

In The Supreme Court

Criminal Division

BETWEEN

IN THE MATTER of Article 20 of the Constitution of the Commonwealth of The Bahamas

AND

IN THE MATTER of the Juries Act, Chapter 59, Statute Laws of the Commonwealth of The Bahamas

AND

ANTHONY BETHEL

Applicant

V

THE DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

BEFORE: The Honourable Madam Justice Deborah Fraser
APPEARANCES: Mr. David Cash for the Applicant
 Ms. Janessa Murray for the Respondent
HEARING DATES: 11th February 2022, 6th May 2022

DECISION

Constitutional motion - Juries Act (Amendment) 2020 - Article 20(1) of the Constitution - right to a fair hearing - section 291(1)(b) of the Penal Code, Chapter 84 – retrospective effect - retroactive effect - section 20 of the Interpretation and General Clauses Act, Chapter 15– prejudice to defendant - section 18 of the

Juries Act, Chapter 59 - section 291(1)(b) of the Penal Code, Chapter 84 - procedural effect – effects a vested right

FRASER, J

1. The Applicant in this matter is charged with one count of Murder contrary to section 291(1)(b) of the Penal Code, Chapter 84. A trial in this matter commenced in February, 2019 and on 16 May 2019 the jury returned a 10-2 guilty verdict. A retrial was ordered on 24 May 2019 and the matter is now before this Court with a trial set for 15 August 2022. On 19 August 2021, the Applicant, at a case management hearing, through Counsel asked for the Respondent to provide clarification as to how many jurors would be empanelled for the re-trial. When the Respondent informed the Applicant that nine jurors would be empanelled, the Applicant through his Counsel objected.

2. Accordingly, via Notice of Originating Motion for Constitutional Relief, filed 20 April 2022 the Applicant brought this application before the Court. The Applicant filed an Affidavit in Support of the Originating Motion on the same date. The basis of the Applicant's application is that his Article 20(1) Constitutional right to a fair hearing will be breached if the Court allows his trial to be heard with less than twelve jurors as has now been prescribed under the Juries Act (Amendment) 2020. It is the position of the Applicant that a jury comprised of nine persons and a majority verdict cannot apply to his case; that the jury should consist of twelve persons as was required before the Juries Act (Amendment) 2020. The Respondent disagreed with the Applicant and filed an Affidavit in the same regard. The Respondent has submitted that the Juries (Amendment) Act 2020 acts retroactively and the trial should proceed with nine jurors as the Applicant is charged under section 291(1)(b) of the Penal Code, Chapter 84 .

ISSUES

3. The issues which this Court must determine in this matter are as follows:
 - (a) Whether the Juries Act (Amendment) 2020 operates retrospectively?
 - (b) Whether the Juries Act (Amendment) 2020, specifically the amount of jurors is purely procedural or whether it invokes a vested right?
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- (c) Whether it is fair to try the Applicant under the Juries Act (Amendment) 2020 with nine jurors?

CASE OF THE APPLICANT

4. The Applicant made this application based on the following grounds that:
- (1) the Juries (Amendment) Act 2020 does not operate retroactively;
 - (2) the Juries (Amendment) Act 2020 affects the vested rights of the Applicant;
 - (3) the Juries (Amendment) Act 2020 prejudices the Applicant;
 - (4) to try the Applicant under that Act would result in an unfair trial; and
 - (5) If the Act does more than affect procedure and affects the right that has already vested then the law in respect to vested rights must be followed.
5. The Applicant seeks a declaration that the Applicant in this particular case be tried by a twelve member panel rather than a nine member panel because of the special facts that relate to him. His position is that the Juries Act (Amendment) 2020 does not operate retrospectively and that if the Applicant were to be tried under the Juries (Amendment) Act 2020, it would without doubt prejudice to him. He further submitted that when the Applicant was first tried, the majority verdict of 10-2 was a non-verdict and presently under the new law, a majority verdict with nine jurors is unacceptable and a clear injustice to the Applicant. Further to this, Counsel submitted that the Applicant's 'right' to have a jury panel of twelve is not only procedural in nature, but is a vested right. He has relied on the case of **Raleigh Seymour v Attorney General SCCA 71 2012** where it was held that the appellant's right to give unsworn evidence from the dock, was a **statutory right** given to defendants. In that case he argued that even though the practice had been abolished, at the time of the offence, the right existed and it was held that the appellant should retain that right.
6. Counsel for the Applicant has distinguished the recent decision of **Teno Adderley v Director of Public Prosecutions No.336/12/2012** in which it was held that the Juries Act (Amendment) 2020 did not affect the Applicant's vested right to a fair hearing and that the amendment was only procedural in nature. Counsel submitted that the difference between that case and this one is that the Applicant in this present matter had already been tried by
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a jury of twelve persons which requires a unanimous verdict of twelve while **Adderley** had not. Subsequently, the Applicant's right to twelve jurors had already vested unlike in the case of **Adderley**. Counsel submitted that the right to be tried by twelve jurors does not vest at the time of charge, but on the day of trial when the jury is empanelled.

CASE FOR THE RESPONDENT

7. Counsel for the Respondent in this matter firstly submitted to the Court that the Juries (Amendment) Act 2020 does not operate retrospectively and that because the Applicant is not on trial for a matter that invokes the death penalty, he should be tried with nine jurors under the current law. Counsel relied on the case of **R v Cruz [1994]2LRC 390** in which the court stated that "*the general rule is that the effect of all ordinances is prima facie prospective. So, retrospective effect is not to be given to them unless by express words of necessary implication it is clear that this was the intention of the legislature. Ordinances which are merely declaratory or relates to matters of procedure or of evidence are not within the general rule*".
 8. Counsel further submitted that in applying the aforementioned case that this matter does not fall within the general rule because this is a statute which relates solely to procedure and it is the procedure for trial by jury that has been amended, not the right to a jury trial which is a vested right. In other words the vested right of the Applicant is only in regard to the right to a fair jury trial in accordance with Article 20 of the Constitution.
 9. In addition, counsel for the Respondent submitted that the Applicant has not demonstrated how the amendment would prove unfair to his re-trial and that the law which exists now should be applied to the Applicant as in the case of **Stephen Stubbs, Andrew Davis, Clinton Evans SCCrApp & CAIS No. 204 of 2013, SCCrApp & CAIS No. 280 of 2013, SCCrApp & CAIS No. 106 of 2014, SCCrApp & CAIS No. 8 of 2014.** Counsel for the Respondent distinguished the case of **Raleigh Seymour and another v the Attorney General SCCrApp 71 of 2012** where the Court of Appeal held that it had peculiar facts, declaring the case to be *sui generis*.
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10. Counsel also relied on the case of **Valentino Yustare v Regina SCCrApp no. 23 of 2015** in which she quoted the Court of Appeal Judgment at paragraph 16:
“Lord Mustill considered the retrospective effect of a statute adversely affecting a right in the case of 'Office (supra) and concluded that one must look at a number of factors to determine whether the statute was meant to be retrospective. The issue Mr. Ducille has failed to address and what must be demonstrated before the ratio in L'Office may be utilized by the appellant is whether the reduction of challenges affected a right or merely alters a procedure. The cart cannot be placed before the horse; nor can the mere incantation that the change has prejudiced a Defendant, replace authority for the proposition.” On this premise, she submitted that the Applicant is unable to provide an authority that suggests that the Juries (Amendment) Act 2020 affects any vested right.

THE LAW

11. This matter concerns the Juries (Amendment) Act 2020 and whether the Applicant can have a fair trial as a result of such amendment. Section 2 of the Juries (Amendment) Act 2020 amended section 18 of the Juries Act, Chapter 59 which now reads:

“18. In every trial for an offence to which the penalty of death is provided for by law, the jury shall consist of twelve persons, and subject to the provisions of subsection (3) of section 28, in every other trial the jury shall consist of nine persons.” (emphasis mine)

12. Further, this matter concerns the constitutional right entrenched in Article 20(1) which states:

“(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”.

13. More specifically, Article 20(2)(g) has been engaged which states that:

“Every person who is charged with a criminal offence- shall, when charged on information in the Supreme Court, have the right to trial by jury”.

14. The Interpretation and General Clauses Act, Chapter 15 in section 20 states that:
**“Where a written law repeals in whole or in part any other written law, the repeal shall not-
(d) affect any right, privilege, obligation or liability acquired, accrued or incurred under any written law so repealed”.**

ANALYSIS AND DECISION

15. The first issue which the Court must consider in these circumstances is whether the Juries Act (Amendment) 2020 can operate retrospectively and/or retroactively. Section 20 of the Interpretation and General Clauses Act, Chapter 2 provides that where a written law repeals in whole or in part any other written law, then **any rights** accrued by the former law shall not be interfered with and that the new law shall not operate retrospectively. That is the general rule applicable under the Interpretation and General Clauses Act and as Counsel for the Applicant has stated, Acts do not operate retrospectively but prospectively unless otherwise stated. In the case of **West v Gwynne [1911] 2 Ch 1 at 11** the Court stated that *“Retrospective operation is one matter, interference with existing rights is another. If an Act provides that as at a past date the law shall be taken to have been that which it was not, that Act I understand to be retrospective”*. An Act which does not affect vested rights can however still operate retroactively, being an Act which impacts the past, present and future.
16. Both terms however operate in the past. With this evaluation, along with the Interpretation and General Clauses Act, Chapter 2 this Court’s ruling is based on the terms distinguishing a thing that can impact vested rights and one that cannot; retroactive being that which does not affect vested rights and retrospective being that which impacts vested rights. It is noteworthy however that nothing turns on the definition of these terms. The issue is whether the Juries (Amendment) Act 2020 is procedural in nature of whether vested rights have been invoked.
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17. The definition of ‘vest’ in the Blacks Dictionary, 8th Edition is “**3. To give (a person) an immediate, fixed right of present or future enjoyment**” while the meaning of ‘right’ is “**2. Something that is due to a person by just claim, legal guarantee, or moral principle**”. The vested right in these circumstances is found in Article 20(2)(g) of the Constitution of The Bahamas and that is the right to trial by jury.
 18. Retrospective and retroactive effect is interconnected with whether a statute was meant to have solely procedural effect or whether it impacts a vested right. In **Yew Bon Tew Alias Yong Boon Tiew And Another Appellants And Kenderaan Bas Mara Respondent [Appeal From The Federal Court Of Malaysia (Appellate Jurisdiction)] [1983] 1 A.C. 553** the court stated that “*A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past. There is, however, said to be an exception in the case of a statute which is purely procedural, because no person has a vested right in any particular course of procedure, but only a right to prosecute or defend a suit according to the rules for the conduct of an action for the time being prescribed.*”
 19. A statute which is retrospective in nature will of course alter or affect the rights of the citizen and in such circumstances the wording of the legislation must be very clear and unambiguous. In the case of **Yew Bon Tew (supra)**, the court opined that “*Whether a statute is to be construed in a retrospective sense, and if so to what extent, depends on the intention of the legislature as expressed in the wording of the statute, having regard to the normal canons of construction and to the relevant provisions of any interpretation statute.*”
 20. In considering the issue of procedure, the Court must consider the **Juries Act, Chapter 59** in its entirety. That Act concerns matters such as qualifications for jurors, preemptory challenges, juror’s fees; etc. These are all matters which the Court considers to be purely procedural. The case of **Valentino Yastare v Regina SCCrApp no. 23 of 2015** supports this finding as it relates to preemptory challenges. The Court of Appeal held that the applicant in that matter had not demonstrated that any of the facets of a fair trial were
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interfered with by the **Juries (Amendment) Act 2011** which altered the number of preemptory challenges an accused could make during the empanelling of a jury. It was held that that amendment affected procedure only and not a vested right.

21. Counsel for the Applicant argued that the fact that a unanimous jury was required in the first trial, and now a majority has been stipulated by the amendment interferes with the Applicant's right to a fair trial. Again the Court disagrees with this submission on the ground that there is nothing in the Constitution which creates a right to any specific number of jurors. It is trite law that words are not to be read into the Constitution. No mode of constitutional interpretation would allow the Court to interpret the phrase "**the right to trial by jury**" as "**the right to trial by a jury of twelve people**". Accordingly, the Court has found that nowhere in any criminal legislation, inclusive of Juries Act Chapter 59, has there been any right bestowed on a defendant to be tried by twelve jurors; only that of a jury. It therefore follows that the Applicant's right to a fair trial and that of a jury trial is unaffected by the Juries (Amendment) Act 2020.

22. Further, the Court also considers the interpretation of the Constitution, specifically Article 20(2)(g). In adopting the purposive mode of interpretation in these circumstances; the Court therefore looked at the reason why the legislation was passed and also what the legislation expressly dealt with. **The Juries (Amendment) Act, Bill in its Objects and Reasons states that: "Clause 2 of the Bill seeks to make a consequential amendment to section 18 of the Juries Act (Ch. 59) in order to make it clear that where the penalty of death is provided for by law, the unanimous verdict of 12 jurors is needed in order to secure a conviction. Additionally, that a majority verdict will secure a conviction in murder cases which do not attract the death penalty."**

Therefore, the Juries (Amendment) Act 2020 was solely put in place to make it clear that in a case where a defendant is facing the death penalty, a unanimous verdict of 12 jurors is mandatory for conviction, while a conviction for the charge of murder where the death penalty is not being sought will require only a majority verdict. With all of the above considered, this Court finds that this amendment to the Juries Act is only procedural in nature and cannot impair any vested right of the Applicant. Conclusively, the Court finds

that the Juries (Amendment) Act 2020 is retroactive but it does not operate retrospectively because it does not affect a vested right.

23. The Court also has had to consider any prejudice to the Defendant in this matter. Counsel for the Applicant has submitted that the lessening of this number increases the prospects of success of the prosecution and decreases the prospects of success for the accused making the trial process unfair to the Applicant. The Court has already declared that the amendment is procedural. In the case of **Humphreys v. Attorney General (Antigua and Barbuda) [2008] ukpc 61 (06 October 2008)**, it was held that “*Prospective litigants (or defendants in criminal proceedings) do not have a vested right to any particular procedure and there will generally be nothing unfair in applying whatever procedure is in force when the case comes to court*”.
24. The Court does not accept this argument for the following reasons; there are many variables concerned in a jury panel; these variables cannot be dictated or controlled; this trial is a re-trial, it is as if the Applicant had not been tried before; there will be new jurors with new perspectives and experiences and they all have to make a decision on the evidence which is presented to them. It cannot be seen to be unfair or in contravention to the Applicant’s Constitutional rights. This factor does not change with the Juries (Amendment) Act 2020. In the same way success may be more probable for the prosecution, the same may be said for the accused. A jury of nine jurors is just as fair as a jury of twelve.
25. Further, the burden of proof is on the Applicant to show how the Applicant would be prejudiced by the Juries (Amendment) Act 2020 relative to the requirements under Article 20 of the Constitution to a fair trial and to a jury. The Court is of the view that that burden has not been discharged.

CONCLUSION

26. This matter has been predicated on whether the Juries (Amendment) Act 2020 affects merely procedure or a vested right. The Court has determined after examination of the submissions of the Applicant and Respondent above, that the said amendment Act is solely procedural; specifically regarding the number of jurors required in cases to which the death penalty is not sought. The Court also finds that the Juries (Amendment) Act 2020 is retroactive and applies to all trials inclusive of matters commenced prior to the amendment. Further, that the vested right of the Applicant to a fair trial and a trial by jury has not been affected and no prejudice has been identified against the Applicant who will be tried with a panel of nine jurors in accordance with the amended section 18 of the Juries Act, Chapter 59.
27. This Application is hereby dismissed.

Dated this 26th Day of September, 2022

DEBORAH FRASER
JUSTICE
