection process. The Plaintiff argues that whilst the Crown is allowed to stand by up to 36 potential jurors under section 519 (2) of the Code, the accused person does not have this right to stand by jurors and this asymmetry produces the appearance of partiality sufficient to amount to an infringement of section 6 (1) of the Constitution.

30. The test for bias is set out in the House of Lords decision in *Porter v Magill* [2002] 2 AC 357 which asks the question whether the relevant circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility that the tribunal was biased. It is further established that there is now no difference between the common law test of bias and the requirements under Article 6 of ECHR of an independent and impartial tribunal. This is made clear in the opinion of the Appellate Committee in House *Lawal v Northern Spirit Limited* [2003] UKHL 35 at [14]:

> *"14. In Porter v. Magill [2002] 2 AC 357 the House of Lords approved a modification of the common law test of bias enunciated in R v Gough [1993] AC 646. This modification was first put forward in In re Medicaments and Related Classes of Goods (No. 2) [2001] 1 WLR 700. The purpose and effect of the modification was to bring the common law rule into line with the Strasbourg jurisprudence. In Porter v Magill Lord Hope of Craighead explained:*
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> > *"102. . .. The Court of Appeal took the opportunity in In re Medicaments and Related Classes of Goods (No. 2) [2001] 1 WLR 700 to reconsider the whole question. Lord Phillips of Worth Matravers MR, giving the judgment of the court, observed, at p 711A-B, that the precise test to be applied when determining whether a decision should be set aside on account of bias had*

given rise to difficulty, reflected in judicial decisions that had appeared in conflict, and that the attempt to resolve that conflict in R v Gough had not commanded universal approval. At p 711B-C he said that, as the alternative test had been thought to be more closely in line with Strasbourg jurisprudence which since 2 October 2000 the English courts were required to take into account, the occasion should now be taken to review R v Gough to see whether the test it lays down is, indeed, in conflict with Strasbourg jurisprudence. Having conducted that review he summarised the court's conclusions, at pp 726-727:

> *'85. When the Strasbourg jurisprudence is taken into account, we believe that a modest adjustment of the test in R v Gough is called for, which makes it plain that it is, in effect, no different from the test applied in most of the Commonwealth and in Scotland. The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair-minded and informed observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased.'*

103. I respectfully suggest that your Lordships should now approve the modest adjustment of the test in R v Gough set out in that paragraph. It expresses in clear and simple language a test which is in harmony with the objective test which the Strasbourg court applies when it is considering whether the circumstances give rise to a reasonable apprehension of bias. It removes any possible conflict with the test which is now applied in most Commonwealth countries and in Scotland. I would however delete from it the reference to "a real danger". Those words no longer serve a useful purpose here, and they are not used in the jurisprudence of the Strasbourg court. The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

The House unanimously endorsed this proposal. In the result there is now no difference between the common law test of bias and the requirements under Article 6 of the Convention of an independent and impartial tribunal, the latter being the operative requirement in the present context."

31. The issue before the Appellate Committee in *Lawal* was whether, in circumstances in which a Queen's Counsel appearing on an appeal before the Employment Appeal Tribunal ("EAT") had sat as a part-time judge in the EAT with one or both of the lay members (called the "wing members") hearing that appeal, the hearing before the EAT was compatible with Article 6 of ECHR and the common law test of bias. It was not suggested that there was actual bias. The

question was whether in the view of the fair-minded and informed observer, there was a real possibility of subconscious bias on the part of a lay member or lay members.

32. In agreement with the view expressed by Stevenson J in Bain, the disparity between the accused person's and the Crown's right to challenge jurors does give rise to and meets the test for appearance of bias as set out in *Porter v Magill.* The Crown's right to stand-bys under section 519 (2) of the Code cannot be upheld because the Crown is allowed to have a greater role in fashioning the jury. In contrast the accused person's role in selecting his or her jury of peers is thereby significantly diminished. A fair-minded and informed observer is likely to conclude that there was a real possibility that the jury may be biased as between the Crown and the accused person. 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 court guaranteed by section 6 (1) of the Constitution.

33. In Canada, apart from the challenges for cause, the provisions of the Criminal Code provided the Crown with the ability to stand by 48 prospective jurors and to challenge 4 jurors peremptorily. The accused person had the right of 12 peremptory challenges. The discrepancy of 4.25 to 1 in favour of the Crown was held to be so unbalanced that it gave rise to an appearance of unfairness or bias against the accused person. I respectfully agree with the analysis and views of Cory J, who expressed the matter as follows:

> *"A petition is frequently made that we not be lead into temptation. The impugned provision of the Criminal Code provides the tempting means to obtain a jury that appears to be favourable to the Crown. The section is so heavily weighed in favour of the Crown that viewed objectively it must give that legal fictional paragon, the reasonable person, fully apprised of the manner in which a jury may be selected, an apprehension of bias. This must be so since the jury, as a result of the selection process, would appear to be favourable to the Crown. It seems to me that so long as this provision exists it may be used and on occasion will be used to select a jury that appears to be favourable to the Crown.*
>
> *It may well be correct that it would be impossible to prove that a jury selected after the Crown had exercised all its stand bys and peremptory challenges was in fact biased. Nonetheless the overwhelming numerical superiority of choice granted to the Crown creates a pervasive air of unfairness in the jury selection procedure. The jury is the ultimate decision maker. The fate of the accused is in its hands. The jury should*

not as a result of the manner of its selection appear to favour the Crown over the accused. Fairness should be the guiding principle of justice and the hallmark of criminal trials. Yet so long as the impugned provision of the Code remains, providing the Crown with the ability to select a jury that appears to be favourable to it, the whole trial process will be tainted with the appearance of obvious and overwhelming unfairness. Members of the community will be left in doubt as to the merits of a process which permits the Crown to have more than four times as many choices as the accused in the selection of the jury."

34. In *Tyson, supra,* during jury selection, the Crown exercised its right to stand-by 21 potential jurors. The Eastern Caribbean Supreme Court was presented with an argument on behalf of the accused that the Crown's unlimited right to stand-by jurors was unconstitutional as it offended the principle of equality of arms, and consequently the accused's constitutional right to a fair trial. Specifically, the accused contended that the relevant provision in the Jury Act 1914, which permitted the Crown and unlimited right to stand down jurors, offended the equality of arms provision enshrined in section 16 of the Virgin Islands Constitution, which is in identical terms as section 6 (1) of the Bermuda Constitution (providing for a fair hearing within a reasonable time by an independent and impartial court established by law). Gonsalves JA (Ag) stated that he was convinced that the Crown was in a vastly superior position when compared with the accused person's right of three peremptory challenges only, and that the superior position of the Crown raised an issue of bias in the selection process. I respectfully agree with Gonsalves JA (Ag) that this disparity gives rise to a real possibility of bias in favour of the Crown on the part of a fair-minded observer. At paragraphs [92]-[93] the learned judge said:

"[92] … 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. 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.

[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 section27(b).*[1] *... 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 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,*[2] *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 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]".*

35. In previous cases it has been argued that even if there is an appearance of bias on part of the court, it does not necessarily follow that the accused person did not receive a fair trial. In *Tyson*, the Crown suggested that (a) it was necessary for the accused person to demonstrate that there was actual bias on the part of the jury, and (b) that when the trial was looked as a whole, in relation to overall fairness, the appellant suffered no injustice. I agree with the decision and reasoning of Gonsalves JA (Ag), that the appearance of bias on the part of the jury (and therefore the court) is in itself sufficient to demonstrate a breach of an accused person's fundamental right to a fair hearing by an independent and impartial court, and constitutes a breach of section 6 (1) of the Constitution.

36. In dealing with this argument Gonsalves JA (Ag) referred to a similar argument before the Privy Council in *Millar v Dickson* [2001] UKPC D4. Before the Privy Council the Solicitor General accepted that a temporary sheriff was not an independent and impartial tribunal for the purposes of Article 6 (1) of ECHR, that notwithstanding, the defendants had received fair trials. The Solicitor General argued that the rights under Article 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

[1] Applying *Porter v McGill* and approved by the Privy Council in *Kearney v Her Majesty"s Advocate* [2006] UKPC D1
[2] 1987] 2 C.R. 694 at page 710

circumstances of the case as a whole, and to weigh the alleged infringement against the general interest of the public. The ultimate issue, argued, was one of overall fairness, viewing the proceedings as a whole. It is clear from the judgments of Lord Bingham and Lord Hope that the submission of the Solicitor General was rejected and in rejecting this submission Lord Bingham referred to the decision of the Court of Appeal in *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 at pages 471-472, paragraphs 2-3:

> *"2. In determination of their rights and liabilities, civil or criminal, everyone is entitled to a fair hearing by an impartial tribunal. That right, guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, is properly described as fundamental. The reason is hello 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) 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 law, is called 'actual bias' are very rare, 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."*

37. Lord Hope explained his rejection of the argument by the Solicitor General in the following terms at [63]:

> "*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 exclude any legitimate doubt as to the tribunal's independence and impartiality: <u>McGonnell v United</u>*

> *Kingdom at p 306, paragraph 48 quoting Findlay v United Kingdom (1997) 24 EHRR 221, 245, paragraph 73. As Lord Clarke said in Rimmer v HM Advocate, 23 May 2001 (unreported), the question of impartiality, actual or perceived, has to be judged from the very moment when the judge or tribunal becomes first seized of the case. It is a question which, at least in a case of perceived impartiality, stands apart from any questions that may be raised about the character, quality or effect of any decisions which he takes or acts which he performs in the proceedings."*

38. Lord Hope expressed his conclusion at [65] as follows:

> *"The principle of the common law on which these cases depend is the need to preserve public confidence in the administration of justice: see Dimes v Proprietors of Grand Junction Canal (1852) 3 HL Cas 759; R v Gough [1993] AC 646, 661 per Lord Goff of Chieveley. It is no answer for the judge to say that he is in fact impartial, that he abided by his judicial oath and there was a fair trial. The administration of justice must be preserved from any suspicion that a judge lacks independence or that he is not impartial. If there are grounds which would be sufficient to create in the mind of a reasonable man a doubt about the 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. The Solicitor General's submission that the matter, if raised after the event, 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. "*

39. In conclusion, it is my view that section 519 (2) of the Code is so heavily weighed in favour of the Crown, that a fair-minded and informed observer would conclude that there was a real possibility that a jury, selected by the exercise of the Crown's right to stand-by, was biased in favour of the Crown. It follows that this conclusion necessarily means that the accused person is denied a hearing by an independent and impartial court and is sufficient to establish a breach of section 6 (1) of the Constitution. It also follows that the provisions of section 519 (2) of the Code can no longer be operative as they are inconsistent with the fundamental right established by section 6 (1) of the Bermuda Constitution.

Equality of Arms

40. The Bermuda decisions in *Phoenix Global Fund Ltd v Citigroup Fund Services (Bermuda) Ltd*, Supreme Court, Civil No. 20 of 2006, *Joseph Lenihan v LSF Consolidated Golf Holdings Ltd* [2007] Bda LR 49, and *Julian Washington v J Adrian Cook (Police Sergeant)* [2013] Bda LR 38, recognise that section 6 (1) of the Constitution providing for the fundamental right to a fair hearing

within a reasonable time by an independent and impartial court established by law, incorporates the equality of arms principle enunciated by the ECHR as part of the right to a fair trial under article 6 of ECHR.

41. In *Lenihan v LSF Consolidated Golf Holdings Ltd*, Kawaley J (as he then was) referred to; "*The requirement to ensure that the parties are on an equal footing is an incident of the Court's duty to ensure that each party's constitutional fair hearing rights are not infringed, and derives from the "equality of arms" principle developed under article 6 of the European Convention of human rights in the case law of the European Court of Human Rights"*

42. In *Tyson, supra*, the accused contended that the relevant provision in the Jury Act 1914 in the Virgin Islands, which permitted the Crown and unlimited right to stand-by jurors, offended the equality of arms provision enshrined in section 16 of the Virgin Islands Constitution, which is in identical terms as section 6 (1) of the Constitution, providing for a fair hearing within a reasonable time by an independent and impartial court established by law. In that context Gonsalves JA (Ag) considered the scope of the principle of equality of arms and stated at paragraph [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 fair trial*[3]*. The principle requires that there be a fair balance between the opportunities afforded the parties involved in litigation. In Bulut v Austria*[4] *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."*[5] *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*

[3] *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)

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

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

> *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."*[6] *The European Convention on Human Rights and the Right to Direct Petition were extended to the BVI on 28th September 2009. 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 into account the international instruments incorporating such norms which apply to the BVI.*[7]*"*

43. Gonsalves JA (Ag) expressed the opinion of the Court of Appeal that due to the extreme disparity created 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. The Court concluded that in the circumstances the relevant section in the Jury Act 1914 in the Virgin Islands was unconstitutional. I respectfully agree with this reasoning which applies equally, in my view, to section 519 (2) of the Code in Bermuda.

44. Previous cases, in common law jurisdictions, record a variety of reasons which, it is said, justify the existence of the disparity arising from provision similar to section 519 (2) of the Code. It is necessary to look at some of the main reasons advanced to support such provisions.

45. First, it is said that the operation of the stand-by provision has always been informed by a practical and prudent appreciation of the challenges of the jury system.[8] The following passage in the judgment of Lawton LJ in *R v Mason* [1980] 3 All ER 771 at 781 is frequently cited:

> "*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*

[6] "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
[7] See Patrick Reyes v The Queen, Privy Council Appeal No. 64 of 2001 at paragraph 27.
[8] see paragraph [58] of the judgment of Gonsalves JA (Ag) in *Tyson*

> *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."*

46. It has been previously asserted that the Crown's right to stand-by potential jurors is a necessity in small jurisdictions, where there are close familial ties between the accused, witnesses and jurors.

47. In his dissenting judgment in *Bain*, Gonthier J took the view that jurors should not only be representative and impartial, they should also be able to understand the trial, their role in the trial, the evidence that is presented, the principles they have to apply, among other things. This requirement of competence is not mentioned in relevant legislation, aside from the general requirements of mental health and linguistic capability, but it is implicit. The learned judge pointed out that some trials are more complex and complicated, others, especially in the areas of economic crimes, to name one, and then a tempering with randomness, may be appropriate to achieve a minimal ability to understand the evidence and issues.

48. In considering these reasons as justification of giving the Crown the right to stand-by potential jurors, it is relevant to look at the existing filtering process for the selection of jurors and the scope of challenging jurors for cause.

49. As far as challenging jurors for cause is concerned, section 519 (4) provides that the Crown or the accused person may effectively challenge for cause any person who is not qualified by law to serve as a juror, or that the juror is not or may not be indifferent as between the Crown and the accused person. It seems reasonably clear that in situations where there are close familial ties between the accused, witnesses and jurors, such a juror can be effectively challenged on the basis that the juror may not be indifferent as between the Crown and the accused person.

50. As noted above at paragraph 11, the Jurors Act 1971 provides that a person is disqualified from jury service if he is unable to read and write the English language. It further provides that a person otherwise qualified for jury service shall not be returned to serve as a juror unless the Revising Tribunal certified that, in their opinion (a) he is a person of reputed honesty, integrity and intelligence; and (b) he is in all other respects a fit and proper person to serve as a juror. These

provisions should be adequate to ensure that persons who are unfit to serve as jurors, even though they are not disqualified, are not returned to serve as jurors.

51. Further, even in the absence of a formal challenge by either party, the trial judge has a residual discretion to exclude from the jury a juror selected by the initial ballot.[9] Lawton LJ in *Mason* described modern practice at p. 887-H by saying:

> *"… 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 impanelled. The most common form of judicial intervention is that when a judge notices that a member of the panel is infirm or has difficulty in reading or hearing; and nowadays jurors from whom taking part in long trial would be unusually burdensome are often excluded from the jury by the judge"*

52. Having regard to these provisions it is not readily apparent why the issues identified cannot be addressed within the existing legislation. In this context, it has to be borne in mind that an essential principle underpinning the jury system in the English/Bermuda legal system is claimed to be that of random selection, namely that from the constituency of potential jurors; no attempt should be made to select "appropriate" jurors. Thus the Report of the Departmental Committee on Jury Service in England stated in 1965, "*the jury should represent a cross-section drawn at random from the community, and should be the means of bringing to bear on the issues the corporate good sense of the community"*.[10]

53. In any event, even if there was an issue relating to qualified but not sufficiently competent jurors, the solution, in my view, does not lie in providing the Crown with the right, to be exercised in its sole discretion, to stand-by, unlimited number of potential jurors.

54. Second, it has been argued for the Crown that the stand-by is not in the same category as a peremptory challenge and at most is a "deferred challenge for cause". It is said that 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

[9] See: Blackstone's Criminal Practice 2019, D 13.36 – 37.
[10] See: East "Jury Packing: A Thing of the Past?" (1985) 48 Modern Law Review 518, at p.519.

challenge is mounted. Therefore, it is not merely possible, but more likely than not, that a juror who is asked to stand by eventually serves on the final panel when selected.[11]

55. I agree with the reasoning of Gonsalves JA (Ag) in *Tyson* that this argument fails to address the reality of the situation and in event provides no answer to the objection that the existence of stand-by gives rise to the reasonable apprehension of a real possibility of bias. As the learned judge explained at [73]:

> *"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."*

56. Finally, it is argued in support of the constitutionality of its right of stand-by that there is a presumption that the Crown would use its right of stand-by in a responsible manner. In this context it is also said that in the criminal process, the Crown Counsel is not expected to seek conviction above anything else, just like the accused attempts to avoid conviction. He or she has special duties in his or her quality as a public officer. In keeping with this quasi-judicial role, the Crown prosecutor in the jury selection process has a duty to ensure that the jury represents the three characteristics of impartiality, representativeness and competence. These qualities, especially impartiality, must not be sought in light of securing a conviction, but rather in light of selecting the best jury to try the case. The Crown Counsel's only justification for taking part in the jury selection process stems from his or her responsibility as a public officer.[12]

57. I respectfully agree with Gonsalaves JA that it is wrong as a matter of principle that for the purposes of protecting his constitutional right under section 6 (1) of the Constitution, an accused person has to rely on the prosecution acting in good faith and not abusing the powers granted to it.

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[11] See: Gonthier J in *Bain*; and Gonsalves AJ (Ag) in *Tyson* at [77].
[12] See; Gonsalves JA (Ag) in *Tyson* at [75] and Gonthier j (dissenting) in *Bain*.

As pointed out by Cory J, in *Bain*, Crown Counsel are mortal, subject to all the emotional and psychological pressures that are exerted by individuals and the community and are subject to human frailties and occasional lapses:

> *"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 influenced by the righteous sense of outrage of the community at the commission of a particularly cruel and vicious crime. As a rule 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."*

58. In the circumstances, I consider that the reasons relied upon in support of the Crown's right to stand-by no longer provide satisfactory justification for the continued use of the practice.

Conclusion

59. Having regard to the reasons set out above, I am satisfied 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 Bermuda Constitution. It follows that the provisions of section 519 (2) of the Code are inconsistent with the fundamental right to a fair trial established by section 6 (1).

60. I am also satisfied that the extreme disparity created in the jury selection process also results in the infringement of the principle of equality of arms by making the position of the accused extremely weaker than that of the Crown, and results in a breach of the right to a fair trial under article 6 of ECHR and the right to a fair trial established by section 6 (1) of the Constitution.

61. It was for these reasons that following the hearing on 17 July 2020, the Court declared that section 519 (2) of the Criminal Code is inoperative to the extent that it allows for a disparity between the

amount of stand-bys afforded to the Crown, and challenges without cause afforded to the accused person.

Dated this 24th August 2020

NARINDER K HARGUN
CHIEF JUSTICE