

IN THE EASTERN CARIBBEAN SUPREME COURT
ANTIGUA AND BARBUDA

IN THE HIGH COURT OF JUSTICE

In The Matter of Sections 3 (a) (b) (c), 10, 12 (1) (4), and 18 of The Antigua and Barbuda Constitution

Order 1981

And

In the Matter of the Supreme Court (Constitutional Redress – Antigua) Rules 1970

CLAIM NO. ANUHCV 2017/0612

BETWEEN:

GEORGE WEHNER

Claimant

and

[1] THE ATTORNEY GENERAL OF ANTIGUA AND BARBUDA
[2] COMMISSIONER OF POLICE

Defendants

Appearances:

Mr. Leon Chaku Symister, Counsel for the Claimant
Ms. Joy Dublin, Counsel for the Defendants

2022: December 22nd

JUDGMENT

Introduction and Findings

[1] **ROBERTSON, J.:** The Claimant was charged with having committed offences contrary to section 4 (1) (a) and section 4 (1) (b) of the **Electronic Crimes Act No. 14 of 2013** [hereinafter called ‘the Act’]. The Claimant formed the view that the provisions of sections 4(1) (a) and 4(1) (b) were unconstitutional and initiated these proceedings. Specifically, the Claimant contends that the provisions of section 4(1) (a) and (b) infringe the Claimant’s fundamental constitutional rights and freedoms which protect freedom of expression and freedom from being subjected to search of person or property or from entry by others onto one’s premises without the person’s consent.

- [2] This Court having considered the evidence and the submissions of the Parties has determined that the provisions of section 4(1) (a) and (b) of the **Act** are constitutional.

Relevant Background and Evidence of the Parties

The Claimant

- [3] The claimant, Mr. George Wehner, identifies as a businessman who in or about May 2015 began hosting a political talk show on a radio station called “Crusader Radio”. The evidence of the Claimant is that the programme was, among other things, “concerned primarily with exposing the weakness of the Antigua Labour Party¹ government, their broken promises, and the malfeasance and misfeasance of individuals in government”. The Claimant’s evidence went on to indicate that “The programme is promoted as one that shoot (sic.) down corruption, blows up ineptness and incompetence, fires at crooked and secret deals that benefits (sic.) those in government and destroys the obstacles to accountability and transparency”. The Claimant listed a number of other matters relating to what the Claimant considers to be malfeasance and misfeasance in public office as matters which the programme addresses.

- [4] The evidence of the Claimant is that the program was promoted by audio and video military sound effects and the host as “commander” announces to the audience:

“Welcome to “In the Trenches” ... A political talk show here on Crusader Radio, 107.3 FM, where hard core political issues are discussed.

The rules In the Trenches are as follows:

- (a) Engage in the “Political Cut and Thrust” with responsible speech!
- (b) Keep your “Eyes on the Political Target”!
- (c) Keep advancing and “Regain Political Ground”!

So, listen strap on your body armor (sic.) and make sure your helmets are properly secured!”

- [5] On 12th December, 2016 members of the Royal Antigua and Barbuda Police Force, which included an Assistant Commissioner of Police, detained and arrested the Claimant. The Claimant was presented with a warrant to search his home for computers, laptop, and other electronic devices. The electronic devices were seized by the police and were, according to the Claimant, searched. While the Claimant was detained by police officers he was questioned. He was released approximately 33 hours after detention and arrest.

¹ The Antigua Labour Party is the political party in governance at the relevant time in Antigua and Barbuda.

- [6] On 3rd May, 2017² the Claimant was presented with fourteen complaints summoning the Claimant to appear in court before the District Magistrate to answer the complaints. The complaints related to intentionally and unlawfully sending by means of an electronic mail, a threat to kill Robin Yearwood, Teco Lake, Molwyn Joseph, Melford Nicholas, Arthur Nibbs, Gaston Browne, Gerald Watts, Michael Browne, Steadroy Benjamin, Lennox Weston, Charles Max Fernandez, Dean Jonas, Paul Chet Greene and Lester Bird contrary to Section 4(1) (a) of the **Act**.
- [7] The Claimant was also presented with fourteen additional complaints to appear before the District Magistrate to answer the complaints that without lawful excuse the Claimant caused Robin Yearwood, Teco Lake, Molwyn Joseph, Melford Nicholas, Arthur Nibbs, Gaston Browne, Gerald Watts, Michael Browne, Steadroy Benjamin, Lennox Weston, Charles “Max” Fernandez, Dean Jonas, Paul Chet Greene and Lester Bird to receive by electronic mail intimidating information intending that the named persons would fear personal violence contrary to section 4(1) (b) of the **Act**. The latter complaints were filed on 24th May, 2017.
- [8] The Claimant contends that the search and seizure of his electronic devices were unlawful and were in violation of his right to privacy of his home and property pursuant to section 3(a) (b) (c) and section 18 of the Antigua and Barbuda Constitution Order [hereinafter “the Constitution”]. Specifically, the Claimant indicated that:

“1. In effecting the said search and seizure the police officers did not pay any or any sufficient attention to the fact that:

(a) I was involved in political satire.

(b) The promotions of the political talk show were in the public domain for almost a year and did not constitute a breach nor imminent breach of the peace.

2. The search and seizure of my electronic devices was directly linked to the said section 4(1) (a) and 4(1) (b) of the Electronic Crimes Act of the Laws of Antigua and Barbuda which, ... is an unlawful violation of my right to freedom of expression under section 12 of the Constitution of Antigua and Barbuda”.

The Defendants

- [9] The evidence of the Defendants was given by Clayton Davis, an Assistant Commissioner of Police (ACP). The Defendants noted that the Claimant was a former member and officer of the Antigua and Barbuda Defence Force and was attached to the force from July 1998 to June 2014. The Defendants also noted that the Claimant attained the rank of captain within the Defence Force. The Defendants were of the view that during the period that the Claimant was with the Defence Force the Claimant

² The dates of the offenses were between the period 1st January, 2016 to 7th December, 2016.

would have received military training and therefore possessed extensive knowledge and experience in the use of various weapons and ammunition and gained experience in target shooting.

- [10] The Defendant's evidence is that Clayton Davis on 7th December, 2016 received a video and a report that the video was reportedly made by the Claimant and posted on the Facebook page entitled "MY UPP". In the video the Claimant was depicted in military uniform save in one instance when the Defendants indicated that the Claimant was dressed in Muslim attire. The video also depicted someone shooting at several targets and the sound of gun shots were heard. On the targets were images of the various persons who were identified in the complaints issued. At the end of the video there was a voice which the Defendants indicate appeared to be the voice of the Claimant stating, "keep your eyes on the target".
- [11] ACP Davis spoke with some of the persons who were depicted in the video, and persons expressed that they were fearful for their lives and the lives of their colleagues. ACP Davis also had a conversation with the Director of Public Prosecutions and was given permission to proceed with an investigation. Consequently, the police sought and executed a search warrant which was issued by the Chief Magistrate. During the search several electronic items and photographs were seized and taken to the police headquarters. The Claimant was detained and interviewed in the presence of his attorney at law. The Claimant was released on 13th December, 2016 pending further investigation.
- [12] The Defendants' servant or agent took photographs of the items seized at the Claimant's premises and on 12th December, 2017 the photographs which were taken were given to the Claimant. On that day the Defendant indicated that the Claimant was informed that he was being reported for (i) sending intimidating messages contrary to section 4(1) (b) of the **Electronic Crimes Act** and (2) sending threats contrary to section 4(1) (a) of the **Electronic Crimes Act**.
- [13] The evidence of the Defendants is that the electronic items were returned to the Claimant.

Matters for the Court's Determination

- [14] The Claimant in his claim sought declarations from the Court that:
- (a) The Claimant is entitled to the protection of freedom of expression as guaranteed by sections 12(1) and (4) of the Constitution; and
 - (b) Section 4(1) (a) and (b) of the **Electronic Crimes Act** violate section 12(1) and 10 (1) of the Constitution.
- [15] The Claimant contends that the provisions of section 4 (1) (a) of the **Act** are in breach of the Claimant's right to freedom of expression in that the provisions of section 4 (1) (a) are overly broad and did not provide a basis for the police to pay any or sufficient attention to the fact that:

- (a) The content was bona fide satirical political speech,
- (b) The promotional information neither constitute a breach nor an imminent breach of the peace.

[16] The Claimant also contends that the provisions of section 4(1) (a) of the **Act**:

- (a) create an offence in which persons are punished who communicate with others in a manner not likely to lead to a breach of the peace;
- (b) deny the right of persons to disseminate information and ideas without interference (whether the dissemination is to the general public or to any person or class of persons); and
- (c) make no provision to distinguish true threats from inadvertent statements, hyperbole, innocuous talk, or political commentary.

[17] As it relates to section 4(1) (b) of the **Act** the Claimant contends that the subsection is an infringement of his right to freedom of expression as stated in section 12 of the Constitution in that the language of the section is vague and “(a) the average citizen cannot determine what conduct is prohibited; (b) does not give adequate notice to people that a certain behaviour is required or is unacceptable; (c) could criminalise innocuous conduct, (d) it (sic.) poses a real danger that the prohibition might ultimately translate to a prohibition on whatever the officer personally finds to be “annoyance, inconvenience, danger, obstruction, insult, injury, intimidation, enmity, hatred or ill will”.

The Legislative Framework

[18] Section 3 of the Constitution provides:

“Whereas every person in Antigua and Barbuda is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, regardless of race, place of origin, political opinions or affiliations, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following namely-

- (a) Life, liberty, security of person, the enjoyment of property and the protection of the law;
- (b) Freedom of conscience, of expression (including freedom of the press) and of peaceful assembly and association; and
- (c) Protection for his family life, his personal privacy, the privacy of his home and other property and from deprivation of property without fair compensation.”

[19] Section 10 of the Constitution provides:

“10. (1) Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision-

- (a) that is reasonably required in the interests of defence, public safety, public order, public morality, public health, public revenue, town and country planning or the development and utilization of property in such a manner as to promote the public benefit;
- (b) that authorises an officer or agent of the Government, a local government authority or a body corporate established by law for public purposes to enter on the premises of any person in order to inspect those premises or anything thereon for the purpose of any tax, rate or due in order to carry out work connected with any property that is lawfully on those premises and that belongs to the Government, or to that authority or body corporate, as the case may be;
- (c) that is reasonably required for the purpose of preventing or detecting crime;
- (d) that is reasonably required for the purpose of protecting the rights or freedoms of other persons; or
- (e) that authorises, for the purpose of enforcing the judgment or order of a court in any proceedings, the search of any person or property by order of a court or entry upon any premises by such order, and except so far as that provision or, as the case may be, anything done under the authority thereof is shown not to be reasonably justifiable in a democratic society.”

[20] The relevant parts of section 12 of the Constitution indicate that:

“12(1) Except with his own consent, no person shall be hindered in the enjoyment of his freedom of expression.

12(4) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision –

- (a) that is reasonably required –
 - (i) in the interest of defence, public safety, public order, public morality or public health; or
 - (ii) for the purpose of protecting the reputations, rights and freedoms of other persons, or the private lives of persons concerned in legal proceedings and proceedings before statutory tribunals, preventing the disclosure of information received in confidence, maintaining the authority and independence of Parliament and the courts, or regulating telephony,

posts, broadcasting or other means of communication, public entertainments, public shows; or
(b) that imposes restrictions upon public officers that are reasonably required for the proper performance of their functions;

and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.”

[21] The **Electronic Crimes Act 2013** makes provisions for the prevention and punishment of electronic crimes and for other related matters. Section 4(1) (a) and (b) provides that:

“4. Sending offensive messages through communication services, etc.

(1) A person shall not intentionally, without lawful excuse or justification send by means of an electronic system –

(a) information that is offensive or threatening;

(b) information which is false, causing annoyance, inconvenience, danger, obstruction, insult, injury, intimidation, enmity, hatred or ill will, persistently by making use of such electronic system or an electronic device;”

The Law

[22] It is accepted that freedom of expression and freedom from arbitrary search are constitutionally protected rights. Sections 3 (b) and 12 make specific reference to, among other things, the freedom of expression, freedom of association security of person and enjoyment of property. Section 3 provides that the rights therein are subject to the rights and freedoms of others and to public interest. Section 12(4) indicates that laws which are reasonably required in a democratic society in the interest of, among other things, defence, public safety, public order, public morality or for the purpose of protecting the reputations, rights and freedoms of other persons shall not be deemed to be inconsistent with or in contravention of the right to freedom of expression.

[23] The Claimant has the burden to show that he is personally affected by the specific provision of the enactment and that there has been or likely to be a breach of his fundamental rights.

The Quality of the Law

[24] Primarily, the Claimant challenges the constitutionality of the law based upon the quality of the law. The concept of what constitutes a law has been considered by many courts. A law must be sufficiently accessible, sufficiently precise, and foreseeable. In the case of Sunday Times v United Kingdom³

³ (1979) 2 EHRR 245.

the European Court of Human Rights in considering Article 10 of the Convention⁴ (an article which addresses the right of the freedom of expression) addressed the word “law” and the term “prescribed by law” and determined that there are two requirements which flow from the expressions. “Firstly, the law must be adequately accessible; the citizens must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a “law” unless it is formulated with sufficient precision to enable the citizen to regulate his conduct; he must be able -if need be, with appropriate advice- to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice”⁵.

- [25] More recently in the case of **Re Gallagher’s** application for Judicial Review (Northern Ireland) and other appeals⁶ the Supreme Court of England considered, among other things, the “quality of the law”. In that case the Lord Sumption noted that “the condition of legality is not a question of degree. The measure either has the quality of law or it does not. It is a binary test. This is because it relates to the characteristics of the legislation itself, and not just to its application in any particular case”⁷. On the specific question of the quality of law Lord Sumption indicated that:

“The accessibility test speaks for itself. For a measure to have the quality of law, it must be possible to discover, if necessary, with the aid of professional advice, what its provisions are. In other words, it must be published and comprehensible. The requirement of foreseeability, so far as it adds to the requirement of accessibility, is essentially concerned with the principle summed up in the adage of the American founding father John Adams, ‘a government of laws and not of men’. **A measure is not ‘in accordance with the law’ if it purports to authorise an exercise of power unconstrained by law. The measure must not therefore confer a discretion so broad that its scope is in practice dependent on the will of those who apply it, rather than on the law itself. Nor should it be couched in terms so vague or so general as to produce substantially the same effect in practice. The breadth of a measure and the absence of safeguards for the rights of**

⁴ “10. 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

⁵ (1980) 2 EHRR 245 at paragraph 49.

⁶ [2019] UKSC 3.

⁷ [2019] UKSC 3 at [14].

individuals are relevant to its quality as law where the measure confers discretions, in terms or in practice, which make its effects insufficiently foreseeable. Thus, a power whose exercise is dependent on the judgment of an official as to when, in what circumstances or against whom to apply it, must be sufficiently constrained by some legal rule governing the principles on which that decision is to be made. ..." (Emphasis Added).

- [26] In this case the relevant provisions of the **Act** provide that persons who intentionally and without lawful excuse or justification send information that is offensive or threatening commit an offence. The provisions also provide that persons who intentionally and without lawful excuse or justification persistently transmit by electronic system or device information, which is false or causing annoyance, inconvenience, danger, obstruction, insult, injury, intimidation, enmity, hatred or ill will commit an offence. It is noted that the provisions of the section frame the offence in that the offence is only created when there is intention and there is an absence of lawful excuse or justification. Thus, a person exercising a right under the provisions of section 12 of the Constitution (or any other enactment) would not fall under the provisions the **Act**. This is because the provisions in question constrain the breath of the provisions and contain measures which safeguard the rights (including fundamental rights) of individuals. Thus, the 'power' or discretion of the official to prefer charges is constrained by the constitutional provisions and the governing principles relating to the rule of law.
- [27] Additionally, in this case under the provisions of section 4(1) (a) the Claimant was charged with having engaged in threatening behaviour. It is noted that generally a "threat" is accepted as 'a menace of bodily harm'. Under the provisions of section 4(1) (b) the Claimant is charged with having transmitted intimidatory information. Information which is intimidatory generally refers to information which frightens to the point of overawing someone. In this Court's view the words are sufficiently precise. The question of whether the Claimant has intentionally engaged in the actions alleged in the complaint in the absence of lawful excuse or justification is a matter for the Court treating with the matter.

The Presumption of Constitutionality and the Proportionality Test

- [28] A person alleging that fundamental constitutional rights have been infringed by reason of the provisions of an enactment has the burden of proving the fact of that infringement. In this regard the Claimant is required to present a prima facie case of the infringement and initially rebut the general presumption of the constitutionality of legislative enactments. It was noted that in the case of **The Chief of Police and the Attorney General v Nias**⁸ where Rawlins CJ, as he then was, indicated that:

"Legislation is presumed to be constitutional unless there is clear proof to the contrary. The burden is upon the applicant to rebut the presumption".

⁸ (2008) 73 WIR 201 at paragraph 10.

- [29] The presumption of constitutionality directs that there is a general presumption that the law's purpose and the constitution are not in conflict, when there is more than one possible interpretation the Court should opt for the one which brings the law in conformity with the constitution rather than to declare the law unconstitutional and in circumstances where there is an interpretation which can resolve the legality of the provision this should be done rather than declaring the law unconstitutional⁹. The presumption of constitutionality would, however, not be used to justify the imposition of the burden of persuasion with the party arguing against the existence of a justification for the limitation on a constitutional right¹⁰.
- [30] Once the Claimant has made out a prime facie case of breach the burden shifts to the Respondent to demonstrate that the infringement is reasonably required, and that the enactment falls within the provisions of sections 10(2) and 12(4). In so doing the responsibility falls to the Respondent to place before the Court all relevant facts and materials to show that the enactment was reasonably required¹¹.
- [31] It is important that the Court in the exercise of its constitutional oversight does not permit legislation to render fundamental provisions of the constitution nugatory. In performing these duties, the Court addresses its mind to the provisions relating to the rights in question including the constitutional limitations and if there is a likely infraction to the fundamental rights and freedoms. If there is a prime facie case of breach the Court employs the proportionality test and engages in a balancing exercise. The proportionality test was outlined in the **De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing**¹² and has seen some modifications¹³.
- [32] It is noted that freedom of expression and freedom from arbitrary search or entry are protected under the common law and these common law protections have, by their inclusion in the Constitution, been elevated to the level of constitutionally protected rights. It is accepted that right to freedom of expression is noted as "one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfillment"¹⁴. In democratic societies it is noted that the protection of freedom of expression "applies not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that

⁹Robinson, Julian v Attorney General of Jamaica [2019] JMFC Full 04 at p. 122(6).

¹⁰ Above.

¹¹ Attorney-General and Minister of Home Affairs v. Antigua Times Ltd (1975) 21 WIR 560.

¹² [1999] AC 69 at 80. The three-limb test set out by Lord Clyde in De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing is:

'whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.'

¹³ See dictum of Dickson CJ in the Canadian case of R v Oakes [1986] 1 SCR 103 and the dictum of Lord Cornhill in Huang v Secretary of State for the Home Dept, Kasmiri v Secretary of State for the Home Dept [2007] UKHL 11 at [19].

¹⁴ Mouvement raelien Suisse v Switzerland and Animal Defenders International v United Kingdom.

offend, shock or disturb¹⁵. It stands to reason that the protection of freedom of expression must be given generous application. The relevant restrictions as provided in the Constitution are to be strictly construed.

[33] In the circumstances of this case the Claimant alleges that the provisions of the section and the action taken by the State against him are sufficient evidence of the infringement of his constitutional right to freedom of expression and right against arbitrary search or entry. Regarding the provisions of the relevant section, the Counsel for the Claimant contends that the provisions of section 4(1) (a) and (b) are overly broad or vague and as such did not create space for “bona fide satirical political speech”, that the provisions create an offence although the comment may not be likely to lead to a breach of the peace and that the provisions of the relevant section of the **Act** interfere with the right to disseminate information, whether political or other statements. On these matters the Court again refers to the provisions of the section which exclude lawful conduct. Speech which challenges, criticizes and offends can easily fall within the ambit of freedom of speech as provided by the Constitution in a democratic constitutional society and therefore speech of such nature is lawful under the provisions of the section 4(1) (a) and (b) of the **Act**. In this Court’s view the Claimant has not discharged its prima facie burden of showing the unconstitutionality of the provisions challenged.

[34] As a consequence of the foregoing, the claim is dismissed.

Justice Marissa Robertson
High Court Judge

By the Court

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¹⁵ Above.