[2007] CCJ 3 (AJ)

IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS

CCJ Appeal No CR. 1 of 2006
BB Criminal Appeal No. 2 of 2005

BETWEEN

THE QUEEN **APPELLANT**

AND

MITCHELL KEN O'NEAL LEWIS **RESPONDENT**

Before The Right Honourable and the Honourables:	**Mr Justice Michael de la Bastide, President**
	Mr Justice Nelson
	Mr Justice Pollard
	Mr Justice Saunders
	Madame Justice Bernard
	Mr Justice Wit
	Mr Justice Hayton

Appearances

Mr Charles Leacock QC and Mr Elwood Watts for the Appellant

Mr Erskine L Hinds and Mr Olson De C Alleyne for the Respondent

JUDGMENT
Of the President and Justices Nelson, Saunders, Bernard, Wit and Hayton
Delivered by the President
The Right Honourable Mr Justice Michael de la Bastide
On the 4th day of June, 2007
and
JUDGMENT
Of the Honourable Mr Justice Pollard

JUDGMENT OF THE PRESIDENT THE RIGHT HONOURABLE MR JUSTICE MICHAEL DE LA BASTIDE, PCCJ, MR JUSTICE NELSON, JCCJ, MR JUSTICE SAUNDERS, JCCJ, MME JUSTICE BERNARD, JCCJ, MR JUSTICE WIT, JCCJ, MR JUSTICE HAYTON, JCCJ, DELIVERED BY THE PRESIDENT:

[1] On the 4th December, 2006, at the conclusion of arguments on a preliminary issue we dismissed this appeal. We promised to give the reasons for our decision in writing, and we now do so.

The History of the Proceedings

[2] The respondent in this case, Mitchell Lewis ('Lewis'), was on the 16th February, 2005, sentenced to death after being convicted by a jury of the murder of a man who was fatally shot on the 8th June, 2000. For present purposes the facts of the case are not important. Lewis appealed his conviction to the Court of Appeal of Barbados and on the 5th January, 2006, that Court delivered its judgment in which it quashed the conviction and sentence of death and ordered a new trial. The Court's judgment was based on a finding that certain things said by counsel on both sides in the presence and hearing of persons who subsequently became jurors in the case, were so prejudicial to Lewis that his trial was rendered unfair. The prejudicial material was introduced in the course of an application made in open court by defence counsel for the trial judge to recuse himself because of certain remarks which he had allegedly made when the case came before him on two previous occasions, and which in Lewis' opinion showed that the Judge was biased against him.

[3] The Crown applied to the Court of Appeal for leave to appeal on the premise that the case involved a question of interpretation of the Constitution and that the Crown was therefore entitled to appeal to this Court as of right pursuant to Section 6 (c) of the Caribbean Court of Justice Act ('the CCJ Act'). An application to the

Court of Appeal for leave is required in such cases by Rule 10.2(a) of the Caribbean Court of Justice (Appellate Jurisdiction) Rules, 2005. There being no objection by Lewis' counsel to the application, the Court of Appeal granted conditional leave to appeal on the 2nd March, 2006, and final leave on the 4th April, 2006.

The Preliminary Issue

[4] This Court, however, had a concern whether the premise on which the Court of Appeal granted leave i.e. that the Crown was in this case entitled to appeal as of right, was correct. Accordingly at a case management conference held on the 4th October, 2006, Mr. Justice Saunders and I made an order with the consent of the parties for the determination as a preliminary issue of the following two questions:

(1) whether by virtue of Section 6 (c) of the Caribbean Court of Justice Act, the Crown has an appeal as of right to this Court in this case, and

(2) whether, if such a right of appeal exists, the Crown can as part of any relief it obtains, secure the restoration of the conviction of the respondent.

[5] For the reasons which we now give, the Court answered the first of those questions in the negative. In other words, we held that the Crown was not entitled to appeal as of right from the decision of the Court of Appeal in this case. In light of that answer, the second question does not really arise, and for that reason and others which I shall give later, it has not been answered.

[6] The first question concerns the applicability of section 6 (c) of the CCJ Act to the instant case. This question has two parts which I shall identify as Question 1(a)

and Question 1(b) respectively. Question 1(a) is whether the right of appeal which this section confers, is in criminal cases conferred only on a convicted person or whether the prosecution too can take the benefit of it and challenge by appeal a decision of the Court of Appeal to quash a conviction. Question 1(b) is whether, assuming that the right of appeal under this section does extend to the prosecution, this case involves a question as to the interpretation of the Constitution.

Question 1(a): Does Section 6 (c) Apply To The Prosecution?

[7] Section 6 (c) of the CCJ Act provides as follows:

> "An appeal shall lie to the Court from decisions of the Court of Appeal as of right in the following cases.
>
> …
>
> (c) in any civil or criminal proceedings which involve a question as to the interpretation of the Constitution;
>
> …"

In construing this provision it is important to take into account the definition of certain words in section 2 of the CCJ Act. Section 2 provides:

> " In this Act, unless the context otherwise requires,
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> …
>
> "appeal" means an appeal to the Court;
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> "appellant" means the party appealing from a judgment;
>
> …
>
> "Court" means the Caribbean Court of Justice established by the Agreement;
>
> …
>
> "party" means any party to proceedings before the Court;
>
> …"

[8] Looking at the CCJ Act in isolation, not only is there nothing in section 6 (c) to suggest an intention to exclude the prosecution from its ambit, but the way in which

the words “appeal”, “appellant” and “party” are defined in section 2, seems to emphasise that no distinction is to be made between different parties to the same proceedings when construing and applying provisions in the Act relating to appeals. On the face of it, therefore, there would seem to be no justification for limiting the right of appeal established by section 6 (c), in the case of criminal proceedings, to the convicted person.

[9] Two main arguments, however, have been advanced on behalf of Lewis in order to displace this prima facie conclusion. The first of these arguments is rooted in the principle that no one should be tried twice for the same offence and the finality which as a consequence is accorded to an acquittal. There is a long line of cases which establish that as a corollary of this basic rule of the common law, when a statute creates in general terms a right of appeal in criminal proceedings from the decision of a trial court, the statutory provision will not be construed as giving the prosecution a right of appeal in the absence of an express statement of that legislative intent. See in this connection *Benson v. Northern Ireland Road Transport Board*[1], *R. (Kane) v. Chairman and Justices of County Tyrone*[2], *Reg. v. Middlesex Quarter Sessions, ex parte DPP*[3] and more recently *Smith (Justis) v. R.*[4]. I accept without reservation this rule of construction in relation to statutory provisions which give a right of appeal from the decisions of a trial court.

[10] One may, however, note in passing that the Judicial Committee of the Privy Council in *The State of Trinidad and Tobago v. Brad Boyce*[5] held that a statutory provision which expressly gave the prosecution a right of appeal in certain circumstances from an acquittal by a jury, did not offend against any fundamental right or freedom as the common law’s bias against appeals by the prosecution from an acquittal, did not form part of due process ‘in its narrower sense’. Accordingly, the Judicial Committee concluded that an Act of Parliament which gave the prosecution a right

[1] [1942] A.C 520
[2] (1905) 40 Ir LT 181
[3] [1952] 2 Q.B. 758
[4] (2000) 56 WIR 145
[5] (2006) 68 WIR 437

of appeal from an acquittal in certain circumstances, did not collide with the constitutionally protected fundamental rights and freedoms, and so did not have to be passed by a special majority.

[11] Whatever view one takes of the decision in *Brad Boyce*, it is interesting to note that the Judicial Committee excluded the common law principle that an acquittal by a Judge and jury is final from those principles that are 'necessary for a fair system of justice'. But the decision leaves untouched the presumption that a right of appeal from the decision of a trial court does not extend to the prosecution unless there is some express statement to that effect.

[12] The real issue for our decision was whether that principle of construction applies to a statutory provision which gives a right of appeal from an intermediate court to a final court of appeal. Must the prosecution be expressly mentioned in such a provision if it is to take advantage of it to challenge a decision by the Court of Appeal to quash a conviction? We were referred to only one case, a case from Northern Ireland, in which a statutory provision providing for an appeal in criminal proceedings from a second to a third tier court, was held in the absence of express reference to the prosecution, not to apply to it.

[13] The case was *The People v. Richard Kennedy*[6] and the statutory provision was section 29 of the Court of Justice Act, 1924 which provided for an appeal from the Court of Criminal Appeal to the Supreme Court upon the certificate of the Court of Criminal Appeal or the Attorney-General. The Supreme Court held by a majority of 4 to 1 that that section did not give the prosecution the right to appeal against a decision of the Court of Criminal Appeal quashing a conviction. None of the majority judgments addressed the question whether there is a significant difference between an acquittal by a trial court and the quashing of a conviction by a court of appeal, which would justify a different approach in determining whether a statutory right of appeal extends to the prosecution. Geoghegan J quoted from the judgment

[6] [1945] 1R 517

of Lord Simon in *Benson v. Northern Ireland Transport Board (supra)* in support of the proposition that clear language was required to give the prosecution a right of appeal. He did not advert, however, to the fact that in *Benson* the court was concerned with a right of appeal from the dismissal of a charge by the trial court, whereas in *Kennedy* the right of appeal which the prosecution sought to exercise, was from an appellate court. In fact, the only judge in *Kennedy* who adverted to this difference was the dissenter, Maguire J., who said:

> "The reversal of a conviction by the Court of Criminal Appeal is not equivalent to a verdict of acquittal from a jury. It is subject to the provisions of the statutory code invoked to bring it about, namely, the provisions of the Court of Justice Acts and, therefore, conditional on, and subject to, the final decision of the Supreme Court in the event of an appeal to that Court."

[14] It must be said in fairness to them that three of the majority judges, Geoghegan, O'Byrne and Black JJ, relied in whole or in part, on inferences as to the legislature's intention drawn from a related Act which was required to be "construed as one" with the 1924 Act. One Judge (Black J) held that since the word "appeal" was used in some places in the operative section in the restricted sense of an appeal by a convicted person only, it must be given that same meaning whenever it appeared elsewhere in the same section.

[15] It may well be that *Kennedy* was rightly decided having regard to the statutory provisions which the Court was in that case construing. I would not regard *Kennedy*, however, as persuasive authority for the general proposition that statutory provisions which give a right of appeal in criminal cases from the decision of an appellate court, do not apply to the prosecution unless the intention that it should do so is expressly stated.

[16] The view that in this context a distinction has to be made between the quashing of a conviction by a Court of Appeal and an acquittal by a trial court, was supported by Lord Goddard (albeit obiter) in giving the opinion of the Board in *The Attorney-*

General for Ceylon v. Perera[7]. In that case the respondent had been convicted of murder by a jury and sentenced to death. The Court of Criminal Appeal of Ceylon quashed the conviction and sentence on the ground of misdirection by the trial judge, and ordered a new trial. The Attorney General appealed by special leave to the Privy Council. The Privy Council held that there had in fact been no misdirection by the trial Judge and restored the original conviction for murder as well as the sentence of death. Before the Judicial Committee counsel for the respondent took the preliminary point that the Board had no jurisdiction to entertain an appeal by the Crown in a criminal case. Lord Goddard said (at page 203) with respect to the preliminary point:

> "The order of the Court of Criminal Appeal in this case does not amount to an acquittal. It merely sets aside the verdict and sentence and orders a new trial, though no doubt the effect of the order is to restore the prisoner to the position of one who has not yet been tried."(emphasis added).

Lord Goddard went on to state that it was not on that ground that the Board decided they had jurisdiction, but rather because of a series of cases which had decided:

> "that Her Majesty in Council has power to entertain an appeal from any Dominion or Dependency of the Crown in any matter, whether civil or criminal, by whichever party to the proceedings the appeal is brought, unless that right has been expressly renounced." (at page 203)

The cases cited by Lord Goddard included *Reg. v. Bertrand*[8], *Reg. v. Murphy*[9] and *Reg. v. Coote*[10], in all of which the Privy Council entertained an appeal by the Crown from the decision of an appellate court quashing a conviction.

[17] Counsel for Lewis correctly pointed out that the basis for all these decisions was the prerogative right of the Sovereign to receive and respond to petitions for justice from the Crown's overseas possessions subject to the procedure established by the

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[7] [1953] AC 200
[8] (1867) LR 1 PC 520
[9] (1868) LR 2 PC 35
[10] (1873) LR 4 PC 509

Judicial Committee Acts of 1833 and 1834, and that the Caribbean Court of Justice does not enjoy any such prerogative right. It does seem to me, however, that if the 'fundamental rule' of the common law against permitting appeals by the prosecution from acquittals, applied to appeals from decisions by an appellate court quashing a conviction, then the Judicial Committee would in the cases on which Lord Goddard relied, have refrained in the exercise of its discretion from giving the prosecution special leave to appeal from the decision of a local court of appeal, even though it had the power to do so.

[18] The question whether there is a meaningful difference between an acquittal and the quashing of a conviction, was explored in depth by the High Court of Australia in *Davern v. Messel*[11]. In that case it was held by a majority of 5 to 2 that the Crown was entitled to appeal to the Federal Court a decision given by the Supreme Court of a Territory quashing a conviction, pursuant to a statutory provision which gave the Federal Court in general terms jurisdiction to hear and determine appeals from judgments of the Supreme Court of a Territory. Gibbs CJ explained the rationale for treating an acquittal as final. He said (at page 30):

> "The purpose of the rule [against double jeopardy] is of course to ensure fairness to the accused. It would obviously be oppressive and unfair if a prosecutor, disappointed with an acquittal, could secure a retrial of the accused person on the same evidence, perhaps, before what the prosecutor "considered to be a more perspicacious jury or tougher judge": Reg. v. Humphrys [1977] AC at p. 47. It might not be quite so obvious that it would be unfair to put an accused upon his trial again if fresh evidence, cogent and conclusive of his guilt, came to light after his earlier acquittal, but in such a case the fact that an unscrupulous prosecutor might manufacture evidence to fill the gaps disclosed at the first trial, and the burden that would in any case be placed on an accused who was called upon repeatedly to defend himself, provide good reasons for what is undoubtedly the law, that in such a case also the acquittal is final: cf. Reg. v. Miles (1890) 24 Q.B. D. at p. 433."

[19] The learned Judge then went on (at page 33) to explain why the same finality was not accorded to the quashing of a conviction by an appellate court. He said:

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[11] (1984) 155 CLR 21

> "As I have shown, the House of Lords in Benson v. Northern Island Road Transport Board applied the well known principle that a statutory provision will not be construed as overthrowing a fundamental rule of the common law unless it expresses a clear intention to do so. The question then is whether the rule against double jeopardy has any application when the accused has been convicted and has himself invoked the appellate procedure. The rule against double jeopardy is not a mere fetish, an empty formula to be applied blindly in all circumstances. It exists as I have said, to ensure fairness and prevent oppression. It seems to me neither unfair nor oppressive to restore a conviction that was set aside on erroneous legal grounds."

[20] I respectfully agree with the view of the High Court of Australia in *Davern v. Messel* and of Lord Goddard in *Perera* and of Maguire J in *Kennedy*, that there is no justification for according to a decision of an appellate court quashing a conviction the same presumption of finality as attaches to an acquittal by a jury or the dismissal of a charge by a magistrate or other judicial officer. In my view, there is no rule that the prosecution cannot avail itself of a right granted in general terms by a statute, to appeal in criminal proceedings a decision of an appeal court to a final court. Subject therefore to the impact which it was argued other statutory provisions have on the interpretation of this section, section 6 (c) of the CCJ Act is effective in my view to give the prosecution a right to appeal from a decision of the Court of Appeal whenever the case involves a question of interpretation of the Constitution.

[21] As already indicated, this conclusion is reinforced by the interpretation section (s.2) of the CCJ Act. It is also consistent with the obvious policy underlying section 6 (c), and its precursors i.e. to vest in the court of last resort the responsibility for correcting any errors made by lower courts in interpreting the Constitution. That policy would be to some extent frustrated if errors of interpretation made by the Court of Appeal in criminal proceedings could not be corrected when they resulted in the quashing of a conviction.

[22] I turn now to the question: what impact, if any, does section 37 of the Criminal Appeal Act have on the interpretation of section 6 (c) of the CCJ Act? It has been

correctly pointed out that section 6 (c) was not an entirely new provision in the law of Barbados. There were earlier provisions which created a similar right of appeal, although in those provisions the appeal was to the Privy Council, not to the Caribbean Court of Justice. It was suggested that the matrix in which this right of appeal was shaped, was section 37 of the Criminal Appeal Act, an Act passed in 1983. The argument is that since the Crown was by the definition of 'appeal' contained in section 2 (1) of that Act, excluded from the right of appeal given by section 37, there was by implication a similar restriction of the right of appeal granted by section 6 (c) of the CCJ Act. In my view, this argument is unsound for several reasons, the principal one being that it is founded on a false premise i.e. that the Crown is excluded from the right of appeal given by section 37 of the Criminal Appeal Act.

[23] Section 37 reads as follows:

> "Subject to sections 38 and 39, an appeal lies to Her Majesty in Council
>
> (a) as of right
>
> (i) from a final decision of the Court in any criminal or other proceedings that involves a question as to the interpretation of the Constitution;
>
> (ii) from any decision of the Court on an appeal on a final decision of the High Court involving a criminal cause or matter given in exercise of its jurisdiction under section 24 of the Constitution;
>
> (iii) from any final decision of the Court on an appeal in any criminal proceedings on a ground that involves a question of law alone;
>
> (b) with leave of the Court,
>
> (i) from any decisions of the Court in any criminal or other proceedings, where in the opinion of the Court the question involved in the appeal is one that, by reason of its general or public importance, or otherwise, ought to be submitted to Her Majesty in Council for consideration;

(ii) from any decision of the Court on an appeal on a final decision of the High Court involving a question of mixed law and fact."

[24] The faulty premise to which I have referred, is that the appeal as of right provided by section 37 (a) (i) is not available to the Crown in criminal proceedings. This assumption is in turn based on the way in which the word 'appeal' is defined in section 2 (1) of the Criminal Appeal Act. Section 2(1) provides:

> "In this Act
>
> "appeal" means an appeal by a person convicted upon indictment".

If that definition of "appeal" governs section 37, then clearly the whole of that section is limited to appeals by convicted persons.

[25] The Criminal Appeal Act comprises 41 sections. 34 of these i.e. sections 3 to 36, both inclusive, comprise Part I of the Act. This Part is headed "Criminal Appeals from High Court". The first section in Part I, section 3(1), reads:

> "3.(1) A person convicted of an offence on indictment may appeal to the Court against his conviction".

The subsequent sections in Part I contain numerous references to an "appeal". There is no doubt that the definition of "appeal" in section 2(1) can be appropriately applied wherever that word appears in Part I of the Act. It is entirely consistent with what has been described as a "fundamental rule" of the common law that the prosecution should not be permitted to appeal from an acquittal by a jury of a person charged on indictment.

[26] The question is does this definition of appeal apply in Part II of the Act? Part II comprises only three sections of which section 37 is the first, and is headed

"Appeals to Privy Council". The definitions contained in section 2(1) are expressly made applicable "in this Act". Therefore, *prima facie* they apply wherever in the Act the terms defined appear. The interpretation section, however, must be read subject to section 33 (2) of the Interpretation Act Cap.1 which provides:

> "An interpretation section or provision contained in an enactment shall be read and construed as being applicable only if a contrary intention does not appear in the enactment".

In fact this is a rule of construction which exists independently of statute. That rule is formulated in *Bennion on Statutory Interpretation (6th ed.)* at page 479 in these terms:

> "Whether it is so stated or not, a definition does not apply if the contrary intention appears from the Act in which the defined term is used".

If one treats the noun 'appeal' whenever it is used in Part II of the Act, as being limited to an appeal by a convicted person, this would have the absurd result of nullifying a good deal of what is provided in sections 37, 38 and 39. This is sufficient to indicate quite clearly that it could not have been the intention of the legislature that the exclusionary definition of "appeal" contained in section 2(1) should apply to these sections in Part II of the Act.

[27] If one focuses on section 37, this grants a right of appeal not only in criminal proceedings, but also in 'other proceedings', which would include civil and constitutional proceedings. In these 'other proceedings' there would be no question of any party having been 'convicted on indictment', so the provision insofar as it relates to 'other proceedings' would be rendered nugatory by applying the definition. The reference to appeals in 'other proceedings' is to be found in section 37 (a) (i) and (b) (i).

[28] Section 37 (a) (ii) provides for an appeal as of right from a decision of the High Court in a criminal cause or matter given in exercise of its jurisdiction under section 24 of the Constitution. Section 24 of the Constitution is the section which enables a person to apply to the High Court for redress for infringement of the fundamental rights and freedoms set out in sections 12 to 23 of the Constitution. The right to appeal a decision of the Court of Appeal to Her Majesty in Council in such matters had previously been given in 1966 by section 87 (2) of the Constitution. There was nothing in that section of the Constitution to limit the right of appeal in criminal cases to persons convicted on indictment. It could hardly have been the intention, therefore, of the legislature when it enacted the Criminal Appeal Act, to deprive the Crown of a right of appeal to the Privy Council which it had previously enjoyed under section 87 (2) of the Constitution, more so in the absence of any express amendment or repeal of that section.

[29] Either the definition of 'appeal' contained in section 2 (1) applies to sections 37 to 39 of the Criminal Appeal Act or it does not. It would not be permissible to concoct a new definition to read: "'appeal' means in the case of criminal proceedings only, an appeal by a person convicted on indictment", and to apply that concocted definition to 'appeal' in Part 2 of the Act. One must either apply the statutory definition as it stands or give the word 'appeal' its usual meaning without any artificial limitation.

[30] It is manifest that the definition of 'appeal' in section 2 (1) was not intended by the legislature to apply in Part 2 of the Act and therefore, any argument based on the premise that it does, must be rejected.

[31] But in any event, I also reject the argument that if the right of appeal granted by section 37 of the Criminal Appeal Act were restricted to convicted persons, this restriction must be imported into the right of appeal to the Caribbean Court of Justice given by section 6 (c) of the CCJ Act. The CCJ Act did not repeal and replace section 37 of the Criminal Appeal Act. In fact that section has never been

expressly repealed. The link with the CCJ Act is made via section 64 of the Supreme Court of Judicature Act (the 'SCJ Act'). Section 64 provides in part as follows:

> "64(1) An appeal lies from decisions of the Court of Appeal to Her Majesty in Council
>
> (a) as of right,
>
> …
>
> (ii) from final decisions in any civil, criminal or other proceedings that involve a question concerning the interpretation of the Constitution
>
> …"

There is no definition of 'appeal' in the SCJ Act. Indeed, "appeal" is a simple English word and does not require a definition unless it is being used in some artificial or restricted sense. Admittedly there is a rule that when a term which is defined in an Act is used in a later Act "within the same field" but is not defined in the later Act, it is assumed that the definition in the earlier Act continues to apply, but this is always subject to a contrary intention appearing (Bennion op cit. at p. 485). The contrary intention in this case is manifest since the 'appeal' which is provided for in section 64 (1) of the SCJ Act, cannot sensibly be limited to appeals by convicted persons. In section 64 (1) (a) (ii) for instance, an appeal is made available as of right "in any civil, criminal or other proceedings". Even if one felt impelled to read section 37 of the Criminal Appeal Act in the restrictive way suggested, I can see no reason why the same restrictive interpretation leading to an absurd result, should be applied to the word "appeal" in section 64 of the SCJ Act. After all, the legislature did expressly confine the artificially restrictive definition of 'appeal' in the Criminal Appeal Act to that Act.

[32] One notes that section 54 (1) (a) of the SCJ Act limits appeals to the Court of Appeal from the High Court in criminal proceedings to such appeals as are provided by the Criminal Appeal Act, but there is no equivalent restriction on appeals in criminal matters from the Court of Appeal to the Privy Council.

[33] Section 64 of the SCJ Act was repealed by section 25 A of the CCJ Act. S. 25A was one of the provisions introduced by an amending Act in 2005. I have explained why in my view the Crown was entitled under both s. 64 of the SCJ Act and s. 37 of the Criminal Appeal Act to appeal to the Privy Council as of right in a case, whether criminal or civil, which involved a question of interpretation of the Constitution. But there is in any event no justification for treating either of these earlier provisions as relevant for the purpose of construing section 6 (c) of the CCJ Act. The purpose of the CCJ Act was to implement an international agreement i.e. the Agreement Establishing the Caribbean Court of Justice ('the Agreement') so that its matrix is to be found in the Agreement, and not in any previous enactment. Section 3 of the CCJ Act gives the Agreement the force of law. Section 6 (c) of the Act substantially reproduces paragraph 2 (c) of Article XXV of the Agreement. It would make no sense to resort to the domestic legislation of any of the States Parties to the Agreement for the purpose of construing either Article XXV paragraph 2(c) or section 6(c). Apart from the fact that two of the States Parties (Guyana and Suriname) did not have any link with the Privy Council, the others did not have an identical code of provisions governing appeals to the Privy Council. There is no question therefore of resorting to earlier legislation in Barbados for the purpose of negating the clear intention of the CCJ Act that any right of appeal created by that Act should be available to all parties to the relevant proceedings.

[34] For all these reasons, therefore, I hold that the right of appeal created by section 6 (c) of the CCJ Act is available to the Crown provided that the case involves a question concerning the interpretation of the Constitution. I turn therefore to a consideration of the second part of the first question.

Question 1 (b): Does The Appeal Involve A Question Of Interpretation Of The Constitution?

[35] Does the case which the Crown wished to argue before this Court involve a question of the interpretation of the Constitution? The provision in the Constitution which the Crown argued required to be interpreted, is section 18(1) which reads as follows:

> "18(1) 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".

It was submitted that the Court of Appeal's conclusion that Lewis had not received a fair trial, was based on a wrong interpretation of what was meant by the phrase 'a fair hearing' in section 18(1). It is to be noted that the requirement that the trial be fair is a requirement of the common law which existed independently of, and prior to, the Constitution. In delivering the opinion of the Board in *Franklyn and Vincent v. R.*[12] Lord Woolf said of the provisions in the Jamaican Constitution which are replicated in section 18 of the Barbados Constitution:

> "These provisions … do no more than codify in writing the requirements of the common law which ensure that an accused person receives a fair trial. They would therefore be part of the law of Jamaica even in the absence of the Constitution."

The question still remains, however, whether what the Court of Appeal was about in this case, was interpreting the expression 'a fair hearing' as opposed to applying it to the particular facts of the case.

[36] The answer to this question becomes a lot clearer if we focus on the issue on which the Court of Appeal's decision turned. The objection which had been taken at the trial to the trial Judge sitting was not pursued in the Court of Appeal, so that the Court of Appeal did not have to consider the issue of bias. The Court of Appeal allowed the appeal substantially because they upheld the complaint

[12] (1993) 42 WIR 262 at 268

made in the first ground of appeal that the application for the recusal of the Judge should not have been made in the presence of persons who subsequently became jurors in the case, and held that as a result the appellant had not received a fair trial. The reason the Court of Appeal held that the trial was unfair, was because the jury had been prejudiced against the accused by what had been said by counsel on both sides in their presence before their selection as jurors. The Court of Appeal at paragraph [15] of their judgment quoted the following passage from counsel for Lewis' skeleton argument:

> "The question for consideration is whether there was a real danger that the nature of the submission and the comments attributed to the Judge might have created a bias in the minds of the jurors, thus prejudicing the fair trial of the appellant."

At paragraph [16] the Court of Appeal recorded that counsel for the Crown had orally submitted inter alia that:

> "In any event, the appellant suffered no prejudice as a result of the submissions being made in the presence of the panel of jurors."

On this vital issue of prejudice, the findings of the Court of Appeal were encapsulated in the following passage at paragraph [19]:

> "The jurors may have formed an unfavourable impression of the appellant; namely, that he was trying to avoid his trial because he was guilty. Moreover, from the response of Mr. Leacock, the jurors may have concluded that the appellant, as a defendant receiving legal aid should be regarded less favourably than a defendant who had paid for his own legal representation. The members of the jury would have been conscious throughout the trial of these matters and may not have approached the case with the same openness of mind as if they had not heard the appellant's application. We do not know, and it would be speculating to surmise how the jury would have been affected by what they heard".

[37] If we had held that the Crown had a right of appeal in this case, we would have had to consider whether what was said by counsel in the presence of the jurors,

was reasonably capable of conveying to the jurors the impressions which the Court of Appeal found they might have conveyed. Basically, what the Court of Appeal had to do was to assess the risk of the jurors (or some of them) being prejudiced against the accused as a result of what had transpired in their presence. Having concluded, as they appear to have done, that there was a real risk of such prejudice, they had no option but to quash the conviction. If one took a different view of the matter, it would not be because one had a different concept of what was meant by a 'fair hearing', but because one made a different assessment of the likely impact of what was said by counsel in the presence of the jurors. No one would disagree with the proposition that a trial would be unfair if before it began, the jury was biased against the accused by prejudicial things said in their presence. The question was whether what was said was apt to create that bias and did not involve an 'interpretation' of section 18 (1).

[38] The true nature of the exercise conducted by the Court of Appeal is not altered by the fact that the Court spoke of it in two places in its judgment as if it involved a process of interpretation. Firstly, in identifying the fact that this was a capital case as one of two factors which disposed the Court of Appeal towards allowing the appeal, the Court in its judgment at paragraph [22] said:

> "In such a case, there is no room for error; looked at objectively, the defendant must receive a fair hearing interpreted in its widest sense, taking into account the defendant's particular circumstances."

It cannot be that the term 'a fair hearing' bears a different meaning in a capital case. What the Court of Appeal were in fact saying was that in applying the test of fairness the bar is raised somewhat higher in a capital case, so that for instance, a risk of prejudice which might be discounted as minimal in a non-capital case, might be considered unacceptable in the context of a capital case. The nature of the case was treated by the Court of Appeal as one of the facts of which account had to be taken in applying the test of fairness. In any case, the Crown did not seek to challenge the significance attached by the Court of Appeal to the capital

nature of the case, so that no question was being raised in the proposed appeal concerning it.

[39] Then at paragraph [29] of the judgment the Court of Appeal states:

> "We conclude that the cumulative effect of the matters raised in the appeal taken together as a whole was to deprive the appellant of a fair hearing, interpreted in accordance with the Constitution, such as to render the verdict unsafe or unsatisfactory".

On analysis, it would appear that the reference to the Constitution is simply intended to make the point that the requirement of a fair hearing is enshrined in the Constitution as there is nothing in the reasoning of the Court to suggest that the conclusion it reached depended in any way on an interpretation of section 18 (1). In fact in the preceding paragraph, paragraph [28], the Court's conclusion is stated without any reference to the Constitution:

> "We conclude that there was a material irregularity in the course of the trial process which rendered the trial unfair and therefore the conviction unsafe."

[40] We, therefore, reject the submission made by Mr. Leacock that we should take the Court of Appeal at its word and treat its judgment as raising a genuine question of interpretation of section 18 (1).

[41] The view I have expressed that this appeal does not involve a question of interpretation of the Constitution, is supported by two decisions of the Judicial Committee of the Privy Council in *Frater v. R*[13] and *Joseph v. The State of Dominica.* [14] In *Frater* an attorney in Jamaica was found guilty of contempt in the face of the court and was fined. He appealed his conviction unsuccessfully to the Court of Appeal and attempted to appeal as of right to the Judicial Committee on the ground that he had not been provided with sufficient particulars of the

[13] [1981] 1 WLR 1468
[14] (1988) 36 W.I.R. 216

offence with which he was charged. He relied on the provision in the Constitution of Jamaica which required that every person who is charged with a criminal offence "shall be informed as soon as reasonably practicable … of the nature of the offence charged". Lord Diplock in delivering the opinion of the Board said (at page 1469):

> "… it cannot plausibly be suggested that any question of interpretation of the plain and simple words "informed … of the nature of the offence charged" … arose in the instant case. The question that did arise … was the application of these plain and simple words to the particular facts of Mr. Frater's case".

Lord Diplock referred to the Board's judgment in *Harrikissoon v. The Attorney-General of Trinidad and Tobago*[15], in which the Board had urged that vigilance be exercised to prevent abuse of the right of access to the High Court for the enforcement of fundamental human rights and freedoms, and recommended that similar care be taken to ensure that cases in which an appeal as of right is claimed under the local equivalent of section 6 (c) of the CCJ Act, "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." (at page 1470)

[42] In *Joseph v. The State of Dominica (supra)* there was a claim by a convicted person to appeal as of right to the Privy Council against the dismissal of his appeal by the Court of Appeal of Dominica, on the ground that the case involved a question of interpretation of a provision of the Dominican Constitution. The provision in question was section 8 (1) which is in the same terms as section 18 (1) of the Barbados Constitution. In dismissing the appeal, Lord Keith of Kinkel who delivered the opinion of the Board (at page 219) said:

> "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

[15] [1980] A.C. 265

> interpretation of that enactment. It is a question of the application of these words to the facts of the particular case. 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 fact that some such mistake has occurred does not, however, mean that the case has not received a fair hearing."

Lord Keith went on to repeat the warning which Lord Diplock had given in *Frater* about permitting abuse of the provision for an appeal as of right on questions of constitutional interpretation. He said (at page 220):

> "The circumstances under which the instant appeal has been presented provide an opportunity for reiterating and emphasising the need for vigilance on the part of Courts of Appeal in dealing with claims to be entitled under similar constitutional provisions to appeal as of right to this Board or to Her Majesty in Council."

We would respectfully adopt the remarks of Lord Diplock and Lord Keith with regard to the need for vigilance by the Court of Appeal when dealing with claims to appeal as of right on the ground that the case involves a question of interpretation of the Constitution.

[43] We do not, however, accept what appears to have been the view of Lord Keith that the question whether a case has received "a fair hearing" within the meaning of the relevant constitutional provision, can never be a question of interpretation of that provision. More often than not what will be involved in the answering of this question, is the application of some well established rule as to what does or does not constitute a fair hearing, to the facts of the particular case. In the instant case, that rule was that the hearing must be before an unbiased jury. There may be cases, however, in which the fairness of the hearing is challenged by the inclusion of some novel element or feature in the concept of what constitutes a fair hearing. An example is provided by a recent decision of the High Court of Malawi which held that the mandatory death sentence for murder infringed the right of a person accused of murder to a fair trial on the ground that that right entitled the accused person to be heard not only on the issue of guilt but also on the question of

sentence (*Kafantayeni & Ors. v. The Attorney-General*)[16]. It might well be argued that an appeal from that decision would involve a question of interpretation of the constitutional provision requiring a fair trial. It is a truism that a court of appeal must first of all understand what a fair hearing connotes before it can apply that concept to what transpired before the trial court. For the purpose of applying a provision like section 6(c), however, it is crucial to consider whether the party seeking to appeal to the final court is complaining that the Court of Appeal either (i) applied a rule or standard not necessary for a fair hearing or conversely failed to apply a rule or standard that is necessary for a fair hearing, or (ii) simply misapplied an accepted rule or standard to the facts of the case. It is quite clear that in the instant case the Crown's complaint was in essence of a misapplication, and not of a misinterpretation, of the constitutional provision.

Question 2: Can A Conviction And Sentence Once Quashed Be Restored?

[44] With regard to the second question, an answer was not required for disposing of the case as we held that there was no valid appeal before us. Neither side argued the point. In the cases to which we were referred in which the prosecution appealed successfully against the decision of an appellate court to quash a conviction e.g. *Attorney-General for Ceylon v. Perera (supra)* and *D.P.P. v. Smith*[17], the reversal of the appellate court's decision was followed by the restoration of both the conviction and the sentence imposed by the trial court. The existing authorities therefore suggest an affirmative answer to this question but none of these cases is very recent and there have been fundamental changes in judges' approach to interpreting and applying human rights provisions since they were decided. In the circumstances, we refrain from answering this question and leave the issue it raises open for possible argument in some future case.

[16] Constitutional Case No. 12 of 2005
[17] [1961] AC 290

Summary Of Findings

[45] To recapitulate, our findings therefore are as follows:

A. The right of appeal to this Court conferred by section 6(c) of the CCJ Act is available in criminal cases to the prosecution when a conviction has been quashed by the Court of Appeal just as it is to a person whose conviction has been upheld by that court;

B. The question whether in this case Lewis received a "fair hearing" is a question not of interpretation of section 18 (1) of the Constitution, but of the application of it to the facts; and accordingly

C. The Crown is not entitled in this case to appeal as of right to this Court against the decision of the Court of Appeal and leave to appeal was wrongly given by the Court of Appeal.

On the basis of these findings the appeal had to be dismissed since the foundation on which it stood had collapsed.

No Application For Special Leave

[46] Towards the end of Mr. Leacock's submissions, we asked him whether he proposed to make an application for special leave to appeal under section 8 of the CCJ Act. This question was prompted by the penultimate paragraph of Mr. Leacock's written submissions in which he suggested that if the Court found that the Crown was not entitled to appeal as of right, it "should treat this matter as an application for leave to appeal pursuant to section 8". Section 8 provides:

> "Subject to section 7, an appeal shall lie to the Court with the special leave of the Court from any decision of the Court of Appeal in any civil or criminal matter".

For the reasons that we have already given, section 8, like section 6 (c), applies to the prosecution in criminal proceedings and so an application for special leave by the Crown in the present case would not, if made in time, have been barred '*in limine'*. In this respect, the law of Barbados remains the same as it was before the 2005 amendment of the Constitution and the enactment of the CCJ Act, except of course for the replacement of the Privy Council as the final court of appeal for Barbados. Be that as it may, in answer to the question put to him, Mr. Leacock indicated that he did not propose to make any application for special leave to appeal. We were therefore relieved of the need to consider whether there were any aspects of the instant case which would have justified our extending the time for applying for, and granting, special leave to the Crown.

The Judgment Of The Court Of Appeal

[47] That is not quite the end of the matter, however, as there are two matters with which we must deal. The first is the suggestion by the Director of Public Prosecutions that we ought to correct alleged errors in the judgment of the Court of Appeal notwithstanding the dismissal of the appeal, in order to prevent the creation of a bad precedent that would be followed by judges in Barbados. The second matter is the attempted challenge by the respondent of the Court of Appeal's order for a re-trial.

[48] With regard to Mr. Leacock's request that we correct some perceived errors in the judgment of the Court of Appeal, since there was no valid appeal before us, we will refrain from expressing any view as to the correctness of the conclusion which formed the basis of the Court of Appeal's decision i.e. that what transpired in the presence of the jurors prior to the start of the case, would have prejudiced them against Lewis. There are, however, three matters emerging from the judgment on which we consider it appropriate to comment.

[49] The first is the question whether in criminal trials an application to the judge to recuse himself should be made in open court or in chambers. We recommend the adoption in such circumstances of the following procedure. Counsel for the party wishing to object to the Judge sitting should ask to see the Judge together with counsel on the other side in the Judge's chambers before the court sits. He should there indicate his objection to the Judge and explain the reasons for it. If the Judge is then persuaded that he should recuse himself, the case is called in open court and either adjourned or transferred to another court. The Judge should indicate in open court, at least in general terms, the reason for the adjournment or transferral. If, however, the Judge is not then so persuaded, then the application for his recusal should be made in open court. Before the objection is heard, however, the court should be cleared of all jurors in waiting and if anything is said in the course of the objection which is prejudicial to the accused, the Judge should warn any members of the media present not to report the prejudicial matter before the conclusion of the trial or risk being charged with contempt of court. The Judge's ruling on the objection and a brief statement of his reasons should be given by him in open court. In recommending this procedure we have in mind the importance of conducting judicial proceedings, particularly those which involve a person's liberty (or life), in public.

[50] The second aspect of the Court of Appeal's judgment on which we would comment, is the failure of the Court of Appeal to indicate how, and to what extent, its decision was based on the "other grounds of appeal", that is to say, those grounds apart from the first ground under which the issue of prejudice was raised. If we had had to deal with this appeal on its merits, it may have been necessary for us either to refer the matter back to the Court of Appeal for clarification or hear argument on all the other grounds of appeal filed in the Court of Appeal. Either course would have meant a loss of time and efficiency in the disposition of this case.

[51] Thirdly, we refer to the unfavourable view which the Court of Appeal took of the Judge stopping counsel, Mr. Bolden, from reading a newspaper article in the course of his submissions. It was clear that given the purpose for which it was being read i.e. to prove what the Judge had previously said to or about Lewis, the newspaper report was hearsay evidence and therefore inadmissible. The Judge was therefore right to stop counsel from reading the article, more especially as it was in his view inaccurate. The fact that the article was in the public domain, was irrelevant to the issue of bias with which the Judge was dealing. Before the Court of Appeal counsel for Lewis did not complain of the Judge's refusal to recuse himself, so it is difficult to see how criticisms of the way in which the Judge dealt with the objection to his sitting, could have affected the outcome of the appeal.

The Order For Re-trial

[52] I turn now to the attempt by Lewis to challenge the order for re-trial. This challenge was originally mounted by way of a cross-appeal for which leave was granted by the Court of Appeal. The appeal itself having collapsed, it seemed at best doubtful whether the cross-appeal could stand on its own. Counsel for Lewis therefore, at our suggestion, applied for an extension of time for applying for special leave to appeal. This was granted. He then applied orally for special leave to appeal against the order for re-trial pursuant to section 8 of the CCJ Act. The order for re-trial was challenged on two grounds. The first (which was the only one pleaded in the notice of cross-appeal) was that the Court of Appeal had failed to take into consideration or to apply a number of relevant principles or guidelines that should have governed the exercise of its discretion. These principles and guidelines were set out in the notice of cross-appeal and in a proposed amendment of it. In its judgment the Court of Appeal referred to the need to strike a balance between the interest of the accused and the interest of the community at large, and went on to say:

> "The interest of justice requires that we order a re-trial. We have taken into account the principles to be applied in deciding whether to order a new trial, including the date of the alleged commission of the offence. … In the instant case the paramount consideration must be the public interest in having a fair trial of a serious crime".

[53] We do not think it was necessary for the Court of Appeal to list all the factors which have to be taken into account in determining whether or not to order a re-trial. There is nothing to suggest that they failed to take into account anything which they should have or took into account anything which they should not have. We ourselves have no doubt that the conviction in this case having been quashed, the interest of justice was served by an order for re-trial. Accordingly, we found that so far as the ground pleaded was concerned, there was no justification for granting special leave to appeal against the order for re-trial.

[54] The other ground of challenge was a procedural one, raised in argument before us. The complaint was that the Court of Appeal did not invite counsel for Lewis to address it on whether or not the Court should order a re-trial. We were informed by counsel on both sides that it is not the practice in Barbados for the Court of Appeal when it quashes a conviction, to invite fresh submissions on the issue whether a re-trial should be ordered. While we consider that the better practice is for the Court of Appeal, if it is minded to order a re-trial, to give the appellant's counsel an opportunity to persuade it not to do so, we do not consider that the failure of the Court of Appeal to invite submissions on that issue in this case, was fatal. Counsel who appeared for Lewis in the Court of Appeal was, as he himself emphasised, a very experienced member of the criminal bar, and therefore would have been well aware of the practice not to invite submissions on the issue of a re-trial. Accordingly, he would have been alive to the need to address that issue before concluding his oral argument or alternatively to request to be heard on it when the Court announced its decision to quash the conviction. As a result we do not think it would be accurate to say that Lewis' counsel was denied the opportunity of addressing the Court of Appeal on the question of a re-trial. We do

not consider that in the circumstances the ordering of a re-trial involved any miscarriage of justice.

[55] For these reasons, we refused Lewis' request for special leave to appeal against the order for re-trial.

[56] In the result, we dismissed both the appeal and the cross-appeal and left intact the decision of the Court of Appeal to quash the conviction and to order a re-trial.

JUDGMENT OF THE HONOURABLE MR. JUSTICE POLLARD, JCCJ:

Introduction

[57] This is an appeal by the Director of Public Prosecutions from the decision of the Barbadian Court of Appeal delivered on 05th January, 2006 quashing the conviction, setting aside the sentence of the Respondent and ordering a new trial. Although the Appellant filed seven grounds of appeal the determinative issue in the judgment of the Court of Appeal was *"whether he was afforded a fair hearing of his case in accordance with his constitutional rights."* The Court of Appeal in its determination concluded *"that the cumulative effect of the matters raised in the appeal taken as a whole was to deprive the appellant of a fair hearing* ***interpreted in accordance with the Constitution*** *such as to render the verdict unsafe or unsatisfactory."* In the determination of the Court of Appeal the conviction of the Respondent could only be upheld as safe or satisfactory if it resulted from a trial in compliance with the rules of good practice and the high professional standards established for criminal trials.

[58] In this appeal the gravamen of the Respondent's contention in the court below was that the verdict of the jury at the trial was heavily influenced by the discussion of

prejudicial matters by counsel of both parties in open court relating to an application for the recusal of the trial judge in the hearing of potential jurors and by the omission of the trial judge to direct the jury to disregard in their deliberations such prejudicial matters which they heard prior to being empanelled as a jury. Furthermore, the trial judge did not allow counsel for the defence to make his application for the recusal of the trial judge in chambers, nor to complete his submissions in open court on the same application. The trial judge also declined to give reasons for refusing to recuse himself.

[59] The Court of Appeal determined, further, that since this was a capital case the term "fair hearing" must be interpreted in its widest sense. In the result, the appeal was allowed, the conviction quashed, the sentence set aside and a retrial ordered. The Appellant is now appealing as of right within the meaning of Section 6(c) of the Caribbean Court of Justice (CCJ) Act Cap. 117 (2003) from the decision of the Court of Appeal to this Court, or in the alternative, with special leave of this Court. Counsel for the Appellant later withdrew the application for special leave. The Respondent's counsel also cross-appealed against the order for retrial.

[60] The two preliminary points which counsel for the litigants agreed at the case management conference that the CCJ should consider and determine are as follows:

(a) whether by virtue of Section 6(c) of the Caribbean Court of Justice Act Cap. 117 of Barbados, the Crown has an appeal as of right to the Caribbean Court of Justice in this case;

(b) whether, if such a right of appeal exists, the Crown can, as part of any relief it obtains, secure the reinstatement of the conviction of the Respondent.

Entitlement of the prosecution to an appeal as of right

[61] Of the two agreed preliminary points identified in the immediately foregoing paragraph the first addressed the substantive issue relating to the legal incidence of section 6 of the Caribbean Court of Justice Act Cap. 117 (CCJ Act) which provides:

> "6. An appeal shall lie to the Court from decisions of the Court of Appeal as of right
>
> (a) …
>
> (b) …
>
> (c) in any civil or criminal proceedings which involve a question as to the interpretation of the Constitution"

[62] On an ordinary reading of the terms "appeal", "Appellant" and "party" of Section 2 of the aforementioned Act, it does appear, *ex facie*, that the Crown, as a party to proceedings before the Court of Appeal, does have an appeal as of right within the meaning of Section 6(c) of the CCJ Act, Cap. 117 (2003) like the defendant. Section 2 of the Act defines "appeal" as an "appeal to the Court", which is a reference to "the Caribbean Court of Justice established by the Agreement." Section 2 also defines the cognate expression "Appellant" as "the party appealing from a judgment" and goes on to define a party "as **any** party to proceedings before the Court."

[63] In light of the foregoing, it is extremely difficult to avoid the inference that the Crown, like the defendant, has been accorded an appeal as of right in criminal proceedings. In my view, however, this inference is sustainable only if it can be established, *in limine,* that the Crown is entitled, to an appeal in criminal proceedings and, provided further, that such an appeal relates to "any … criminal proceedings which involve a question as to the interpretation of the Constitution." In his written submissions Counsel for the Appellant contended, *inter alia*, that the Caribbean Court of Justice Act, Cap. 117 (2003) cannot be so narrowly construed as to restrict an appeal as of right in criminal proceedings to a convicted person.

He submitted, further, that *"(t)he Crown has always enjoyed an appeal as of right from decisions of the Court of Appeal on matters relating to interpretation of the Constitution. The fact that this has been seldom or never exercised is no basis for saying that it does not exist."* This submission must be presumed to incorporate a reference to criminal proceedings. He submitted that Section 6(c) of the Caribbean Court of Justice Act "merely repealed and replaced the jurisdiction of the Judicial Committee of the Privy Council making the Caribbean Court of Justice the final Court of Barbados. Accordingly, it is imperative that the Crown should continue to enjoy the same right and jurisdiction that it was always accorded in the Supreme Court of Judicature Act Cap. 117 as is intended."

[64] The learned President in his judgment has adduced compelling and persuasive reasons to support the view that the term "appeal" as employed in related antecedent legislation, namely, section 37 of the Criminal Appeal Act, Cap. 113A and section 64 of the Supreme Court of Judicature Act, Cap. 117A is not restricted to a person convicted on indictment. Further, he maintained that the CCJ Act 117 (2003) which superseded the Supreme Court of Judicature Act, Cap. 117A defined appeal in a manner which clearly contemplated according the prosecution an appeal as of right within the meaning of section 6(c).

[65] I agree with the learned President that section 6(c) of the Caribbean Court of Justice Act, Cap. 117 (2003) accorded the prosecution an appeal as of right in criminal proceedings which involved a question as to the interpretation of the Constitution. I also agree with the learned President, but for different reasons set out below, that the Court of Appeal in reaching its determination was not engaged in the interpretation of the Constitution.

Importance of a fair hearing guaranteed by the Constitution

[66] In paragraph 2 of its judgment the Court of Appeal maintained that although the Appellant had filed seven grounds of appeal, "the important issue for us to decide

is whether he was afforded a fair hearing of his case in accordance with his constitutional rights". I am inclined to concur in the opinion of the Court of Appeal that the determinative issue falling to be decided was whether the Respondent was accorded a fair hearing consistently with his constitutional rights. Consequently, I propose to examine various relevant judicial determinations on the interpretation and application of the term "fair hearing" given its seminal importance for human rights generally[18] and, in particular, for the liberty and life of the individual, especially in the retentionist jurisdiction of Barbados.

[67] Section 18(1) of the Constitution of Barbados provides as follows:

> "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."

The Respondent's main ground of appeal in the court below was that he did not enjoy the benefit of a fair hearing within the meaning of Section 18(1) of the Constitution. The Court of Appeal in allowing the appeal of the Respondent determined, *inter alia*:

> "A great deal of prejudicial matter was raised in the hearing of potential jurors; the objections (of the accused) struck at the fairness and impartiality of the trial judge … We conclude that there was a material irregularity in the course of the trial process, which rendered the trial unfair and therefore the conviction unsafe … We conclude that the cumulative effect of the matters raised in the appeal taken together as a whole was to deprive the appellant of a fair hearing**, interpreted in accordance with the Constitution**, such as to render the verdict unsafe or unsatisfactory."

[68] In effect, as indicated above, the gravamen of the issue to be determined here is whether the accused was granted a fair hearing in accordance with his constitutional rights. This brings me to the second aspect of the first preliminary issue, namely, whether the appeal accorded the Appellant by the Caribbean Court of Justice Act, Cap. 117 (2003) was an appeal as of right in a criminal proceeding

[18] See, for example, Morel v France – 34130/96 [2000] ECHR 218 (6 June 2000)

involving "a question as to the interpretation of the Constitution". The Court of Appeal had no hesitation in determining that the Appellant was deprived of a "fair hearing, interpreted in accordance with the Constitution." And it is common ground that the right to a fair trial is absolute! In the opinion of Lord Bingham:

> "If the trial as a whole is judged to be unfair, a conviction cannot stand. What a fair trial requires cannot, however, be the subject of a single unvarying rule. It is proper to take account of the facts and circumstances of particular cases, as the European Court has consistently done."[19]

[69] In determining whether a party was accorded a fair hearing in accordance with Article 6 (1) of the European Convention on Human Rights and Fundamental Freedoms, the European Court of Human Rights has developed a body of interpretative principles for employment as the facts determined in any given case may prescribe. In extending support to the *dictum* of Lord Bingham mentioned above, Lord Steyn in the same case asserted:

> "Once it has been determined that the guarantee of a fair trial has been breached, it is never possible to justify such breach by reference to the public interest or any other ground. This is to be contrasted with cases where a trial has been affected by irregularities not amounting to denial of a fair trial."[20]

[70] In light of its determination on this issue, the Court of Appeal was right to quash the conviction and sentence and order a retrial, especially since the trial judge omitted to warn the jury to disregard in their deliberations the prejudicial information which was disclosed in their presence and hearing prior to being empanelled. In this connexion it is important to bear in mind that:

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[19] Glyne Hamilton Cumberbatch v The Queen, (2004) 67 WIR 48 at p. 53; also Brown v Stott [2001] 2 WLR 817 at 693; Wilberforce Bernard v The State [2007] UK PC 34 at p. 12

[20] Idem at 708

> "(i)n a criminal trial, it is the court acting collectively that has the shared responsibility of ensuring a fair trial. The judge and the jury are, by the system employed, given distinct functions to perform which will collectively protect the rights of the person standing trial. In fulfilling their distinct functions, both the judge and the jury must recognize the need to ensure that the accused receives a fair trial but that does not require the jury to take upon themselves functions that the law properly entrusts to the judge. Provided each fulfils its role the accused will receive a fair trial."[21]

[71] Since the right to a fair hearing or fair trial is absolute, the overall fairness of a criminal trial cannot be compromised.[22] "The rights specified in paragraphs (a) to (f) of Section 18(2) are guaranteed by the Constitution as practical and effective rights. In the European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950) the rights similar to those listed in Section 18(2) of the Constitution are described as "minimum rights" – see Article 6. They are not and are not meant to be theoretical or illusory. They are of value in a democracy governed by the rule of law. If it can be established that a hearing has not been fair, a conviction will be quashed."[23]

Is the concept "fair hearing" amenable to judicial interpretation?

[72] Despite the seminal importance of a fair hearing in retentionist jurisdictions to the safety of a conviction and the necessity to ensure in every case judicial respect for this constitutional right, the Judicial Committee of the Privy Council (JCPC) in *Joseph v State of Dominica* determined that "(t)he question whether the 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."[24]

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[21] Per Lord Hutton in Regina v Mushtag [2005] UKHL25; also per Bingham CJ in Randall v R (2002) 60 WIR 103 at 120

[22] Brown v Stott [2001] 2 All ER 97; See also the dictum of Lord Bingham CJ in Randall v R (2002) 60 WIR at 120

[23] Per Sir David Simmons, CJ in Glyne Hamilton Cumberbatch v The Queen (2004) 67 WIR 48 pp. 53-54

[24] Joseph v State of Dominica (1988) 36 WIR 216 at p. 218

[73] In my respectful opinion this *dictum* betrays symptoms of a juridical oxymoron and evokes disconcerting queries about its legitimacy. Compare this *dictum* with the opinion of President Aharon Barak of the Supreme Court of Israel who pertinently observed:

> "The judge has an important role in the legislative project: The judge interprets statutes. **Statutes cannot be applied unless they are interpreted**. The judge may give a statute a new meaning, a dynamic meaning, that seeks to bridge the gap between law and life's changing reality without changing the statute itself. The statute remains as it was, but its meaning changes because the court has given it a new meaning that suits new social needs."[25]

[74] The foregoing statement of the role of the judge applies, *a fortiori*, in relation to the constitution of Barbados which is an instrument of a peculiar and superior class constituting as it does the supreme law of the State. Since this instrument is seen to be a living instrument and always speaking the words contained therein must be viewed as eminently susceptible to interpretation in order to accommodate ever-changing social realities. In light of evolving international human rights standards what might have constituted a fair hearing in 1988 may not be seen to satisfy required conditions in 2006. In the characterization of Sir David Simmons CJ *"…the Constitution must be interpreted as a living instrument adapting itself to take account of the contemporary standards and values of a democratic society."*[26] This judicial insight must be considered as lying at the heart of a determination concerning the constitutional right to a fair trial.[27]

[75] There can be no doubt in my view that the provisions of the Barbados Constitution, like those of any other legal instrument, cannot be meaningfully applied unless they are interpreted, if only for the very simple reason that written

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[25] Aharon Barak, The Judge in a Democracy (Princeton University Press 2006) at pp. 4-5
[26] Clyde Grazette v Attorney General and Director of Public Prosecutions No 16 of 2006
[27] Brown v Stott op. cit. at p. 106

words in such an instrument are mere visible symbols expressive of human intentions or motivations continuously vulnerable to change, consistently with the dynamism of their operational environment. The sociological significance of such symbols is necessarily a function of determination and evaluation in the light of contemporary social realities. Sometimes the language of commitment employed in a legislative enactment or constitution is self-explanatory as in *Frater v R,*[28] such that the court of competent jurisdiction adopts the interpretation which is self-evident. But what may be self-evident in one generation may not be so regarded in the next! Semantically, it does appear from relevant case law that the term "fair hearing" does not fall into this unique class of eternally self-explanatory verities. As Lord Bingham pertinently observed:

> *"The requirements of fairness in any given case are not however an abstract or absolute standard. They depend on the context and all the facts."*[29]

[76] Understandably, the JCPC in its relevant determinations were apparently anxious to avoid opening the flood gates for appeals on constitutional grounds. However, the courts appear to be very well placed to preempt such an eventuality by defining and delimiting the juridical parameters of a "fair hearing" on the basis of judicially determined and agreed principles and by adjudging in every case whether the constitutionally guaranteed right to a fair hearing genuinely addressing the interpretation of the constitution is engaged;[30] or whether, in the final analysis, a litigant is indulging a frivolous or vexatious suit or is otherwise abusing the process of the court.

[77] Relevant judicial determinations have so far confirmed that the concept "fair hearing" eludes definitional specificity and exhaustiveness. However, this circumstance must not be considered as precluding an inclusive/exemplary

[28] Frater v R (1981) 1 WIR 1468
[29] R v Criminal Cases Review Commission ex parte Pearson [2000] IG App R 141 p.171
[30] Harrikissoon v Attorney General for Trinidad and Tobago (1980) AC 265

interpretation of it. The requirement of legal certainty, especially in matters relating to human rights and, more particularly, to matters affecting the life and liberty of the subject, demands that the term "fair hearing" must not remain untrammelled by judicially agreed juridical parameters, leaving the concept completely at large and vulnerable to the whims and fancies of subjectivist judicial activism.

[78] In my opinion, the important issue falling to be determined by our Court is whether the Court of Appeal in reaching its judgment, did in effect *interpret* the term "fair hearing" set out in Article 18(1) of the Constitution before concluding that the conviction was unsafe or unsatisfactory, or whether the Court of Appeal merely applied to the facts found judicially predetermined principles encapsulated in the term "fair hearing". If the latter, then the expression "*interpreted in accordance with the Constitution"* employed by the Court of Appeal in its final determination must be regarded as otiose and lacking in juridical significance for the outcome of the appeal. I have no doubt that the latter was the case.

[79] In support of his position, reliance was placed by counsel for the Respondent on the decision of the JCPC in *Joseph v The State of Dominica.*[31] Section 8(1) of the Constitution of Dominica which guaranteed the constitutional right to a "fair hearing" was expressed in terms similar to Section 18(1) of the Barbados Constitution. This decision of the Board, however, must be distinguished from a similar determination by their Lordships in *Frater v R* where an appeal, purporting to be made as of right under Section 110(1) of the Constitution of Jamaica, was dismissed on the ground that while the application of the particular constitutional provision might have been in issue no question of its interpretation properly arose. The relevant language of commitment, which is clear, unambiguous and invokes no intractable problems of interpretation was as follows:

> "(6) Every person who is charged with a criminal offence-

[31] (1988) 36 WIR 216

(a) shall be informed as soon as reasonably practicable, in a language which he understands, of the nature of the offence charged…"

[80] The relevant determinations of their Lordships mentioned above were undoubtedly informed by considerations of legal policy and, in particular, "the need for vigilance on the part of the Courts of Appeal in dealing with claims to be entitled under similar constitutional provisions to appeals as of right to this Board or to Her Majesty in Council"[32]**.** Lack of vigilance in this regard by judges competent to make a determination could trigger such a rash of appeals on constitutional grounds as to inundate, prejudicially, the criminal justice system in Barbados.

[81] Granting the generally acknowledged difficulty of arriving at a precise and exhaustive definition of the term "fair hearing", the anxiety of the Board to preempt frivolous or vexatious constitutional appeals as of right, thereby overburdening the administration of criminal justice and devaluing the important constitutional right to a fair hearing, is to be commended and endorsed. Judiciously, the European Court of Human Rights has determined that the concept of a "fair hearing" defies precise and exhaustive definition.[33] There is no definition of the term "fairness" for the purposes of the Convention (on which the provisions on fundamental rights and freedoms of many Caricom States are based). It has been judicially characterized not as a term of art and does not have to be given any strict or technical meaning.[34]

[82] The foregoing notwithstanding, strict compliance with the rule of law in modern democracies does appear to prescribe the need for a more compelling and persuasive basis than definitional intractability as a ground for disentitling an accused person convicted on indictment to an appeal as of right in proceedings before a court of last resort, especially in capital cases. More importantly, as

[32] Joseph v The State of Dominica op. cit. at p. 219
[33] CG v The United Kingdom (2001) ECHR 870 at p. 28
[34] See Judge Bratza, CG v united Kingdom [2001] ECHR 43373/98, p. 13

pointed out by the European Court of Human Rights, the "right to a fair trial holds so prominent a place in a democratic society that there can be no justification for interpreting Article 6(1) of the Convention restrictively."[35] Article 6(1) of the Convention speaks, *inter alia*, of a "fair hearing".

[83] It does appear to be the subject of a reasonable inference from relevant case law, however, that although the European Court of Human Rights has had to come to terms with the reality that the Convention omitted to define the term "fair", this did not preclude an "interpretation" of the term "fair hearing". Thus, the European Court of Human Rights recognized that *"principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify"*[36]. It is clear from this *dictum* that the term "fair trial" from the perspective of the European Court of Human Rights, is amenable to the elaboration and extrapolation of interpretative principles for application in appropriate circumstances. In my view the definitional and interpretative processes are closely allied being both concerned with discerning meaning from verbal expressions of human intentions. Whereas the interpretative function is concerned with the ascertainment of the meaning to be assigned to written words or other verbal manifestations of human intention, the definitional function is essentially concerned with an enhanced awareness of the meaning of words for the purpose of sharpening the perception of phenomena[37].

[84] In effect, in defining a legal concept set out in a constitution or enactment the legislative draftsperson is not merely concerned with the correct choice of words to communicate meaning but, even more importantly, with the sociological phenomena which words are employed to portray. In short, legal language which critically determines the cut and thrust of social interaction must be concerned with identifying and clarifying the sociological phenomena which verbal

[35] Per Judge Bratza, CG v United Kingdom[2001] ECJR 43373/98, p. 14
[36] Dourson v The Netherlands (1996) 22 EHRR, 330, 358 para. 70
[37] See HLA Hart, The Concept of Law, (2nd ed) 1994, p. 14

expressions are employed to signify. In light of the foregoing, I apprehend that every term or concept employed in legal discourse must be seen as amenable to interpretation if not precise definition, including the intractable concepts "fair trial" or "fair hearing" or "due process" and such like.

[85] In point of fact the Human Rights Committee of the United Nations has interpreted the term "fair hearing" despite the general awareness that "fair trial" and "fair hearing" are semantically elusive concepts "characterized by considerable vagueness"[38] tending to an open-ended residual quality not unlike the concepts of "proportionality", "due process of law" and "safety of a conviction".[39] Consider in this context the *dictum* of Lord Bingham CJ:

> "The expression unsafe in Section 2(i)(a) Criminal Appeal Act (1968) does not lend itself to precise definition. In some cases unsafety will be obvious, as (for example) where it appears that someone other than the appellant committed the crime and the appellant did not, or where the appellant has been convicted of an act that was not in law a crime, or where a conviction is shown to be vitiated by serious unfairness in the conduct of the trial or significant legal misdirection, … Cases, however, arise in which unsafety is much less obvious: Cases in which the Court, although by no means persuaded of an appellant's innocence, is subject to some lurking doubt or uneasiness whether an injustice has been done … If on consideration of all facts and circumstances of the case before it, the Court entertains real doubts whether the appellant was guilty of the offence of which he has been convicted, the Court will consider the conviction unsafe. In these less obvious cases the ultimate decision of the Court of Appeal will very much depend on its assessment of all the facts and circumstances.[40]

[86] In the characterization of Lord Clyde:

> "But while there can be no doubt that the right to a fair trial is an absolute right, precisely what is comprised in the concept of fairness may be open to a varied analysis. It is not to be supposed that the content of the right is necessarily composed of rigid rules which provide an absolute protection for an accused person under every circumstance.[41]

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[38] See Stefan Trechsal, Human Rights in Criminal Proceedings, Oxford University Press (2005) p. 54
[39] R v Michael George Davis et al [2001] 1 Cr App R 8 at p. 131
[40] R v Criminal Cases Review Commission, ex p. Pearson [2000] 1 Cr Appl R 141 at pp. 146-7
[41] Brown v Stott, op. cit. at 727

[87] In *Morael v France,* the United Nations Human Rights Committee determined that "(a)lthough Article 14 (of the International Covenant of Civil and Political Rights (ICCPR)) does not explain what is meant by a "fair hearing" in a suit at law (unlike paragraph 3 of the same article dealing with the determination of criminal charges), the concept of a fair hearing in the context of Article 14(1) *should be interpreted as requiring a number of conditions*, such as equality of arms, respect for the principle of adversary proceedings, preclusion of *ex officio reformatio in pejus*, and expeditious procedure.[42] The facts of the case should accordingly be tested against those criteria."[43] It is also common ground that the right to a reasoned decision is an indispensable attribute of a fair trial[44].

[88] In a similar vein the European Court of Human Rights perceptively determined:

> "It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and the defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party..."[45]

Did the Court of Appeal interpret the Constitution?

[89] In my opinion, a judicial determination whether, on the basis of the facts established in any given case, the constitutional right of an accused to a fair trial guaranteed by Section 18(1) has been breached, unavoidably engages an interpretation of the Constitution. Nevertheless, in any particular case it is for the courts to determine if, on the facts found, a judicial interpretation of a fair trial in accordance with the Constitution has already been made by a court of competent

[42] See Herbert Bell v Director of Public Prosecutions and Another [1985] 3 WLR 73
[43] CCPR/C/36/D/207/1986 [1989] UNHRC 16 (28 July 1989).
[44] Clyde Hamilton Cumberbatch v The Queen, op. cit.
[45] Per Lord Bingham of Cornhill in Brown v Stott [2000] 2 WLR 817 at p. 695

jurisdiction and all that remains to be done is to apply the relevant principles to the instant case.

[90] In some cases, however, it may very well be determined that the language of commitment is self-explanatory, that is to say, it is so clear and devoid of doubt or ambiguity that the relevant provisions of an enactment may be applied without the need for discerning its meaning which is self-evident:

> "Where the language is plain and admits of but one meaning, the task of interpretation can hardly be said to arise. 'The decision on this case', said Lord Morris of Borth-y-Gest in a revenue case 'calls for a full and fair application of particular statutory language to particular facts as found. The desirability or the undesirability of one conclusion as compared with another cannot furnish and guide in reaching a decision.' Where, by the use of clear and unequivocal language capable of only one meaning anything is enacted in the legislature, it must be enforced however harsh or absurd or contrary to common sense the result may be."[46]

But although in this situation the burden of interpretation falling on the judge is considerably reduced, it is not entirely dispensed with. This appears to have been the case in *Frater v R*[47] mentioned above where the language of commitment was self-explanatory. Given, however, that the concept "fair" invokes the aphorism *quot hominess tot sententiae* (open to as many interpretations as there are judges competent to make a determination) and is liable to be defined by the many different circumstances establishing the context of its interpretation, I would hesitate to presume that it may be applied in the absence of interpretation.

[91] Where, however, a prior judicial determination on the same or similar facts has not been made and the language of commitment is not self-explanatory, an examination of relevant agreed principles by a court of competent jurisdiction is required in order to establish whether an accused was accorded a fair trial to which he was constitutionally entitled thereby engaging an interpretation of the constitution. Contrary to authoritative *dicta* on the issue, and consistently with the

[46] Maxwell on the Interpretation of Statutes (12 ed) by P St J Langan (Butterworths, 2006) at p. 29
[47] Supra, Note 11

insightful observations of Aharon Barak mentioned above, it is my respectful opinion that it would not normally be possible to apply the provisions of any legal enactment, be it a constitution or other legal instrument, in the absence of interpreting them or discerning their meaning.

[92] It has been pertinently observed that every word in a legislative text must be given its own meaning. This was expressed to follow from the assumption that the legislature avoids tautology and that every word of legislation has a sensible reason for being there. The legislature does not make mistakes or waste words.[48] In *R v Kelly* Cory J, in support of this position, said, *"(i)t is a trite rule of statutory interpretation that every word in a statute must be given a meaning."*[49]

[93] Section 18(1) of the Constitution of Barbados guarantees the individual charged with a criminal offence the right to a "fair hearing". This right, as mentioned above, has been determined by the weight of judicial authority to be absolute.[50] Like *habeas corpus* the right to a fair hearing is a peremptory attribute of a democracy based on the rule of law from which no derogation is to be entertained. Given the fundamental importance of this right, as expressed in the language of the Constitution, I find it difficult to accept that the term "fair hearing" is not susceptible to interpretation, since in the absence of attributing meaning to the term in light of contemporary social realities, its correct application to the facts established in any given case would, to my mind, be infeasible. On a careful examination of cases involving the right to a fair hearing it appears to me that the courts of competent jurisdiction in making a determination, apply, either consciously or unconsciously, but more often than not, inarticulately, judicially predetermined principles to the facts found.

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[48] Ruth Sullivan, Statutory Interpretation, Irwin Law (1997)
[49] [1992]25 CR 170 at p. 31
[50] Fitt v United Kingdom (2000) 30 EHRR 450, 510; Brown v Stott [2001] 2 All ER 99; Glyne Hamilton Cumberbatch v The Queen – Criminal appeal No 52 of 2002 (Barbados) p. 9; A Mohammed & R Harripersad v The State (2000) 58 WIR 391 at 408; R v A (No 2) [2000] 2 WLR 1546; Ramdatt v R (2002) 60 WIR 103 at 28; Clyde Grazette v Attorney General and Director of Public Prosecutions No 2016 of 2006 at p. 15; R v Michael George Davis et al [2001] 1 Cr App R 8; Wilberforce v Bernard op.cit.

[94] Indeed, the instant appeal appears to be an excellent case in point of this practice. For example, the Court of Appeal must be seen to have applied the generally accepted right to adversarial proceedings based on the principle of equality of arms at paragraphs 14, 15 and 24 of its judgment and the equally important right to a reasoned decision at paragraph 12 of its determination, even though no explicit reference was made to these principles. In *Clyde Grazette v Attorney General and Director of Public Prosecutions*[51], however, the Court of Appeal expressly made reference to the right to adversarial proceedings based on the principle of equality of arms.

[95] In conclusion, I am of the view that Section 6(c) of the Caribbean Court of Justice Act, Cap. 117 (2003) accorded the prosecution an appeal as of right in criminal proceedings involving a question as to the interpretation of the Constitution. The Court of Appeal held that the Respondent was deprived of a fair hearing to which he was constitutionally entitled such as to render the verdict of the trial judge unsafe or unsatisfactory. However, although the term "fair hearing" must be seen to be normally susceptible to judicial interpretation, an interpretation of the Constitution by the Court of Appeal does not appear to have been engaged in this case. The Court of Appeal must be seen, on an examination of the reasoning employed, to have simply applied judicially predetermined principles of a fair hearing to the facts found. Consequently, the determinative ground of appeal adduced by the Appellant must fail.

[96] I concurred in the decision of my learned brothers and sister to dismiss this appeal. I also concurred in the dismissal of the cross-appeal for the reasons adduced by the learned President.

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[51] No 2016 of 2006 at pp. 6 ff