

**BARBADOS:**

**[Unreported]**

**IN THE SUPREME COURT OF JUDICATURE  
COURT OF APPEAL**

**Civil Appeal No. 30 of 1998**

**BETWEEN:**

**CARLOS ANTHONY LICORISH**

**Appellant**

**AND**

**THE ATTORNEY GENERAL**

**Respondent**

**Civil Appeal No. 31 of 1998**

**BETWEEN:**

**NATHANIEL NELSON**

**Appellant**

**AND**

**THE ATTORNEY GENERAL**

**Respondent**

**Civil Appeal No. 32 of 1998**

**BETWEEN:**

**ARLEIGH HECTOR JAMES**

**Appellant**

**AND**

**THE ATTORNEY GENERAL**

**Respondent**

**Before: The Honourable Sir Denys Williams, Chief Justice, The Honourable Mr. Justice Errol Chase, The Honourable Mr. Justice Colin Williams, Justices of Appeal.**

**2000: February 21st & 22nd.**

**Mr. A. Shepherd Q.C. in association with Mr. M.A. King for Appellant.**

**Ms. K. Goodridge in association with Ms. Roslyn Jordan for Respondent. [1]**

**DECISION**

These three originating notices of motion against the Attorney General taken out pursuant to section 24 of the Constitution, one by Carlos Licorish No. 1126 of 1996, the second by Nathaniel Nelson No. 1127 of 1996 and the third by Arleigh Hector James No. 971 of 1997, all raise the same questions and were consolidated and heard together in the High Court by agreement between the attorneys-at-law for the applicants and the Attorney General.

#### The Constitutional Provision

Section 11 of the Constitution recites that every person in Barbados is entitled to the fundamental rights and freedoms of the individual including the right, subject to respect for the rights and freedoms of others and for the public interest, to the protection of the law.

In order to protect that right section 18(1) enacts that where any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial Court established by law.

Section 18(2)(d) provides that every person who is charged with a criminal offence shall be permitted to defend himself before the court in person or by a legal representative of his own choice.

Section 18(12) provides that nothing contained in section 18(2)(d) shall be construed as entitling a person to legal representation at public expense.

And section 24 provides, inter alia, that if any person alleges that section 18 has been infringed in relation to him, he may apply to the High Court for redress. [2]

#### The Relief Sought

The applicants Licorish, Nelson and James each allege that section 18 has been infringed in relation to him and apply for relief under section 24. They were convicted of murder and sentenced to death and sought to prosecute their appeals before Her Majesty's Privy Council. Each of them is dissatisfied with the response of the Crown to their concerns. James seeks the following relief:-

1. a declaration that at all times during the applicant's trial for murder including his appeal to the Judicial Committee of the Privy Council in London he is entitled to a properly funded attorney-at-law and/or barrister and/or a solicitor pursuant to the provisions of the Community Legal Services Act Cap. 112 A and the Constitution of Barbados;
2. a further declaration that the failure of the respondents to provide a properly funded solicitor and barrister so that he could make proper arrangements to pay for his lawyer to pursue an application for leave to appeal to Her Majesty's Judicial Committee of the Privy Council in London is in breach of his constitutional right to a fair trial and to life as enshrined in section 11 and protected by sections 12 and 18 of the Constitution;
3. a further declaration that the decision of the Crown to limit financial assistance to the applicant to \$1000.00 towards the cost of his appeal to Her Majesty's Judicial Committee of the Privy Council and/or whatever arrangements that are presently offered amounts to a constitutional infringement of his fundamental rights and freedoms as guaranteed under, inter alia, section 11 of the Constitution and protected by the provisions of section 18; [3]
4. an order quashing the decision of the Crown to limit financial assistance to the applicant to \$1000.00 towards the cost of his appeal to Her Majesty's Judicial Committee of the Privy Council and a further order mandating the Crown to pay the applicant and/or his legal representatives all such funds as may be legitimately requested in order to enable the applicants to fund solicitors and barristers of his own choice in pursuing his appeal to Her Majesty's Judicial Committee of the Privy Council;
5. an order directing the respondents and each of them to do all such acts and things as are necessary to ensure that the applicant is not obligated to proceed with his application for special leave until proper arrangements have been made in order to ensure that his lawyers are paid for their services in prosecuting his appeal to the Judicial Committee of the Privy Council in London;
6. a further order directing the respondents to adjourn the present application for leave to appeal to the Judicial Committee of the Privy Council in London until proper arrangements have been made in order to ensure that his lawyers are paid for their services in prosecuting that appeal;
7. in the interim and pending the outcome of this application an order that the petition for special leave to appeal to Her Majesty in Council be adjourned sine die; and
8. all such orders, writs, directions as may be necessary or appropriate to secure redress by the applicant for the contravention of the Human Rights and Fundamental Freedoms guaranteed by the Constitution of Barbados.

Licorish and Nelson seek the like relief as is sought by James at 1, 2, 3, 4 and 8 above. [4]

#### The Grounds

The grounds of the applications are stated as follows:-

1. As the applicant is entitled to a properly funded attorney-at-law given the impossibility of affording him a fair hearing without providing him with such an attorney-at-law, the decision of the Crown to limit the financial assistance to the applicant to \$1000.00 towards the costs of his appeal to Her Majesty's Judicial Committee of the Privy Council is in effect to provide him with no attorney-at-law and is unconstitutional null and void.

2. As (a) the applicant is entitled to a properly funded attorney-at-law given the seriousness of the offence for which he was convicted, the nature of the penalty, and the impossibility of affording him a fair hearing without providing him with such a properly funded attorney-at-law as of right/or (b) the Community Legal Services Act Chapter 112A of the Laws of Barbados mandates by implication the Crown to provide the applicant with a properly funded attorney-at-law, to limit the financial assistance to the applicant to \$1000.00 to pursue his appeal to Her Majesty's Judicial Committee of the Privy Council is to deprive the applicant of a fair hearing and constitutes a breach of his constitutional rights and freedoms.

3. The applicant has been sentenced to death by virtue of his conviction for the offence of murder and is entitled as of right to appeal to Her Majesty's Judicial Committee of the Privy Council in London and to a funded attorney-at-law as of right for the purposes of conducting his defence and prosecuting his appeal but is being denied sufficient funds and/or financial assistance from the Crown in contravention of those rights. [5]

4. The Crown is seeking to change and amend a previously established practice of fully financing appeals to Her Majesty's Judicial Committee of the Privy Council in London in circumstances where the appeal is against the dismissal by the Court of Appeal of Barbados of an appeal against conviction and sentence to death for the offence of murder.

#### The Affidavits

The applications of Licorish and Nelson are each supported by an affidavit sworn by the applicant. In each case the applicant deposes to his conviction for murder and being sentenced to death, to his appeal against his conviction and sentence being dismissed by the Court of Appeal and to his being advised by his attorney-at-law that he had a further right of appeal to Her Majesty's Judicial Committee of the Privy Council in England. He also deposes that he has no means and is made to pay for an attorney-at-law or English Solicitors or English barristers to act for him in his appeal to Her Majesty's Judicial Committee. The applicants further depose in like terms as follows:

"4. I have been advised by Mr. Alair Shepherd who is my attorney-at-law that he has already corresponded with the Attorney General in relation to the question of funding appeals to the Judicial Committee of the Privy Council in circumstances such as mine where the person appealing has been sentenced to death. I am shown a true copy of a letter dated 16th November, 1995 which is to the effect that a decision has been made by the Government of Barbados to grant me \$1000.00 to pursue my appeal to the Judicial Committee of the Privy Council..... This letter makes it clear that I will only receive these funds as the decision made in those cases applies to me.

5. I have been further advised by my attorney-at-law and verily believe that I cannot appeal to Her Majesty's Judicial Committee of the Privy Council unless I am able to retain English solicitors who are Privy Council agents. The figure of [7] \$1000.00 is not sufficient to fully retain English solicitors and English barristers or English solicitors and a Barbadian attorney-at-law to pursue my appeal to Her Majesty's Judicial Committee of the Privy Council. Assuming I am to have a Barbadian attorney-at-law present my petition he would have to travel to England and the costs involved in his presentation of the petition would exceed the figure of \$1000.00. I am also advised that throughout my criminal trial which includes any appeals the prosecution is ably represented by experienced attorneys-at-law. If I do present my petition then the prosecution will have English solicitors and most likely Queens Counsel for them.

6. I have been represented up and until now by attorneys-at-law who have been funded by the Government under the provisions of the Community Legal Services Act Cap. 112A .... However, as I am further advised by my attorney-at-law even though Her Majesty's Judicial Committee of the Privy Council is the final Court of Appeal for Barbados and I am entitled to legal aid under the provisions of that Act for my defence there is at present no provision in the Community Legal Services Act which addresses how much funds I am entitled to receive for the presentation of the petitions to Her Majesty's Judicial Committee of the Privy Council.

7. I have been advised and verily believe that because my life is at stake it was the practice of the Government of Barbados to meet all the costs involved in my appeal to the Judicial Committee of the Privy Council up to and including the cases of Denzil Roberts and Peter Bradshaw. In those cases, it is a matter of record ... that applications for funding in like circumstances to mine made at that time "created vigorous debate within the Ministry". The Ministry over a period of time was forced to research, revise and review its position in relation to the grounds of appeals "in forma pauperis" being paid out of the public purse...."

8. I am saying that I cannot have a fair trial unless I am represented by a properly funded attorney-at-law or person who is licensed to practise law in the particular jurisdiction where I am to conduct my defence by way of appeal or otherwise. I am further saying that in order to do this the Crown must pay all my legal fees involved in presenting my case to Her Majesty's Judicial Committee of the Privy Council [7] and if they do not do so then I am being deprived of my constitutional right to a fair hearing as enshrined by section 11(c) and protected by the provisions of section 18 of the Constitution.

9. In the event the Crown do not pay the fees involved for me to retain lawyers so that I can present my case to the Judicial Committee of the Privy Council then I am saying that my rights under section 11 and protected by section 18 are being or likely to be contravened and in those circumstances I respectfully ask the Court to grant me such relief as is set out in the originating motion filed in this action. I make this affidavit in support of that motion".

The affidavit in support of James's application was sworn by his attorney-at-law and not by James himself. This affidavit, although different in form from the affidavits of Licorish and Nelson is virtually the same in substance.

Crown Counsel Mr. Carrington swore and filed an affidavit on December 9, 1996 which set out the respondent's position:

"5. I am aware that since November 16, 1995 the Attorney General has reviewed this matter and Miss Kaye Goodridge, Solicitor General has communicated to Mr. Alair Shepherd Q.C. that the Government of Barbados is prepared to pay the following sums in respect of a person who has applied in forma pauperis to the Judicial Committee of the Privy Council. Those sums are as follows:

(a) all disbursements in connection with the prosecution of appeals to the Judicial Committee of the Privy Council, including the costs of preparing the record;

(b) the sum of \$1000.00 towards the legal fees.

6. I have been instructed by the Attorney General that, for the purposes of these proceedings and similar applications, the Government of Barbados will pay the expenses hereinbefore mentioned in paragraph 5 .....

9. There is no provision as to quantum in respect of applications in forma pauperis contained in the Rules made by the Governor General on the advice of the Privy Council to be observed for dealing with applications from or on behalf of persons under [8] sentence of death for special leave to appeal to the Judicial Committee of the Privy Council. These Rules were made on the 9th day of September 1967 and are referred to as LN 144 of 1967 ....

10. That the maximum fees payable in respect of appeals in capital cases under the Community Legal Services Act Cap. 112A is \$1,000.00 as set out in paragraph 2 on page 2 of the Tariff of Fees established by the Community Legal Services Commission with the approval of the Minister published in the Official Gazette dated December 15, 1983 ....

11. Notwithstanding ..... what is contained in paragraph 5 of the said Tariff, I am instructed that the Government of Barbados will be prepared to pay all disbursements, including the cost of the record and expenses for the application for special leave (i.e. disbursements but not legal fees) and if leave to appeal is granted the sum \$1000 towards legal fees in addition to all disbursements.

12. I am not aware of a practice of the Government of Barbados to meet all costs involved in appeals to the Judicial Committee of the Privy Council in capital cases but agree that in the case of Denzil Roberts and Peter Bradshaw full expenses were paid. I deny that such an isolated case constitutes a practice”.

Mr. Shepherd responded to the filing of this affidavit by deposing in a further affidavit (sworn and filed on December 10, 1996), inter alia, that it was his understanding which he had derived from consultations with solicitors in England that the provisions only allow for counsel in England to provide services to appellants on a pro bono basis. This, he said, means that the availability of counsel to prosecute these appeals depends upon their goodwill. Here refers to the following letter which he wrote to the Solicitor General containing contentions, which, if accepted, would allow an applicant to obtain the services of lawyers in the United Kingdom:-

“Dear Solicitor General,

I refer to your letter dated 25th September 1996. In my view any agreement as to costs must be such that [9] ensures the ability to petitioners to prosecute their appeals to the Judicial Committee of the Privy Council in London. It must also speak to the fact that any application to the Judicial Committee of the Privy Council necessitates briefing solicitors who are Privy Council agents, a Queens Counsel and Junior.

I am informed that in England if an applicant is granted a legal aid certificate for an application for leave to appeal to the House of Lords for a serious crime, then that applicant's legal fees are taxed by the Legal Aid Board. A taxing master will tax those fees but depending on the amount of hours work it is likely to equate to \$2500.00 for Queens Counsel, \$750 for Junior Counsel. Solicitors bills will be taxed on the basis that they are reimbursed for all out of pockets and given \$180.00 per hour for a partner.

In my view, there are two methods of proceeding: either we can agree figures to cover applications for leave to appeal and a further figure to cover the appeal itself in the event leave is granted. Alternatively, we can agree that the applications proceed on the basis that solicitors for the Crown and Solicitors for the applicant will agree the costs or alternatively that costs be taxed by a costs draughtsman who will act as arbitrator and tax the costs as if he were taxing costs of an application for leave to appeal to the House of Lords or an appeal to the House of Lords for a serious crime on the same basis as a matter where a legal aid certificate has been granted”.

The Judge's Decision

The learned trial Judge concluded:-

“There is in Barbados a well established practice of long standing for the Government in criminal cases to provide legal assistance for persons without means so as to enable them to appeal to Her Majesty's Judicial Committee of the Privy Council.

The facts in the instant cases show that the applicants are well aware of their right to appeal to the Judicial Committee of the Privy Council. After dismissal of their appeals by the Court of Appeal the applicants made applications to the relevant Ministry for funds from the public purse to enable them to appeal to the Privy Council. They all say that they have no means and are unable to pay for attorneys-at-law or [10] English Solicitors or English barristers to act for them in their appeals to the Privy Council, They also say that they are not in receipt of any income.

The Government has informed the applicants that it will pay for all disbursements in connection with the prosecution of their appeals to the Privy Council, including the costs of preparing the record and the sum of \$1000 towards legal fees....

The question whether the applicants' representation by English solicitors and barristers in prosecuting their appeals to the Judicial Committee of the Privy Council should be fully funded by the Government of Barbados is an economic and political problem the solution of which rests with the Government. This Court has no power to direct the Government as to how much it should pay to provide solicitors and barristers for indigent persons such as the applicants. The Government has determined how much it will pay and that is an end of the matter as far as this Court is concerned.

Section 18(1) of our Constitution requires that every person should be afforded a fair hearing. Under section 18(2)(d) every accused person is

permitted to defend himself in person or by a legal representative of his own choice. This right to legal representation of choice is not an absolute right (Frank Robinson v The Queen (1985) 3 WLR 84). Section 18(12) enacts that nothing contained in subsection (2)(d) entitles a person to legal representation at public expense."

Richard Hinds v The Attorney General et al

On September 30, 1999 this Court gave judgment on an appeal by Richard Hinds against the dismissal by the High Court of his application for redress under section 24 of the Constitution for alleged contravention of his constitutional rights. The question arose as to the right of Hinds to an attorney-at-law funded by the State and after reviewing American, Canadian and Irish cases cited on behalf of Hinds, this Court said (at p.17 of the judgment in Civil Appeal No. 20 of 1997 delivered on September 30, 1999):

"Seaton J.A. said (Ewing and Kearney v The Queen 49 DLR(3d) 619 at 628) that the essential difficulty in [11] the appellant's position was that the provisions of the Bill of Rights prevent a law being construed so as to deprive the accused of the right to counsel, but do not provide that a law shall be construed so as to bestow the right to counsel.

The passages from Powell v The State of Alabama (287 US Rep. 45) and The State v Donoghue ((1976) IR 324) show the importance of state funded legal representation for persons who cannot afford legal representation from their own resources. The question is how far can section 18(1) of the Constitution of Barbados be construed to require the State of Barbados to provide such legal representation.

Section 18(12) provides the answer. It enacts that nothing contained in subsection 2(d) shall be construed as entitling a person to legal representation at public expense. Subsection (2)(d) provides that every person who is charged with a criminal offence shall be permitted to defend himself before the court in person or by a legal representative of his own choice. If an accused has no entitlement to be defended before the Court by a legal representative provided at public expense, it would necessarily follow that his entitlement to a fair trial cannot be construed so as to include the provision of a legal representative at public expense".

So that this Court has already ruled against the submission that section 18(1) entitles an accused to funded legal representation as a necessary incident or ingredient of a fair hearing.

The Community Legal Services Act

The Community Legal Services Act Cap. 112A is entitled "An Act to provide for a system of free legal services to persons of insufficient means" and section 3(1) states that the purposes of the Act are to provide legal services to persons in respect of civil and criminal matters where these persons are financially unable to secure legal services from their own resources.

The Community Legal Services Commission was established by the Act for the purposes of the Act and section 5 (b) obliges the [12] Commission, after consultation with the Bar Association and the Judicial Council, to establish with the approval of the Minister a tariff of fees pursuant to which attorneys-at-law rendering their services under the Act shall receive remuneration for their services.

As was stated by this Court in Richard Hinds v The Queen earlier referred to, this Act defines the circumstances in which funded attorneys-at-law may be provided for persons charged with or convicted of criminal offences and underlying it is an acknowledgment that the State cannot afford to provide a funded attorney-at-law for every person charged with or convicted of a criminal offence. In order to determine whether a person charged with or convicted of a criminal offence can be granted legal representation at public expense, one has to examine, not the provisions of section 18 of the Constitution, but the provisions of Cap. 112A, and the extent of the funding as determined by the prescribed tariff of fees.

It seems to this Court that there is significant deficiency in the existing arrangements for the grant of funded representation in cases of persons convicted of murder. Murder is the most serious of criminal offences and the punishment for persons convicted of murder in Barbados is death. The Judicial Committee is the Island's final Court of Appeal and therefore has the final word on whether appeals against convictions for murder should be allowed or dismissed. Where leave to appeal is granted by the Judicial Committee, the necessary inference is that there is some issue on which the Committee thinks there should be argument.

The tariff of fees established by the Community Legal Services Commission with the approval of the Minister under section 5(b) of the Act in respect of appeals to the Judicial Committee of the Privy Council provides as follows: [13]

1. In relation to an appeal to Her Majesty-in-Council, a fee of one hundred dollars for advice to the convicted person as to whether he had any ground for appeal, and in addition a fee of five hundred dollars for drafting the application and all necessary documents where the convicted person appeals or applies for leave to appeal.

The evidence discloses that, notwithstanding this provision, the Government is prepared to pay all disbursements, including the cost of the record and expenses for application for special leave and, if leave to appeal is granted, the sum of \$1000 towards legal fees in addition to all disbursements: see paragraph 11 of the affidavit of Barry Leroy Carrington, Crown Counsel in the Office of the Attorney General, sworn and filed on December 9, 1996.

However the sum of \$1000 appears to be inadequate if leave is granted to appeal and it is necessary for the appellant to engage a solicitor and a barrister for the hearing. In our view the provision of a sum more geared to reality and to present day costs would be more in keeping with the status of Barbados as an independent State and would avoid the spectacle of an indigent appellant who may have an arguable case against a conviction for murder having to go around cap in hand to see who would appear for him or her pro bono at the hearing before the final court of appeal.

However, for the reasons given earlier, the appeals must be and are dismissed with no order as to costs. [14]

Chief Justice.

Justice of Appeal. Justice of Appeal.