

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

ANTIGUA AND BARBUDA

ANUHCRA2021/0003

BETWEEN:

CHERYL THOMPSON

Appellant

and

THE QUEEN

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste
The Hon. Mr. Paul Webster
The Hon. Mde. Margaret Price-Findlay

Justice of Appeal
Justice of Appeal [Ag.]
Justice of Appeal [Ag.]

Appearances:

Mr. Fitzmore Harris for the Appellant
Ms. Rily Adams for the Respondent

2021: October 21
2022: March 9.

Criminal appeal – Appeal from order made in criminal cause or matter - Appeal as of right – Whether appeal lay as of right - Section 121(a) of the Constitution of Antigua and Barbuda – Right to appeal where question concerning the interpretation of the Constitution arises – Whether any question properly arose as to the interpretation of section 15(1) of the Constitution – Section 121(b) of Constitution – Right to appeal in cases concerning exercise of High Court’s jurisdiction conferred by section 18 of the Constitution – Whether judge’s order was a final decision given in the exercise of High Court’s jurisdiction conferred by section 18 of the Constitution – Rule 62.1(3) of the Civil Procedure Rules 2000 – Test to determine whether an order or judgment is final or interlocutory – Application Test - Leave to appeal – Whether leave to appeal should be granted - Section 31(2)(a) of the Eastern Caribbean Supreme Court Act – Bar on appeals from orders made in criminal cause or matter

Cheryl Thompson ("the appellant") faced an eleven-count indictment for offences contrary to the Trafficking in Persons (Prevention) Act, 2010 as amended. Prior to this, a magistrate had committed her to stand trial, having found that the prosecution had made out a prima facie case. The appellant pleaded not guilty, and her counsel raised preliminary objections seeking to quash the indictment and stay the prosecution. Her counsel alleged a violation of her right to a fair hearing pursuant to section 15(1) of the Constitution of Antigua and Barbuda ("Constitution"), an abuse of process and that the prosecution failed to make out a prima facie case. Smith J, after hearing counsel for the appellant dismissed the motion to stay the prosecution and to quash the indictment. Smith J also ordered the matter to remain on the court's calendar with a trial date to be set. Dissatisfied with the order of the learned judge, the appellant sought to appeal.

Counsel for the appellant argued that the Court of Appeal had jurisdiction to hear the questions arising on the appeal. He asserted that an appeal lay as of right pursuant to section 121(a) of the Constitution since it was an appeal from a final decision in a criminal proceeding on questions as to the interpretation of the Constitution. The constitutional provision subject to interpretation, as alleged by counsel for the appellant, was section 15(1), the right to a fair hearing, which counsel also alleged had been breached. Counsel further argued that the appeal lay as of right as per section 121(b) of the Constitution since it was an appeal from a final decision given in exercise of the High Court's jurisdiction conferred by section 18 of the Constitution. Alternatively, counsel argued that if the appeal did not lie as of right, the Court of Appeal should grant leave to appeal.

Held: dismissing the appeal and the application for leave to appeal, that:

1. The question whether a case has received a fair hearing within the meaning of section 15(1) of the Constitution is not a question of interpretation of that enactment. It is a question of the application of these words to the facts of the particular case. Despite counsel's argument that the appellant's right to a fair hearing was violated, this did not warrant leave pursuant to section 121(a) of the Constitution. Whilst the application of section 15(1) of the Constitution may have been in issue, on the facts, no question arose as to the interpretation of that section. Consequently, no appeal lay as of right pursuant to section 121(a).

Eric Frater v The Queen [1981] 1 WLR 1468 applied; **Eric Joseph v The State** [1988] UKPC 20 applied.

2. For an appeal to lie as of right pursuant to section 121(b) of the Constitution, there must have been a final decision given in exercise of the jurisdiction conferred on the High Court by section 18 of the Constitution. To determine whether a decision is final, the applicable test is the application test, and the court will examine the application pursuant to which the order was made. If the decision made would be determinative of the issues that arise on the claim, whichever way the application could have been decided, then the decision would be a final one. On the facts, the questions at issue in the proceedings before the High Court included, inter alia,

whether the decision of the magistrate to commit was lawful, whether the magistrate wrongly admitted evidence and whether the appellant's constitutional rights were breached. Applying the application test, the judge's decision was not a final one since it would not have determined the matter in litigation for whichever side the decision had been given. Consequently, no appeal lay as of right pursuant to section 121(b) of the Constitution.

Jacpot Ltd. v Gambling Regulatory Authority [2018] UKPC 16 applied; Rule 62.1(3) of the **Civil Procedure Rules 2000** applied; **Othniel R Sylvester v Satrohan Singh** [1995] ECSCJ No. 2 followed; **Oliver McDonna v Benjamin Wilson Richardson** AXAHCVP2005/0003 (delivered 29th June 2007, unreported) followed.

3. Counsel for the appellant contended that section 31(2)(a) of the Eastern Caribbean Supreme Court Act contravened section 121 of the Constitution. However section 31(2)(a) conforms with the Constitution by virtue of paragraph 2 of Schedule 2 to the Antigua and Barbuda Constitutional Order 1981. Consequently, section 31(2)(a) operates as a jurisdictional bar in circumstances where an appellant fails to satisfy the requirements of section 121 of the Constitution. On the facts, the appellant failed to meet the requirements for leave as of right as per section 121 of the Constitution. Therefore, the judge's order, having been made in a criminal cause or matter, is caught by the prohibition contained in section 31(2)(a). Consequently, no leave to appeal can be granted as no appeal lies.

Section 31(2)(a) of the **Eastern Caribbean Supreme Court Act** Cap. 23, Revised Laws of Antigua and Barbuda 1992 applied.

JUDGMENT

- [1] **BAPTISTE JA:** An eleven-count indictment was preferred against Cheryl Thompson ("the appellant") for offences contrary to the **Trafficking in Persons (Prevention) Act, 2010**¹ as amended. Prior to this, a magistrate had committed her to stand trial at the High Court having found that the prosecution had made out a prima facie case. The matter came up before Smith J. Upon the appellant's plea of not guilty, her counsel, Mr. Harris, indicated that he was raising preliminary objections. A date was set for the hearing of the objections.

¹ Act No. 12 of 2010, Laws of Antigua and Barbuda.

[2] Mr. Harris sought to quash the indictment and stay the prosecution, alleging (i) a violation of the appellant's constitutional right to a fair hearing pursuant to section 15(1) of the **Constitution of Antigua and Barbuda**² ("**Constitution**"), (ii) an abuse of process and (iii) that the prosecution failed to make out a prima facie case which would warrant committal to stand trial at the High Court. After hearing submissions on the matter, Smith J ordered that:

(1) Ms. Thompson's motion to stay prosecution is denied.

(2) Ms. Thompson's motion to quash the indictment on the grounds that it would be a contravention of her right pursuant to section 15(1) of the **Constitution** to stand trial in the High Court is denied.

(3) The matter will remain on the court's calendar with a trial date to be fixed upon the resumption of trials.

[3] Mr. Harris contends that the learned judge erred in making the order and seeks leave to appeal. He also asserts that an appeal lies as of right pursuant to section 121 of the **Constitution**, as it is an appeal from (a) a final decision in a criminal proceeding on questions as to the interpretation of the **Constitution** and (b) it is an appeal from a final decision given in exercise of the jurisdiction conferred on the High Court by section 18 of the **Constitution** (which relates to the enforcement of fundamental rights and freedoms). Mr. Harris submits that there is nothing in section 121 of the **Constitution**, Part 62 of the **Civil Procedure Rules 2000** ("**CPR**"), or the **Eastern Caribbean Supreme Court Act**³ ("**Supreme Court Act**") which prevents this Court from exercising its jurisdiction to hear the questions that would arise under the appeal. Alternatively, if this Court considers that the appeal does not lie as of right and that permission is required to appeal as per rule 62.2 of the **CPR**, this Court should grant leave to appeal.

² Cap. 23, Revised Laws of Antigua and Barbuda 1992.

³ Cap. 143, Revised Laws of Antigua and Barbuda 1992.

Appeal as of right – Section 121(a) of the Constitution

[4] In light of counsel's submissions with respect to an appeal as of right, it is prudent to commence with section 121 of the **Constitution**. Section 121 provides that, subject to the provisions of section 44 thereof, an appeal shall lie as of right from the decision of the High Court to the Court of Appeal in the following cases:

- (a) final decisions in any civil or criminal proceedings on questions as to the interpretation of the **Constitution**;
- (b) final decisions given in exercise of the jurisdiction conferred on the High Court by section 18 of the **Constitution**; and
- (c) such other cases as may be prescribed by Parliament.

[5] The base issue in section 121(a) concerns whether any question properly arose as to the interpretation of the **Constitution**. Mr. Harris contends that the right to a fair hearing contained in section 15(1) has been breached. Section 15(1) states:

“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.”

[6] In **Eric Frater v The Queen**,⁴ the Board dismissed an appeal purporting to be made as of right under section 110 of the Constitution of Jamaica. Lord Diplock opined at page 1470, that while the application of the particular constitutional provision might have been in issue, no question as to its interpretation properly arose.

[7] In **Frater**, Lord Diplock stated:

“In **Harrikissoon v Attorney-General of Trinidad and Tobago** [1980] A.C. 265 this Board had occasion to point out the danger of allowing the value of the right to apply to the High Court for redress for contravention of his fundamental rights and freedoms which is conferred upon the individual by section 6 of the Constitution of Trinidad and Tobago (of which the corresponding section in the Constitution of Jamaica is section 25) to

⁴ [1981] 1 WLR 1468.

become debased by lack of vigilance on the part of the courts to dispose summarily of applications that are plainly frivolous or vexatious or are otherwise an abuse of process of the court. In their Lordships' view similar vigilance should be observed to see that claims made by appellants to be entitled to appeal as of right under section 110(1)(c) are not granted unless they do involve a genuinely disputable question of interpretation of the Constitution and not one which has merely been contrived for the purpose of obtaining leave to appeal to Her Majesty in Council as of right."

- [8] Although the present appeal does not concern leave to appeal to the Privy Council, very useful guidance as to the court's approach is gleaned from **Frater**. Authoritative guidance is also provided by the Board in **Eric Joseph v The State**.⁵ Section 8(1) of the **Constitution of the Commonwealth of Dominica**,⁶ in terms identical to section 15(1) of the **Constitution of Antigua and Barbuda** reads:

"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."

- [9] Joseph was convicted of murder and sentenced to death. He appealed to the Court of Appeal against conviction. The most important ground of appeal was that the trial judge wrongly admitted in evidence, as voluntary, two statements he made to the police. The appeal was dismissed. Joseph gave notice of his intention to move the Court of Appeal to grant leave to appeal to the Judicial Committee of the Privy Council. The Privy Council remarked that this was a case where the Court of Appeal was induced to grant conditional leave to appeal on the basis that a question of construction of the constitution was involved. The Privy Council stated:

"The question whether a case has received a "fair hearing" within the meaning of section 8(1) of the Constitution is not a question of interpretation of that enactment. It is a question of the application of these words to the facts of the particular case."

- [10] The guidance given by the Board in **Frater** and **Joseph** is very pertinent to the present appeal. The appellant's case is that the police, and other law enforcement agencies, conducted an illegal search of her club wherein she and eight ladies

⁵ [1988] UKPC 20.

⁶ Cap. 1:01, Revised Laws of Dominica, 1990.

present were arrested without an arrest warrant. Later, the police illegally obtained affidavits from five of the ladies. The affidavits were submitted to the Magistrate's court as part of the prosecution's case. Mr. Harris objected to the inclusion of the affidavits as evidence, on the ground that they were illegally obtained as a result of an illegal search of the club and the police had previously given an undertaking not to use evidence obtained as a result of the search. Mr. Harris argued that the use of the affidavits constituted an abuse of process. In the circumstances, the appellant's right to a fair hearing conferred by section 15(1) of the **Constitution** was breached. Mr. Harris asserted that it would be prejudicial to the appellant to allow the prosecution to use evidence obtained in breach of her constitutional rights. Also, the prosecution has failed to make a prima facie case with respect to the eleven charges set out in the indictment.

- [11] In my judgment, the substratum of the complaint concerned the admissibility of evidence, a matter which is exclusively for the trial judge. As the Board stated in

Joseph:

“Various mistakes may arise in the course of a criminal trial. Evidence may be wrongly admitted or rejected, or there may be a misdirection in law on a matter of some importance. The Court of Appeal exists to correct such mistakes and to do justice accordingly. In extreme cases the Board may grant special leave to appeal. The fact that some such mistake has occurred does not, however, mean that the case has not received a fair hearing. The whole process of trial, appeal to the Court of Appeal and in appropriate circumstances to this Board has the effect that the case does have a fair hearing. Section 8(1) does not have the effect that any mistake by the trial judge in the course of a trial gives an automatic appeal as of right to the Judicial Committee.”

- [12] Adopting the guidance of the Board in **Joseph**, the question whether a case has received a “fair hearing” within the meaning of section 15(1) of the **Constitution** is not a question of interpretation of that enactment. It is a question of the application of these words to the facts of the case. One must be cognizant of the difference between interpretation and application. Although the application of a particular constitutional provision might have been in issue, no question as to its

interpretation arose. Accordingly, resort cannot be had to section 121(a) as it is of no avail in the circumstances of this case.

Appeal as of right – Section 121(b) of the Constitution

[13] Section 121(b) now falls for consideration. As far as is material, section 121(b) provides for an appeal as of right to the High Court from final decisions given in exercise of the jurisdiction conferred on the High Court by section 18 of the **Constitution**. Mr. Harris contends that it is an appeal from a final decision given in the exercise of jurisdiction conferred on the High Court by section 18 of the **Constitution**.

[14] Subsection 1 of section 18 provides that if a person alleges that any of the provisions of sections 3 to 17 has been, is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter that is lawfully available, that person may apply to the High Court for redress. Subsection 2 ordains the High Court with original jurisdiction to hear and determine any such application and make such declarations and orders and give such directions as it may consider appropriate. There is, however, the important proviso that the High Court may decline to exercise its powers under section 18(2), if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.

[15] In **The Attorney General of Trinidad and Tobago v Ramanoop**,⁷ the Board said at paragraph 25:

“... where there is a parallel remedy constitutional relief should not be sought unless the circumstances of which complaint is made include some feature which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the court’s process.”

⁷ [2006] 1 AC 328.

Ms. Adams for the Crown states that there is no such feature and points out that parallel remedies were available.

- [16] In terms of section 121(b), the primary question is whether there was a final decision given in exercise of the jurisdiction conferred on the High Court by section 18 of the **Constitution** (which relates to the enforcement of the fundamental rights and freedom) to found an appeal as of right. In **Jacpot Ltd. v Gambling Regulatory Authority**⁸ at paragraph 9, the Board observed that constitutional and statutory provisions dealing with appeals commonly distinguish between appeals from interlocutory and final orders. In England, the distinction generally favours the “applications approach”. The applications approach is based on the nature of the decision. It treats it as final if (subject to appeal) it will determine the outcome of the litigation either way. The alternative approach “the order approach” is that a decision is final if the order finally made, disposes of the litigation.
- [17] Rule 62.1(3) of the **CPR** provides that (a) a determination whether an order or judgment is final or interlocutory is made on the “application test”; (b) an order or judgment is final if it would be determinative of the issues that arise on a claim, whichever way the application could have been decided. Several cases within the jurisdiction have addressed the application test. In **Othniel R Sylvester v Satrohan Singh**,⁹ at paragraph 12, Byron JA (as he then was) stated:
- “Under the application test, an order would be final if it was made on an application which would have determined the matter in litigation for whichever side the decision was given.”
- [18] In considering whether an order is interlocutory or final, the court looks at the application pursuant to which the order was made. As Barrow JA explained in **Oliver McDonna v Benjamin Wilson Richardson**,¹⁰ at paragraph 19:

⁸ [2018] UKPC 16.

⁹ [1995] ECSCJ No. 2.

¹⁰ AXAHCVP2005/0003 (delivered 29th June 2007, unreported).

“If, whichever way the application was decided that decision would have brought an end to the issue in litigation, the decision given on that application is a final order. If, on the other hand, the proceedings would not have ended if one side as opposed to the other side won, the order is not a final order, but is an interlocutory order.”

At paragraph 20 he continued:

“...the test is whether a decision of the application, whichever way it went, would have finally determined the issues between the parties.”

[19] The questions at issue in the proceedings before the High Court concerned whether the decision of the magistrate to commit was lawful; whether the magistrate wrongly admitted evidence; allegations of breaching the constitutional rights of the appellant; and whether the indictment should be quashed, and proceedings stayed. Therefore, applying the application test, it is indisputable that the decision of Smith J was not a final decision. It would not have determined the matter in litigation for whichever side the decision was given; it would not have determined the outcome of the litigation either way. In the circumstances the appellant cannot avail herself of an appeal against a final decision as of right under section 121(b) of the **Constitution**.

[20] Mr. Harris submitted that the judge’s order would preclude him from raising issues at the trial as to admissibility of the evidence. This is not and could not be the effect of the order. I note that upon inquiry from the bench, counsel informed that when the criminal trial came up for hearing, preliminary points were raised by the appellant’s counsel and the learned judge gave directions for the filing of submissions. These were filed and the judge subsequently gave her decision. From that scenario, the judge’s decision would be in the course of the criminal trial. Importantly, the issue relating to the evidence must be looked at in the context of the division of functions between the judge and jury, and that the matter was taken up as a preliminary issue. In that regard, the guidance of the Supreme

Court in **Shagang Shipping Company Ltd. (in liquidation) v HNA Group Company Ltd.**,¹¹ is instructive. The court stated at paragraph 102:

“In criminal proceedings where there is a division of function between judge and jury a factual finding made by the judge for a preliminary purpose such as determining whether evidence is admissible is not binding on (nor even generally known to) the jury when it is performing its task of deciding facts in issue in proceedings. So if, for example, the defence alleges that a confession was obtained by an improper threat and the judge finds that the prosecution (on whom the burden of proof lies) has proved beyond reasonable doubt that the confession was not so obtained, evidence of the confession will be admissible; but the jury at the trial will be free to make its own assessment of the facts and to reach a different conclusion on whether the alleged threat was or might have been made.”

In the premises, the complaint is not merited and issues of the admissibility of evidence can be dealt with at the trial.

Leave to appeal

- [21] With respect to leave to appeal, section 31(2)(a) of the **Supreme Court Act**, effectively operates as a jurisdictional bar in circumstances where an appellant fails to satisfy the requirements of section 121 of the **Constitution**. As far as is material, section 31(1)(b) provides that, subject to the provisions of the **Supreme Court Act** or any other enactment, an appeal shall lie to the Court of Appeal and the Court of Appeal shall have jurisdiction to hear and determine the appeal from any judgment or order of the High Court. Section 31(2)(a) states:

“No appeal shall lie under this section –
(a) from any order made in any criminal cause or matter.”

There is no dispute that the order of Smith J was made in a criminal cause or matter. In circumstances where no appeal shall lie, the question of leave to appeal does not arise.

- [22] Mr. Harris submits that section 31(2)(a) of the **Supreme Court Act** conflicts with section 121 of the **Constitution**. The short answer to that submission lies in paragraph 2 of Schedule 2 to the **Antigua and Barbuda Constitutional Order**

¹¹ [2020] UKSC 34.

1981.¹² As per paragraph 2, the **Supreme Court Act** is an existing law, which from 1st November 1981 is to be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring it into conformity with the **Constitution** and the **Supreme Court Order**.¹³ As per the reasoning of Floissac CJ in **Glasford (Michael) and Others v Commissioner of Police and Another**,¹⁴ the decisions appealable as of right by reason of section 121 of the **Constitution** are final decisions in any civil or criminal proceedings on questions as to the interpretation of the **Constitution**, and final decisions given in the exercise of the jurisdiction conferred on the High Court by section 18 of the **Constitution**, notwithstanding section 31(2)(a) of the **Supreme Court Act**.

[23] The appellant's failure to satisfy the requirements of section 121 of the **Constitution**, means that she does not have an appeal as of right. The judge's order, having been made in a criminal cause or matter, the appellant is caught by the prohibition contained in section 31(2)(a) of the **Supreme Court Act** that no appeal shall lie from an order made in a criminal cause or matter. In the circumstances, no leave to appeal can be granted as no appeal lies.

[24] Although not necessary in light of the conclusions reached, I will briefly deal with the issues of a stay of proceedings and quashing the indictment. In **Urban St. Brice v The Attorney General of St. Lucia**,¹⁵ at paragraph 30, this Court stated that the grant or refusal of a stay engages the exercise of the court's discretion. Prima facie, it is the duty of a court to try a person who is charged before it with a criminal offence which the court has power to try, therefore, the jurisdiction to grant a stay must be exercised carefully, sparingly and for compelling reasons. A stay of criminal proceedings requires clear and compelling justification and is an exceptional remedy. There is an undoubtedly strong public interest in the prosecution of crime and to ensure that those charged with serious criminal

¹² Cap. 23, Revised Laws of Antigua and Barbuda 1992.

¹³ Cap. 422A, Revised Laws of Antigua and Barbuda 1992.

¹⁴ (1995) 48 WIR 117.

¹⁵ SLUHCVP2018/0036 (delivered 31st July 2020, unreported).

offences are tried. Therefore, ordering a stay of proceedings, which in criminal law is effectively a permanent remedy, is thus a remedy of last resort. Given the high public interest in the determination of very serious crimes, it is only in exceptional circumstances that a person so charged will be able to obtain the relief of a permanent stay or a quashing of the indictment.

[25] The present case does not present any exceptional circumstances which would have warranted a stay. Having regard to the well-established principles as to the limited circumstances under which appellate interference with the exercise of discretion of a judge is justified, appellate interference would not be justified. Additionally, there would have been no basis for the judge to quash the indictment.

[26] In conclusion, the appeal as of right given by section 121(a) and (b) of the **Constitution** is circumscribed by the requirements that (a) the appeal has to be from a final decision on a question as to the interpretation of the **Constitution**. In addressing this requirement, an allegation that an appellant has not been given a “fair hearing” within the meaning of section 15 of the **Constitution** is not a question of interpretation of that enactment. Further, neither was there a final decision in the exercise of a discretion conferred by section 18 of the **Constitution**. The judge’s order was not one made in the exercise of the jurisdiction conferred on the High Court by section 18 so as to render the decision appealable under section 121(b) of the **Constitution**. In the circumstances, in light of the jurisdictional bar posed by section 31(2)(a) of the **Supreme Court Act**, the application for leave to appeal is dismissed.

Order

[27] I would order that the appeal is dismissed so also is the application for leave to appeal.

I concur.

Paul Webster

Justice of Appeal [Ag.]

I concur.

Margaret Price-Findlay

Justice of Appeal [Ag.]

By the Court

Chief Registrar