

17/11/03

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

CLAIM NO. HCV 0543 OF 2003

**CORAM: THE HONOURABLE MR. JUSTICE WOLFE, CHIEF JUSTICE  
THE HONOURABLE MR. JUSTICE MARSH  
THE HONOURABLE MISS JUSTICE SMITH**

BETWEEN FARQUHARSON INSTITUTE OF PUBLIC AFFAIRS  
LIMITED CLAIMANT

AND THE ATTORNEY GENERAL OF JAMAICA 1<sup>ST</sup> RESPONDENT

AND THE DIRECTOR OF PUBLIC PROSECUTIONS 2<sup>ND</sup> RESPONDENT

Frank Phipps Q.C., Richard Small, Walter Scott, Christopher Townsend and Mrs. Sharon Usim for the claimant

Mrs. Susan Reid Jones and Miss Catherine Denbow for the 1<sup>st</sup> Respondent

Kent Pantry, Q.C. and Miss Tara Reid for the 2<sup>nd</sup> Respondent

**HEARD: September 24, 25 and December 19, 2003**

**WOLFE, C.J.**

On the 25<sup>th</sup> day of September 2003 we dismissed the claim and promised to put our reasons for so doing in writing. That promise is now being fulfilled.

Jamaica Land We Love, for sometime now has literally become immobilized by the activities of criminal elements in the society. The level

of criminality has had a debilitating impact upon the economy and the quality of life. Citizens have virtually become prisoners in their homes.

In addition to the above, persons who are witnesses to criminal incidents have been so intimidated by the viciousness of the criminal elements that they are reluctant to appear in court to testify.

Witnesses in criminal cases have been murdered on their way to court to give evidence.

This situation has made it extremely difficult for the Prosecuting Authority to successfully prosecute persons charged with serious criminal offences.

It is against this background that the Legislature in 1995 amended the Evidence Act by adding sections 31A to 31L.

This claim alleges that section 31D of the Evidence (Amendment) Act 1995 is inconsistent with section 20(6) (d) of the Constitution, is illegal, void and of no effect.

The claimant therefore seeks a Declaration that accused persons who were tried and convicted on the basis of documents admitted in evidence as witness statements pursuant to the Evidence (Amendment) Act 1995 were denied a fair hearing at trial by not being afforded the facility to examine in

person or by their legal representatives the witnesses called by the prosecution.

At the outset the court advised Mr. Phipps, Q.C. that it would not be deciding whether any person convicted in circumstances where section 31D had been employed, had been denied a fair hearing. The court is of the view that whether or not a person who has been convicted had a fair hearing was a matter for the Appeal Court. The court was therefore only prepared to consider the constitutionality of section 31D of the Evidence (Amendment) Act 1995.

Section 31D states:

“Subject to section 31G, a statement made by a person in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible if it is proved to the satisfaction of the court that such person –

- (a) is dead;
- (b) is unfit, by reason of his body, or mental condition, to attend as a witness;
- (c) is outside of Jamaica and it is not reasonably practicable to secure his attendance;
- (d) cannot be found after all reasonable steps have been taken to find him, or
- (e) is kept away from the proceedings by threats of bodily harm and no reasonable steps can be taken to protect the person”.

Section 20 (6) (d) of the Constitution reads :

“Every person who is charged with a criminal offence shall be afforded facility to examine in person or by his legal representative the witnesses called by the prosecution before any court”.

Mr. Phipps, Q.C. conceded during the course of his submissions that the burden of establishing the unconstitutionality of legislation rests upon the party alleging unconstitutionality. He further conceded that the burden is a heavy one.

In considering whether a particular law enacted by Parliament is constitutional one must be mindful of section 48 of the constitution.

Section 48 (1)

Subject to the provisions of this Constitution, Parliament may make laws for the peace, order and good government of Jamaica. (emphasis mine)

Section 48 (2) states:

Subject to the provisions of sections 49 and 50 of this Constitution, 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.

It was submitted that the clear wording of section 20(6)(d) of the Constitution gives a constitutional right to persons charged with criminal offences to examine all witnesses called by the prosecution. It is further submitted that the right referred to in section 20(6)(d) cannot be

circumvented by producing document to replace evidence of a witness even where the witness is not available. For such circumvention to apply, Mr. Phipps argues, there would have to be a specific exemption in the Constitution itself.

Bearing in mind the provisions of section 48 (1) of the Constitution which empowers Parliament to make laws for the order and good Government of Jamaica the question is, does section 31D of the Evidence (Amendment) Act offend section 20 (6) (d) of the Constitution.

Parliament in enacting section 31D was clearly not bequeathing an inalienable right to the prosecuting authority. Whether or not a witness' statement was admitted into evidence was subject to the court's discretion. Section 31L permits the court to exclude evidence if in its opinion the prejudicial effect of that evidence outweighs its probative value. Further section 31(D) requires certain preconditions to be proved to the satisfaction of the court before the statement can be admitted into evidence.

Once again it becomes necessary to remind those seeking to impugn the constitutionality of legislation, passed by the Parliament of the Nation, of the dictum of Lord Diplock in *Hinds v R* (1975) 24 W.I.R. 326 at p.340.

“In considering the constitutionality of the provisions of s. 13 (1) of the Act, a court should start with the presumption that the circumstances existing in Jamaica are such that hearings in

camera are reasonably required in the interests of 'public safety, public order or the protection of the private lives of persons concerned in the proceedings'. The presumption is rebuttable. Parliament cannot evade a constitutional restriction by a colourable device: *Ladore v Bennett* (4) ([1939] AC at p482). But in order to rebut the presumption their Lordship would have to be satisfied that no reasonable member of the Parliament who understood correctly the meaning of the relevant provisions of the Constitution could have supposed that hearings in camera were reasonably required for the protection of any of the interests referred to; or, in other words, that Parliament in so declaring was either acting in bad faith or had misinterpreted the provisions of section 20(4) of the Constitution under which it purported to act".

I make bold to say that I am satisfied that every reasonable member of the Jamaican Parliament in 1995 and more so in 2003 who understood correctly the provisions of section 48(1) of the Constitution would have concluded that section 31D of the Evidence (Amendment) Act was reasonably required for the peace, order and good Government of Jamaica. It certainly, in my view, cannot be said that Parliament was acting in bad faith or had misinterpreted the provisions of section 48(1) of the Constitution.

The enactment of section 31D of the Evidence (Amendment) Act was no colourful device or act of expediency. The nation faced a real problem in which the peace, order and good government were seriously threatened.

Parliament as the guardian of the nation, in so enacting, acted in the best interest of the citizens of Jamaica to ensure a stable society. A society in which all Jamaicans can feel safe.

This is patently clear from the preconditions which must exist before the statement can be admitted into evidence. Further the trial Judge is bound to warn the jury of the need for caution before such a statement is acted upon, bearing in mind that they the jury did not have the opportunity of seeing and hearing the witness, especially under cross examination.

A similar situation arose in *R v Thomas, Flannagan, Thomas and Smith* [1998] Criminal Law Review 887,888 in which the English Court of Appeal had to determine whether sections 23-26 of the *Criminal Justice Act 1988* were inconsistent with Article 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms 1950*. The Provisions of sections 23-26 of the Criminal Justice Act are similar to the provisions of section 31D of the Evidence (Amendment) Act. Article 6 sets out the rights of an accused person in terms similar to section 20(6)(d) of the Constitution.

The Court held that the provisions of the Criminal Justice Act were not inconsistent with Article 6. In so holding the court said:-

“The narrow ground which the trial judge has to be sure existed before he could allow a statement to

be read to the Jury, coupled with the balancing exercise that he had to perform and the requirement that having performed that exercise he should be of the opinion that it was in the interest of justice to admit the statement, having paid due regard to the risk of unfairness to the accused, meant that the provisions of section 23-26 of the 1988 Act were not in themselves contrary to Article 6 of the Convention”.

In my view the applicant has failed to discharge the burden which rests upon it to prove that section 31D of the Evidence (Amendment) Act is contrary to the provisions of section 20(6) (d) of the Jamaica Constitution.

The second respondent submitted that the claimant had no locus standi. The basis of this submission is section 25 (1) of the Constitution which states:-

“Subject to the provisions of subsection (4) of this section, if any person alleges that any provisions of sections 14 to 24 (inclusive) of this Constitution 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”. (emphasis mine)

It was submitted that the claimant failed to show that a right guaranteed to it by sections 14-24 (inclusive) of the Constitution had been, is being or is likely to be contravened in relation to it.

It was further contended, by the respondent, that the affidavit of Ken Jones which supports the application is based upon hearsay evidence and



does not assert the breach or likely breach of any right guaranteed by sections 14 – 24 of the Constitution.

Paragraph 4 of Ken Jones' affidavit states :-

“The claimant claims an interest in all matters concerning the rights of all citizens of Jamaica under the Constitution of this country. The claimant is an organization dedicated to constructive action in matters affecting the vital interests of the people, such as peace, freedom, justice and prosperity in the society, law and order, the justice system and correctional institutions”

The question is, does this averment bring the claimant within the provisions of section 25(1) of the Constitution.

For the claimant, Mr. Richard Small submitted that the claimant is a legal entity, duly incorporated under the Law of Jamaica and exposed to the possibility of being charged for criminal offences in which section 31(D) of the Evidence (Amendment) Act could be prayed in aid by the prosecution.

There is no allegation by the claimant that it is authorized to act on behalf of anyone within the terms of section 25(1) of the Constitution. To establish that it has locus standi it must therefore prove that a right guaranteed to it by virtue of sections 14- 24 of the Constitution has been, is being or is likely to be contravened.

There is no allegation that any right so guaranteed has been or is being contravened. The issue then is whether any such right is likely to be

contravened. Mr. Small spoke about the possibility of the claimant being charged. The test, in my view, is much higher than a mere possibility. “Is likely” connotes a reasonable probability that it could be charged and that section 31D of the Evidence (Amendment) Act could be employed by the prosecution in proving the case against the claimant.

In resolving the issue I ask myself the question could a reasonable person considering all the probabilities conclude that any right of the claimant is likely to be contravened. I unhesitatingly answer the question in the negative.

I therefore hold that the claimant has no locus standi to bring the claim.

For the reasons stated I would order that the claim be dismissed.

**Marsh, J**

This is fulfilling a promise made on September 25, 2003 when we dismissed the claim herein with promise to put our reasons in writing.

The claimant Farquharson Institute of Public Affairs Limited “claims an interest in all matters concerning the rights of all citizens of Jamaica under the Constitution.”

It is in this capacity, that it sought a Declaration that Section 31D of the Evidence (Amendment) Act 1995 is inconsistent with Section 20(6)(d) of the Constitution and is illegal, void and of no effect. Consequently, accused persons who are tried and convicted on the basis of documents admitted in evidence as witness statements pursuant to the Evidence (Amendment) Act, 1995 were denied a fair hearing at trial by not being afforded the facility to examine in person or by their legal representatives the witnesses called by the prosecution.

Whether or not a person has had a fair hearing at a trial is a matter exclusively for the Appellate Court and therefore there would be no decision as to the fairness or otherwise of a trial where there was a conviction where the provisions of Section 31D of the Evidence (Amendment) Act 1995 were relied on. This was communicated to the claimant’s attorney Mr. Phipps at the beginning.

What therefore fell to be considered was whether Section 31(d) of the said Act was inconsistent with Section 20(6)(a) of the Constitution and therefore illegal void and of no effect.

Section 31D of the Evidence (Amendment) Act 1995 reads as follows:

*“Subject to Section 31G, a statement made by a person in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible if it is proved to the satisfaction of the court that such person –*

- (a) is dead;*
- (b) is unfit, by reason of his bodily or mental condition, to attend as a witness;*
- (c) is outside of Jamaica and it is not reasonably practicable to secure his attendance;*
- (d) cannot be found after all reasonable steps have been taken to find him; or*
- (e) is kept away from the proceedings by threats of bodily harm and no reasonable steps can be taken to protect the person.*

Section 20(6)(d) of the Constitution states:

*“Every person who is charged with a criminal offence –*

*shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before any court and to obtain the*

*attendance of witnesses, subject to the payment of their reasonable expenses, and carry out the examination of such witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and”*

Section 48 of the Constitution must be borne in mind when any assault on the constitutionality of any legislation of Parliament is being made.

This section empowers Parliament to make laws and lays down the appropriate procedure.

Section 48(1) states:

*“Subject to the provisions of the Constitution Parliament may make laws for the peace, order and good government of Jamaica”.*

Where any other law is inconsistent with this Constitution, subject to the provisions set out in Sections 49 and 50 of the Constitution, that law is inconsistent with the Constitution and therefore void.

The burden of proving the unconstitutionality of any legislation rests upon the person who alleges the unconstitutionality. Sir William Douglas in *Ramesh Depraj Kumar Mootoo v. Attorney General of Trinidad and Tobago (1978) 30 W.I.R. 411 at page 415(g)* puts it thus in delivering the Board’s opinion-

*“It is not in dispute between the parties that in a case involving an Act of Parliament, the presumption of constitutionality applies, and that the burden cast on the appellant to prove invalidity is a heavy one.”*

This principle was repeated and applied in the following areas:

*Attorney General v. Mohammed Ali (1987) 41 W.I.R. 176,*

*Attorney General of Antigua and Barbuda and Another v.*

*Goodwin (Ann) and Others (1999) 60 W.I.R. 249*

Mr. Phipps for the claimant agreed with this statement of the law.

It was claimant's submission that Section 31D of the Evidence (Amendment) Act 1995 infringed the right conferred on an accused in Section 20(6)(d) to examine all witnesses called by the prosecution. This right, it was further submitted, could not be circumvented by any Act of Parliament unless this was made by a specific provision in the Constitution.

When Section 31D of the Evidence (Amendment) Act 1995 was passed, it did not give a right for its provisions to be used only by one side in criminal proceedings.

Anyone wishing to call direct oral evidence either prosecution or defence, and the witness is unavailable for any of the reasons identified in Section 31D (a – e), then a statement made by a person in a document shall

be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible.

The admission of this statement was not automatic even if the circumstances mentioned in Section 31D(a – c) were proven. The Court still had discretion to exercise as to whether such a statement would be admitted.

Section 31D should for its full effect be read with Sections 31C and 31L of the said Evidence (Amendment) Act.

S.31C states:

“Subject to this section, in any criminal proceedings, a written statement by a person shall, if the conditions specified in subsection (2) are satisfied, be admissible in evidence to the same extent and effect as direct oral evidence by that person.

- (2) the conditions referred to in subsection (1) are that -
- (a) the statement purports to be signed by the person who made it;
  - (b) a copy of the statement and a notice of intention to tender the statement in evidence are served on all other parties to the proceedings by or on behalf of the person seeking to tender the statement in evidence, at least twenty-one days before the hearing at which the statement is to be so tendered;
  - (c) none of the other parties to the proceedings or their attorneys-at-law have, within ten days from the service of the copy of the statement, served a counter-notice on the party seeking

so to tender it, objecting to the statement being tendered in evidence and requiring the attendance of the maker of the statement as a witness at the hearing;

- (d) notice of the intention to tender the statement in evidence is accompanied by a declaration by the person who made it to the effect that it is true to the best of his knowledge and belief and that he made it knowing that, if it were tendered in evidence, he would be liable to prosecution if he willfully stated in it anything which he knew to be false or did not believe to be true.
- (3) Paragraphs (b) and (c) of subsection (2) shall not apply if the parties to the proceedings agree before or during the hearing that the statement be tendered in evidence.
- (4) A statement shall be inadmissible in evidence under this section in any criminal proceedings where a party to the proceedings has served a counter-notice objecting to the statement being tendered in evidence and requiring the person who made the statement to attend the hearing as a witness.
- (5) Notwithstanding that a written statement made by any person may be admissible by virtue of subsection (2), the court may, on its own motion or on application by any party to the proceedings, require that the maker of the statement attend and give oral evidence at the hearing.
- (6) Notwithstanding the failure of any party to the proceedings to serve a counter-notice objecting to the admissibility of the statement, the court may, if it thinks fit, permit that party to lead evidence



contradicting the evidence contained in the written statement.

- (7) Where contradicting evidence is given as mentioned in subsection (6), the party who tendered the written statement may lead additional evidence in response to the contradicting evidence.”

### **S.31L**

“It is hereby declared that in any proceedings the court may exclude evidence if, in the opinion of the court, the prejudicial effect of that evidence outweighs its probative value.”

Section 48 of the Constitution must be always uppermost in mind when the constitutionality of any Act of Parliament is being considered - Parliament’s power to make laws for the peace, order and good government of Jamaica.

In cases where, as are very frequently reported, witnesses are threatened, spirited away or even killed, it would be an affront to the peace, order and good government of Jamaica, if there are no statutory provisions to deal with such situations. Miscreants could always be assured of success in criminal proceedings by putting the witness out of the reach of the Court.

The right claimed by claimant in Section 20(6)(d) of the Constitution is in fact so provided. An accused person has the right to examine in person prosecution witnesses. This however is a right subject to qualifications. In

the instant case, an accused man's right is mentioned above, must or an interpretation of Section 13 of the Constitution be subject to the rights and freedoms of others and for the public interest ..." (emphasis mine).

I agree with the submission of second respondent that the right afforded by Section 20 of the Constitution is a right to a fair hearing, which is part of a wider public interest that justice be done.

The statute which claimant seeks to impugn as unconstitutional in no way breaches the rights of an accused person to receive fair hearing.

The decision of the English Court of Appeal in **R. v. Thomas Flannagan Thomas and Smith** (1998) Criminal Law Review 887, at 888, in examining the provisions of Sections 23-26 of the Criminal Justice Act and their impact on Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, is illustrative of the situation. The sections of the Criminal Justice Act and the provisions of the said European Convention, respectively are similar to the provisions of Section 31D of the Evidence (Amendment) Act 1995 and Section 20(6)(d) the Jamaican Constitution.

The Court held that –

*“The narrow ground, which the trial judge has to be sure existed before he could allow a statement to be read to the jury, coupled with the balancing*

*exercise that he had to perform and the requirement that having performed that exercise he should be of the opinion that it was in the interests of justice to admit the statement, having paid due regard to the risk of unfairness to the accused, meant that the provisions of Section 23 – 26 of the 1988 Act were not in themselves contrary to Article 6 of the Convention.”*

It was submitted by the second respondent that claimant had no *locus standi* since Section 25(1) of the Constitution stated: -

“Subject to the provisions of subsection (4) of this section, if any person alleges that any of the provisions of sections 14 to 24 (inclusive) of this constitution 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.”

There is no evidence that any provisions of sections 14 to 25 (inclusive) of the Constitution is being or is likely to be contravened in relation to Claimant.”

Mr. Ken Jones’ affidavit for claimant provides no evidence to suggest that there is any right it has been guaranteed by the Constitution (sections 14-24) has been, is being or so likely to be contravened.

The claimant has failed to discharge the heavy burden placed on it, to prove invalidity. In a case involving an Act of Parliament, the presumption

of constitutionality applies and the burden cast on the applicant to prove invalidity is a heavy one.

I would therefore dismiss the claim.

### **G. SMITH J.**

The Claimant seeks the following declarations:-

- (1) That the provisions of Section 31D of the Evidence (Amendment) Act 1995 are ultra vires and contravene the Constitution of Jamaica;
  - (2) That Section 31D of the Evidence (Amendment) Act 1995 is inconsistent with Section 20(6)(d) of the Constitution of Jamaica, is illegal, void and of no effect;
  - (3) That the accused persons who are tried and convicted on the basis of documents admitted in evidence as witness statements pursuant to the Evidence (Amendment) Act, 1995 were denied a fair hearing at trial by not being afforded the facility to examine in person or by their legal representative the witnesses called by the Prosecution.
1. At the commencement of these proceedings the Court took the view and indicated that the question of whether or not accused persons who were tried and convicted on the basis of documents admitted in

evidence under Section 31D of the Evidence (Amendment) 1995 Act were denied a fair hearing, was an issue for determination by the Court of Appeal, and not for the Constitutional Court.

2. The following were the issues left for the determination of the Court:
  - (a) Are the provisions of Section 31D of the Evidence (Amendment) Act 1995 ultra vires and contravene the Constitution of Jamaica; and
  - (b) Is Section 31D of the Evidence (Amendment) Act 1995 inconsistent with Section 20(6)(d) of the Constitution of Jamaica and therefore illegal, void and of no effect.
3. In determining these issues it is important to examine closely the provisions of Section 31D of the Evidence (Amendment) 1995 Act and Section 20(6)(d) of the Constitution of Jamaica.
4. Section 31D of the Evidence (Amendment) Act provides:

“Subject to Section 31G, a statement made by a person in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence by him would be admissible if it is proved to the satisfaction of the Court that such person:

  - (a) is dead;

- (b) is unfit, by reason of his bodily or mental condition, to attend as a witness;
- (c) is outside of Jamaica and it is not reasonably practicable to secure his attendance.
- (d) Cannot be found after all reasonable steps have been taken to find him; or
- (d) Is kept away from the proceedings by threats of bodily harm and no reasonable steps can be taken to protect the person.”

5 Section 20(6)(d) of the Constitution of Jamaica provides:

“Every person who is charged with a criminal offence shall be afforded facilities to examine in person or by his legal representative the witnesses called by the prosecution before any Court”.

6. The Claimant submitted that the effect of Section 31D of the Evidence (Amendment) Act 1995 is to make statements in a document admissible as proof of the facts stated in the document, where the maker of the document would be competent to give direct oral evidence of the facts. The production of the document has a similar effect as calling the witness to give oral testimony. The important

difference they argued is fairness and the quality of the evidence presented as fact.

7. They further contended that under Section 20(6)(d) of the Constitution when oral evidence is given in criminal proceedings the accused has the right to test and challenge the facts by examining the witnesses called by the prosecution. This right would be denied where the facts were stated in a document as contemplated by Section 31D of the Evidence (Amendment) Act 1995. Where evidence of fact is stated in a document without the accused having the opportunity to test and challenge the statement by examining the maker, they submitted that this was inconsistent with Section 20(6)(b) of the Constitution of Jamaica.
8. A careful examination of these sections in my view reveals that Section 20(6)(d) of the Constitution contemplated the availability of live witnesses to attend Court. The prevailing conditions that existed in Jamaica in 1995 necessitated Parliament to create legislation to cover circumstances when witnesses died or otherwise became unavailable to attend Court. The prosecution had experienced great difficulties in getting witnesses to attend trials for the proper and timely prosecution of criminal cases.

Section 31D in my opinion was therefore introduced to deal with those circumstances.

9. Is Section 31D of the Evidence Amendment Act unconstitutional?

It was argued by counsel for the first Respondent and conceded by the Claimant that the burden of proving that a provision of a legislation is unconstitutional lies with the person seeking to challenge the provision. Further that the burden is “a heavy one”. This was stated by the Privy Council in RAMESH DIPRAJ KUMAR MOOTOO v ATTORNEY GENERAL OF TRINIDAD & TOBAGO [1978] 30 WIR 411 where Sir William Douglas in delivering the judgment said:

“.... In a case involving an Act of Parliament the presumption of constitutionality applies, and that the burden cast on the Appellant to prove invalidity is a heavy one ....”

This principle was later applied by the Eastern Caribbean Court of Appeal in ATTORNEY GENERAL OF ANTIGUA AND BARBUDA AND ANOTHER V ANN GOODWIN AND OTHERS [1997] 60 WIR 249.

10. To determine whether or not Section 31D of the Evidence (Amendment) Act 1995 is unconstitutional regard must be had to Section 48 and Section 2 of the Constitution of Jamaica. Section 48



provides for the power of Parliament to make laws. It states as follows:

“Subject to the provisions of the Constitution, Parliament may make laws for the peace, order and good government of Jamaica ...”

Section 2 provides:

“Subject to the provisions of Sections 49 and 50 of this Constitution, 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...”

11. When Section 31D of the Evidence Amendment Act was introduced in 1995 as was stated earlier the Prosecution was experiencing great difficulty in securing the attendance of witnesses in criminal trials. It is against that background that you must examine and say whether the legislation was passed by the Parliament for the peace, order and good government of Jamaica. The nation then faced and continues to face a very serious crisis in the escalation of crime. Witnesses have sometimes been threatened or even killed before the cases can be tried. Usually these are vital witnesses for the prosecution of these cases. If this legislation was not introduced then a state of utter chaos and anarchy would exist in this country. It is therefore my view that this legislation was introduced for the peace, order and good government of Jamaica, and therefore not unconstitutional.

12. The enactment of Section 31D is subject to certain preconditions which must be proved to the satisfaction of the court before a statement can be admitted in evidence.
13. Section 31L gives the Court an overriding discretion to exclude evidence if in its opinion the prejudicial effect will outweigh the probative value.
14. That discretion under Section 31L along with the preconditions which have been provided in Section 31D before the statement may be admitted in evidence, taken together with the warning that the Court is required to give to the jury of the need for caution before the statement may be acted upon, are sufficient safeguards to uphold the interest of Justice.

I therefore find that Section 31D of the Evidence Amendment Act is not inconsistent with Section 20(6)(d) of the Constitution and is not illegal or void.

15. Does the Claimant have locus standi in these proceedings?

The 1<sup>st</sup> Respondent submitted that the Claimant has no locus standi under Section 26 of the Constitution to bring this action.

16. Mr. Richard Small on behalf of the Claimant responded that the Claimant is a legal entity duly incorporated under the laws of Jamaica

and is exposed to the possibility of being charged with Criminal offences in which Section 31D of the Evidence (Amendment) Act 1995 may be invoked.

17. Having had the benefit of reading the Chief Justice's judgment in this matter I wish to concur with him when he states "... The test in my view is much higher than a mere possibility. "Is likely" connotes a reasonable probability that it could be charged and that Section 31D of the Evidence (Amendment) Act could be employed by the Prosecution in proving the case against the Claimant..."

On the evidence placed before this Court there is not one shred of evidence to show that the right of this Claimant "has been, is being or is likely to be contravened". It therefore follows that the Claimant has not demonstrated that it has any locus standi to bring this claim.

18. On the basis of the foregoing I dismiss the claim brought by this Claimant.

**WOLFE C.J.**

It is hereby ordered that the Claim be dismissed.