

TERRITORY OF THE VIRGIN ISLANDS

IN THE COURT OF APPEAL

HCVAP 2009/016

In the Matter of Section 308 of the Criminal
Code 1997 of the Virgin Islands

And in the Matter of the Constitutional Order
of The Virgin Islands 2007

And in the Matter of an Application by
RUDOLPH MADURO for redress pursuant to
Section 31 of the said Constitutional Order for
Contravention of sections 19(2), 25(1), 16(2)(a)
and 16(6) thereof in relation to him

BETWEEN:

[1] THE COMMISSIONER OF POLICE OF THE VIRGIN ISLANDS POLICE FORCE
[2] THE ATTORNEY GENERAL OF THE VIRGIN ISLANDS

Appellants

and

RUDOLPH MADURO

Respondent

Before:

The Hon. Mde. Ola Mae Edwards	Justice of Appeal
The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mr. Ian Donaldson Mitchell, CBE, QC	Justice of Appeal [Ag.]

Appearances:

Hon. Mr. Baba Aziz, Attorney General for the appellants
Mr. Stephen Daniels for the respondent

2011: January 11;
February 7.

*Civil Appeal - Constitutional - Law whether the judge erred in law in declaring that s.308 of
the Criminal Code 1997 of Virgin Islands was unconstitutional, without first determining*

whether or not that section could be adapted or modified to bring it into conformity with the Constitution – s.115 of the Constitution – whether non-conformity with the Constitution renders the statutory provision unconstitutional – costs on appeal.

The respondent was charged by the police for contravening section 308 of the Criminal Code of the Virgin Islands after they executed a search warrant at his home and seized his goods that were not the subject of the search warrant. Section 308 of the Code states that “Any person who is charged with having in his possession in any place, or conveying in any manner, anything which is reasonably suspected of being stolen or unlawfully obtained and who does not give an account to the satisfaction of the court as to how he came by that thing, commits an offence and is liable on conviction to imprisonment for a term not exceeding six months or to a fine not exceeding five hundred dollars.” The respondent sought constitutional reliefs, including a declaration that section 308 is in conflict with sections 16(2) and 16(6) of the Constitution and therefore unlawful. These constitutional provisions state that every person who is charged with a criminal offence shall be presumed to be innocent until he or she is proved guilty according to law; and no person who is tried for a criminal offence shall be compelled to give evidence at the trial. The trial judge held that section 308 contravenes section 16(2)(a) of the Constitution as it puts the onus on the person charged to disprove that he/she did not know the goods were stolen; and that it thus reverses the burden of proof and offends section 16(6) of the Constitution. The judge declared section 308 to be unconstitutional; and stated that the criminal case cannot proceed. The appellant appealed the decision of the trial judge, alleging that the judge erred in not applying section 115 of the Constitution; which provides that existing laws which are inconsistent with the Constitution must be construed with such adaptations and modifications as may be necessary to bring them into conformity with the Constitution.

Held: allowing the appeal, setting aside the declaration that section 308 of the **Criminal Code 1997** is unconstitutional, remitting the matter to the court below for the learned judge to carry out the exercise envisaged by section 115 of the **Virgin Islands Constitution**; and then determine the constitutional fate of section 308 of the **Criminal Code**, and awarding no costs to either party.

1. That the declaration made by the trial judge was made pursuant to section 31(2) (a) of the Constitution without first considering the constitutional effect of the inconsistency between section 308 of the Code and section 16(2)(a) and (6) of the Constitution. Section 115 of the **Constitution of the Virgin Islands** stipulates the constitutional effect of an inconsistency between an existing law and the Constitution.

Attorney General of Hong Kong v Lee Kwong-Kut [1993] A.C. 951 considered and distinguished.

2. That the jurisprudence for modifying a statutory provision found to be inconsistent with constitutional principles depends on the existence of a modification provision in the Constitution, such as section 115, and not necessarily on the developments in jurisprudence since **Attorney General of Hong Kong v Lee Kwong-Kut**.

Vasquez v R (1994) 45 WIR 103 and **San Jose Farmers' Co-operative Society Ltd v Attorney General** (1991) 43 WIR 63 considered.

3. Adopting the statements of La Bastide C.J. in **Roodal v The State** at pages 16 and 19 of the judgment of the Trinidad and Tobago Court of Appeal. "The function which the court is mandated to carry out in relation to existing laws under this section,...[section 115 of the Virgin Islands Constitution] goes far beyond what is normally meant by 'construing'. It may involve the substantial amendment of laws, either by deleting parts of them or making additions to them or substituting new provisions for old. It may extend even to the repeal of some provision in a statute or a rule of common law...but [the] section... imposes a duty on the court to try and save the "good" portion of the law by modification. That may involve simply deleting the inconsistent part. It has been held that such deletion is within the scope of [the] section... But the effect of the deletion may be to create a gap which requires to be filled by something compatible with the Constitution. Alternatively, the inconsistency may arise because of the absence of something needed to bring the law into conformity with the Constitution. The cases show that it is sometimes perfectly legitimate for the court to fill such gaps by way of modification under [the] section... provided that in doing so the court does not arrogate to itself a law-making function that should properly be left to the legislature. When may the court fill the gap and when should it refrain from doing so? We suggest that it depends on whether there is a simple and obvious means of filling the gap in a way that will achieve conformity with the Constitution and is in fact dictated by the Constitution. In such a case the court may fill the gap by modification. Where however the solution is not so simple, and filling the gap involves the making of a choice or the establishment of a policy, these are matters which the court should leave to the legislature...These are the considerations which limit the power of the court to modify under [the] section ... Another situation in which modification may not be possible is when a substantial part of an enactment is void for inconsistency and what remains is so closely intertwined with the tainted portion that it cannot sensibly stand on its own."

Roodal v The State Cr. App. No. 64 of 99 (Unreported Judgment of Trinidad and Tobago Court of Appeal) and **Roodal v The State** [2005] A.C. 328 (Privy Council) applied.

4. The court has to identify the element of unconstitutionality in the relevant statutory provision and then to consider what change is necessary to give effect to the requirements of the Constitution and the appellant's constitutional rights.

Greene Browne v The Queen [2000] 1 A.C. 45 (at page 50 per, Lord Hobhouse) applied.

5. The partial success of both parties justifies an order that no costs should be awarded to either party in all the circumstances of the appeal.

JUDGMENT

- [1] **EDWARDS, J.A.:** This appeal raises the sole question as to whether the learned trial judge erred in law in declaring that section 308 of the **Criminal Code 1997 of the Virgin Islands** ("the Code") was unconstitutional, without first determining whether or not that section could be adapted or modified to bring it into conformity with the **Virgin Islands Constitution Order 2007** ("the Constitution").
- [2] The respondent was charged by the police for contravening section 308 of the Code after they had executed a search warrant at his home and seized goods that were not the subject of the search warrant. Section 308 of the Code states as follows:
- "Any person who is charged with having in his possession in any place, or conveying in any manner, anything which is reasonably suspected of being stolen or unlawfully obtained and who does not give an account to the satisfaction of the court as to how he came by that thing, commits an offence and is liable on conviction to imprisonment for a term not exceeding six months or to a fine not exceeding five hundred dollars."
- [3] The respondent sought constitutional reliefs, including a declaration that section 308 "is in contravention of the provisions of Sections 16(2)(a) ...and 16(6) of the said Constitution and is therefore unlawful". The relevant provisions of section 16 of the Constitution state:
- "16(2) Every person who is charged with a criminal offence shall –
- (a) be presumed to be innocent until he or she is proved guilty according to law;
- (3) to (5) ...
- (6) No person who is tried for a criminal offence shall be compelled to give evidence at the trial.
- (7) to (11) ...
- (12) Nothing in any law or done under its authority shall be held to contravene –
- (a) subsection (2)(a) to the extent that the law in question imposes on any person charged with a criminal offence the burden of proving particular facts;"

[4] The learned judge correctly identified the elements of the offence to be: (1) that a person has an article in his possession or is carrying an article; (2) the article is reasonably suspected to be stolen or unlawfully obtained; and (3) the person fails to give a satisfactory explanation to the court as to how he came by the article. Having applied the Privy Council decision in **Attorney General of Hong Kong v Lee Kwong-Kut**¹ which I will consider later, at paragraphs 29, 30 and 54 of her judgment the learned judge concluded thus:

"[29] Having regard to the elements of the offence created by section 308 as already identified ..., section 308 to my mind contravenes subsections 2(a) ... of article... 16. The section puts the onus on the person charged to prove that he/she came by the goods in a lawful manner or in other words to disprove that he/she did not know the goods were stolen as it provides that if he/she fails to give a satisfactory explanation he is guilty of the offence. It thus reverses the burden of proof and offends against the principles enshrined in the Constitution to the effect that a person charged with an offence cannot be required to give evidence at his trial and is presumed to be innocent until he or she is proved guilty according to law.

[30] Furthermore, section 308 does not create a special defence or explanation known only to the accused and there is nothing before me or in the Act itself which suggests that the section so framed is justifiable and proportional and is reasonably required in the interest of the public. Accordingly, the constitutional challenge must succeed.

[54] For the for[e]going reasons, Mr. Maduro's challenge to section 308 of the Criminal Code 1997 as being unconstitutional is upheld. Accordingly, he is entitled to declarations to that effect. Obviously, the criminal case cannot proceed..."

¹ [1993] A.C. 951; See also High Court decision *Sandra Mills v Attorney General* [1993] ECLR (Commonwealth of Dominica)

- [5] The declaration made by the judge was obviously made pursuant to section 31(2) (a) of the Constitution, without first considering the constitutional effect of the inconsistency between section 308 of the Code and section 16(2)(a) of the Constitution. Section 31(2) states that: "The High Court shall have original jurisdiction – (a) to hear and determine any application made... and may make such declarations and orders ...as it may consider appropriate for the purpose of enforcing or securing the enforcement of the provisions of this Chapter [including section 16] to the protection of which the person concerned is entitled."
- [6] However, section 115 of the Constitution stipulates the constitutional effect of an inconsistency between an existing law and the Constitution. Section 115 of the Constitution provides:
- "115(1) Subject to this section, the existing laws shall have effect on and after the appointed day as if they had been made in pursuance of or in consistency with this Constitution and shall be construed with such adaptations and modifications as may be necessary to bring them into conformity with this Constitution.
- (2) ...
- (3) In this section "existing laws" means laws and instruments other than Acts of the Parliament of the United Kingdom and instruments made under them having effect as part of the law of the Virgin Islands immediately before the appointed day."
- [7] In **Lee Kwong-Kut**, the Privy Council held that on a charge under section 30 of the **Summary Offences Ordinance** ("the Ordinance")² the defendant's inability to give a satisfactory explanation as to how he came in possession of the property in question, was not a special defence but the most important element of the offence under section 30 of the Ordinance; and that since the burden on the prosecution was thereby reduced to proving matters which were likely in the majority of cases, to be merely formal, the section unjustifiably contravened article 11(1) of the Hong Kong **Bill of Rights Ordinance 1991**, ("the Bill of Rights Ordinance")³ and has been repealed by section 3(2) of the **Bill of Rights Ordinance**. The **Summary Offences Ordinance** was pre-existing legislation since it pre-dated the **Bill of**

² A provision similar to section 308 of the Virgin Islands Code

³ The equivalent of section 16(2)(a) of the Virgin Islands Constitution

Rights Ordinance. Section 3 of the **Bill of Rights Ordinance** provides for the effect of the section 30 contravention where it states that:

- (1) All pre-existing legislation that admits of a construction consistent with this Ordinance shall be given such construction.
- (2) All pre-existing legislation that does not admit of a construction consistent with this Ordinance is, to the extent of the inconsistency, repealed.

Submissions

- [8] Learned counsel, Hon. Attorney General Mr. Aziz focused on section 115 of the Constitution. He referred us to several authorities in support of his submission that non-conformity with the Constitution does not ipso facto, render a statutory provision unconstitutional: See **Director of Public Prosecution of Jamaica v Mollison**;⁴ **Roodal v Trinidad and Tobago**;⁵ **Rojas v Berllaque (Attorney General for Gibraltar intervening)**;⁶ **Ghaidan v Godin-Mendoza**;⁷ **Ying v Governor in Council and Others (Hong Kong)**;⁸ and **R v Lambert (Steven)**.⁹ Some of these decisions contain statements which provide helpful guidance for a judge who is asked to declare a statutory provision unconstitutional.
- [9] The Hon. Attorney General, Mr. Aziz submitted that section 115(1) of the **Virgin Islands Constitution** must be distinguished from section 3 of the Hong Kong **Bill of Rights Ordinance** which justified the repeal of section 30 in **Lee Kwong-Kut** because of the difference in the wording of the provisions. He contended that section 3(2) of the Ordinance has not expressly given the court the power to modify or adapt existing legislations to bring them into conformity with the **Bill of Rights Ordinance** in the case of the inconsistency, as is the case with section

⁴ [2003] A.C. 411

⁵ [2005] A.C. 328 from Trinidad and Tobago

⁶ [2004] 1 W.L.R. 201

⁷ [2004] 2 A.C. 557

⁸ [1997] UKPC 36 (Privy Council Appeal No. 11 of 1997)

⁹ [2001] UKHL 37; [2001] 3 W.L.R. 206

115 of the **Virgin Islands Constitution**. Attorney General, Mr. Aziz rationalized that this difference in the provisions explains why the Privy Council did not determine whether section 30 of the Ordinance was capable of being modified or adapted in such a way as to bring it into conformity with the **Bill of Rights Ordinance**, rather than declare section 30 as having been repealed. The Attorney General, said that the modern jurisprudence on modification and incompatible provisions is reflected in these authorities, demonstrating that the jurisprudence has not stood still since the decision in **Lee Kwong-Kut** was delivered 17 years ago.

[10] On the other hand learned Counsel Mr. Daniels submitted that section 115 of the Constitution does not save section 308 of the Code from being declared to be in conflict with the Constitution; and the court first had to declare that the impugned provision was unconstitutional before considering whether it can be modified to conform with the Constitution. Mr. Daniels contended that the learned judge was correct in declaring the provision unconstitutional, as did the Privy Council in **Vasquez v R**¹⁰ which applied the same approach taken in **Lee Kwong-Kut** in the face of a provision in the Belize Constitution similar to the Virgin Islands section 115. In any event, section 16(6) of the Constitution should be taken into account where the court is minded to modify section 308 of the Code, he argued.

[11] The fact that the judge stated that the criminal case cannot proceed strongly suggests, in my view that she was not merely declaring that the impugned provision of the Code was unconstitutional in the sense that it was in conflict with the principles of the Constitution. That statement of the learned judge compels the

¹⁰ (1994) 45 WIR 103 Section 134(1) of the Belize Constitution states: "Subject to the provisions of this chapter the existing laws shall ... be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Constitution."

conclusion that she was in effect also declaring that the entire section 30 of the Code was unconstitutional in the sense that it must be considered void; and therefore all acts or duties which depended on section 30 are also void. Hon. Attorney General, Mr. Aziz informed us at the hearing that before the judge delivered her judgment on 24th July 2009, the section 308 charge under the Code was dropped by the prosecution. The appeal would not lose its significance, however, for prosecutions under section 308 which may be pending the determination of this appeal.

- [12] Before reviewing the authorities I must note in all fairness to the trial judge that she was not urged to consider and apply section 115 of the Constitution by the Solicitor General who represented the appellant in the court below, or Mr. Daniels. The judge therefore did not have the benefit of the submissions' authorities presented to this Court. However, this would not have precluded her from considering section 115 of the Constitution before making the declaration as she did.

The Authorities

- [13] The decision of the Belize Court of Appeal in **Vasquez** pre-dates the decision in **Lee Kwong-Kut**. This demonstrates that the jurisprudence for modifying a statutory provision found to be inconsistent with constitutional principles depends on the existence of a modification provision in the constitution, and not necessarily on the developments in jurisprudence since **Lee Kwong-Kut**.
- [14] Prior to **Vasquez**, the Belize Court of Appeal, before 1991 had by a majority, interpreted and applied that same section 134(1) of the Constitution in **San Jose Farmers' Co-operative Society Ltd v Attorney-General**¹¹. In that case the Court was faced with the problem of resolving discrepancies between the Constitution and the provisions in the **Land Acquisition (Public Purpose) Act** which required as a condition for the compulsory acquisition of land that

¹¹ (1991) 43 WIR 63

reasonable compensation should be paid within a reasonable time. The statute enabled the State to pay compensation over a protracted period and in the meantime to pay a low rate of interest on the outstanding balance. The Court in discharge of its duty to construe the existing law with modifications, not only deleted parts of certain sections of the Act which were inconsistent with the Constitution, it inserted new sub-sections which gave access to the courts to those whose lands had been compulsorily acquired, thus enabling awards of compensation to be enforced like judgments. However, the court, felt that the modification of the section which empowered the Minister to pay compensation over 10 years and specified the circumstances in which it might be so paid, was properly a matter for Parliament, and so they struck it out.

- [15] In **Vasquez**, the Privy Council held that two sections of the **Criminal Code** of Belize infringed the presumption of innocence enshrined in the Constitution, where the sections placed the burden of proving provocation on the defence. The Privy Council did not have the assistance of the Belize Court of Appeal in dealing with this Constitutional question argued before it, as this question was never argued in Belize. The Board was not asked to remit the matter to the Court of Appeal. The Board took the view that since the offences were of a capital nature it would be most convenient for them to deal with the matter. The Board invoked the power conferred on it by the modification provision (section 134(1) of the Constitution); and effectively re-wrote the prefatory words of those sections so as to place the burden of disproving provocation on the prosecution.
- [16] In **Roodal v Trinidad and Tobago**, La Bastide C.J (as he then was) writing for the Court of Appeal, carried out a comprehensive review and analysis of the decisions on constitutional modification in the Caribbean. The Chief Justice interpreted the modification provision in section 5(1) of the **1976 Constitution Act of Trinidad and Tobago** ("the T&T 1976 Act") upon holding that the mandatory sentence of death is a cruel and unusual punishment under sections 4 and 5 of the 1976 Constitution. Section 5(1) reads as follows:

"5(1) Subject to the provisions of this section, the operation of the existing law on and after the appointed day shall not be affected by the revocation of the Order in Council of 1962 but the existing laws shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Act."

[17] Apart from the decisions previously mentioned at paragraphs 12 and 13 above, the Chief Justice considered others including **Greene Browne v The Queen**¹² and **Hughes (Peter) v Queen**¹³. La Bastide C.J. stated at page 2 of his judgment:

"In **Greene Browne**, the Privy Council held that a proviso in a statute directing that a person who was convicted of murder but was too young to be hanged, should be detained during the Governor-General's pleasure, was in breach of the Constitution of St. Christopher and Nevis because such detention deprived the person of his liberty otherwise than in execution of an order or sentence of a court. The Privy Council referred to the counterpart in St. Christopher and Nevis of our section 5(1) and held that it imposed the duty on the court 'to decide what modifications required to be made to the offending provision in the proviso and to give effect to it in its modified form, not to strike down the proviso altogether'. The Privy Council went on to hold that the proviso should in effect be amended so as to substitute detention 'during the court's pleasure' for detention 'during the Governor-General's pleasure' and remitted the case to the Court of Appeal for it to deal with the matter accordingly."

[18] At page 50 of the judgment, Lord Hobhouse in **Greene Browne** opined that:

"In their Lordships' judgment the answer ... is to identify the element of unconstitutionality in the relevant statutory provision and then to consider what change is necessary to give effect to the requirements of the Constitution and the appellant's constitutional rights."

[19] In **Hughes** the Privy Council were able to avoid interfering with the provisions which prescribe the death penalty for murder by simply deleting from section 1284 of the Saint Lucian **Criminal Code** the words "other than death", so that that section after modification reads "Unless otherwise expressly provided, a court may sentence any offender to any less punishment than that prescribed".

¹² [2000] 1 A.C. 45

¹³ [2002] UKPC 12 (Saint Lucia)

[20] Having reviewed this modification approach to provisions which offend the constitution, La Bastide C.J. observed at pages 16:

"In fact, the function which the court is mandated to carry out in relation to existing laws under this section, [section 5(1)] goes far beyond what is normally meant by 'construing'. It may involve the substantial amendment of laws, either by deleting parts of them or making additions to them or substituting new provisions for old. It may extend even to the repeal of some provision in a statute or a rule of common law...but section 5(1) imposes a duty on the court to try and save the "good" portion of the law by modification. That may involve simply deleting the inconsistent part. It has been held that such deletion is within the scope of section 5(1). But the effect of the deletion may be to create a gap which requires to be filled by something compatible with the Constitution. Alternatively, the inconsistency may arise because of the absence of something needed to bring the law into conformity with the Constitution. The cases show that it [at page 17] is sometimes perfectly legitimate for the court to fill such gaps by way of modification under section 5(1) provided that in doing so the court does not arrogate to itself a law-making function that should properly be left to the legislature. When may the court fill the gap and when should it refrain from doing so? We suggest that it depends on whether there is a simple and obvious means of filling the gap in a way that will achieve conformity with the Constitution and is in fact dictated by the Constitution. In such a case the court may fill the gap by modification. Where however the solution is not so simple, and filling the gap involves the making of a choice or the establishment of a policy, these are matters which the court should leave to the legislature. It appears to us that these are the considerations which limit the power of the court to modify under section 5(1)... Another situation in which modification may not be possible is when a substantial part of an enactment is void for inconsistency and what remains is so closely intertwined with the tainted portion that it cannot sensibly stand on its own."

[21] Finally, at page 19 La Bastide C.J. concluded that:

"In these judgments resort is had to modification only after the invalidity has been established. This suggests that although it is not expressly stated in section 5(1), the power to modify contained in that section is triggered only by an inconsistency which gives rise to invalidity. If there is no invalidity, then the occasion for the court to construe with modifications does not arise. Viewed from a slightly different angle, the purpose of modification is to achieve conformity with the Constitution as a whole, not with a particular part of it."

- [22] These statements of the learned Chief Justice commend themselves and are endorsed by this Court and adopted in relation to the effect of section 115 of the **Virgin Islands Constitution**, particularly where the correctness of this approach was not disputed before the Privy Council. What was disputed was the Chief Justice's conclusion that the mandatory death penalty is saved by section 6 of the Trinidad and Tobago **Constitution**¹⁴ which is irrelevant for the purposes of this appeal.
- [23] There is no need to discuss the other authorities cited by Hon. Attorney General, Mr. Aziz in my view since the applicable principles are reflected in the cases which I have considered.
- [24] In the premises I would allow the appeal to the extent of setting aside the declaration that section 308 of the **Criminal Code 1997** is unconstitutional, and remit the matter to the court below for the learned judge to carry out the exercise envisaged by section 115 of the **Virgin Islands Constitution**; and then determine the constitutional fate of section 308 of the Code.
- [25] On the question of costs, there has been partial success by both parties which would justify an order that no costs should be awarded to either party in all the circumstances of the appeal.

Ola Mae Edwards
Justice of Appeal

I concur.

Davidson Kelvin Baptiste
Justice of Appeal

¹⁴ Section 6 of the Constitution provides: "(1) Nothing in sections 4 and 5 shall invalidate (a) an existing law; ... (3) In this section – "Existing law" means a law that had effect as part of the law of Trinidad and Tobago immediately before the commencement of this Constitution, and includes any enactment referred to in subsection (1)"

I concur.

Ian Donaldson Mitchell, CBE, QC
Justice of Appeal [Ag.]