

**IN THE EASTERN CARIBBEAN SUPREME COURT
ST VINCENT & THE GRENADINES**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SVGMCRAP 2021/0013

BETWEEN:

GRANVILLE DEFREITAS

Appellant

And

THE COMMISSIONER OF POLICE

Respondent

Before: Honourable Madam Justice M E Birnie Stephenson

Appearances:

Mr. Ronald Marks of Marks & Marks for the Appellant

Ms. Rose-Anne Richardson Crown Counsel for the Attorney General's Chambers
for the respondent

2024: May 31st
November 21st

RULING ON WRITTEN SUBMISSIONS

[1]. **STEPHENSON, J.:** This matter was referred to the High Court for the determination of a Constitutional question by order of the Court of Appeal dated the 25th July 2023. The matter came up for hearing on the 23rd November 2023 and it was agreed that the matter will be decided on written submissions. A directions order was made ordering the appellant to file his submissions in support of his case that section 308 of

the Criminal Code of Saint Vincent and the Grenadines offences sections 8(2)(a) and 8(7) of the Constitution of Saint Vincent and The Grenadines, the respondents were ordered to file their submissions in response, the appellant was at liberty to file a reply to the respondent's submissions, only the appellant filed submissions as ordered. The court's reserve date was the 31st May 2024. This is the court's judgment.

Background:

[2]. Mr. Granville De Freitas was on board in a minivan which was stopped by a member of the Saint Vincent and Grenadines Police Force and searched. He was found to have in his possession 62.5 pounds of meat of which according to the police was reasonably suspected to have been stolen or unlawfully obtained. The appellant was charged and placed before the Magistrate's Court and he was charged on the 13th July 2017 at North Union, he had in his possession 62.5 pounds of beef suspected of being stolen or unlawfully obtained,

[3]. The appellant pleaded not guilty to the charge as preferred. It is the appellant's contention that:

- (1). the meat was mutton and not beef as alleged;
- (2). that the meat was his meat;
- (3). that the meat was from a goat he slaughtered that very morning;

[4]. At the trial before His Honour the Magistrate, the prosecution led evidence from Officers PC881 Gayme C. and Cpl. Jack V. It was their case that on the 4th July 2017 they were on a stop and search operation and the minibus upon which the appellant was travelling was stopped and the passengers subjected to search. The appellant was found to have quantity of meat in his knapsack. When questioned by the said officers the appellant told that it was mutton from a goat he killed at the river earlier the morning.

[5]. The police further informed the court that they took the appellant to the place where he claimed to have killed the goat. It was the police evidence that they did a thorough

- search of the area and found no traces of a slaughter having taken place. The Police also stated that they searched the appellant's home and found nothing upon which they could advance their case.
- [6]. The prosecution also called on Orlando Craigg who gave evidence in his capacity as an environmental officer. It is the appellant's case that this witness was not treated or deemed an expert witness at the trial.
- [7]. The appellant submitted that in any event, it was unlikely that this witness would have qualified as an expert witness. It was further submitted by Mr. Marks on behalf of the appellant that this witness said when he first tested the meat he concluded that it was "pork", however after seeking further opinions he later concluded that the meat found in the appellant's possession was beef. It was noted by counsel that one of the opinions relied on by Mr. Craigg was that of an officer from the Fire Department of the Police Force.
- [8]. It is the appellant's case that he was initially informed that the meat was "pork", but was later charged with being in unlawful possession of "beef".
- [9]. The case for the defence in the Magistrate's Court at trial was that the appellant case was that he was a small farmer who rears goats and like the other small farmers in his area he was the victim of theft of his animals. The appellant's case before the Magistrate was that as practiced in his community, he proceeded early in the morning to the riverside where he slaughtered the animal. He told the Court that on his way to the river he met a fellow small farmer David Richards who he told he was going to the river to slaughter the goat.
- [10]. The appellant further informed the court that he chose a spot on the river that would leave no blood or entrails which would attract predator dogs in the area. It is noted that it was his case that these dogs also posed a threat to the local farmers in the area. He further explained to the court that after slaughtering the goat, he disposed

of the waste parts in the fast flowing river and cleaned off the excess blood from the stones using coconut fibre.

[11]. It was also in the appellant's submissions to this court that this area that is on the stones that persons from the community would wash their clothes.

[12]. It was submitted before this court that David Richards also gave evidence before the magistrate who confirmed that on the morning in question, he met the appellant with a goat and that the appellant told him he was going to river to kill the goat and that the appellant even offered him the goat's head and the feet.

[13]. A third witness, one Grantley Peters also gave evidence on behalf of the appellant before the Magistrate.

[14]. The appellant was convicted and the following extract from the Magistrate's decision was quoted by counsel Marks in his submissions and reasons as appeared on the Record of Appeal¹ as follows:

“The test used by the Court to determine what is reasonably suspected is that of whether a reasonable person would suspect the goods of being unlawfully obtained. It is an objective test relying on what the reasonable person would suspect and not what was on the accused person's mind. The prosecution did not have to prove that the meat was in fact stolen unlawfully obtained, reasonable suspicion was enough. Having possession of items includes having control of the item, in one's control. The accused person is then required to prove that he did not suspect the item to be stolen or unlawfully obtained. It comes down to the accused person's actual belief at the time he was in possession of the meat. If the

¹ Record of Appeal at pages 37 and 38

Court accepts that the accused person did not suspect the item to be stolen or unlawfully obtained, then he is not guilty”².

[15]. It was submitted by Counsel Ronald Marks that it is the prosecution who brought the case and it was them that were required under law to prove their case, every single ingredient beyond a reasonable doubt.

[16]. Counsel submitted that the wording of section 308 of the Criminal Code of Saint Vincent and The Grenadines suggests a civil standard however, where a person’s liberty is at stake, the law demands no less than beyond a reasonable doubt that the possession of the meat was unlawful and must adduce evidence that the tribunal of fact is sure.

[17]. The appellant appealed his conviction, and that appeal was heard before the Court of Appeal on the 25th July 2023. The Court of Appeal ordered that this matter be referred to the High Court for determination of the Constitutional Question.

[18]. Counsel Marks on behalf of the appellant submitted that the Magistrate applied the wrong test in law as it is contrary to Section 101 of the Constitution of Saint Vincent and the Grenadines. Counsel quoted an extract from the Magistrate’s reasons for his decision. (supra)

[19]. Section 101 of the Constitution states

“The Constitution is the supreme law of Saint Vincent and the Grenadines and subject to the previous constitution, if any other law is inconsistent with this constitution, this Constitution shall prevail and all other laws shall to the extent of the inconsistency be void”.

[20]. Section 101 is known as the Supreme Law Clause of the Constitution. This is well established if not trite principle of Constitutional Law in our Courts. The supremacy of

² Paragraph 12 of the Appellants written submissions

the Constitution is imperative and is well established that any law found to be inconsistent with it will be found to be unconstitutional. **Re: Collymore -v- The Attorney General**³

[21]. Counsel Marks further submitted that section 8(2) (a) of the Constitution provides that

“Every person who is charged with a criminal offence shall be presumed to be innocent until he is proved or has pleaded guilty”

Counsel further made reference to section 8(7) which provides *“A person who is tried for a criminal offence shall not be compelled to give evidence at trial”*

[22]. It was submitted on behalf of the appellant that the learned magistrate misdirected himself in law as his direction and the test which he applied was clearly at odds with the provisions of the constitution. Counsel cited and relied on the Courts ruling in **The Commissioner of Police of the Virgin Islands Police Force & The Attorney General of the Virgin Islands**⁴ where the Court of Appeal held that where such conflicts with the Constitution arose the inconsistent law must be construed with such adaptations and modifications as may be necessary to bring them in conformity with the Constitution.

[23]. Counsel also cited and relied on **The Attorney General -v- Peter Hyppolite et al**⁵ where the court of appeal ruled that section 441 of the Criminal Code of St Lucia was unconstitutional. It was noted by Counsel that the Court of Appeal applied the case of **Attorney General of Hong Kong -v- Lee Kwong-Kot; Attorney General of Hong Kong -v- Lo Chak-man and another**⁶(**The Lee Kwong Kot Case**). In that case it was held that it was unconstitutional to place the onus of the Defendant to establish

³ (1967) 12 WIR 5 as affirmed by the (1969) 15 WIR 229

⁴ HCVAP2009/0017 (Territory of the Virgin Islands)

⁵ SLUHAP2015/0019 (St Lucia)

⁶ (1993) AC 951

his or her innocence. It was held that the right was enshrined and guaranteed in the Constitution.

- [24]. Counsel submitted that the Magistrate in the case at bar placed the onus on the Appellant to prove his innocence and shifted the burden of proof from the prosecution to the defendant which was wrong.

Court's considerations

- [25]. The court's task in the case at bar is to examine the challenge to the constitutionality of sections 308 of the Criminal Code of Saint Vincent and The Grenadines.⁷ That is, whether it is in clear contradiction of section 8(2) (a) and sections 8(7) of the Constitution of Saint Vincent and The Grenadines.
- [26]. In **McEwan -v- The Attorney General of Guyana**⁸ the Caribbean Court of Justice observed that

*"... A Constitution must be read as a whole. Courts should be astute to avoid hindrances that would deter them from interpreting the Constitution in a manner faithful to its essence and its underlying spirit. If one part of the Constitution appears to run up against an individual's fundamental right, then, interpreting the Constitution as a whole, courts should place a premium on affording the citizen his/her enjoyment of the fundamental right, unless there is some overriding public interest. ..."*⁹

Reversed burden of Proof:

- [27]. This case involves the consideration of the reversed burden of proof which really is a concept that involves shifting the responsibility of proving a fact from the prosecution to the defence. It also means that here is a shift in the burden of proof.
- [28]. One of the fundamental principles of the criminal law in the common law system is that the prosecution is required to prove the accused person's guilt beyond a

⁷ Op cit

⁸ [2018] CCJ 30, 94 WIR 332, [2019] 1 LRC 608

⁹ Ibid @ para 41 per Saunders PCCJ

reasonable doubt. There is the “presumption of innocence¹⁰” that is guaranteed to every person under the constitution of Saint Vincent and The Grenadines. Like wise there is also the constitutionally guaranteed right to remain silent. An accused person is not bound to say anything in his or her defence.¹¹

[29]. Section 308 of the Criminal Code¹² provides as follows:

“Any person who is charged with having in his possession in any place or conveying in any manet, anything reasonably suspected of being stolen or unlawfully obtained and who does not give an account to the satisfaction of the court as to how he came by same, is guilty of an offence and liable to imprisonment for six months”

[30]. This section of the law contains a reversal of the burden of proof which can be seen as being in violation of the accused person’s constitutional rights. In the case at bar, the issue to be considered is whether this provision of the criminal code is contrary to the provisions of the constitution pursuant to section 101 of the Constitution which provides

“The Constitution is the Supreme Law of St Vincent and the Grenadines and, subject to the provisions of the constitution any law that is inconsistent with this Constitution, this Constitution shall prevail and the other Law shall, to the extent of the inconsistency be void.”

[31]. Counsel Marks cited and placed reliance on the Court of Appeal decision in the **Maduro Case** emanating out of the Territory of the Virgin Islands.¹³ At issue in that case was whether the learned judge erred in law in declaring that section 308 of the Criminal Code of the Virgin Islands was unconstitutional without first determining whether the section could be adopted or modified to bring it in conformity with the

¹⁰ See section 8(2)(a) of the Constitution of Saint Vincent and the Grenadines

¹¹ See section 8(7) *ibid*

¹² Chapter 171 of the Laws of Saint Vincent and the Grenadines

¹³ *Op cit*

Constitution. In that case, the section of the Criminal Code was identical to the section of the Saint Vincent & The Grenadines Criminal code under consideration.¹⁴

[32]. The High Court Judge who heard the Constitutional motion found that the impugned sections of the Criminal Code violated 16(2) and 16(6) Virgin Islands Constitution in that it put the onus on the defendant charged to disprove that he or she did not know that the goods were stolen or unlawfully obtained and that in the circumstances that criminal matter could not be proceeded with.

[33]. The Attorney General appealed this decision successfully on the ground that the trial judge did not apply section 115 of the Constitution which provides existing laws which are inconsistent with the Constitution must be construed with such adaptations and modifications as may be necessary to bring into conformity with the Constitution and the judge of first instance decision was duly set aside.

[34]. The matter was remitted to the High Court for the High Court Judge to carry out the exercise envisaged by section 115 of the Virgin Island's constitution and then determine the constitutional fate of section 308 of the Criminal Code.

[35]. The Court of Appeal also held that the court must identify the element of unconstitutionality in the relevant statutory provision and then to consider what change is necessary to give effect to the requirement of the Constitution and the appellant's constitutional rights. The Court of appeal in coming to its decision applied the case of **Greene Browne -v- The Queen**¹⁵

[36]. **Section 115 of the Constitution of the Virgin Islands which provides**
"115(1) Subject to this section the existing laws shall have effect on and after the appointed day as if they had been made pursuance of or in consistency with this

¹⁴ Section 308 of the Criminal Code of Saint Vincent & The Grenadines Chapter 171 of the Law of St Vincent and the Grenadines

¹⁵ [2000] 1 AC 45

Constitution and shall be construed with such adaptations and modifications as may be necessary to bring them into conformity with this Constitution.

...

(3) In this section “existing Laws” means laws and instruments other than acts of Parliament of the United Kingdom and instruments made under them having effect as part of the law of the Virgin Islands immediately before the appointed day”

[36]. This section is very similar to the **Paragraph 2 of the second schedule to the Constitution of Saint Vincent and The Grenadines** states

- (1) “The existing laws shall, as from the commencement of the Constitution, be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution and Supreme Court Order.*
- (2) Where any matter that falls to be prescribed or otherwise provided for under the constitution by Parliament or by any other authority or person is prescribed or provided for by or under an existing law (including any amendment to any such law made under this section), that prescription or provision shall, as from the commencement of the Constitution, have effect (with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the Constitution and Supreme Court Order) as it had been made under the Constitution by Parliament or, as the case may require, by other authority or person.*

...

*(5) “For the purposes of this paragraph, the expression “**existing law**” means any Act, Ordinance Rule, Regulation, order or other instrument made in pursuance of or continued in force by or under the Constitution and having effect as a law immediately before the commencement of the Constitution.”*

- [36] The takeaway from the **Maduro case** is that the approach to be adopted in considering the constitutionality of the impugned sections of the Civil Code in the case at bar is to first consider the “**Existing Laws**” section of the Constitution as quoted in the previous paragraph in order to give consideration to the constitutional effect of an inconsistency between an existing law and the Constitution.
- [37] The question therefore is the Criminal Code “*made in pursuance of or continued in force by or under the Constitution and having effect as a law immediately before the commencement of the Constitution.*” The view being, that if it is not this court can then go immediately to considering the constitutionality of the impugned sections.
- [38] Breaking the provision down into the following questions, is the Criminal Code:
- (1). *made in pursuance of; or*
 - (2). *continued in force*
- by or under the Constitution and*
- having effect as a law immediately before the commencement of the Constitution.*”
- [39] The Criminal Code¹⁶ is Act no 23 of 1988 is stated to be an act to amend and codify the criminal laws of St Vincent and The Grenadines and for matters incidental thereto. Its date of Commencement was **the 30th day of October 1989.**
- [40] The date of commencement of the Constitution of Saint Vincent and Grenadines was the 27th October 1979.

¹⁶ Chapter 171 of the Laws of Saint Vincent & The Grenadines

- [41] Counsel Marks also cited and relied on the case of **The Attorney General -v- Peter Hyppolyte et al.**¹⁷ It is noted that a similar complaint was made about sections 8(1) (2) & (7) of the St Lucia Civil Code, which placed the onus of proof on the accused persons to prove that their possession of the foreign currency was lawful. The challenge raised was whether the fact that the reverse onus and burden placed on them was unconstitutional vis a vis section 16 of the St Lucia Constitution or that it was disproportionate in all the circumstances. In St Lucia the judge of first instance found in favour of the defendants. The Attorney General being dissatisfied with the judge's decision appealed. This appeal was dismissed. The Court of Appeal held that the element of the charge requiring the defendant to give a "*satisfactory account*" of how the property came into his possession was in fact "*the most important ingredient of the offence charged*" *This charge was similar to the case at bar.*
- [42] The Court of Appeal found that this placed an onus on the defendant to avoid a finding of guilt to establish that he or she was able to give an explanation as to his or her innocent possession of the property. It was further held that this section reduces the burden of proof placed on the prosecution to proving possession by the defendant the facts from which a reasonable suspicion can be inferred that the property was stolen or unlawfully obtained. It was found that this section therefore contravened the presumption of innocence as provided for in the Constitution of St Lucia. The Court of appeal therefore upheld the finding of the judge of first instance.
- [43] The Court of Appeal further held that in consideration of the Constitutional provision which embodies the presumption of innocence "*has to be given a generous and purposive construction*" and *should not be construed in such a manner which emasculates the provisions of the presumption of innocence embodied in S8(2)(a) of the Constitution. Further, section 8(12)(a) of the Constitution is not intended to apply to the essential ingredient of the offence. It*

¹⁷ SLUHCVP2015/019

was held that the judge of first instance was correct when he severed the offending part of Section 444(1) of the St Lucia Criminal Code and to the extent that the offending part of section 441 (1) was inextricably linked to s 441(2) of its entirety.

[44] The Court of Appeal accordingly applied the following cases in arriving at their decision:

(1). **Attorney General of Hong Kong -v- Lea Kwong Kut; Attorney General of Hong Kong -v- Lo Chak Man and another (The Hongkong Case)**¹⁸

(2). **The Attorney General of The Gambia -v- Momodou Jobe** ¹⁹

The case of **Beezzadhur -v- The Independent Commissioner against Corruption and Another** ²⁰was distinguished.

[45]. In the **Hong Kong Case**, the Privy Council was called on to opine on whether sections 25(1) and 30 of the Hong Kong Drug Trafficking (Recovery of Proceeds) Ordinance was unconstitutional. The consideration was whether it breached Article 11 of the Hong Kong Bill of Rights Ordinance which provides that “*Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law*”

[46]. The language and the structure of Section 30 under consideration by the court were similar to 308 of the Saint Vincent and the Grenadines Criminal Code. The Privy Council opined that this section comprised of three elements that is, firstly, the possession or conveying of the property by the defendant, secondly, the reasonable suspicion that the property has been stolen or unlawfully obtained and thirdly, the inability of the defendant to give a satisfactory account of how the property came into his possession.

¹⁸ [1993] AC 951

¹⁹ [1984] AC 689 100

²⁰ [2014] UKPC

[47]. It was the opinion of the Board that the third element was the most important element of the offence since

“ ... were it not for the third ingredient, it is not difficult to envisage circumstances in which a defendant in possession of property could be guilty of an offence without any behaviour on his part to which it would be appropriate to attach the strictures of the criminal law. He could, be in possession of the property without having any knowledge of any circumstances which gave rise to the reasonable suspicion that the property was either stolen or obtained unlawfully which justified the police officer detaining him.”²¹

[48]. The Privy Council held that the substantive effect of section 30 is to place the onus on the defendant to establish that he can give an explanation as to his innocent possession of the property, further, that it was the most significant element of the offence which reduced the burden of the prosecution to proving possession by the defendant and facts from which a reasonable suspicion can be inferred. The Court's finding was that the section contravened Article 11(1) of the Hong Kong Bill of Rights in a manner which the State could not justify.

[49] By parity of reasoning the same consideration which led the Privy Council to conclude that section 30 of the Summary Offences Ordinance of Hong Kong Contravened the presumption of innocence the same would apply to the case at bar.

[50] Belle J at first instance in the **Hyppolite decision** found that the effect of the impugned section which is identical to the sections here in Saint Vincent and the Grenadines and in Hong Kong contravened the Constitution.

[51] This court agrees with the reasoning of the learned judge that the required explanation interfered with the requirement of reasonable doubt.

²¹ Opcit at page 265

[52] Further, the Court of Appeal Considered the decision of the Privy Council and the test laid down for when a reverse burden of proof would be acceptable. Justice of Appeal Baptiste who handed down the Court of Appeal's decision quoted Lord Woolf in the Hong Kong case as follows:

“whether they [reverse burdens] are justifiable will in the end depend upon whether it remain primarily the responsibility of the prosecution to prove the guilt of the accused to the required standard and whether the exception is reasonably imposed, notwithstanding the importance of maintaining the principle [presumption of innocence] ... if the exception requires certain matters to be presumed until the contrary is shown, then it will be difficult to justify the presumption unless, as was pointed out by the United States Supreme Court in Leary -v- United States (1969) 23 L Ed. 2d 57,82 “it can be at least said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend”.

[53] The learned Justice of Appeal stated “ *the Board unambiguously held that section 30 of the Summary Offence Ordinance of Hong Kong (the equivalent of Section 441 in Saint Lucia) [also equivalent to section 308 in Saint Vincent and The Grenadines] violates the presumption of innocence. ...*” This court is bound by the decision of the Court of appeal and would make the same finding.

[54] The main issue to be decided in the case at bar is whether section 308 of the Saint Vincent and the Grenadines Criminal Code is inconsistent with Sections 8(2)(a) and Section 8(7) of the Constitution of Saint Vincent and The Grenadines.

[55] The Court of Appeal in St Lucia was called on to review the decision made by Justice Francis Belle who struck out the similar sections in the St Lucia Criminal Code and the Court of Appeal agreed with and upheld the Learned Judge's decision.

- [56] In the Court of Appeal decision as cited and relied on by the appellant herein the case of **A-G of Hong Kong -v- Lee Kwong-Kut, A-G of Hong Kong -v- Chak - man**²² was found by Justice of Appeal Baptiste to be critical to the disposition of the appeal.
- [57] In the **Lee Kwon Kut case** the Privy Council interpreted a provision similar to section 441 of the St Lucia Criminal Code and to Section 308 of the St Vincent Criminal Code and struck it down as being inconsistent with the Hong Kong Bill of Rights Ordinance.²³
- [58] The relevant facts in the **Lee Kwong Kut Case** was that the accused was charged under Section 30 of the Summary Offences Ordinance of Hong Kong alleging that he had in his possession HK\$1.76 million reasonably suspected of having been stolen or unlawfully obtained. Section 20 of the Summary Offences Act of Hong is in identical terms of Section 308 of the St Vincent Criminal Code.
- [59] The Privy Council stated that the offence created by the section contained three elements as follows:
- (1). The possession or conveying of property by the defendant
 - (2). The reasonable suspicion that the property has been stolen or unlawfully obtained
 - (3). The inability of the defendant to give a satisfactory account of how the property came into his possession.
- [60] It was the opinion of the Privy Council that the third ingredient of the offence was the most important ingredient and that however; it was not a special defence.
- [61] The Privy Council ruled that this in effect placed the onus of the defendant to establish that he can give an explanation as to his innocent possession of the

²² [1993] 3 ALL E R 939, [1993] 3 WLR 329

²³ See Para 10 of Baptiste JA Judgment in the Hyppolyte case

property which reduced the burden on the prosecution to prove the possession by the defendant that the facts from which reasonable suspicion can be inferred that the property had been stolen or illegally obtained. It was held that this section of the Hong Kong statute contravened the Hong Kong Bill of Rights that everyone charged with a criminal offence shall be deemed innocent until proven guilty according to law- in a manner that the Attorney General could not justify.

[62] By parity of reasoning, the same considerations which led the Privy Council to hold that section 30 of the Summary Offences Ordinance in Hong Kong contravened the right to be presumed innocent as provided for by the Hong Kong Bill of Rights in the same manner this court finds that the impugned section in this case contravenes the presumption of innocence in favour of the appellant as guaranteed by the Constitution of Saint Vincent and the Grenadines as it places on the appellant the onus of proof in order to avoid a finding of guilt that he must establish that he is able to give an explanation for his innocent possession of the meat in question. This imposes on the appellant the burden of proving certain facts which interferes with the requirement of reasonable doubt. As was held in the **Hyppolite case**.

[63] It is noted that no case was cited to this court to doubt the validity of the pronouncement of the Privy Council's finding in **Lee Kwong-Kut**²⁴ which has in fact provided guidance to this court also.

[64] This court finds that section 308 of the Saint Vincent Criminal Code contravenes the Constitution. Before striking out the section, it is necessary for the court to consider whether this provision was an existing law or not.

[65] Section 308 is found in the Criminal Code²⁵ which in 1988 codified the criminal laws of Saint Vincent and the Grenadines and all matters incidental thereto. This

²⁴ Op cit

²⁵ Act number 23 of 1988 which was assented to by the Governor General on the 6th October 1988

legislation was further revised in 2009. The previous Law Revision occurred according to the preface in Volume 1 of the 1988 law as written by the then Attorney General Parnell Campbell QC was the formal revision since 1926.

- [66] The various pieces of criminal legislation in 1988 was brought under a single piece of legislation which has since been known as the Criminal Code. These Act were in existence it is presumed since 1926 which certainly predated the coming into existence of the Constitution of Saint Vincent in 1979. This being so it is not necessary to conduct the exercise as discussed in the **Maduro Case**.

The Respondent's submissions

The late submissions

- [67] In the case at bar, after it was agreed by counsel that this matter would be determined on written submissions, directions were given for the filing of submissions by each side²⁶.
- [68] The respondent was, however, extremely late and out of time with the filing of their submissions. It cannot be helped but to notice that when the matter was listed for decision²⁷ based on the applicant's submissions that the respondents hurriedly filed their submissions with the court. There was no application for an extension of time or to deem the submissions filed out of time, properly filed as is provided for in the Civil Procedure Rules 2023 (Revised Edition) (CPR).
- [69] It is this court's view that the state had ample time to ensure that their written submissions were filed in a timely manner in compliance with the order of court or make the necessary applications as provided for in CPR.
- [70] Now in view of the actions by the respondent what should the court do?
Reference is made to the Privy Council opinion in **Crick and another -v- Kurt**

²⁶ Order of Court dated the 23rd November 2024

²⁷ The matter was listed in October 2024 for decision

Brown²⁸. The issue to be decided in that matter was the consequences which may be imposed on a party who fails to file their written submissions in proper time in accordance with the case management directions set out by the court.²⁹

- [71] In that case, no excuse was offered by the defaulting party for failing to file their written submissions in compliance with the court's directions as has occurred in the case at bar. Counsel sought to make presentations at the appeal hearing. This was not allowed by the court of appeal as it interfered with the court's scheduled hearing of the matter and further, that the court was deprived of prereading the written submissions of the defaulting party which was liable to jeopardise the efficient and effective use of the court's time and that it would have been unfair to the other side to allow the defaulting party to make submissions for which the other side would have had no notice of. The result was that the first matter was dealt (The Cricks Appeal) without hearing the submissions or dealing with the submissions of the defaulting party who happened to be the appellant, and the appeal was subsequently dismissed.
- [72] In the Phillip case, directions were given by the court of appeal for the filing and service of written submission and authorities, the order did not set out what sanction might apply if there was default by the parties. This was the same situation as in the Crick Case.
- [73] Submissions were filed by the appellant without leave or without application to deem them properly filed. The appellant was challenged as to his failure to file the submissions as ordered, or to make the necessary applications as provided for by CPR. Amongst the excuses offered was the impecuniosity of the appellant and his inability to retain the services of counsel to assist him. The court expressed its dissatisfaction as to the noncompliance and spoke to the fact that the appellant's failure affected the entire timetable including whether there would be an effective

²⁸ [2020] UKPC 32

²⁹ This opinion of the Privy Council dealt with two cases emanating out of Trinidad and Tobago on the same point of delay and non compliance with trial directions. The first case was "the Crick Case" and the second case was the "the Phillip Case".

hearing on the date fixed for the hearing of the appeal. Counsel for the appellant was unable to offer an excuse for the noncompliance and accepted that he was at fault.

- [74] The court in its ruling found that there was no good explanation for the failure to file the submissions when they were due. The justice of appeal rendering the court's decision Mendonca JA referred to the guidance offered by the Trinidad Court of Appeal in **Roland James -v- The Attorney General of Trinidad and Tobago Civil Appeal NO 44 of 2014 dated 19th December 2014** regarding the extensions of time where the court of appeal held *inter alia* that they would not extend the time for the filing of the submissions, and dismissed the appeal.
- [75] The dismissal of both appeals amounted to the determination of the substantive matters before the court.
- [76] The Privy Council examined *inter alia* the Overriding Objective and its supporting provisions³⁰ and the provisions regarding Sanctions – striking out statement of case³¹
- [77] The Privy Council considered the question of whether the Court complied with Part 26.6(1) in view of the fact that neither of the direction orders specified any sanction for failure to comply with the directions. The Court also considered their decision in the **Keiron Matthews Case**³² and considered the effect of an order or directions made without a sanction as a penalty for noncompliance with them and how the court should proceed in the light of that. It was stated that "... the party who failed to comply would be subject to the general case management power of the court under CPR 26.1 (TTT). That power would fall to be exercised so as to further the overriding objecting of CPR Part 1 ..."

³⁰ Under the CPR 2023 (Revised Editions) Parts 1 – The Overriding objection, Application of the overriding objective by the court and Duty of Parties

³¹ Parts 26.26.4, 26.7. 26.8 and 26.9

³² Attorney General of Trinidad & Tobago -v- Keron Matthews [2011] UKPC 38 @ paras 15-16

[78] Lord Sales in delivering the opinion went on to discuss that it is desirable for the court to seek to foster predictability by specifying a sanction for breach of any order or direction when it can, but realised that this is not always possible or practicable to do so. His lordship went on to say whilst

“... it did not mean that there would be no consequences attaching to non compliance with directions ...aside from the obvious consequence that an extension of time would be required from the filing of any written submissions ...any party who failed to comply with them would be at risk of suffering such detriment as the court might think it right to impose in the exercise of its discretion, having regard to the need to further the overriding objective.”³³

[79] It was ultimately concluded that the Court of Appeal in the Cricks case was fully entitled not to grant the adjournment sought by the defaulting party which was made only on the day of the hearing. However, after considering all the circumstances attendant on the Phillips appeal as presented to the court, it was noted that the submissions were filed albeit without the leave of the court. The Privy Counsel considered that they were filed and that the opposition would have had notice of the contents and it was held that the Court of Appeal of Trinidad and Tobago erred in failing to consider whether it would be fair and in accordance with the overriding objective whether or not to allow his submissions to be presented. That fairness judged in the light of the overriding objective should have permitted Mr. Phillips to present his case.

[80] This court takes into consideration the case of **Denton**³⁴ even though in this case the Court of Appeal in England was called on to consider whether to grant an application for relief from sanctions, the judgment is very helpful in this court's

³³ See paragraph 27 of the Crick judgment op cit

³⁴ [2014] ECWA Civ 906

consideration as to whether or not to entertain the very late submissions filed by the State, filed out of time or without leave of the court.

[81] This court noted the directions order did not contain any sanction and in considering the importance of the decision to the jurisprudential landscape along with the third prong of the **Denton Test** to consider all circumstance of the case and to deal with the application fairly, it was decided to consider the submissions as made by the state.

[82] It is to be noted that the parties were not summoned to court and the applicant given an opportunity to respond to the late submissions filed by the state.

The Crown's submissions

[83] In the submissions made by Crown counsel L T Rose-Ann Richardson on behalf of the Crown she cited and relied **The Attorney General -v- Peter Hyppolite et al**³⁵ and the Privy Council opinion in **AG of Hong Kong -v- Lee Kwong-Kut**³⁶ and **Vasquez -v- The Queen**³⁷ in discussing the issues at bar.

[84] It is the thrust of the State's submissions that the reverse burden of proof contained in the law does not fall within the exception contemplated in the **Lee Kwong-Kut** case and cannot otherwise be justified and that section 308 in the case at bar should be declared unconstitutional.

[85] The respondent's submission, however, does not stop there but goes on to recommend that based on the provision 2 of the second schedule of the Constitution of Saint Vincent and the Grenadines that the court should utilise the tool with which it is empowered with to modify the impugned section of the law to bring it within the conformity of the requirements of the constitution. It was further submitted that the Criminal code cannot be considered as existing law because it

³⁵ SLUHCV2015/0019

³⁶ [1993]A C 951

³⁷ [1994] 45 WIR 103

post-dates the Constitution, which empowers the court to modify, adapt, qualify or make exceptions to that section. However, it was submitted that there appears to be no authority to modify the Constitution and the court can only declare the impugned section 308 to be void without arrogating unto itself the function of the legislature and then it would be left to the legislature to repeal the section from the criminal code.

- [86] On behalf of the state, the submission was made that the court should declare the impugned sections as being unconstitutional in that it offends sections 8(2)(a) and section 8(7) of the Constitution and should accordingly be deemed void.

Disposition

- [87] Therefore, the disposition of this case would be simply to declare section 308 to be unconstitutional and to strike same out without attempting to modify the section in anyway.
- [88] In the **Hyppolyte Case**, our Court of Appeal upheld Justice Belle's ruling that section 441 of the Criminal Code of St Lucia and held that he properly severed the offending part of section 441 (1) which is identical to the impugned section at bar to the extent that the offending part was found to be inextricably linked to section 441 (2) and section 441 (2) could not be saved.
- [89] Likewise in Saint Vincent and the Grenadines, section 308 of the Criminal Code is unconstitutional and therefore null and void and is struck out.
- [90] It is noted that counsel Mr. Marks for the appellant submitted that the Magistrate misdirected himself regarding the test to be used to find the appellant guilty, unfortunately, this court is not clothed with the jurisdiction to opine on that but merely to opine on constitutionality of the section 308 of the Criminal Code. Similarly, crown Counsel Richardson in her submission that the appeal against the conviction by the appellant should be upheld and the conviction quashed. This

court is also not clothed with the jurisdiction to uphold or quash a decision of the magistrate's court that is a jurisdiction held exclusively by the Court of Appeal. In any event, this court's mandate was to pronounce on the constitutionality of the impugned section and this has been done.

[91] This court wishes to thank counsel for their helpful submissions and patience in awaiting this decision.

M E Birnie Stephenson
High Court Judge

By the Court

Registrar