

## CASE NOTES/COMMENTS BY JUDGES AND JURISTS

### Statutory Interpretation- Accepted Boundaries of the Courts

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In a thriving democracy, there must be a high regard and great respect for the concept of the separation of powers.

The three arms of the State, namely the Executive, the Legislature and the Judiciary are considered separate entities with specific roles.

And when it comes to the judiciary, there must never be real or apparent compromise of its integrity and independence.

Thankfully, in my country, the judiciary guards its independence jealously and is always vigilant in its role to ensure that justice is served in all matters that come before its Courts.

Perhaps the best example of the growing role played by the Courts in ensuring that justice is not only done but manifestly be seen to be done, is the less conventional and more practical approach adopted in statutory interpretation. There is a school of thought that believes that the Courts are guilty of overreaching when it seeks to fix statutory provisions with the use of creative interpretations, in instances in which it is clear that there has been a legislative slip by the Parliament.

As a professional who over the decades has spoken about and decided cases that deal with boundaries in the sea, I thought it fit to limit this presentation to a subject that displays the extending boundaries of the Court when it is called upon to interpret statute in the arena of criminal law and the administration of justice.

Few would deny that the Courts are no longer viewed as restrained players when it comes to matters of statutory interpretation and many are concerned that at times, the Courts have shifted the goal posts-for those of you who love football; batted out of its crease- for those of you who love cricket; and unapologetically navigated in others waters- for those of you, like me, who are well acquainted with the law of the Sea.

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Whichever analogy makes you most comfortable, the fact is that the Courts are not merely interpreters of the law because in limited circumstances, they can in fact fix the law without being accused of indecent judicial overreaching.

## **CORPORAL PUNISHMENT ACT- DOES MALE INCLUDES FEMALE**

Twenty years ago, a criminal law Court in my country was called upon to decide whether the Corporal Punishment Act, which as the name suggests made provision for offenders of certain crimes to be whipped or flogged, included female offenders or was limited to male offenders only. Throughout the Act reference was made to male offenders and not female offenders.

The Interpretation Act, which has provisions similar to those in other countries, specifically states that references to 'male' include 'female.'

Therefore, in the particular matter in which the offender was female, it was submitted that the provisions of the Corporal Punishment Act applied.

The Accused was sentenced to be flogged and she appealed on several grounds, including severity of sentence, relying on the fact that the Corporal Punishment Act did not apply to female offenders.

The Court of Appeal did not rule on that particular ground of severity of sentence because it found merit in the other grounds of appeal and a re-trial was ordered.

In the submissions however on behalf of the Appellant, the Court was asked to consider, that despite the provisions in the Interpretation Act, it could not be expected that male and female offenders would be treated equally when it came to matters of corporal punishment, as men would be perceived to better handle, from a physical standpoint, this type of punishment.

The simple point is that had the Court of Appeal been made to decide on this limited point of sentence, consideration would have had to been given to matters of public policy and human rights issues in the context of the legitimate boundaries of statutory interpretation.

## **MANDATORY MINIMUM SENTENCES**

A matter which is currently engaging the attention of our Court of Appeal is the interpretation of a section in the Dangerous Drugs Act, which on the face of it makes provision for a mandatory minimum sentence for any person found guilty of trafficking drugs beyond a certain quantum.

The minimum sentence is 25 years and submissions have been made, that to interpret the section in a purely literal style, in an instance where there is a lack of clarity in the particular section, even with the obvious and intended purpose

of the Legislature to set a stiff penalty for those who are engaged in the drug trade, is to run afoul of the separation of powers by removing the discretion of a judge to impose any sentence, including non-custodial when a person is convicted of a crime.

Further, it has been submitted that where a section is capable of two or more interpretations of equal weight, the interpretation that is most favourable to the Accused should be adopted.

In this case, the most favourable interpretation would be that there is no minimum sentence and the judge should have his full discretionary power to impose any sentence which he deems appropriate.

The arguments on the interpretation of the provision are obviously more detailed than I have highlighted, but it is a decision which we all anxiously await because it will determine the acceptable boundaries for Courts in the interpretation of provisions that impose sentences.

## JUDICIAL STATUTORY RECONSTRUCTION

I propose for the remainder of my presentation to focus on a particular case in which the learned trial judge, Justice Mark Mohammed, a well-respected academic and former Director of Public Prosecutions gave a ruling on the interpretation of a provision which dealt with the admissibility of the written evidence of a witness who was not available to testify when the matter came before him for trial.

In Trinidad and Tobago, before a serious criminal matter is heard in the High Court by a Judge and Jury, there is a preliminary inquiry presided over by a Magistrate who determines whether there is sufficient evidence to establish a 'prima facie' case against the Accused.

If after hearing all of the evidence the Magistrate is of the view that a 'prima facie' case has been made, there is a committal for the Accused to stand trial in the High Court.

The old system of 'long hand writing' is used to record evidence of the witnesses in the Magistrate's Court and the document containing the evidence, after it has been read over to the witness and certified by the magistrate is referred to as a '**deposition.**'

Finally, in 2005, the legislation was amended to include the audio recording of evidence in order to reduce the length of the proceedings and to provide a more accurate record of the testimony of witnesses.

In the case of **The State Against Dane Lewis**, H.C.A. No. 10 of 2008, in which the Accused was indicted for murder, the learned trial judge was asked to admit the transcript of the audio evidence given by a witness in the

preliminary inquiry who, at the time of the trial in the High Court, was deceased.

By virtue of s. 39 of the Indictable Offences Preliminary Inquiries Act, Chap. 12:01 of Trinidad and Tobago, provision is made, if certain criteria are met, for a trial judge to exercise his discretion to admit as evidence, the ‘**deposition**’ of a deceased witness.

The section, that is, s. 39, does not provide for the admission as evidence at trial of a verified transcript of the electronically recorded evidence of a witness. It only provides for the admission of a ‘**deposition**.’

The issue to be determined by the learned trial judge in the Dane Lewis trial was whether a verified transcript of a witness’ evidence given at a Preliminary Inquiry and recorded electronically, is capable of being tendered in evidence at trial under s. 39 as a ‘**deposition**.’

In determining this matter, consideration was given to the broader question - whether Parliament, under the Indictable Offences Preliminary Inquiries Act, as amended, intentionally omitted the verified transcript of evidence electronically recorded at the preliminary inquiry to be admitted as evidence in a trial under s. 39 or whether it was a ‘legislative slip.’

The learned trial judge in considering the matter had to first ensure that the omission was not a deliberate action by the Parliament, because if it was, then any attempt at judicial rectification of s. 39 would be a case of crossing the judicial boundaries.

If however, the lack of amendment of s. 39 by the Parliament to incorporate the transcript of electronically recorded evidence was not deliberate, then the issue became, as stated by the learned trial judge :-

**“Can a judicial rectifying construction be applied or would an attempt to apply a rectification construction be an example of judicial overreach with respect to a statutory lacuna that may only be remedied by Parliament and not the Court.”**

In order to determine whether the Court should apply a rectification construction to s. 39, guidance was taken from **Bennion on Statutory Interpretation**, 5<sup>th</sup> Edition, 2008, pg. 877, section 287 which states: -

**“A flawed text has been promulgated as expressing the legislative intention, this needs judicial correction, yet those who have relied on it are entitled to protection. This**

raises a difficult conflict between literal and purposive construction. The Courts tread a weary middle way between the extremes; the Court must do the best it can to implement the legislative intention without being unfair to those who reasonably expect a predictable construction. The five categories. The cases where rectifying construction may be required can be divided into five categories, which may overlap. These are: One, the garbled text, which is grammatically incomplete or otherwise corrupt; Two, the text containing an error of meaning; Three, the text containing a casus omissus; Four, the text containing a casus male inclusus; and five, the case where there is a textual conflict.”

The first consideration of the learned trial judge therefore was whether Parliament reasonably and rationally intended that s. 39 be only applicable to evidence recorded in writing at the preliminary inquiry.

Various principles of statutory construction were considered namely: -

1. That there is a presumption that an updating construction is to be given. **Bennion** states at pg. 890 section 288

“It is presumed that Parliament intends the Court to apply to an ongoing Act a construction that continuously updates its working to allow for changes since the Act was initially framed, that an updating construction. While it remains law, it is to be treated as always speaking. This means that in its application on any date, the language of the Act, though necessarily embedded in its own time, is nevertheless, to be construed in accordance with the need to treat it as current law.”

2. That there should be an interpretation to make due allowance for any relevant changes in technology. **Bennion** states at pg. 893 section 288 :-

“In construing an ongoing Act the interpreter is to presume that Parliament

intended the act to be applied at any future time in such a way as to give effect to the true original intention. Accordingly, the interpreter is to make allowances for any relevant changes that have occurred since the Act's passing, in law, social conditions, technology, the meaning of the words and other matters. An enactment of former days is thus to be read today in the light of dynamic processing received over the years, with such modification of the current meaning of its languages as will now give effect to the original legislative intention. The reality and effect of dynamic processing provides the gradual adjustment. It is constituted by judicial interpretation year in and year out, it also comprises processing by executive officials."

3. That where a question arises of whether an ongoing enactment covers a legal entity not known at the date it was passed, the key is whether it is of the same type or genus as things originally covered in the enactment.
4. It is presumed that an Act of Parliament is intended to be an ongoing Act, since this is the nature of statute law. An Act is always speaking and there must be some reason adduced on account of which Parliament is taken to depart in a particular case from this principle.
5. The Courts seek to avoid a construction of an enactment that produces an unworkable or impracticable or an absurd result since this is unlikely to have been intended by Parliament. Bennion at pg. 971, section 313 states:-

**"The Court seeks to avoid a construction of an enactment that produces an unworkable or impractical result, since this is unlikely to have been intended by Parliament. Sometimes, however, there are overriding reasons for applying such a construction, for example, where it appears that Parliament really intended it or the literal meaning is too strong. Comment, general presumption**

against absurdity and reference is made to another section of the code.”

6. Courts are anxious to facilitate the smooth working of legal proceedings provided no injustice is caused.

The learned trial judge, applying the six (6) principles of statutory construction referred to, concluded that:-

**“Parliament could not reasonably and rationally have intended that s. 39 be only applicable to evidence recorded in writing in the specified form of a deposition and that the admission of a record of evidence at the trial should depend on wholly coincidental and unrelated side wind of whether the record derives in writing or electronically. Such a consequence will be absurd, impracticable, would impede the smooth operation of the criminal justice system and would render evidential proof of guilt impracticable, doing all of those things by the illogical introduction of a whimsical differentiating factor.”**

The next step taken by the learned trial judge was to consider whether there was a legislative slip and if so, whether the statutory lacuna was capable of judicial correction by reading into the existing word ‘**deposition**’ or by inserting, by way of rectification, new words after the word ‘**deposition.**’

Bennion states at pg. 875 section 287 :-

**“It is presumed that the legislature intends the Court to apply a construction which rectifies any error in the drafting of the enactment, where it is required in order to give effect to the legislator’s intention. This may be referred to as a rectifying construction.”**

In the case of Gill v Donald Humberstone and Company Ltd [1963] 1 WLR 929, Lord Reid said that :-

“to avoid an unworkable result a strained construction may be justified even where the enactment is not grammatically ambiguous. Lord Reid also said that cases where it has properly been held that one word can be struck out of a statutes and another substituted, includes the case where, without such substitution, the provision would be unworkable. There however, must be a limit to applying a strained construction and doing violence to statutory language in order to judicially rectify even a self-evident statutory lacuna that Parliament cannot, on any reasonable, possible reasonable view, have rationally intended.”

In Victor Chandler International Ltd. v Customs & Excise Commissioner & Another [2000] 1 AER 160, Justice Lightman stated at pg. 167, letter J and continuing to pg. 168 :-

“I fully accept that a purposive construction should be adopted of penal legislation, as of any other legislation and that, in construing legislation on occasion, some violence to the words used may be justified to achieve the obvious intention of the legislature and produce a reasonable result. I also accept that the 1981 Act should be treated as always speaking and accordingly construed by continuously updating its working to allow for changes since the 1981 Act was written. But the working for this purpose must be wide enough, fairly to embrace the changes in question. Parliament has, in this case, perfectly reasonably laid down as a constituent of the criminal offence, the issue circulation or distribution of a document and not the doing of what is the equivalent or achieve the same mischief. The statutory language is not apt to embrace what modern technology has achieve, namely the dissemination in non-documentary form of information, which on receipt, is reduced to written form. This case reveals a lacuna in the legislation.



The lacuna has arisen because modern technology has enabled VCI to advertise without the need for any document covered by Section 9. It is not possible to fill that lacuna by updating of the statutory language. What is needed for this purpose, is not construction, but reconstruction of Section 9. The lacuna is for Parliament and not for the Court to fill, most particularly, since this is a case of a statutory provision, creating a criminal offence. And at the end of the Judgement, it is for Parliament to decide whether to fill the gap in the 1981 Act by a legislative amendment to the like effect.”

According to this dictum, if the learned trial judge wanted to include electronically recorded evidence in s. 39, the statutory wording under consideration had to be wide enough to embrace the changes in question. If it was not possible to do so, then the lacuna was one for Parliament and not the Courts to fill. In the end, the learned trial judge summarised as follows:-

“One, a lacuna exists in section 39 of the Preliminary Inquiries Act.

Two, it is as result of a legislative slip and cannot reasonably and rationally have been intended by Parliament. This conclusion is borne out by an examination of the true and real purpose behind the taking of depositions, the Act itself and several relevant statutory presumptions and principles.

Three, there is, however, no proper scope for the application of a strained rectifying judicial construction doing some violence to the statutory language, because the lacuna is too large to be constitutionally possible of filling it, in that sense, and the Court would be overreaching in this particular case if it did so. What is required is statutory reconstruction and not a rectifying judicial construction. The lacuna is for Parliament to fill, if it chooses to do so, by way of a short simple amendment.”

Thus the learned trial judge, distressed as he may have been about the obvious omission in s39 and its impact on the administration of justice and one could argue, fairness in the case, dutifully respected the boundaries of his judicial remit.

And for the sake of completeness, I should add that the transcript was admitted into evidence under relevant common law rules, the accused was found 'not guilty' and s.39 is yet to be amended.

To say more on the point of the delay in fixing the legislation would be crossing the boundaries of this presentation.