In The Supreme Court of Bermuda

CIVIL JURISDICTION
2017 No: 458

BETWEEN:

JUSTIN PARSONS

Plaintiff

And

THE ATTORNEY GENERAL AND MINISTER OF LEGAL AFFAIRS

Defendant

JUDGMENT

Dates of Hearings:	Wednesday 21 March 2018 and Tuesday 12 June 2018 Supplemental Submissions: Thursday 5 July 2018
Date of Judgment:	Friday 10 August 2018
Counsel for the Crown:	Mrs. Shakira Dill-Francois (Deputy Solicitor General)
Counsel for the Accused:	Mrs. Susan Mulligan (Christopher's)

Challenge to constitutionality of Section 329E(1) of the Criminal Code
Mandatory Remand in Prison Custody for Assessment Report
Protection from arbitrary arrest or detention (s. 5(1) of the Bermuda Constitution)

JUDGMENT of Shade Subair Williams J

Introduction:

1. The Plaintiff appeared before this Court on his Originating Summons claiming that he had been unlawfully subjected to arbitrary detention pursuant to section 329E(1) of the Criminal

Code which he submits to be unconstitutional in that it is a breach of section 5 of the Bermuda Constitution Order 1968 ("the Constitution" or "the Bermuda Constitution"). (During the course of the hearings before me, the Plaintiff expanded its case to include a complaint of breach of section 7 of the Constitution.) On the Originating Summons, other constitutional breaches are alleged arising out of the operation of section 329E(1).

2. Counsel for both sides sensibly narrowed the disputed issues and both agreed that as a starting point the mandatory remand provision under s. 329E(1) is constitutionally non-compliant. The Court's resolve beyond the necessary declaration is sought on how best to cure the offending provision. The Plaintiff proposed a list of ingredient orders for the constitutionally friendly interpretation of s. 329E(1). The Defendant, however, opposed the suggested approach on the basis that such elaborations would necessitate a legislative amendment.

3. At the conclusion of the hearings before me and upon receipt of supplemental evidence and written submissions, I reserved judgment and now deliver my decision and reasons herein.

Background Proceedings:

4. On 21 March 2018 the hearing was adjourned part-heard to enable Counsel to engage in further research and to file supplemental submissions if so needed in order to address the fullness of the Court's declaratory powers in ordering that a statutory provision be read differently from its literal meaning.

5. The fixed return date of Thursday 3 May 2018 was delisted due to illness on the part of Mrs. Mulligan. Neither party filed a request for a rescheduled hearing date resulting in an interim period of listing delay. Subsequently, the Court of its own motion relisted this matter to 21 June 2018.

6. The efficient continuation and disposal of this matter was particularly necessary as the underlying criminal appeal is partly contingent on the outcome of this constitutional challenge. Notably, the Plaintiff is currently on bail and his sentence has been stayed pending appeal.

7. On 21 June 2018, I allowed the parties a 14 day period within which to file supplemental evidence and/or law in relation to points raised in respect of a non-pleaded point relating to section 7 of the Constitution.

The Facts:

8. On 1 July 2016 the Plaintiff was charged in the Magistrates' Court on two counts, namely unlawful assault occasioning bodily harm contrary to section 309 of the Criminal Code, and sexual assault contrary to section 323 of the Criminal Code. He entered not guilty pleas in respect of both counts and elected summary mode of trial. Approximately 18 months later on 5 December 2017, the Plaintiff was convicted on both counts after trial before the learned Magistrate, Mr. Archibald Warner.

9. Following these convictions, Magistrate Warner considered himself to be statutorily bound to remand Mr. Parsons pursuant to section 329E. It is this mandatory remand with which I am presently concerned.

The Evidence on the Assessment Procedure

10. Without objection from Mrs. Dill-Francois, Mrs. Mulligan explained that where a personal injury offence before the Court is of a sexual nature, the assessment regime under section 329E would entail the performance of a psychological examination. She said that this would comprise of an extensive personality profiling exercise and explained that those results would assist an expert in identifying any personality disorders. Counsel informed the Court that this process involved both psychological and psychiatric testing.

11. Mrs. Mulligan, in developing her submissions and constitutional grounds throughout the hearing, later suggested that the mandatory assessment procedure also amounted to a breach of the offender's constitutional right to privacy under section 7 of the Constitution. Without evidential support, she uttered that the assessment procedure also entailed a physical examination of the offender's genitals in sexual offence cases.

12. Mrs. Dill-Francois, with the leave of the Court, filed additional evidence to clarify the position. An affidavit sworn by the Acting Commissioner of Corrections outlined the assessment procedure as follows:

   "*3. When an inmate first arrives at the Correctional Facility they are given a medical assessment. The medical inspection does not include the inspection of genitals unless the inmate specifically indicates that he has a problem in that area.*

   4. Psychometric testing is currently not used in assessing sex offenders in our facility. This assessment consist of a process where persons are shown a variety of images and their physical responses are captured to determine which images are sexually stimulating to them.

5. A Clinical Risk Assessment is currently provided by the Department of Corrections and consists of approximately three (3) to six (6) hours of face to face interviews with the client during which time clinical evaluation tools are used. These tools are questions and answers and do not involve any physical inspection of the body; as such the inmate would be required to speak verbally and be required to complete a questionnaire.

6. The Psychologist would also review reports and / or documents in relation to the client to corroborate any findings or verify information provided. The Psychologist would then score and evaluate the test instruments to compile a report and make a risk judgment. Once this is done, they would meet with the client to disclose the report to them, document their comments and if necessary make changes for accuracy. If no changes are required then the report would be forwarded to the appropriate persons. If the report is amended, the changes would be disclosed to the client and the(n) forwarded to the appropriate persons."

13. I accept the uncontroverted evidence of the Acting Commissioner of Prisons.

The Relevant Law

13. Section 329E contains a mandatory provision for the remand of an offender upon conviction of a serious personal injury offence for the purpose of an assessment of that offender. The list of offences which qualify as 'serious personal injury offences' are outlined in section 329D. Section 329D(1)(a) places sexual offences under the umbrella of serious personal injury offences. The term 'sexual offences' is defined thereunder to include, *inter alia*, the offence of sexual assault contrary to section 323.

14. Section 329E provides:

Remand of offender for assessment
329E (1) Where an offender is convicted of a serious personal injury offence, the court shall, before sentence is imposed on the offender, remand the offender for a period not exceeding 60 days to the custody of the Commissioner of Prisons.

(2) The Commissioner of Prisons shall cause an assessment to be conducted by a qualified professional to determine if the offender constitutes a threat to the life, safety or physical or mental well-being of any other person on the basis of evidence establishing—
(a) in the case of a sex offender, that—
(i) the offender, by his conduct in any sexual matter, including that involved in the commission of the offence for which he has been convicted, has shown a failure to control his sexual impulses; and
(ii) there is a likelihood of his causing injury, pain or other evil to other persons through failure in the future to control such impulses; or
(b) in any other case, that—
(i) the offender has demonstrated a pattern of repetitive behaviour, of which the offence for which he has been convicted forms a part, showing a

failure to restrain his behaviour and a likelihood of his causing death or injury to other persons or inflicting severe psychological damage on other persons, through failure in the future to restrain his behaviour; or
(ii) the offender has demonstrated behaviour of such a brutal nature as to compel the conclusion that his behaviour in the future is unlikely to be inhibited by normal standards of behavioural restraint.

(3) The person charged with the conduct of an assessment under subsection (2) shall report his findings and recommendations for sentence to the court.

(4) The court, if on receipt of the report under subsection (3) it is satisfied that—
(a) it would be appropriate to impose a sentence of three years or more for the
offence for which the offender has been convicted; and
(b) there is a substantial risk the offender will reoffend;
shall—

(c) impose a sentence for the offence for which the offender has been convicted, which sentence shall be imprisonment for not less than three years; and
(d) order the offender to be supervised in the community for such period not exceeding ten years as may be specified in the order and subject to such conditions as are so specified, and such order may specify a condition that the offender be enrolled in the Mental Health Treatment Programme under section 68A(7).

(5) The court shall not make an order under subsection (4)(d) if the offender has been sentenced to life imprisonment.

(6) If the court is not satisfied of the matters referred to in subsection (4)(a) and (b), it shall impose any sentence it could otherwise impose for the offence for which the offender has been convicted.

(7) Nothing in this section shall be construed to derogate from section 71E (which relates to dangerous offenders).

[Section 329E added by 2000:23 s.2 effective 29 October 2001; subsection (4)(d) amended by 2016 : 30 s. 5 effective 15 August 2016]

15. This Court shoulders the burden of determining whether section 329E may be read henceforth in a manner which does not offend any constitutional provisions. The relevant Schedule 2, Chapter 1 constitutional rights with which the Plaintiff is concerned to protect are contained in sections 5 and 7:

Protection from arbitrary arrest or detention

5 (1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases:

(a) in execution of the sentence or order of a court, whether established for Bermuda or some other country, in respect of a criminal offence of which he has been convicted or in consequence of his unfitness to plead to a criminal charge;

(b) in execution of the order of a court punishing him for contempt of that court or of another court or tribunal;

(c) in execution of the order of a court made in order to secure the fulfilment of any obligation imposed upon him by law;

(d) for the purpose of bringing him before a court in execution of the order of a court;

(e) upon reasonable suspicion that he has committed, is committing, or is about to commit, a criminal offence;

(f) in the case of a person who has not attained the age of twenty-one years, under the order of a court or with the consent of his parent or guardian, for the purpose of his education or welfare;

(g) for the purpose of preventing the spread of an infectious or contagious disease or in the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his care or treatment or the protection of the community;

(h) for the purpose of preventing the unlawful entry of that person into Bermuda or for the purpose of effecting the expulsion, extradition or other lawful removal from Bermuda of that person or the taking of proceedings relating thereto.

(2) Any person who is arrested or detained shall be informed as soon as is reasonably practicable, in a language that he understands, of the reasons for his arrest or detention.

(3) Any person who is arrested or detained in such a case as is mentioned in subsection (1)(d) or (e) of this section and who is not released shall be brought without undue delay before a court; and if any person arrested or detained in such a case as is mentioned in the said paragraph (e) is not tried within a reasonable time he shall (without prejudice to any further proceedings that may be brought against him) be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.

(4) Any person who is unlawfully arrested or detained by any other person shall be to compensation therefor from that other person.

(5) Any person who is arrested shall be entitled to be informed, as soon as he is brought to a police station or other place of custody, of his rights as defined by a law enacted by the Legislature to remain silent, to seek legal advice, and to have one person informed by telephone of his arrest and of his whereabouts.

Protection for privacy of home and other property
7 (1) Except with his consent, no person shall be subjected to the search of his person or property or the entry by others on his premises.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision-

> *(a) that is reasonable required-*
> > *(i) in the interests of defence, public safety, public order, public morality, public health….*
> > *(ii) ….*
>
> *(b) ….*
> *(c) ….*

except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

16. Section 5(1) of the Constitution expressly calls for existing laws to be read and construed in pursuance of the Constitution. It states:

    Existing laws
    5 (1) Subject to the provisions of this section, the existing laws shall have effect on and after the appointed day [2 June 1968] as if they had been made in pursuance of the Constitution and shall be read and construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution.

17. Mrs. Mulligan proposed that the Court construe the 'shall' in section 329E(1): '*Where an offender is convicted of a serious personal injury offence, the court* ***shall****, before sentence is imposed on the offender, remand the offender…'* to '***may****…remand the offender*'. She submitted that this would be consistent with section 54 of the criminal code which states that the fundamental principle of sentencing is that is must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

18. Without specificity to the underlying case law, Mrs. Mulligan referred to other provisions carrying mandatory sentences which were not amended but were instead later construed by the Courts in a manner consistent with section 54. I will insert here that the Court of Appeal in *Dean Sinclair Burgess v The Queen [2012] Bda LR 46* outlined the proper approach to be

taken by the Court in respect of mandatory minimum sentences. Departure from such minimum tariffs centered on exceptionality and proportionality without reference to section 5(1) of the Constitution or any other constitutional provisions.

19. Mrs. Dill-Francois, in principle, accepted that provisions such as 329E may be construed in a constitutionally friendly way if in so doing, the Court is merely tasked to insert one or few words without changing the meaning of the provision altogether.

20. The razor in the apple appeared when Mrs. Mulligan suggested that this Court would have to provide some guidance on the applicable criteria for the Court's proper exercise of discretion imported by the use of the word 'may' in section 329E(1) in substitution for 'shall'.

21. At this point, it is important to note that the end-goal of section 329E(1) is achieved when the Court makes a proper determination as to whether the offender would be subject to a sentence of no less than 3 years imprisonment and Supervision Order under section 329E(4)(d). Such orders are mandatory where the Court is satisfied on receipt of the assessment report that it would be appropriate to impose a prison sentence of at least 3 years and that there is a substantial risk that the offender will reoffend.

22. So the crucial question is this: Under what circumstances should the Court order a remand for an assessment report? It would clearly be futile and even wrong to do so in case where the Court has determined from the outset (without the need for any assessment report) that the proportionate sentence for the offence in question will undoubtedly be less than a 3 year imprisonment sentence, notwithstanding that the offender has been convicted of an offence of 'serious personal injury' as defined by section 329D.

23. The drafting origins of section 329E, according to Ms. Mulligan, are split between the similar provisions in Canada and Queensland, Australia.

24. The Canadian legislation which Ms. Mulligan relied on is titled '*Dangerous Offenders and Long-Term Offenders*'. She cited section 752.1(1):

    "*On application by the prosecutor, if the court is of the opinion that there are reasonable grounds to believe that an offender who is convicted of a serious personal injury offence or an offence referred to in paragraph 753.1(2)(a) might be found to be a dangerous offender under section 753 or a long-term offender under section 753.1, the court shall, by order in writing, before sentence is imposed, remand the offender, for a period not exceeding 60 days, to the custody of a person designated by the court who can perform an assessment or have an assessment performed by experts for use as evidence in an application under section 753 or 753.1.*"

25. Thus in Canada the statutory test for the Court to apply in determining whether it will be duty-bound to remand a serious personal injury offender for assessment is '*if the court is of*

the opinion that there are ***reasonable grounds to believe*** *that an offender … **might be found** to be a dangerous offender under section 753 or a long-term offender under section 753.1.*

26. Ms. Mulligan invites this Court to adopt a similar criterion. She referred to the decision of Mr. Justice Cameron of the Court of Appeal for Saskatchewan in *Her Majesty the Queen v Calvin Joseph Fulton 2006 SKCA 115* where he stated at paragraph 21:

"*Third, section 752.1 does not call upon the court to consider whether the offender will probably be found, or is likely to be found, a dangerous or long-term offender. It does no more than call upon the court to consider whether the offender will probably be found, or is likely to be found, a dangerous or long-term offender. It does no more than call upon the court to consider whether there exist reasonable grounds to believe the offender might be found to be a dangerous or long-term offender; and it does so for no other purpose than that of deciding whether to order an assessment. The word "might" speaks to possibilities: Is the prospect of the offender being found to be a dangerous or long-term offender within the realm of possibility or beyond it? In effect, then, the trial judge concluded that, while it was possible the accused could be found to be a long-term offender on the basis of the criteria mentioned in subsection 753.1(2)(b)(i), it was impossible the accused could be found to be a dangerous offender on the basis of the criteria mention in subsection 753(1)(a)(i) and (ii).*"

27. Section 15(1)-(2) of the Constitution outlines the redress powers of the Supreme Court where it has been determined that a constitutional right has been contravened.

Enforcement of fundamental rights
15 (1) If any person alleges that any of the foregoing provisions of this Chapter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.

(2) The Supreme Court shall have original jurisdiction—
(a) to hear and determine any application made by any person in pursuance of subsection (1) of this section; and
(b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3) of this section,

and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the foregoing provisions of this Chapter to the protection of which the person concerned is entitled:

Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law.

28. Mrs. Mulligan emphasized that the proposed test requires the Court to have reasonable grounds to believe that the Court might be satisfied on the factors set out in s. 329E(4) ie. that the Court might impose a sentence of three years imprisonment or more and that there is a substantial risk that the offender will reoffend.

29. However, Mrs. Dill-Francois raised objection to importing the test of "reasonable grounds to believe" into section 329E(1). She submitted that such an alteration would go beyond the scope of the Court's powers as permitted by section 15 of the Constitution.

30. Counsel for both sides relied on known principles of statutory interpretation as codified in the sixth edition of Bennion on Statutory Interpretation. In particular, Counsel referred to the rule of 'Judicial acceptance of legislator's purpose': "*It is the duty of the court to accept the purpose decided on by Parliament although disagreeing with it. This applies even where the court considers the result unjust, provided it is satisfied that Parliament really did intend that result*."

31. As observed by the then learned Hon. Chief Justice, Ian Kawaley, in *Charles Richardson v Lyndon Raynor [2011] Bda L.R. 52 at page 7* section 5(2) of the Constitution granted a 12 month period within which the Governor could amend any of the existing laws to bring them into conformity with the Constitution. Constitutional conformance is, therefore, to be presumed in respect of all laws enacted post-1968.

32. In *Richardson v Raynor*, the Court construed section 214 (1) of the Criminal Code (Unlawful publishing defamatory matter) in a manner so to bring it into conformance with section 9(2) of the Constitution which protects an individual's right to freedom of expression. Section 214(1) in its parliamentary drafted form reads:

"***Unlawfully publishing defamatory matter***
s. 214(1) Any person who unlawfully publishes any defamatory matter concerning another person is guilty of a summary offence, and is liable to imprisonment for twelve months.

(2) If the offender knows the defamatory matter to be false, he is liable on conviction on indictment to imprisonment for two years."

33. Kawaley CJ construed s. 214(1) to read as follows:

"***Unlawfully publishing defamatory matter***
s. 214(1) Any person who unlawfully publishes any defamatory matter concerning another person knowing the defamatory matter to be false is guilty of ~~a summary~~ an offence, and is liable to imprisonment for twelve months upon summary conviction and ~~(2) If the offender, he is liable on~~ conviction on indictment to imprisonment for two years."

(Further inserting:)

Provided that no charge shall be laid under this section without the consent expressed in writing of the Director of Public Prosecutions."

34. Mrs. Dill-Francois in her submissions sought to discourage this Court from importing any words into section 329E which would change the meaning of the section. She argued that Mrs. Mulligan's proposal to insert the similar wording used in the Canadian provision would stand to usurp Parliament's sole possession of law-making powers. Without specificity, Mrs. Dill-Francois suggested that the Court could rely on the provisions in the Bail Act 2005 in deciding whether or not to remand an offender convicted of a personal injury offence.

35. I have had regard to the provisions of the Bail Act 2005 and refer to my earlier ruling in *R v Chae Foggo [2017] SC (Bda) 66 Crim (31 July 2017)* where I outlined the relevant provisions as follows:

> ***The Law on Bail***
>
> *25. While neither Counsel referred to the relevant provisions of the Bail Act 2005 in the course of their submissions, it is uncontroversial that section 6 of the Act outlines the general right to bail.*
>
> *26. Section 6(1) reads: "A person to whom this section applies shall be granted bail except as provided in Schedule 1."*
>
> *27. Section 6(4) reads: "This section also applies to a person who has been convicted of an offence and whose case is adjourned by the court for the purpose of enabling inquiries or a report to be made to assist the court in dealing with him for the offence."*
>
> *28. Section 6(6) reads: "In Schedule 1 "the defendant" means a person to whom this section applies and any reference to a defendant whose case is adjourned for inquiries or a report is a reference to a person to whom this section applies by virtue of subsection (4).*
>
> *29. Part I of Schedule 1 at item 1. Reads: "Where the offence or one of the offences of which the defendant is accused or convicted in the proceedings is punishable with imprisonment, the following provisions of this Part of this schedule apply."*
>
> *30. Under the Part I 'Exceptions to the right to bail' at item 6 it reads: "The defendant need not be granted bail if he is in custody in pursuance of the sentence of a court."*
>
> *31. While Counsel did not address me on the construction of item 6, I accept that it is drafted in a way which, on a literal interpretation at least, it suggests that it applies to Defendants who are already in custody seeking bail as opposed to a Defendant already on bail looking to extend his bail right through to sentence.*

32. However, the Courts have a long history of interpreting these provisions to generally exclude Defendants convicted on offences punishable by imprisonment from a general right to bail. In my view, a Defendant becomes even further removed from the prospect of bail where an immediate custodial sentence is likely."

Analysis

36. Both the statutory and common law principles of bail pending sentence require the Court to principally consider whether the convicted offender will likely face a custodial sentence.

37. In applying the bail pending sentence principles, the Court would have to first form an opinion on the likelihood of an immediate custodial sentence. In the context of an assessment under section 329E(1), its operation is tied to s. 329E(4) in that the Court must be satisfied, before making a Supervision Order, that it would be appropriate to impose a sentence of three years or more and that there is a substantial risk of reoffending.

38. There is no doubt in my mind that a Court would be able to properly assess upon conviction whether the offence and offender concerned is appropriately facing a prison sentence of 3 years or more. However, in my judgment the question as to whether there is a substantial risk of offending may not always be answered without expert psychological or psychiatric reports.

39. Clearly, the Court must retain a discretion under section 329E in deciding whether to remand an offender convicted of a personal injury offence. Such discretionary powers should be exercised on the primary basis as to whether the Court is satisfied the offender would appropriately face an immediate custodial sentence of 3 years or more. The Court needn't go further than that. It would only be in the most exceptional cases that an offender is permitted to bypass the section 329E remand in the face of the Court's opinion that such an offender will appropriately serve at least a 3 year prison term.

40. The question on the meaning of "satisfied" was resolved in my earlier judgment in divorce proceedings in *A. R.M.F. v A. J. F [2018] SC (Bda) 61 Div (23 July 2018)* where I relied on Omrod LJ's analysis in *K v K (Avoidance of Reviewable Disposition) (1983) 4 FLR 31, 36G, CA* at para 36:

    "The section is perfectly explicit. It says in terms 'if it' (that is the court) 'is satisfied that the other party has, with that intention, made a reviewable disposition…' it may set aside the disposition. The question the judge has to ask himself, having heard the evidence, analysed it, listened to the submissions of counsel, is: 'Am I satisfied that the declaration of trust in this case was made in 1974 with the intention of defeating the wife's future claim?'

I venture to think that all of us know when we are 'satisfied' of something by evidence in court, or not. Our difficulties begin when we try to say what we mean by being 'satisfied'. It forces people to turn to synonyms, which alter the sense, or to the addition of various adverbial phrases such as 'beyond reasonable doubt' or 'on the balance of probability', which can lead to rather unreal distinctions being drawn. But the question remains, in simple language, 'Am I satisfied?' I think that, if the judge had asked himself that question, he would have arrived at the same answer as that which he actually did.

The question of what is the meaning of the phrase 'is satisfied' has been litigated over and over again in relation to other sections of various Matrimonial Causes Acts and it has been pronounced upon on a number of occasions by the House of Lords, not in this context but in the context of other sections.

I would briefly refer, because I think it is a helpful case, to Blyth v Blyth [1966] Ac 643, a decision which split the House of Lords three to two, but in the three majority speeches the position is made quite clear. The first is Lord Denning's and he took the view that 'satisfied' was primarily directed to the question of which side the onus of proof lay, but as to what the word 'satisfied' meant, he said at p. 668:

'I hold, therefore, that in this statute' [that is the predecessor to the Matrimonial Causes Act 1973] 'the word "satisfied" does not mean "satisfied beyond reasonable doubt". The legislature is quite capable of putting in the words "beyond reasonable doubt" if it meant it. It did not do so. It simply said on whom the burden of proof rested, leaving it to the court itself to decide what standard of proof was required in order to be "satisfied".'

…

I do not think one can take it much further than that, save to refer to a dictum which Lord Denning cited in Bater v Bater [1951] P 35, when he referred to a dictum of Lord Stowell which, although the language is not very familiar, I find helpful. It was in a case called Loveden v Loveden (1810) 2 Hagg Con 1:

'The only general rule that can be laid down upon the subject is that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion.'

I do not think I can do better than that."

Conclusion

41. I do not find in favour of the Plaintiff in so far as it is complained that sections 1, 3, 6 of the Constitution were breached.

42. However, the Plaintiff is entitled to the redress prayed in its Originating Summons only to the extent that this Court declares that section 329E(1) contravenes Schedule 2, section 5 of the Constitution which safeguards an individual's right against arbitrary arrest and detention.

43. Going forward, section 329E(1) shall be construed so to read:

    *329E (1) Where an offender is convicted of a serious personal injury offence, the court ~~shall~~, **may** before sentence is imposed on the offender, remand the offender for a period not exceeding 60 days to the custody of the Commissioner of Prisons.*

44. The Court shall first satisfy itself whether the offender would appropriately face an immediate custodial sentence of 3 years or more in the exercise of its discretion in determining whether or not to remand an offender convicted of a personal injury offence. It should only be in the most exceptional of cases that an offender is permitted to bypass the section 329E remand in circumstances where it is the Court's opinion that such an offender will appropriately serve at least a 3 year prison term.

45. A copy of this Judgment shall be served on the Director of Public Prosecutions and the underlying criminal appeal shall be listed for case management directions in the next available Thursday Chambers Session.

46. I shall hear the parties as to costs.

Dated this 10th day of August 2018

JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT