

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

**FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT**

CLAIM NO. SKBHCV2019/0057

**IN THE MATTER of sections 3(a) and 10(2)(a)
of the Constitution of the Federation of Saint
Christopher and Nevis**

AND

**IN THE MATTER of sections 6(3) and 6(4) of
the Drugs Prevention and Abatement of the
Misuse and Abuse of Drugs Act Cap 9.08 of
the 2009 Revised Edition**

AND

**IN THE MATTER of an Application for
Declaratory Orders by SHAKESPEARE
SOUTHWELL pursuant to section 18(1) & (2)
of the Constitution of the Federation of Saint
Christopher and Nevis**

AND

**IN THE MATTER of an Application pursuant to
Part 54 of the Civil Procedure Rules 2000**

BETWEEN:

SHAKESPEARE SOUTHWELL

Claimant

and

**THE ATTORNEY GENERAL OF SAINT CHRISTOPHER AND NEVIS
THE CHIEF OF POLICE**

Defendants

CLAIM NO. SKBHCV2019/0061

**IN THE MATTER of Sections 2, 3(a),5(1), 7, 10
and 37 of the Constitution of the Federation of
Saint Christopher and Nevis**

AND

**IN THE MATTER of an Application for
Declaratory Order by KAUESI HANLEY,
pursuant to Section 18 of the Constitution of
the Federation of Saint Christopher And Nevis**

AND

**IN THE MATTER of an Application pursuant to
Part 54 of the Civil Procedure Rules 2000 as
amended**

BETWEEN:

KAUESI HANLEY

Claimant

and

**THE RESIDENT MAGISTRATE OF DISTRICT "A"
THE ATTORNEY GENERAL OF SAINT CHRISTOPHER AND NEVIS**

Defendants

Appearances:

Dr. Henry Browne Q.C., with him, Mr. O'Grenville Browne for Mr. Southwell
Mr. Jason Hamilton for Mr. Hanley
Mrs. Simone Bullen Thompson for the Defendants

2019: July 23
Final submissions received October 21
2020: January 27

JUDGMENT

- [1] **VENTOSE, J.:** The Claimants in both cases were convicted of possession of, and possession with intent to supply, cannabis contrary to sections 6(2) and 6(3) of the Drugs (Prevention and Abatement of Misuse and Abuse of Drugs) Act CAP 9:08 of the Revised Laws of Saint Christopher and Nevis (the “**Drugs Act**”). Both Claimants were sentenced to 24 months imprisonment to run concurrently on both charges purportedly in accordance with section 15(1) of the Drugs Act. The Claimants challenge the constitutionality of sections 6(4) and 15(1) of the Drugs Act. on the basis that they are: (1) inconsistent with section 7 of the Constitution of Saint Christopher and Nevis which provides for protection against inhuman treatment; and (2) contrary to the Claimants’ right to life, liberty and security of the person and the right not to be deprived thereof without the protection of law contrary to sections 3(a) and 10(2)(a) of the Constitution.

The Relevant Provisions of the Drugs Act

- [2] The relevant sections of the Drugs Act that are at issue in this matter are as follows:

6. Restriction of possession of controlled drug.

(1) Subject to any regulations made under section 8 for the time being in force, it shall not be lawful for a person to have a controlled drug in his or her possession.

(2) Subject to subsection (5) and to section 29, it is an offence for a person to have a controlled drug in his or her possession in contravention of subsection (1).

(3) Subject to section 29, it is an offence for a person to have a controlled drug in his or her possession, whether lawfully or not, with intent to supply it to another in contravention of section 5(1).

(4) Subject to subsection (1), a person found in possession of the following controlled drugs in quantities of more than

- (a) two grammes of diacetylmorphine (hexion);
- (b) one gramme of cocaine;
- (c) fifty-five grammes of opium;
- (d) three grammes of morphine; or
- (e) fifteen grammes of cannabis or cannabis resin;

is deemed to have the controlled drug for the purpose of trafficking unless the contrary is proved, the burden of proof being on the accused.

15. Drug trafficking.

(1) A person who commits a drug trafficking offence or of being in possession of a controlled drug for the purpose of drug trafficking is liable,

(a) on summary conviction,

(i) to a fine of four hundred thousand dollars or where there is evidence of the street value of the controlled drug, of three times the street value of the controlled drug whichever is the greater, and

(ii) to imprisonment for a term which may extend to ten years but which shall not be less than five years; or

(b) upon conviction on indictment, to imprisonment for life but which shall not be less than fifteen years.

(2) A person who commits a drug trafficking offence in a substance other than a controlled drug, which he or she represents or holds out to be a controlled drug is liable,

(a) upon summary conviction, to a fine of five thousand dollars and to imprisonment for two years; or

(b) upon conviction on indictment, to a fine of twenty-five thousand dollars and to imprisonment for five years.

29. Proof of lack of knowledge, etc., to be a defence in proceedings for certain offences.

(1) This section applies to offences under any of the following provisions of this Act, that is to say, section 5(2) and (3), section 6(2) and (3), section 7(2) and section 10.

(2) Subject to subsection (3), in any proceedings for an offence to which this section applies it shall be a defence for the person charged to prove that he or she neither knew of nor suspected nor had reason to suspect the existence of some fact alleged by the prosecution which it is necessary for the prosecution to prove if he or she is to be convicted of the offence charged.

(3) Where in any proceedings for an offence to which this section applies it is necessary, if the accused is to be convicted of the offence charged, for the prosecution to prove that some substance or product involved in the alleged offence was the controlled drug which the prosecution alleges it to have been, and it is proved that the substance or product in question was that controlled drug, the accused

(a) shall not be acquitted of the offence charged by reason only of proving that he or she neither knew, nor suspected nor had reason to suspect that the substance or product in question was the particular controlled drug alleged; but

(b) shall be acquitted thereof

(i) if he or she proves that he or she neither believed nor suspected nor had reason to suspect that the substance or product in question was a controlled drug; or

(ii) if he or she proves that he or she believed the substance or product in question to be controlled drug or a controlled drug of a description, such that if it had in fact been that controlled drug or a controlled drug of that description, he or she would not at the material time have been committing any offence to which this section applies.

(4) Nothing in this section shall prejudice any defence which is open to a person charged with an offence to which this section applies to raise apart from this section.

The Constitutional Provisions

[3] The applicable constitutional provisions are as follows:

3. Fundamental rights and freedoms.

Whereas every person in Saint Christopher and Nevis is entitled to the fundamental rights and freedoms, that is to say, the right, whatever his or her race, place of origin, birth, political opinions, 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 the person, equality before the law and the protection of the law;

...

the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any person does not impair the rights and freedoms of others or the public interest.

7. Protection from inhuman treatment.

A person shall not be subjected to torture or to inhuman degrading punishment or other like treatment.

10. Provisions to secure protection of law.

(2) Every person who is charged with a criminal offence

(a) shall be presumed to be innocent until he or she is proved or has pleaded guilty;

...

(12) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of

(a) subsection (2)(a) to the extent that the law in question imposes upon any person charged with a criminal offence the burden of proving particular facts;

...

- [4] These cases require the application of well-established decisions of Commonwealth and Caribbean courts where the issue of the constitutionality of mandatory sentences have been pronounced upon.

The Presumption of Innocence

- [5] In **Attorney General of Belize v Zuniga and others** [2014] CCJ 2 (AJ), the Caribbean Court of Justice (the “**CCJ**”) had to consider the constitutionality of legislation passed by the Parliament of Belize. The legislation: created the offence of knowingly disobeying or failing to comply with an injunction (in particular an anti-arbitration injunction); prescribed severe penalties for persons convicted of this offence, including mandatory minimum penalties; and provided for a range of ancillary matters. If a natural person is found guilty of an offence, the penalty is a fine which shall not be less than \$50,000.00 but which may extend to \$250,000.00, or imprisonment for a term which shall not be less than five (5) years but which may extend to ten (10) years, or both such fine and term of imprisonment. The CCJ stated that:

[65]. Section 6(3)(a) of the Constitution establishes the presumption of innocence. Every person charged with a criminal offence is presumed to be innocent until he is proved or has pleaded guilty. It is, however, permissible for a law to impose on an accused person the burden of proving particular facts. ...

[71]. We agree with the conclusion reached by the court below that the sub-section contravenes the principle of the presumption of innocence.

The analysis must begin with the fundamental duty of the prosecution in a criminal case. The basic principle is that the prosecution must prove every essential ingredient of a criminal offence. It is this principle that is reflected in section 6(3)(a) of the Constitution; a provision that must be construed generously in favour of the individual. The burden on the prosecution does not extend to every conceivable fact in issue. Section 6(3)(a) is not infringed by a law requiring a defendant to establish a particular matter of fact or law. Section 6(10)(a) of the Constitution actually permits the State to impose on an accused —the burden of proving particular facts. But the imposition must be reasonable and proportionate. A balance must be struck between the importance of what is at stake and the rights of the defence. Since section 6(10)(a) is a derogation from a right that is to be generously construed, the derogation must be construed strictly.

- [6] In **Attorney General of Hong Kong v Lee Kwong-Kut; Attorney General of Hong Kong v Lo Chak-man and another** [1993] 2 LRC 259, the Privy Council had to consider whether sections 25(1) and 30 of the Drug Trafficking (Recovery of Proceeds) Ordinance of the Laws of Hong 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.” Section 30 states as follows:

Any person who is brought before a magistrate charged with having in his possession or conveying in any manner anything which may be reasonably suspected of having been stolen or unlawfully obtained, and who does not give an account, to the satisfaction of the magistrate, how he came by the same, shall be liable to a fine of \$1,000 or to imprisonment for 3 months.

- [7] The Privy Council explained (at p. 264) that section 30 contains three elements: (1) the possession or conveying of the property by the defendant, (2) the reasonable suspicion that the property has been stolen or unlawfully obtained and (3) the inability of the defendant to give a satisfactory account of how the property came into his possession. The Privy Council explained (at p. 265) that the third element:

This third ingredient is 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 behavior on his part to which it would be appropriate to attach the strictures of the criminal law. He could, for example, be in possession of the property without having any knowledge

of any of the circumstances which gave rise to the reasonable suspicion that the property was either stolen or obtained unlawfully which justified the police officer detaining him.

[8] Section 25(1) states that:

Subject to subsection (3), a person who enters into or is otherwise concerned in an arrangement whereby – (a) the retention or control by or on behalf of another (“the relevant person”) of the relevant person’s proceeds of drug trafficking is facilitated (whether by concealment, removal from the jurisdiction, transfer to nominees or otherwise); or (b) the relevant person’s proceeds of drug trafficking(i) are used to secure that funds are placed at the relevant person’s disposal; or (ii) are used for the relevant person’s benefit to acquire property by way of investment, knowing or having reasonable grounds to believe that the relevant person is a person who carries on or has carried on drug trafficking or has benefited from drug trafficking, commits an offence.

[9] The Privy Council stated (at p. 267) that, first, the language of section 25 makes the purpose of the section clear and that it is designed to make it more difficult for those engaged in the drug trade to dispose of the proceeds of their illicit traffic without the transactions coming to the knowledge of the authorities. Second, once a person has knowledge or has reasonable grounds to believe that a relevant person carries on or has carried on drug trafficking or has benefited from drug trafficking, then it will be an offence to become involved with “the relevant person” in any of the wide-ranging activities referred to in the section, unless the activity is reported in accordance with sub-section (3) or the person who engages in the activity is in a position to establish the defence provided for in section 25(4). Third, the section therefore creates an offence, which involves an absolute prohibition on engaging in the activities referred to in the section with someone whom you know or have reasonable grounds to believe is a person who carries on or has carried on or has benefited from drug trafficking, subject to an exception contained in section 25(3) and a special defence contained in sub-section (4).

[10] The Privy Council also stated (at pp. 271-272) that:

Here reference can be usefully made to the decision of the European Court of Human Rights in *Salabiaku v France* (1988) 13 EHRR 379 at 388, where the judgment, which has been followed in later cases in the

European court, contains the following statement as to the equivalent provisions to art 11 of the Hong Kong Bill of Rights:

'Presumptions of fact or of law operate in every legal system. Clearly, the Convention does not prohibit such presumptions in principle. It does, however, require the Contracting States to remain within certain limits in this respect as regards criminal law. If, as the Commission would appear to consider, paragraph 2 of Article 6 merely laid down a guarantee to be respected by the courts in the conduct of legal proceedings, its requirements would in practice overlap with the duty of impartiality imposed in paragraph 1. Above all, the national legislature would be free to strip the trial court of any genuine power of assessment and deprive the presumption of innocence of its substance, if the words "according to law" were construed exclusively with reference of domestic law. Such a situation could not be reconciled with the object and purpose of Article 6, which, by protecting the right to a fair trial and in particular the right to be presumed innocent, is intended to enshrine the fundamental principle of the rule of law. Article 6(2) does not therefore regard presumptions of fact or of law provided for in the criminal law with indifference. It requires States to confine them within reasonable limits which take into account the importance of what is at stake and maintain the rights of the defence.'

This statement provides a valuable illustration of the collective effect of the decisions in other jurisdictions, apart from Canada, to which their Lordships have been referred on equivalent provisions to art 11(1) in other constitutional documents. Even though they are not subject to any express limitation they are considered to have an implicit degree of flexibility. The situation is the same in relation to art 11(1).

This implicit flexibility allows a balance to be drawn between the interest of the person charged and the state. There are situations where it is clearly sensible and reasonable that deviations should be allowed from the strict applications of the principle that the prosecution must prove the defendant's guilt beyond reasonable doubt. Take an obvious example in the case of an offence involving the performance of some act without a licence. Common sense dictates that the prosecution should not be required to shoulder the virtually impossible task of establishing that a defendant has not a licence when it is a matter of comparative simplicity for a defendant to establish that he has a licence. The position is the same with regard to insanity, which was one of the exceptions identified by Viscount Sankey LC in the passage in *Woolmington v DPP* [1935] AC 462 at 481, [1935] All ER Rep 1 at 8 which has already been cited. The other qualification which Viscount Sankey LC made as to statutory exceptions clearly has to be qualified when giving effect to a provision similar to art 11(1).

Some exceptions will be justifiable, others will not. Whether they are justifiable will in the end depend upon whether it remains primarily the responsibility of the prosecution to prove the guilt of an accused to the required standard and whether the exception is reasonably imposed, notwithstanding the importance of maintaining the principle which art 11(1) enshrines. The less significant the departure from the normal principle, the simpler it will be to justify an exception. If the prosecution retains responsibility for proving the essential ingredients of the offence, the less likely it is that an exception will be regarded as unacceptable. In deciding what are the essential ingredients, the language of the relevant statutory provision will be important. However, what will be decisive will be the substance and reality of the language creating the offence rather than its form. If the exception requires certain matters to be presumed until the contrary is shown, then it will be difficult to justify that presumption unless, as was pointed out by the United States Supreme Court in *Leary v US* (1969) 395 US 6 at 36, 'it can at least be 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'.

- [11] The Privy Council held (at p 274) that, first, 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. Second, that was the most significant element of the offence. Third, it reduces the burden on the prosecution to proving possession by the defendant and facts from which a reasonable suspicion can be inferred that the property has been stolen or obtained unlawfully, matters which are likely to be a formality in the majority of cases. The Privy Council concluded that section 30 contravened article 11(1) of the Hong Kong Bill of Rights in a manner which the State could not justify.
- [12] In relation to section 25, the Privy Council held (at p. 275) that, first, the substance of the offence is contained in section 25(1) and that the onus is on the prosecution. Second, unless the prosecution can prove that the defendant had been involved in a transaction involving the relevant person's proceeds of drug trafficking as set out in section 25(1) and that at that time he had the necessary knowledge or had reasonable grounds to believe the specified facts, the defendant is entitled to be acquitted. Third, once the defendant knows or has reasonable grounds to believe that the relevant person is a person who carries on or has carried out drug trafficking or has benefited from drug trafficking, then the

defendant knows that he is at risk of committing an offence and that he can only safely deal with that person if he is in a position to satisfy sections 25(3) or (4). Third, if the defendant chose not to take the precautionary action under section 25(3) of informing the authorities, then he knew that he could only safely proceed by relying on section 25(4). Fourth, to be able to achieve that the defendant would have to take any steps necessary to ensure that he did not have the knowledge or suspicion referred to and it would be extremely difficult, if not virtually impossible, for the prosecution to fulfil the burden of proving that the defendant had not taken those steps. Fifth, to that extent it was reasonable for the defendant to bear that onus under section 25(4). Consequently, the Privy Council held that section 25 did not contravene Article 11(1) of the Bill of Rights.

- [13] In **Vasquez v R; O'Neil v R** [1994] 2 LRC 377, the Privy Council had to consider whether sections 116 to 119 of the Criminal Code of Belize, which sought to place the burden of proving provocation on the accused, were inconsistent with section 6(3)(a) of the Constitution of Belize, which provided that any person charged with a criminal offence was presumed to be innocent until he was proved guilty, and were therefore void. The Privy Council explained (at p. 385) the legal position as follows:

In order to establish murder against an accused at common law the Crown must prove that the killing was (a) intentional and (b) unprovoked. Lack of provocation may be inferred from the circumstances of the killing or there may be direct evidence to show that the accused intended to kill in cold blood. Section 114 of the code gives effect to the common law and clearly demonstrates that in the absence of provocation an intentional killing can amount to murder. It follows that the lack of provocation is an essential ingredient of murder. To place the burden of proof of such an essential ingredient of the crime upon the accused was, submitted the appellants, contrary to provisions of s 6(3) (a) of the Constitution. To this the Crown replied that the position was expressly preserved by s 6(10) (a) because the burden cast upon an accused by s 116(a) was no more than 'the burden of proving particular facts' within the meaning of that section.

In their Lordships' view s 116(a) of the code, by placing the burden of proof of provocation upon an accused, is in conflict with s 6(3)(a) of the Constitution and must accordingly be modified to conform therewith. ...

[14] In **Ong Ah Chuan v Public Prosecutor** [1981] AC 648, one of the two issues the Privy Council had to determine was whether the provision, in section 15 of the Misuse of Drugs Act 1973 of Singapore, that proof of possession of controlled drugs in excess of the minimum quantities stated in the section gives rise to a rebuttable presumption that such possession is for the purpose of trafficking, is inconsistent with the Constitution of Singapore. Section 15 of the Misuse of Drugs Act 1973 states that:

15. Any person who is proved or presumed to have had in his possession more than - ... (c) 2 grammes of diamorphine (heroin) contained in any controlled drug; ... shall, until the contrary is proved, be presumed to have had such controlled drug in his possession for the purpose of trafficking therein.

[15] In relation to the manner in which section 15 operates, the Privy Council (at pp. 667-668) stated that:

Proof of the purpose for which an act is done, where such purpose is a necessary ingredient of the offence with which an accused is charged, presents a problem with which criminal courts are very familiar. Generally, in the absence of an express admission by the accused, the purpose with which he did an act is a matter of inference from what he did. Thus, in the case of an accused caught in the act of conveying from one place to another controlled drugs in a quantity much larger than is likely to be needed for his own consumption the inference that he was transporting them for the purpose of trafficking in them would, in the absence of any plausible alternative explanation by him, be irresistible - even if there were no statutory presumption such as is contained in section 15 of the Drugs Act. As a matter of common sense the larger the quantity of drugs involved the stronger the inference that they were not intended for the personal consumption of the person carrying them, and the more convincing the evidence needed to rebut it. All that section 15 does is to lay down the minimum quantity of each of the five drugs with which it deals at which the inference arises from the quantity involved that they were being transported for the purpose of transferring possession of them to another person and not solely for the transporter's own consumption. There may be other facts which justify the inference even where the quantity of drugs involved is lower than the minimum which attracts the statutory presumption under section 15. In the instant cases, however, the quantities involved were respectively 100 times and 600 times the statutory minimum.

Whether the quantities involved be large or small, however, the inference is always rebuttable. The accused himself best knows why he was

conveying the drugs from one place to another and, if he can satisfy the court, upon the balance of probabilities only, that they were destined for his own consumption he is entitled to be acquitted of the offence of trafficking under section 3.

So the presumption works as follows, when an accused is proved to have had controlled drugs in his possession and to have been moving them from one place to another: (1) the mere act of moving them does not of itself amount to trafficking within the meaning of the definition in section 2; but if the purpose for which they were being moved was to transfer possession from the mover to some other person at their intended destination the mover is guilty of the offence of trafficking under section 3, whether that purpose was achieved or not. This is the effect of the provisions of section 3 (c) and section 10. (2) If the quantity of controlled drugs being moved was in excess of the minimum specified for that drug in section 15, that section creates a rebuttable presumption that such was the purpose for which they were being moved, and the onus lies upon the mover to satisfy the court, upon the balance of probabilities, that he had not intended to part with possession of the drugs to anyone else, but to retain them solely for his own consumption.

- [16] In respect of the constitutionality of section 15, the Privy Council explained (at pp. 669-672) as follows:

Their Lordships now turn to the eleventh hour attack by the defendants on the constitutional validity of the presumption for which section 15 provides. Although sections 15 to 19 inclusive of the Drugs Act create a series of rebuttable presumptions that upon proof of the existence of certain facts the existence of other facts shall be treated as established, unless the contrary is proved, in the instant cases their Lordships are concerned only with the presumption under section 15 that arises from proved possession; there was no need for the prosecution to rely on any presumed possession for which sections 16 and 19 provide.

...

One of the fundamental rules of natural justice in the field of criminal law is that a person should not be punished for an offence unless it has been established to the satisfaction of an independent and unbiased tribunal that he committed it. This involves the tribunal being satisfied that all the physical and mental elements of the offence with which he is charged, conduct and state of mind as well where that is relevant, were present on the part of the accused. ... What fundamental rules of natural justice do require is that there should be material before the court that is logically probative of facts sufficient to constitute the offence with which the accused is charged.

In a crime of specific intent where the difference between it and some lesser offence is the particular purpose with which an act, in itself unlawful, was done, in their Lordships' view it borders on the fanciful to suggest that a law offends against some fundamental rule of natural justice because it provides that upon the prosecution's proving that certain acts consistent with that purpose and in themselves unlawful were done by the accused, the court shall infer that they were in fact done for that purpose unless there is evidence adduced which on the balance of probabilities suffices to displace the inference. The purpose with which he did an act is peculiarly within the knowledge of the accused. There is nothing unfair in requiring him to satisfy the court that he did the acts for some less heinous purpose if such be the fact. Presumptions of this kind are a common feature of modern legislation concerning the possession and use of things that present danger to society like addictive drugs, explosives, arms and ammunition.

In the case of the Drugs Act any act done by the accused, which raises the presumption that it was done for the purpose of trafficking, is per se unlawful, for it involves unauthorised possession of a controlled drug, which is an offence under section 6. No wholly innocent explanation of the purpose for which the drug was being transported is possible. Their Lordships would see no conflict with any fundamental rule of natural justice and so no constitutional objection to a statutory presumption (provided that it was rebuttable by the accused) that his possession of controlled drugs in any measurable quantity, without regard to specified minima, was for the purpose of trafficking in them. The Canadian Narcotic Control Act 1960-61, so provides by section 8. In contrast to this the Drugs Act only raises the rebuttable presumption when the quantity of drugs in the possession of the accused exceeds the appropriate minimum specified in section 15. It is not disputed that these minimum quantities are many times greater than the daily dose taken by typical heroin addicts in Singapore; so, as a matter of common sense, the likelihood is that if it is being transported in such quantities this is for the purpose of trafficking. All that is suggested to the contrary is that there may be exceptional addicts whose daily consumption much exceeds the normal; but these abnormal addicts, if such there be, are protected by the fact that the inference that possession was for the purpose of trafficking is rebuttable.

In their Lordships' view there is no substance in the suggestion that section 15 of the Drugs Act is inconsistent with the Constitution, at any rate so far as it relates to prove possession, with which alone the instant cases are concerned.

- [17] Counsel for Mr. Southwell submits that the presumption of innocence is one of the components that comprises the right to a fair trial. Any limitation placed upon this right by burdening the Claimant with an onus of proof offends the Constitution.

This fundamental right is an important doubly-entrenched constitutional right. The right to be presumed innocent is unqualified. It is an independent right expressed in mandatory terms in section 10(2)(a) of the Constitution. This unqualified right is set apart from the right to a fair trial provided for in section 10(1) of the Constitution. This reverse onus of proof is inconsistent with the right under section 10(2)(a) of the Constitution.

[18] Counsel for Mr. Southwell submits that, firstly, section 6(4) of the Drugs Act means that the Claimant is automatically deemed to be in possession or to have knowledge of more than 15 grammes with the intention to traffic; and, secondly, to avoid punishment the Claimant has to establish a negative, namely, that he is not in possession with intent to supply. Counsel further submits that the decision in **Kwong-Kut** is distinguishable because under section 30 of the Drug Trafficking (Recovery of Proceeds) Ordinance of Hong Kong the offence is not deemed to be committed upon being found with the property but upon failure by the person charged to give a satisfactory explanation to the Magistrate as to how the person charged came to be in possession thereof. On the other hand, the accused is deemed guilty of having committed an offence under section 6(4) of the Drugs Act by the mere fact of possession of more than 15 grammes at the point in time he is found to possess such quantity.

[19] Counsel for Mr. Southwell contends that section 6(4) of the Drugs Act does not speak to “knowledge or suspicion” as part of the offence. Counsel further contends that section 29 creates a defence which appears to negative an implied mens rea in section 6(4) even though the articulation of the relevant mens rea is not part of the offence. Counsel submits that the prosecution is exempted from the need to prove any mens rea on the part of the Defendant and that the Defendant is left to prove an unarticulated ingredient of the offence. Counsel further submits that, in the instant case, unlike in **Kwong-Kut**, the person charged bears the responsibility of disproving what should be an essential ingredient of the offence. Counsel contends that the presumed fact of trafficking from the mere possession of more than 15 grammes does not without more justify such a presumption equating to

guilt. Counsel submits that section 6(4) is unconstitutional and that the means used to impair the right to the presumption of innocence is not proportionate.

[20] The Defendants submit that the provisions considered in ***Ong Ah Chuan*** have a similar effect as section 6(4) of the Drugs Act in that they place on an accused person the onus of proving facts which would be within his knowledge. Consequently, the Defendants further submit that section 6(4) of the Drugs Act are not inconsistent with sections 3(a) and 10(2)(a) of the Constitution. The Defendants further submit that section 6(4) sets the minimum quantity of each of the five drugs with which it deals at which the inference arises from the quantity involved that they were in a person's possession for the purpose of supplying it to another. The Defendants contend that section 6(4) also states that where an accused person is found to be in possession of the specified quantities of any of the drugs mentioned in section 6(4) the burden of proof is on the accused person to show that he did not have the drug in his possession for the purpose of trafficking. The Defendants further contend that what section 6(4) does is to require an accused person to prove facts and that this requirement falls within the confines of section 10(12)(a) of the Constitution. The Defendants conclude that, first, the provisions of section 6(4) of the Drugs Act are not inconsistent with the presumption of innocence in section 10(2) of the Constitution. Second, section 6(4) requires an accused person to prove facts which are peculiarly within his/her own knowledge and is permissible by section 10(12)(a) of the Constitution. Third, the requirement that an accused person prove facts which are within his/her own knowledge is both reasonable and proportionate as stated by the decision in ***Zuniga***.

[21] The Constitution itself states that the right of every person charged with a criminal offence to be presumed innocent until he or she is proved or had pleaded guilty is subject to any law that imposes upon any person charged with a criminal offence the burden of proving particular facts: section 10(12)(b) of the Constitution. Contrary to the argument of Counsel for Mr. Southwell, section 10(12)(b) provides the qualification to section 12(2)(a) of the Constitution. The essential question that

arises is whether section 6(4) offends section 12(2)(a) of the Constitution or whether it is saved by the proviso in section 10(12)(b) of the Constitution. Section 6(4) provides that a person found in possession of, among other things, 15 grammes of cannabis or cannabis resin is deemed to have the controlled drug for the purpose of trafficking unless the contrary is proved, the burden of proof being on the accused. The decision of the Privy Council in **Lee Kwong-Kut** makes it clear that there are situations where it is clearly sensible and reasonable that deviations should be allowed from the strict application of the principle that the prosecution must prove the defendant's guilt beyond a reasonable doubt. The Privy Council continued that whether any exceptions are justifiable will depend upon whether it remains primarily the responsibility of the prosecution to prove the guilt of an accused to the required standard and whether the exception is reasonably imposed, notwithstanding the importance of maintaining the principle of the presumption of innocence. Importantly, the Privy Council also explained, citing the decision of the United States Supreme Court in **Leary v US** (1969) 395 US 6, that if the exception requires certain matters to be presumed until the contrary is shown, then it will be difficult to justify that presumption unless it can at least be 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.

- [22] In my view, the Privy Council in **Lee Kwong-Kut** failed properly to apply the principle that where the presumption applies it will be justified if it can be 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. **Vazquez** does not assist because the burden to prove lack of provocation, an essential ingredient for murder, was placed on the accused and this contravened the presumption of innocence. The Privy Council in **Ong Ah Chuan** explained that proof of the purpose for which an act is done, where such purpose is a necessary ingredient of the offence with which an accused is charged, presents a problem with which criminal courts are very familiar. I agree with the Privy Council in **Ong Ah Chuan** when it stated that all that section 15 of the Misuse of Drugs Act 1973 of Singapore (which is in similar terms to section 6(4) of the Drugs Act) does is to lay down the minimum

quantity of each of the five drugs with which it deals at which the inference arises from the quantity involved that they were being transported for the purpose of transferring possession of them to another person and not solely for the transporter's own consumption. The Privy Council also noted that the accused himself best knows why he was conveying the drugs from one place to another and, if he can satisfy the court, upon the balance of probabilities only, that they were destined for his own consumption he is entitled to be acquitted of the offence of trafficking.

[23] The Privy Council explained that, first, in a crime of specific intent where the difference between it and some lesser offence is the particular purpose with which an act, in itself unlawful, was done, borders on the fanciful to suggest that a law offends against some fundamental rule of natural justice because it provides that upon the prosecution's proving that certain acts consistent with that purpose and in themselves unlawful were done by the accused, the court shall infer that they were in fact done for that purpose unless there is evidence adduced which on the balance of probabilities suffices to displace the inference. Second, the purpose with which he did an act is peculiarly within the knowledge of the accused. Third, there is nothing unfair in requiring him to satisfy the court that he did the acts for some less heinous purpose if such be the fact. Fourth, presumptions of this kind are a common feature of modern legislation concerning the possession and use of things that present danger to society like addictive drugs, explosives, arms and ammunition.

[24] The Privy Council stated that it saw no conflict with any fundamental rule of natural justice and so no constitutional objection to a statutory presumption (provided that it was rebuttable by the accused) that his possession of controlled drugs in any measurable quantity, without regard to specified minima, was for the purpose of trafficking in them. Section 6(4) of the Drugs Act only raises the rebuttable presumption when the quantity of drugs in the possession of the accused exceeds the appropriate minimum. What is important is that the presumption is rebuttable by the accused. I agree that in such cases only the accused would know the

purpose for which he did the act and that there is nothing unfair in requiring him to explain to the court that he did it for some other purpose separate and apart from tracking. There is nothing unconstitutional in section 6(4) of the Drugs Act. Section 6(4) of the Drugs Act does not contravene section 3(a) or section 10(2)(a) of the Constitution because it is saved by section 10(12)(b) of the Constitution.

Mandatory Sentences

[25] The CCJ in **Zuniga** stated that:

[61] It is a vital precept of just penal laws that the punishment should fit the crime. The courts, which have their own responsibility to protect human rights and uphold the rule of law will always examine mandatory or mandatory minimum penalties with a wary eye. If by objective standards the mandatory penalty is grossly disproportionate in reasonable hypothetical circumstances, it opens itself to being held inhumane and degrading because it compels the imposition of a harsh sentence even as it deprives the court of an opportunity to exercise the quintessentially judicial function of tailoring the punishment to fit the crime. As stated by Holmes JA in *State v Gibson*, a mandatory penalty —unduly puts all the emphasis on the punitive and deterrent factors of sentence, and precludes the traditional consideration of subjective factors relating to the convicted person. This is precisely one of the circumstances that justifies a court to regard a severe mandatory penalty as being grossly disproportionate and hence inhumane. A variety of expressions has been utilised to define —grossly disproportionate in this context. It is said to refer to a sentence that is beyond being merely excessive. In *Smith v R*, where the seven year mandatory minimum sentence was invalidated, Wilson J characterised such a sentence as one where —no one, not the offender and not the public, could possibly have thought that that particular accused's offence would attract such a penalty. It was unexpected and unanticipated in its severity ...

[62] Ultimately, it is for judges, with their experience in sentencing, to assess whether a severe mandatory sentence is so disproportionate that it should be characterised as inhumane or degrading punishment. In this case the mandatory minimum fines of \$50,000 plus a daily rate of \$100,000 are well beyond the ability of the average Belizean to pay and so are grossly disproportionate. Equally, the imposition of a mandatory minimum fine of \$50,000.00 or a sentence of imprisonment for at least a stretch of five years on anyone convicted of any of the offences in question (save those whose sentences fall within mitigating criteria fashioned not by the court but by Parliament) is grossly disproportionate. It bears no reasonable relation to the scale of penalties imposed by the Belize Criminal Code for far more serious offences and for that reason it is

also arbitrary. In our view, the mandatory minimum sentences here should indeed be characterised as being grossly disproportionate, inhumane and therefore unconstitutional for contravening section 7 of the Constitution. Later in this judgment we shall consider the consequences of this finding.

[26] Counsel for Mr. Southwell submits that, contrary to the separation of powers doctrine, section 15(1) of the Drugs Act completely remove any power in the judiciary to consider the question as to the minimum sentence or punishment for the commission of the crime for which Mr. Southwell or any other individual is charged however compelling the circumstances of any particular case might be. This intrusion into the province of the judiciary, Counsel for Mr. Southwell further submits, is unconstitutional and certainly cannot be said to be reasonably justifiable in a democratic society, citing **Hinds v The Queen** [1977 AC 195 and **Director of Public Prosecutions v Mollison** [2003] 1 AC 1.

[27] The Defendants submit that section 15(1) of the Drugs Act provides for the imposition of sentences for drug trafficking offences. The Defendants further submit that section 15(1)(a) outlines the sentence where a person has been tried before a Magistrate and convicted summarily while section 15(1)(b) outlines the sentence to be imposed where a person is tried and convicted on indictment before a High Court Judge. The Defendants contend that both 15(1)(a) and 15(1)(b) of the Drugs Act provide for mandatory sentences. The Defendants further contend that separate consideration should be given to the imposition of the mandatory sentence where the mandatory sentence is imposed upon summary conviction by a Magistrate as opposed to when it is imposed by a High Court Judge following conviction on indictment. The Defendants state that a Magistrate's jurisdiction is conferred by statute and that a sentencing Magistrate has no discretion to vary the sentence stipulated in section 15(1)(a). The Defendant concludes that considering the quantity of the drug which would be sufficient to ground a charge of trafficking, namely 15 grammes in the case of cannabis, and the fact that the Magistrate is a creature of statute who has no discretion to vary the sentence, the Defendant would be "hard pressed" to argue that section 15(1)(a) of the Drugs Act does not contravene section 3(a) of the Constitution.

[28] The Defendants further submit that section 15(1)(b) of the Drugs Act does not contravene the right to protection of law outlined in section 3(a) because a sentencing High Court Judge is permitted to vary the mandatory sentence pursuant to section 2 of the Abolition of Minimum Punishments Act CAP 4:01 of the Revised Laws of Saint Christopher and Nevis (the “**AMP Act**”) which provides:

It shall be lawful for any Judge of the High Court when passing sentence upon any person convicted under any enactment which prescribes for the offence of which such person is convicted a minimum term of imprisonment or a minimum fine, notwithstanding any enactment to the contrary, to reduce the prescribed term of imprisonment, and, in case of a fine, to reduce the prescribed amount thereof, and to sentence such person to such less term of imprisonment, or to pay such less fine, as to the presiding Judge shall appear right.

[29] Counsel for Mr. Southwell submits that section 2 of the AMP Act does not apply to a Magistrate, because it was never in the contemplation of Parliament that a Magistrate would have such powers of punishment.

[30] The Defendants submit that section 2 of the AMP Act allows the trial judge to reduce the mandatory minimum sentence so as impose the sentence that he/she deems appropriate having regard to the circumstances of the specific case. Since a High Court Judge is permitted to vary a mandatory sentence, thus ensuring that the sentence is proportionate to the specific case, the Defendants conclude that section 15(1)(b) of the Drugs Act does not contravene the right to the protection of law provided for in section 3(a) of the Constitution. In the Defendants’ view, section 2 of the AMP Act provides sufficient safeguard against irrationality, unreasonableness, fundamental unfairness or arbitrary exercise of power.

[31] The Claimants correctly did not question the view that the Drugs Act must be read subject to the AMP Act. I agree with Counsel for the Defendant that section 2 of the AMP Act allows a High Court Judge to reduce the mandatory minimum sentence so as to impose the sentence that the court deems appropriate having regard to the circumstances of the specific case. Section 15(1)(b) of the Drugs Act does not contravene the right to the protection of law provided for in section 3(a) of the Constitution as it relates to the High Court Judge. However, section 15(1)(a) of

the Drugs Act contravenes the right to the protection of law provided for in section 3(a) of the Constitution as it relates to the Magistrate who is not afforded the power under section 2 of the AMP Act to reduce the mandatory minimum sentence.

Protection from Inhuman Treatment

- [32] The Claimants also seek a declaration that section 15(1) of the Drugs Act insofar as it purports to impose a mandatory penalty for drug trafficking offences is inconsistent with section 7 of the Constitution which protects a person from inhuman or degrading punishment or other treatment. It is clear that Parliament and not the courts have the power to provide for discretionary or mandatory sentences including the mandatory sentence, unless the court is satisfied that the mandatory sentence of death either infringes the doctrine of the separation of powers set out in the Constitution or contravenes or is inconsistent with other express provisions of the Constitution: **Hughes v R; Spence v R** [2002] 2 LRC 531 (at [10]). The courts have made it clear that it is not inconsistent with the independence of the judiciary to have a fixed mandatory sentence imposed by Parliament (Ibid). A severe punishment might violate the prohibition against cruel, inhuman or degrading punishment, but by itself does not constitute the assumption by the legislature of judicial powers: **Zuniga and others v Attorney General of Belize** (2012) 81 WIR 87.
- [33] Counsel for Mr. Hanley submits that, first, a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Second, mandatory provisions such as those at issue do not allow a judicial officer to make any exception in an appropriate case. Third, a mandatory sentence can be grossly disproportionate. Fourth, in such a case, it may well amount to inhuman or degrading punishment under section 7 of the Constitution.
- [34] Counsel for Mr. Hanley accepts that the test to determine whether a punishment is cruel and unusual under section 7 of the Constitution is to ask whether the punishment prescribed is so excessive as to outrage the standards of decency or whether the effect of that punishment is grossly disproportionate to what would

have been appropriate. In an effort to show that the mandatory sentences in section 15 of the Drugs Act are disproportionate, Counsel for Mr. Hanley provides many examples of sentences handed down by the courts across the Member States and Territories served by the Eastern Caribbean Supreme Court, concluding that “these case summaries illustrate to the Court the disproportionality that has arisen from the use of 5 years as the notional sentence in the Claimant’s matter”.

[35] It cannot be questioned that the right granted under section 7 of the Constitution that a person shall not be subjected to torture or to inhuman degrading punishment or other like treatment means in this context that although the State may impose punishment, the effect of that punishment must not be grossly disproportionate to what would have been appropriate: **Reyes v R** (2002) 60 WIR 42. In **Aubeeluck v State** [2011] 1 LRC 627, the Privy Council had to answer the question of whether, and in what circumstances, a court is entitled to pass a lesser sentence than the minimum sentence provided by law for the commission of a criminal offence. The Privy Council, following the decision of the Supreme Court of Mauritius in **Bhinkah v State** 2009 SCJ 102, accepted that the minimum penalty would be considered disproportionate in cases where “the imposition of a mandatory minimum sentence would be startlingly or disturbingly inappropriate with respect to hypothetical cases which could be foreseen as likely to arise commonly” (at p. 637) and “where the minimum sentence would be disproportionate in relation to the degree of seriousness of the offence, with no exceptional circumstances available to the court to weigh down the scale” (ibid). The Privy Council concluded that a sentence of three (3) years imprisonment would be wholly disproportionate to the offences committed by the appellant (at p. 638).

[36] It will be remembered that the CCJ in **Zuniga** stated that if by objective standards the mandatory penalty is grossly disproportionate in reasonable hypothetical circumstances, it opens itself to being held inhumane and degrading because it compels the imposition of a harsh sentence even as it deprives the court of an

opportunity to exercise the quintessentially judicial function of tailoring the punishment to fit the crime (at [61]). In **Ponoo v Attorney General of the Seychelles** [2011] 3 LRC 323, the Constitutional Court of the Seychelles held that a mandatory sentence per se does not amount to cruel, inhuman or degrading treatment. It may only amount to cruel, inhuman or degrading treatment if the length and severity of the sentence is such that it violates the principle of proportionality and removes all discretion from the court to impose any other term whatsoever (at [42]). Dismissing the claim, the Constitutional Court emphasized that the trial judge retained much discretion to impose any sentence ranging from the minimum mandatory of five (5) years to the maximum allowable sentence of 14 years (at [43]).

- [37] The Defendants submit that these cases establish that a mandatory sentence may be deemed unconstitutional for contravening section 7 of the Constitution if the mandatory sentence is one which cannot be applied to all possible range of hypothetical cases which may arise in connection with the offence so that its application violated the principle of proportionality and there was no discretion in the court to impose any sentence other than the minimum provided by the legislation. For the same reasons explained above, the Defendant admits that section 15(1)(a) of the Drugs Act might be constitutionally suspect in relation to the sentencing by a Magistrate and but not by a High Court Judge under section 15(1)(b) of the Drugs Act.
- [38] I agree with the Defendants that section 2 of the AMP Act allows the High Court Judge to reduce the mandatory minimum sentence so as to impose the sentence that the court deems appropriate having regard to the circumstances of the specific case. Section 15(1)(b) of the Drugs Act does not therefore contravene the right to protection from inhuman treatment provided for in section 7 of the Constitution as it relates to the High Court Judge. However, section 15(1)(a) of the Drugs Act contravenes the right to protection from inhuman treatment provided for in section 7 of the Constitution as it relates to the Magistrate who is not afforded

the power under section 2 of the AMP Act to reduce the mandatory minimum sentence.

The Doctrine of Severance

[39] I have found above that section 15(1)(a) of the Drugs Act contravenes: (1) the right to protection from inhuman treatment provided for in section 7 of the Constitution; and (2) the right to the protection of law provided for in section 3(a) of the Constitution, as it relates to the Magistrate who is not afforded the power under section 2 of the AMP Act to reduce the mandatory minimum sentence.

[40] In **Zuniga**, the CCJ explained that:

[88] In mandating that a law inconsistent with the Constitution is void to the extent of its inconsistency, the Constitution sanctions the principle of severance and encourages its exercise where possible. When faced with a statute that contains material that is repugnant to the Constitution the court strives to remove the repugnancy in order, if possible, to preserve that which is not. As long as the constitutional defect can be remedied without striking down the entire law, the court is obliged to engage in severance. In some cases it is not difficult to do this. But in other cases it is necessary to invalidate an entire Act so that, if it wishes, Parliament can have another go at the legislation. The court will do this because, broadly speaking, what remains after judicial surgery is incoherent or so impairs the legislative object that the constitutionally valid part cannot be said to reflect what Parliament originally intended.

[89] The doctrine of severance is not free from controversy, but it is an important judicial tool regularly employed by courts as part of their responsibility simultaneously to uphold constitutional supremacy and maintain the separation of powers. The classic statement on severability is regarded to be that given by Viscount Simon in *Attorney-General for Alberta v. Attorney-General for Canada* when he stated that:

"The real question is whether what remains is so inextricably bound up with the part declared invalid that what remains cannot independently survive or, as it has sometimes been put, whether on a fair review of the whole matter it can be assumed that the legislature would have enacted what survives without enacting the part that is ultra vires at all."

[90] In performing the exercise of severance the court has no remit to usurp the functions of Parliament. Assuming severance is appropriate, the aim of the court is to sever in such a manner that, without re-drafting the legislation, what is left represents a sensible, practical and comprehensive

scheme for meeting the fundamental purpose of the Act which it can be assumed that Parliament would have intended. The court is entitled to assess whether the legislature would have preferred what is left after severance takes place to having no statute at all. If it can safely be assessed that what is left would not have been legislated, then severance would not be appropriate. As Demerieux notes, severance involves speculation about parliamentary intent. The court seeks to give effect, if possible, to the legitimate will of the legislature, by interfering as little as possible with the laws adopted by Parliament. Striking down an Act frustrates the intent of the elected representatives and therefore, a court should refrain from invalidating more of the statute than is necessary.

[91] In *Schachter v Canada*, the Supreme Court of Canada indicated that severance will be warranted where a) the legislative objective is obvious and severance or the reading in of words would further that objective or constitute a lesser interference with that objective than would striking down; b) the choice of means used by the legislature to further that objective is not so unequivocal that severance/reading in would constitute an unacceptable intrusion into the legislative domain; and c) severance or reading in would not involve an intrusion into legislative budgetary decisions so substantial as to change the nature of the legislative scheme in question.

[92] The argument for the total invalidation of a law that is only partially unconstitutional is invariably premised on the notion that the court cannot be sure that Parliament would have passed the constitutionally valid remainder in any event and that the court should not re-word a statute.⁶⁵ The consummate ease with which this argument can always be made should warn judges of the need closely to scrutinise it. Unsurprisingly, the challengers have said exactly this to us; that severance is inappropriate here because we do not know what Parliament would have done. The challengers also claim that the mandatory minimum penalties are not severable because they are —the *raison d'être*" for the introduction of the Acts and are inextricably bound up with its purpose.

[93] It is axiomatic that after a court has severed the unconstitutional portion of an impugned law, that which remains will never be precisely what Parliament had intended originally to enact. Further, a court can never know the intent of each legislator who voted to enact a statute. No court can ever be perfectly sure about parliamentary intent. If courts took it upon themselves to sever only after they possessed such certitude, then severance will never actually take place.

- [41] Applying the principles enunciated by the CCJ in **Zuniga**, I agree with the Defendants' submission that: first, section 15(1)(a) is not so inextricably bound up with the other provisions in section 15 or the provisions of the Drugs Act that it could not be conveniently separated from the other provisions in section 15 or the

other provisions of the Drugs Act; and second, severing the mandatory penalty contained in section 15(1)(a) will not frustrate the purpose of the Drugs Act. Consequently, the words “**but which shall not be less than five years**” shall be deleted from section 15(1)(a)(ii) of the Drugs Act.

Disposition

[42] For the reasons explained above, I make the following orders:

- (1) A Declaration is granted that section 15(1)(a) of the Drugs Act contravenes:
(1) the right to protection from inhuman treatment in section 7 of the Constitution; and (2) the right to the protection of law in section 3(a) of the Constitution.
- (2) The mandatory penalty found in section 15(1)(a) is hereby severed by deleting the words “**but which shall not be less than five years**” found in section 15(1)(a)(ii) of the Drugs Act.
- (3) All other claims are hereby dismissed.
- (4) Each party to bear its own costs.

Eddy D. Ventose

High Court Judge

By the Court

Registrar