Trinity Term
[2017] UKPC 26
Privy Council Appeal No 0004 of 2016

JUDGMENT

Sexius (Appellant) *v* The Attorney General of Saint Lucia (Respondent) (Saint Lucia)

From the Court of Appeal of the Eastern Caribbean Supreme Court (Saint Lucia)

before

Lord Mance
Lord Kerr
Lord Hughes
Lord Hodge
Sir Ronald Weatherup (NI)

JUDGMENT GIVEN ON

31 July 2017

Heard on 16 May 2017

Appellant	*Respondent*
David Dorsett Ph.D Andie George Kabir Bhalla (Instructed by Axiom Stone Solicitors)	Tom Poole (Instructed by Charles Russell Speechlys LLP)

SIR RONALD WEATHERUP:

Introduction

1. The issue in this appeal is whether the provisions of the St Lucia Criminal Code 2004 and Criminal Procedure Rules 2008, concerning the requirements for a Defence Statement in advance of a criminal trial, are consistent with the Constitution of St Lucia and the right to a fair trial.

2. The appellant was arrested and charged with attempted murder on 28 May 2009. Case management hearings were conducted in February, April and September 2010. During the case management hearing on 12 April 2010 Benjamin J, acting pursuant to section 909 of the St Lucia Criminal Code, ordered the appellant to file a Defence Statement and serve it on the office of the Director of Public Prosecutions. The appellant did not comply with the court's order.

3. On 20 September 2010, during a further case management hearing, Benjamin J again ordered that the appellant should file a Defence Statement and serve it on the office of the Director of Public Prosecutions. Benjamin J also stated that, should the appellant fail to file and serve a Defence Statement, adverse inferences may be drawn by the court in accordance with section 912(1) of the Criminal Code.

4. On 8 October 2010 the appellant filed a Constitutional Motion challenging the constitutionality of sections 909 and 912 of the Criminal Code, being the sections concerned with the service of a Defence Statement and the comments that may be made and the adverse inferences that may be drawn by reason of a failure to comply. The parties filed affidavits and agreed prior to trial that there would be no cross-examination and that the suit could proceed on legal submissions on the effect of the relevant sections of the Constitution, the Criminal Code and the Criminal Procedure Rules.

5. The High Court of Justice in St Lucia upheld the appellant's application and declared the provisions relating to the filing of Defence Statements to be incompatible with the Constitution. The Court of Appeal allowed the appeal of the Attorney General of St Lucia and held the provisions to be compatible with the Constitution. The appellant now appeals the decision of the Court of Appeal.

The Constitution of St Lucia

6. The Constitution of St Lucia was introduced in 1979. Chapter 1 concerns the protection of fundamental rights and freedoms and section 1 provides:

> "Whereas every person in Saint Lucia is entitled to the fundamental rights and freedoms, that is to say, the right, whatever his or her race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely -
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> > (a) life, liberty, security of the person, equality before the law and the protection of the law;
> >
> > (b) freedom of conscience, of expression and of assembly and association; and
> >
> > (c) protection for his or her family life, his or her personal privacy, the privacy of his or her home and other property and from deprivation of property without compensation,
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> the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the rights and freedoms of others or the public interest."

Section 1(a) above includes "the protection of the law". Section 8 of Chapter 1 contains provisions to secure the protection of the law -

> "(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.
>
> (2) Every person who is charged with a criminal offence -

> (a) shall be presumed to be innocent until he or she is proved or has pleaded guilty;
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> …
>
> (7) A person who is tried for a criminal offence shall not be compelled to give evidence at the trial."

Section 41 provides for the alteration of the Constitution by a Bill being passed by the legislature by weighted majority.

Section 120 states that -

> "This Constitution is the supreme law of St Lucia and, subject to the provisions of section 41, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void."

The Criminal Code of St Lucia

7. Section 584 concerns the bringing of an arrested person before a court and provides that if the person arrested is to be questioned, he or she should be informed of the right to remain silent, without such silence being a consideration in the determination of guilt or innocence.

Section 908 provides for disclosure by the prosecution.

Section 909 is headed "Voluntary Disclosure by accused" and provides:

> "(1) Subject to any guidelines as the Director of Public Prosecutions may from time to time issue, at the trial of an accused for an offence, the accused shall, where the prosecutor has complied with section 908 give a defence statement to the prosecutor; and to the court.
>
> (2) For the purposes of this section a defence statement is a written statement -

(a) setting out in general terms the nature of the accused's defence;

(b) indicating the matters on which he or she takes issue with the prosecution; and

(c) setting out in the case of each such matter, the reasons why he or she takes issue with the prosecution.

(3) If the defence statement discloses a special defence the accused must give particulars of the defence in the statement, including -

(a) the name and address of any witness the accused believes is able to give evidence in support of the special defence if the name and address are known to the accused when the statement is given;

(b) any information in the accused's possession which might be of material assistance in finding any such witness, if his or her name and address are not given.

(4) The defence shall make a defence statement as soon as is practicable after the prosecution complies or purports to comply with section 908 or section 913 as the case may be."

Section 912 concerns defaults in disclosure by an accused and provides:

"(1) Where the defence -

(a) fails to give a defence under section 908;

(b) gives a defence after undue delay following the disclosure by the prosecution;

(c) sets out inconsistent defences in a defence statement given under section 909;

(d) at his or her trial, puts forward a defence which is different from any defence set out in a defence statement given under section 909;

(e) at his or her trial, adduces evidence in support of a special defence without having given particulars of the defence in a statement given under section 909;

(f) at his or her trial, calls a witness in support of a special defence without having complied with section 903(3);

the court or, with the leave of the court, any other party, may make such comment as appears appropriate or the court or jury may draw such inferences as appear proper in deciding whether the accused committed the offence concerned.

(2) A person shall not be convicted of an offence solely on an inference drawn under subsection (1).”

The Criminal Procedure Rules of St Lucia

8. Section 11 concerns case management conferences and at 11.1(3) provides:

“At the case management conference, the judge shall make an order scheduling further events in the case including -

…

(c) the date by which the defendant must give the defence statements required by law.”

Section 11.3 provides for disclosure by the defence -

“(1) Where the defendant intends to plead and give evidence of a special defence, he or she shall give notice of such defence to the court and to the prosecutor by the date fixed in the scheduling order and shall make available to the prosecutor, on the date set by the

court, any information which might be of material assistance, including -

(a) the name and address of any witness the defendant believes is able to give evidence in support of the special defence if the name and address are known to the defendant when the statement is given;

(b) any information in the defendant's possession which might be of material assistance in finding any such witness, if his or her name and address are not given.

(2) Where the defendant intends to plead an alibi, he or she shall give notice of such defence to the court and to the prosecutor by the date fixed in the scheduling order and shall make available to the prosecutor, on the date set by the court, information as to the particulars of time and place and of the witnesses by whom he or she proposes to prove the alibi."

Initial Hearings and Sufficiency Hearings in St Lucia

9. Since 2008 Preliminary Inquiries and Committal Proceedings in St Lucia have been replaced by Initial Hearings and Sufficiency Hearings. In the case of an indictable offence a Magistrate conducts the Initial Hearing and makes a Scheduling Order fixing dates for the Sufficiency Hearing and the engagement of counsel. The Judge conducts the Sufficiency Hearing and in the presence of the defendant and counsel and prosecuting counsel, reviews and evaluates the witness statements of the prosecution and the defence and hears submissions. If the Judge considers that there is a prima facie case the Judge commits the defendant for trial. If the defendant is committed for trial he is arraigned by the Judge and a Scheduling Order is made setting out the next steps in the trial process, including the requirements for prosecution and defence disclosure. Upon disclosure by the prosecution under section 908 of the Criminal Code the requirement arises under section 909 for the defendant to give a Defence Statement to the prosecutor and to the court. There then follows the requirement on the prosecution to make secondary disclosure.

The terms of the Criminal Code

10. The scheme for Defence Statements in St Lucia takes its form from the Criminal Procedure and Investigations Act 1996 introduced in England and Wales and Northern Ireland. The duty of primary disclosure by the prosecutor leads to the requirement for a

Defence Statement from the accused, which in turn leads to secondary disclosure by the prosecutor. Default by an accused may lead to comment by the court or other parties and the drawing of adverse inferences against the accused. The 1996 Act has been amended, including amendments contained in the Criminal Justice Act 2003. The amendments have not been introduced in St Lucia.

11. While the terms of the impugned provisions are based on sections 5 and 11 of the 1996 Act they have not been faithfully transposed. First of all the 1996 Act (section 5) provides for compulsory disclosure by an accused at trial on indictment and (section 6) voluntary disclosure at summary trial. Section 909 adopts the heading "Voluntary disclosure by accused" but applies the compulsory provisions of section 5. Second, section 912(1) (a) and (b) refer to a "defence" where, as in section 11(1)(a) and (b) of the 1996 Act, the reference should be to "defence statement" and section 912(1)(a) should refer to section 909 and not 908. Third, section 912(1) refers to the making of comment "or" the drawing of inferences whereas section 11(3) of the1996 Act does not provide for comment and inferences as alternatives. There may be circumstances where comment and inferences would be alternatives but it is not apparent why it would have been intended that that should always be required.

12. The content of the Defence Statement comprises the nature of the defence in general terms, an indication of the matters in issue and the reason why each matter is an issue. In addition there must be particulars of any special defence, including the identity of any witness or any information to assist in finding any witness. From the judgment of Wilkinson J it appears that the definition of "special defence" in the Criminal Code includes the defences of alibi, duress, automatism, necessity, insanity or any defence tending to affect the question of liability of the accused, which definition appears to embrace any defence. In the Criminal Procedure Rules "special defence" is defined as alibi, automatism or insanity.

13. The default provisions concern the failure or delay in providing a Defence Statement but in particular concern inconsistency within the Defence Statement or between the Defence Statement and the evidence at trial. If there is default there may be comment "as appears appropriate" or the drawing of inferences "as appear proper".

14. The common law applicable in St Lucia prior to the adoption of the Constitution of St Lucia in 1979 placed an onus on an accused to provide advance notice of any special defence, including alibi. Hence, the appellant accepts the requirements of the Criminal Code in this regard as representing the codification of the common law as it existed prior to the 1979 Constitution.

The Nature of the Right to Silence

15. The appellant contends that the impugned provisions offend the right to silence of an accused. There is no universal or absolute right to silence. What is often described as the right of silence comprises a number of different rules, most of which are qualified. This was the position even before provisions such as those here under consideration were introduced in different jurisdictions, as Lord Mustill explained in *R v Director of Serious Fraud Office, Ex p Smith* [1993] AC 1 from 30E as follows -

> "I turn from the statutes to 'the right of silence'. This expression arouses strong but unfocused feelings. In truth it does not denote any single right, but rather refers to a disparate group of immunities, which differ in nature, origin, incidence and importance, and also as to the extent to which they have already been encroached upon by statute. Amongst these may be identified:
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> (1) A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions posed by other persons or bodies.
>
> (2) A general immunity, possessed by all persons and bodies, from being compelled on pain of punishment to answer questions the answers to which may incriminate them.
>
> (3) A specific immunity, possessed by all persons under suspicion of criminal responsibility whilst being interviewed by police officers or others in similar positions of authority, from being compelled on pain of punishment to answer questions of any kind.
>
> (4) A specific immunity, possessed by accused persons undergoing trial, from being compelled to give evidence, and from being compelled to answer questions put to them in the dock.
>
> (5) A specific immunity, possessed by persons who have been charged with a criminal offence, from having questions material to the offence addressed to them by police officers or persons in a similar position of authority.

> (6) A specific immunity (at least in certain circumstances, which it is unnecessary to explore), possessed by accused persons undergoing trial, from having adverse comment made on any failure (a) to answer questions before the trial, or (b) to give evidence at the trial.
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> Each of these immunities is of great importance, but the fact that they are all important and that they are all concerned with the protection of citizens against the abuse of powers by those investigating crimes makes it easy to assume that they are all different ways of expressing the same principle, whereas in fact they are not. In particular it is necessary to keep distinct the motives which have caused them to become embedded in English law; otherwise objections to the curtailment of one immunity may draw a spurious reinforcement from association with other, and different, immunities commonly grouped under the title of a 'right to silence'."

16. Lord Mustill went on to analyse the different reasons for the various distinct rules which he identified and to conclude that, given the diversity of those immunities and the policies underlying them, it was not enough to say simply that there existed a general and fundamental right which parliament could be taken not to have intended to abrogate. The Board is here concerned with the appellant's claim to a right to pre-trial silence in respect of the giving of advance notice of any defence and issues to be raised at trial. References below to pre-trial silence are made in the context of the giving of such advance notice.

The decision of Wilkinson J at first instance

17. On 2 October 2012 Wilkinson J upheld the appellant's application and declared sections 909 and 912 of the Criminal Code and rule 11.1(3)(c) of the Criminal Procedure Rules to be incompatible with section 8(1) of the Constitution and thereby null and void. Wilkinson J stated that the common law right to silence had over the years been eroded in the United Kingdom by the Criminal Justice Act 1967, the Criminal Justice Act 1987, the Criminal Procedure and Investigations Act 1996, the Criminal Justice Act 2003 and the Criminal Justice and Immigration Act 2008, in each instance requiring various forms of disclosure by an accused. The court adopted the sentiments expressed by Sopinka J in *R v Noble* [1997] 1 SCR 874 at paras 75 and 76 on the importance of the right of silence.

18. Wilkinson J considered the provisions of the Criminal Code and the Criminal Procedure Rules in relation to the right to a fair hearing under section 8(1) of the

Constitution. She stated that by having to set out the contentious issues in the Defence Statement a burden or duty was placed on the accused to show why he was not guilty and this eased the burden on the prosecution; the non-existence of a right to silence or against self-incrimination in the pre-trial period made a nonsense of the right to silence at arrest and the right not to be compelled to give evidence at trial; the Defence Statement could be read into the record of proceedings where an accused exercised his right not to give evidence; the Defence Statement could be used indirectly by the prosecution to fashion the State's case against an accused; the threat of self-incrimination was very real.

19. Accordingly, Wilkinson J concluded that an accused's right to a fair hearing as provided by section 8(1) of the Constitution and to be presumed innocent as provided by section 8(2)(a) of the Constitution would be breached if he was to prepare a Defence Statement pursuant to section 909 of the Criminal Code. Further she concluded that failure to do so would, pursuant to section 912 of the Criminal Code, subject an accused to the pain of comments or inferences being drawn from his silence which could assist the prosecutor without him necessarily having proved the case beyond a reasonable doubt. For the same reasons the court found that rule 11.1(3)(c) infringed an accused's right to a fair hearing.

The decision of the Court of Appeal

20. On 27 October 2014 the Court of Appeal of the Eastern Caribbean Supreme Court allowed the appeal of the Attorney General of St Lucia and found sections 909 and 912 of the Criminal Code and rule 11.1(3)(c) of the Criminal Procedure Rules to be compatible with the fair trial provisions of the Constitution and therefore valid.

21. Blenman JA, in giving the judgment of the Court, addressed two grounds of appeal. The first ground was whether the pre-trial right to silence was a constitutional right and if so, whether the learned trial Judge erred in concluding that sections 909 and 912(1) of the Criminal Code together with rule 11.1(3)(c) of the Criminal Procedure Rules violated the constitutional right to silence. It was stated that there was nothing in the Constitution which indicated that the right to silence was a fundamental right. Rather, the right to silence as a general rule was a common law right. The trial Judge had treated the right to silence as an aspect of a fair trial and had not invalidated the sections of the Criminal Code or the Criminal Procedure Rules on the basis that they violated the right to silence but rather on the basis that they offended the fair trial provisions of the Constitution. Further the trial Judge had not held that the inferences that may be drawn under section 912(1) of the Criminal Code breached an accused's right to silence under section 8(7) of the Constitution. The first ground of appeal was dismissed.

22. The second ground of appeal was whether the learned trial Judge erred in concluding that sections 909 and 912(1) of the Criminal Code together with rule 11.1(3)(c) of the Criminal Procedure Rules were incompatible with section 8(1) of the Constitution. Comparisons were made between section 8 of the Constitution and the right to a fair hearing under article 6 of the European Convention on Human Rights. Comparisons were also made between sections 909 and 912 of the Criminal Code and section 11 of the Criminal Procedure and Investigations Act 1996. It was noted that the drawing of adverse inferences against an accused person had been upheld by the European Court of Human Rights in *Murray v United Kingdom* (1996) 22 EHRR 29.

23. Blenman JA noted several similarities with the facts of *Murray v United Kingdom*, particularly in relation to safeguards. In St Lucia, before a Defence Statement was ordered, a Sufficiency Hearing would have been completed by the Judge and a determination made that a prima facie case had been established. The trial Judge had total control over the drawing of adverse inferences. An accused would not be convicted of an offence solely on the basis of adverse inferences drawn from failure to comply with the requirement to provide a Defence Statement. The Court of Appeal concluded that the requirement that an accused provide a Defence Statement did not undermine the cardinal principles of criminal law or constitutional rights. The burden of proof remained on the prosecution and the accused's privilege against self-incrimination remained intact. The drawing of adverse inferences was found not to alter the right to a fair hearing under section 8(1) of the Constitution. Accordingly, the appeal was allowed on this ground.

The Appeal to the Board

24. The appellant appeals on the basis that the Court of Appeal erred in holding that sections 909 and 912(1) of the Criminal Code and rule 11.1(3)(c) of the Criminal Procedure Rules do not contravene the appellant's right to the protection of the law and in particular the right to a fair trial and a pre-trial right to silence. The issues in the appeal are stated by the appellant to be:

> (i) Was the Court of Appeal right to reverse the finding of the learned trial Judge that sections 909 and 912(1) of the Criminal Code individually and rule 11.1(3)(c) of the Criminal Procedure Rules were incompatible with section 8(1), 8(2)(a) and 8(7) of the Constitution and accordingly null and void?
>
> (ii) Do sections 909 and 912(1) of the Criminal Code and rule 11.1(3)(c) of the Criminal Procedure Rules contravene the appellant's right to the protection of the law and diminish the rule of law?
>
> (iii) What is the nature of the constitutional right to silence?

(iv) Can the constitutional right to silence be limited other than by a provision of chapter 1 of the Constitution?

25. In essence the appellant relies on two grounds on appeal. The first ground is that the rights in issue are constitutional rights, such that any amendment of those rights can only be given effect by a change to the Constitution by weighted majority and not, as has occurred, by unweighted legislative change through the Criminal Code. The second ground is that the impugned provisions of the Criminal Code and the Criminal Procedure Rules are incompatible with the right to a fair hearing.

The Constitutional Rights

26. The appellant's case develops from Section 1 of the Constitution and the entitlement of every person in St Lucia to "the fundamental rights and freedoms" which includes "the protection of the law" which in turn includes the right to a fair trial. The appellant relies on a right to a fair trial embracing the presumption of innocence, the right to pre-trial silence, the right to silence at trial and the privilege against self-incrimination. The appellant seeks to secure the enhanced protection of the Constitution for all of these rights by a variety of means.

First of all it is said that the protection for fundamental rights and freedoms in the Constitution should be construed generously and extend to "related rights and freedoms" so as to include the right to pre-trial silence and the privilege against self-incrimination (*Vasquez v The Queen* [1994] 1 WLR 1304).

Further, the relevant fundamental right and freedom under section 1(a) of the Constitution is "the protection of the law". Section 8 of the Constitution sets out "Provisions to secure protection of law" and is not necessarily exhaustive of the rights conferred by the protection of law in section 1(a) of the Constitution (*Matadeen v Pointu* [1999] 1 AC 98).

"Protection of the law" refers to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law (*Ong Ah Chuan v Public Prosecutor* [1981] AC 648). At the commencement of the Constitution of St Lucia in 1979 the system of law included the right to silence, which the appellant contends became a constituent of the constitutional right to the protection of the law. Further constituents include the right to a fair trial, the right to the presumption of innocence and the protection against self-incrimination.

In addition the appellant contends that the explicit right to silence at trial in section 8(7) of the Constitution results in an implicit constitutional pre-trial right to silence.

In any event the pre-trial right to silence is said to be necessarily implicit in the right to a fair hearing and thus a part of the constitutional right under section 8(1) of the Constitution.

27. Section 1 of the Constitution provides that the fundamental rights and freedoms are subject to such limitations as are contained in the provisions of chapter 1 of the Constitution. As the impugned provisions of the Criminal Code are said to amount to limitations on the protections afforded by the fundamental rights and freedoms they are said to be null and void to the extent that they are not contained in chapter 1 of the Constitution.

28. The Constitution of St Lucia is described by the appellant as following the "Westminster Model" with the provisions dealing with fundamental rights and freedoms appearing in a separate chapter of the Constitution. Other constitutions have of course different frameworks and particular attention has been given in these proceedings to the constitutions of Canada and South Africa. Each has its own character and structure and the interpretation of the provisions of one constitution may not translate directly into the interpretation of the Constitution of St Lucia.

29. What is the status of the pre-trial right to silence within the legal framework of St Lucia? Section 1 of the Constitution contains a recital of entitlement to fundamental rights and freedoms. The fundamental rights and freedoms then specified include the protection of the law. Section 8 of the Constitution contains matters that have effect for the purpose of affording the protection of the law. Those provisions to secure protection of the law include a fair hearing in section 8(1), the presumption of innocence in section 8(2)(a) and the right not to be compelled to give evidence in section 8(7). There is no express provision in relation to pre-trial silence.

30. There may be instances of fundamental rights and freedoms that extend beyond those specified in section 1 of the Constitution. There may be instances of rights that secure the protection of the law that extend beyond those specified in section 8 of the Constitution. In the present case the right to pre-trial silence was found by Wilkinson J to arise as an aspect of the right to a fair hearing under section 8(1) of the Constitution. Similarly, the Court of Appeal treated the right to pre-trial silence as an aspect of the right to a fair hearing under section 8(1) of the Constitution.

31. The appellant's written case relies not only on the constitutional right to a fair hearing but on the right to the presumption of innocence and the right of silence at trial,

not merely as constituent parts of the right to a fair hearing but as distinct constitutional rights affected by the impugned provisions. In addition the appellant's written case would extend the reach of constitutional rights to the right to pre-trial silence and the privilege against self-incrimination. Thus, the appellant contends that all these rights become entrenched rights under the Constitution and any limitation on any of those rights may only be given effect by constitutional amendment. On the respondent's case there is but one ground of appeal to be considered, namely whether the impugned provisions offend the right to a fair hearing.

32. The broader interpretation of fundamental rights and freedoms or of the protection of the law to extend to rights other than those specified in sections 1 and 8 of the Constitution may arise when the rights in question are not otherwise provided for within the scheme of the Constitution. That broader interpretation may be unnecessary when the rights in question can be secured within the express provisions of the Constitution. A right to pre-trial silence may achieve protection where any impact on that right is capable of being addressed as an aspect of the right to a fair hearing under section 8(1) and the presumption of innocence under section 8(2) and the right not to be compelled to give evidence under section 8(7). The same applies to the privilege against self-incrimination. Then the question becomes whether any impact on the right to pre-trial silence or the privilege against self-incrimination amounts to a limitation on the specified rights under sections 8(1) or 8(2) or 8(7) so that the impugned provisions could only have been introduced by constitutional amendment. Limitations on such protections would be as contained in the provisions of chapter 1 of the Constitution.

The right not to be compelled to give evidence at trial

33. The appellant objects that the provisions in relation to Defence Statements offend section 8(7) of the Constitution by which an accused may not be compelled to give evidence. It is common ground that the provisions of the Criminal Code do not directly compel the appellant to give evidence. Rather it is said that the provisions indirectly impact on the right to silence at trial when the contents of the Defence Statement may become evidence at the trial.

34. The appellant relies on *R v Tibbs* [2002] Cr App R 309 where the Court of Appeal in England & Wales was dealing with a Defence Statement under the Criminal Procedure and Investigations Act 1996. The defendant was charged with supplying a controlled drug. He served a Defence Statement denying the offence and giving particulars of his conduct which included a meeting where he was to collect a stated amount of cash and be paid a stated sum. The defendant's evidence at trial was that he was to collect a different amount and that he was to be paid a different sum. These differences became the subject of comment and adverse inference. Beldam LJ stated, at p 315:

> "In our view the word 'defence' cannot be restricted to its general legal description. A defence depends on the facts which an accused intends to prove. Where those facts differ from the facts on which the prosecution is based, issues will be raised and the object of the section is to ensure that the prosecution have a proper opportunity of investigating the facts giving rise to those issues."

35. Thus, contends the appellant, a Defence Statement compels an accused to set out the facts relied on in support of a defence, which in effect strips away the right of silence.

36. The Board is satisfied that this is not an instance of an accused being compelled to give evidence nor is there any impact on the right not to be compelled to give evidence. In *R v Tibbs* Beldam LJ referred to facts which an accused "intends to prove". Whether by his own evidence or that of witnesses called by the defence, it will, in such a case, be the intention of the accused to make a case at trial. By the Defence Statement the accused is being required to give advance notice of the case he intends to make at trial. If an accused does not propose to offer a defence at trial but to require the prosecution to prove the case then the Defence Statement may so state. On the other hand, if an accused does propose to offer a defence, the Defence Statement requires him to give advance notice setting out in general terms the nature of the defence to be offered at trial and indicating the matters on which he takes issue with the prosecution and the reasons for taking issue.

37. Counsel for the Attorney General states from the Bar that there is no practice in St Lucia of routinely providing Defence Statements to the jury. Section 6E of the Criminal Procedure and Investigations Act 1996, introduced in 2005 by the amendments in the Criminal Justice Act 2003, provides that the trial Judge may direct that the jury be given a copy of any Defence Statement if the Judge is of the opinion that it would help the jury to understand the case or to resolve any issue in the case and may direct that the Defence Statement be edited so as not to include references to evidence that would be inadmissible. Equivalent provisions have not been introduced in St Lucia. However the contents of a Defence Statement may become relevant if inconsistent or not consistent with the evidence at trial.

38. The impugned provisions do not impact on the appellant's right to silence at trial. He is not compelled to give or to call evidence, either directly or indirectly. If he otherwise intends to give or to call evidence he is required to give advance notice of the nature of his defence and the issues raised. If his advance notice of the nature of his defence is inconsistent, whether within the Defence Statement or with evidence at trial, he may be called to account at trial. However, this does not amount to a limitation on the right not to be compelled to give evidence.

The presumption of innocence

39. The appellant further contends that the provisions in relation to Defence Statements offend against the presumption of innocence under section 8(2) of the Constitution.

40. Reliance is placed on *R v Lecky* [1944] KB 80, 86 where the trial Judge appears to have suggested to the jury that they might infer guilt from the silence of the accused after police caution. The Court of Criminal Appeal found there to have been a misdirection, noting that an innocent person might well, either from excessive caution or for some other reason, decline to say anything when charged and cautioned. Viscount Caldecote CJ stated that:

> "If that could be held out to a jury as ground on which they might find him guilty he might obviously be in great peril."

41. The appellant further relies on the finding of the Constitutional Court of South Africa in *Thebus v State* [2004] 1 LRC 430, an instance of failure to give notice of alibi. It was stated that to draw an inference of guilt from pre-trial silence would undermine the rights to remain silent and to be presumed innocent so that an obligation on an accused to break his silence or disclose a defence before trial would be invasive of the constitutional right to silence. However it was found that while there may be no inference of guilt from silence it was permissible to make an inference as to the credibility of the accused from the failure to disclose an alibi in advance of trial. It is to be noted that section 35(1)(a) of the Constitution of South Africa provides a constitutional guarantee of the pre-trial right to silence. Ultimately the court concluded that the interference with the constitutional right to pre-trial silence was justified by the limited character of the consequences.

42. A failure to comply with a requirement to serve a Defence Statement under section 909 does not provide a basis on which an accused may be found guilty of the offence. Section 912(2) of the Code provides:

> "A person shall not be convicted of an offence solely on an inference drawn under subsection (1)."

43. The appellant contends that the making of comments and the drawing of inferences ease the burden on the prosecution. In some instances the drawing of inferences arises from the silence of an accused at police questioning or at trial. So for example, in England and Wales, section 34 of the Criminal Justice and Public Order Act 1994 provides that, in determining whether there is a case to answer or whether the

accused is guilty of the offence, the court may draw such inferences as appear proper from the failure of the accused to mention facts, when questioned or charged, that he could reasonably have been expected to mention. Section 35 provides for the drawing of such inferences from the failure to give evidence at trial. The provisions are not in the same terms as those applicable to Defence Statements.

44. *Murray v United Kingdom* (1996) 22 EHRR 29 concerned similar statutory provisions in Northern Ireland. Adverse inferences were drawn from the fact that the accused had not answered police questions and had not given evidence at his trial. The European Court of Human Rights at para 54 rejected the contention that the drawing of reasonable inferences from the behaviour of the accused in the circumstances of the case had the effect of shifting the burden of proof from the prosecution to the defence so as to infringe the principle of the presumption of innocence.

45. In particular, at para 51, the ECtHR noted that before inferences can be drawn the prosecutor must first establish a prima facie case against the accused. This was stated to be a case consisting of direct evidence which, if believed and combined with legitimate inferences based upon it, could lead a properly directed jury to be satisfied beyond reasonable doubt that each of the essential elements of the offence is proved. The question in each particular case was stated to be whether the evidence adduced by the prosecution was sufficiently strong to require an answer.

46. In the present case the trial Judge has conducted a Sufficiency Hearing before counsel and evaluated the witness statements and heard submissions and determined that there is a prima facie case against the appellant.

47. The onus remains on the prosecution throughout. The requirement for advance disclosure of any positive case that is to be made is, in the same manner as advance notice of 'special defences', entirely consistent with the presumption of innocence. The impugned provisions do not involve a limitation on the presumption of innocence.

The right to a fair hearing

48. The appellant contends that the provisions concerning a Defence Statement limit the appellant's right to a fair trial under section 8(1) of the Constitution. As noted above, certain constituent elements of a fair trial are also specified in the Constitution, namely the presumption of innocence and the right to silence at trial. Additional constituent elements of a fair trial for present purposes concern pre-trial silence and the privilege against self-incrimination.

49. Section 8(1) and (2) of the Constitution echo articles 6.1 and 6.2 of the European Convention on Human Rights. In relation to article 6 Lord Bingham stated in *Brown v Stott* [2003] 1 AC 681 at 704:

> "The jurisprudence of the European court very clearly establishes that while the overall fairness of a criminal trial cannot be compromised, the constituent rights comprised, whether expressly or implicitly, within article 6 are not themselves absolute. Limited qualification of these rights is acceptable if reasonably directed by national authorities towards a clear and proper public objective and if representing no greater qualification than the situation calls for. The general language of the Convention could have led to the formulation of hard-edged and inflexible statements of principle from which no departure could be sanctioned whatever the background or the circumstances. But this approach has been consistently eschewed by the court throughout its history."

50. In relation to the constitutional framework of St Lucia this translates into a recognition that pre-trial silence may be qualified, provided the qualifications do not involve a limitation of the absolute right to a fair trial and further, in an echo of proportionality, that the qualifications serve a clear and proper public objective and are not more extensive than the situation requires.

51. Consideration has been given by the Court of Appeal in England and Wales to the impact of the present arrangements for Defence Statements under the 1996 Act, as amended, on the right to a fair trial under article 6 of the European Convention. These considerations have been influenced by the decision of the ECtHR in *Murray v United Kingdom*, although that case concerned the different aspects of the right to silence relating to police questioning and evidence at trial. The defendant had been arrested while present in premises where a victim of false imprisonment was being held by a proscribed organisation. The defendant gave no explanation for his presence on the premises either to police or at trial. The legislation permitted the drawing of such inferences "as appear proper". The trial Judge repeatedly referred to the exercise of common sense in the drawing of inferences. The Court of Appeal in Northern Ireland, in dismissing the appeal, stated that the evidence of the victim called for an answer from the defendant.

52. The ECtHR stated that whether the drawing of adverse inferences from an accused's silence infringed article 6 was a matter to be determined in the light of all the circumstances of the case, having particular regard to the situations where inferences may be drawn, the weight attached to them by the national courts in their assessment of the evidence and the degree of compulsion inherent in the situation: 22 EHRR 29, para 47. While recognising a certain level of indirect compulsion the ECtHR concentrated

its attention on the role played by the inferences in the proceedings against the defendant and especially in his conviction: para 50.

53. A pivotal consideration was the presence of a significant number of safeguards. Appropriate warnings had to be given to an accused as to the legal effects of maintaining silence. The prosecutor must first establish a prima facie case against the accused. The court cannot conclude that the accused is guilty merely because he chooses to remain silent. It is only if the evidence against the accused calls for an explanation which the accused ought to be in a position to give that a failure to give that explanation may as a matter of common sense allow the drawing of an inference. The Judge had discretion whether an inference should be drawn. The conclusion of the ECtHR was, at para 54:

> "In the court's view, having regard to the weight of the evidence against the applicant, as outlined above, the drawing of inferences from his refusal, at arrest, during police questioning and at trial, to provide an explanation for his presence in the house was a matter of common sense and cannot be regarded as unfair or unreasonable in the circumstances."

54. The Court of Appeal of the Eastern Caribbean Supreme Court noted that the decisions of the ECtHR are highly persuasive in the Caribbean and that where the legislation is similar the court has very consistently applied the principles enunciated in the ECtHR. The Court of Appeal in England and Wales has also had occasion to consider the compatibility of the requirements for Defence Statements under the 1996 Act with the European Convention. The Board is in agreement with the approach taken in the following three decisions. First of all, *R v Bryan* [2004] EWCA Crim 3467 where the prosecution and the Judge commented to the jury on the absence of a Defence Statement. On appeal against conviction it was contended that any comments or directions to the jury should be circumscribed in the same manner as comments and directions under sections 34 and 35 of the 1994 Act in relation to pre-trial silence and trial silence. In particular it was contended that there should be no comments made or inferences drawn without an accused having been warned that such comments or inferences may be a consequence of the failure to file a Defence Statement. However, the court stated that the comparison was not exact between comments and directions on default of Defence Statements and comments and directions on silence at police questioning or at trial. Latham LJ, at paras 22-23, referred to the right of silence being at the heart of the notion of a fair procedure under article 6 and stated that it held that position as part of the protection for a suspect from self-incrimination but that the requirement for a Defence Statement made no inroads into that right:

> "The defence statement could say to the prosecution: 'You prove it', and if that is all that the defendant seeks to say during the trial, no adverse comment could be made and no adverse inference

> could be drawn from that fact alone. Section 5 is a procedural measure, after commencement of proceedings, to ensure an orderly trial of the real issues to be raised between the prosecution and the defence. It is a measure designed to ensure a fair procedure, that is, fair to both the prosecution and the defence in the public interest."

55. The analogy with sections 34 and 35 was found not to require the court to treat comments or to tailor directions in the same way in relation to a failure to provide a Defence Statement. The true analogy was said to be with the directions which are appropriate for the drawing of adverse inferences, for example the drawing of adverse inferences from lies, that is, a Judge should warn a jury, if it is asked to draw such an inference, to do so only if it is sure that there is no other reasonable explanation.

56. In relation to the right of silence at police questioning the arrested person is cautioned and thus receives a warning as to the possible consequences of silence. At trial the accused is warned of the possible consequences of a failure to give evidence. As to the absence of a warning as to the possible consequences of a failure to provide a Defence Statement, the Court of Appeal in *R v Bryan* stated that, where the defendant was legally represented, the trial Judge was perfectly entitled to assume, in the absence of any evidence to the contrary, that the defendant had been appropriately advised by his legal representatives of the possible consequences of failure to comply with the requirements for a Defence Statement. The Board will return below to the issue of the unrepresented defendant.

57. Secondly, in *R v Daha Essa* [2009] EWCA Crim 43 adverse inferences were drawn in the absence of a Defence Statement. It was contended that section 11(5) of the 1996 Act, which provides that a person shall not be convicted of an offence solely on an inference drawn, was incompatible with the right to a fair trial under article 6 of the European Convention. Hughes LJ stated that section 11(5) is compatible with the European Convention. It was stated that, contrary to any submission otherwise, the use which can be made of section 11(5) is not without judicial control, whether by stopping unfair cross examination, deciding the terms on which the jury is to be directed or telling the jury to disregard unfair cross examination.

58. Thirdly, in *R v Rochford* [2011] 1 WLR 534, on a charge of dangerous driving to which the amended 1996 Act applied, the Defence Statement indicated that the defendant was not driving the vehicle at the relevant time. The Court of Appeal reaffirmed the position that there would be no failure of the requirement to file a Defence Statement if a defendant was going to make no positive case at all and not raise the issue of his possible location elsewhere and was simply going to require the Crown to prove its case. Further, it was reaffirmed that the requirement to file a Defence

Statement did not offend against the defendant's privilege against self-incrimination. As Hughes LJ stated, at para 21:-

> "What the defendant is required to disclose by section 6A is what is going to happen at the trial. He is not required to disclose his confidential discussions with his advocate, although of course they may bear on what is going to happen at the trial. Nor is he obliged to incriminate himself if he does not want to. Those are fundamental rights and they have certainly not been taken away by section 6A."

59. The Board is satisfied that the impugned provisions do not involve a limitation on the right to a fair hearing under article 8(1) of the Constitution. Nor do they involve a limitation on the presumption of innocence under article 8(2) of the Constitution or a limitation on the right not to be compelled to give evidence at trial under article 8(7) of the Constitution. Nor do they involve a limitation on the privilege against self incrimination. In so far as the impugned provisions involve a qualification of pre-trial silence, which the Board is satisfied is not the case, the provisions are reasonably directed towards a clear and proper public objective and represent no greater qualification than the situation calls for. The Court of Appeal of the Eastern Caribbean Supreme Court correctly stated the effects of defence disclosure, namely -

(a) to assist in the management of the trial by helping to identify the issues in dispute early;

(b) to provide information that the prosecution needs to identify any material that should be disclosed;

(c) to prompt reasonable lines of inquiry whether they point to or away from the accused;

(d) it may lead to prosecution discontinuances; and

(e) to prevent delay and lead to efficiency.

60. This appellant is legally represented. In many prosecutions in St Lucia defendants are not legally represented. It is a relevant consideration in determining whether and what comments may be made and inferences drawn that the defendant may not have appreciated the significance of a Defence Statement that satisfied the requirements of the Criminal Code. Accordingly it is important that the trial Judge

conducting the case management hearings makes clear to the unrepresented defendant the nature of the requirement for a Defence Statement and the possible consequences of a failure to satisfy those requirements.

61. For the above reasons the Board will humbly advise Her Majesty that the appeal should be dismissed. The parties are invited to make written submissions on costs within 21 days of the delivery of this judgment.