

A brief review of the mandatory death penalty in Barbados and the decision of Nervais & Severin v The Queen [2018] CCJ 19 (AJ).

I am delighted to be here but in all honesty I would not have imagined myself standing here ten years ago.

I have not always been an abolitionist, I once believed that if you killed someone, if you had gone through the system and had been found guilty then you should die, that was justice.

In short, I had a completely misguided view of justice, one that I am sorry to say too many people share. This view fails to take into account the realities of an imperfect judicial system and fails to acknowledge the infinite possibility for redemption.

I am happy to say that my viewpoint has evolved as I have become more informed through my work as a criminal defence Attorney. In fact my journey here today began with the first case I worked on fresh out of law school- It was the appeal of Jabari Sensimania Nervais.

Mr. Nervais had been found guilty of murder and the mandatory death penalty had been imposed on him in accordance with section 2 of our Offences Against the Person Act (“OAPA”) which provides:

“Any person convicted of murder shall be sentenced to, and suffer, death”.¹

Section 2 of the OAPA compels a presiding judge to impose the sentence of death on the convicted individual automatically. This is the punishment mandated by the legislation.

A mandatory sentence is one whereby legislation which outlines the offence also outlines as part of the legislation the sentence that must be imposed for the offence. These types of sentences in all forms are routinely found to be unconstitutional because their effect is to reduce the purely judicial function of sentencing to simple rubber stamping of the legislative will.

This is unacceptable given that an essential characteristic of sentencing is that it is an individualised process whereby each sentence is tailored to not only the crime but the offender. This objective cannot be achieved where there is a mandatory sentence prescribed by the legislation.

There is no starker an example of the crippling effects of a mandatory sentence than that of the mandatory death penalty. It compounds all the faults of mandatory sentences with permanent results that are the antithesis of justice.

¹ Section 2 of the Offences Against the Person Act CAP 141

In Barbados, once found guilty of murder an individual was sentenced to death without the possibility of mitigation and consideration of the individual circumstances of the case and the convicted person. Given this existing state of affairs, as a matter of course, every murder conviction and the sentence flowing therefrom was immediately appealed.

On appeal to our local Court of Appeal, Mr. Nervais' appeal was dismissed and his conviction and sentence upheld. We then appealed to the Caribbean Court of Justice, our final appellate Court.²

We were not successful in our appeal on conviction, however, our challenge to the constitutionality of the mandatory death penalty was successful. This decision, as you can imagine, was land mark for our jurisdiction as it came after years of unsuccessful challenge to the mandatory death penalty.

Other mandatory or mandatory minimum sentences had routinely been found to be unconstitutional by our Courts. However, it had been an uphill battle to have the mandatory death penalty declared unconstitutional.

The origin of the battle is found in section 26 (1) of the Constitution³, commonly referred to as the savings law clause. It provides that:

“Nothing contained in or done under the authority of any written law shall be held to be inconsistent with or in contravention of any provision of sections 12 to 23 to the extent that the law in question:

- a) is a law (in this section referred to as “an existing law”) that was enacted or made before 30th November 1966 and has continued to be part of the law of Barbados at all times since that day;
- b) repeals and re-enacts an existing law without alteration; or
- c) alters an existing law and does not thereby render that law inconsistent with any provision of sections 12 to 23 in a manner in which, or to an extent to which, it was not previously inconsistent

The historical interpretation and application of this section had the effect of immunising the mandatory death penalty, found in section 2 of the OAPA, from constitutional challenge on the

² Our team was ably lead by Andrew Pilgrim QC and Douglas Mendez SC whose skill and guidance are exceptional.

³ Section 26 (1) of the Constitution of Barbados

basis that it was an existing law and as such could not be held to be inconsistent with sections 12-23 of our Constitution.

Sections 12-23 contain the fundamental rights and freedoms that each individual in Barbados is entitled to and ought to enjoy. In essence section 26 was thought to create a protective barrier around existing laws which shielded it from being deemed unconstitutional even in circumstances where it clearly contravenes fundamental rights and freedoms.

The Caribbean Court of Justice in **Nervais v R**⁴ tore down this protective barrier and found that Section 2 of the OAPA to be unconstitutional.

The Court's reasoning was extremely in depth and employed a modern approach to constitutional interpretation which focused on capturing the expanded understanding of the rights of the individual.

This approach led the Court to determine that the rights encapsulated in section 11 of the Constitution are separately enforceable to those in section 12 -23.

The Court found that "there could be no justification for the courts in Barbados or the Caribbean to be prevented from considering whether the rights conferred in section 11(a) include protections not referenced in those subsequent sections."⁵ and that "the literal and plain meaning of such a provision should be that the 'saving' effected by section 2 does not extend to section 11 and so the court is permitted to make decisions in relation to acts done in contravention of section 11."⁶

This interpretation for the first time broadened the ambit of constitutional redress against the mandatory death penalty. This came in the form of recognising that the right to protection of the law encapsulated in section 11(c) 'afforded protections' separately enforceable and not contingent on the sections following it.

The Court considered whether the mandatory death penalty was in breach of the right to protection of the law in light of this broadened view of Section 11 and concluded that:

"Court's should always examine [mandatory] penalties with "a wary eye" as mandatory penalties deprive the court of an opportunity to exercise the quintessentially judicial function of tailoring the punishment to fit the crime. The right to protection of the law or due process

⁴ Jabari Nervais & Dwayne Severin v The Queen [2018] CCJ 19 (AJ).

⁵ Paragraph 36 ibid

⁶ Paragraph 38 ibid

includes the right to a fair trial. Having said that, we do not believe that the trial process stops at the conviction of the accused. Sentencing is a congruent component of a fair trial. So too is mitigation”.⁷

Therefore, the fact that the mandatory nature of section 2 of the OAPA circumvented core components of the right to a fair trial it was a violation of the right to protection of the law and as such void by virtue of section 1.⁸

The question for the Court then became whether section 2 of the OAPA could be modified to be brought into conformity with the Constitution. The majority of the Court found that it could be modified by determining the Independence Order possessed an enduring power to modify laws to bring them into conformity with the Constitution.

The strongly couched view of the court that:

“The idea that even where a provision is inconsistent with a fundamental right a court is prevented from declaring the *truth*⁹ of that inconsistency just because the laws formed part of the inherited laws from the colonial regime must be condemned.”¹⁰

In its condemnation the court stated:

“It is incongruous that the same Constitution, which guarantees that every person in Barbados is entitled to certain fundamental rights and freedoms, would deprive them in perpetuity from the benefit of those rights purely because the deprivation had existed prior to the adoption of the Constitution”.¹¹

In essence the Court confirmed that our Constitution and constitutional interpretation is fluid and must mirror our evolved understanding of rights encapsulated therein.

Past interpretations and outdated colonial laws like the mandatory death penalty would no longer be protected by artificial constraints. The full enjoyment of an individual’s right to life and right to freedom from inhumane and degrading treatment cannot be shackled to a colonial understanding.

⁷ Paragraph 49 *ibid*

⁸ “This Constitution is the supreme law of Barbados and, subject to the provisions 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.”:Section 1 of the Constitution of Barbados

⁹ Emphasis added

¹⁰ Paragraph 58 of *Nervais & Severin v R* [2018] CCJ 19 (AJ)

¹¹ Paragraph 59 *ibid*

At this juncture I must mention the concurring judgement of Justice Anderson. In essence, while not agreeing with the reasoning of the majority, he found the unconstitutionality of the mandatory death sentence in our current constitution was rooted in the fact that such a sentence infringed the separation of powers doctrine and therefore succinctly concluded that

“It is by reason of the judicial monopoly on the power to sentence protected by the separation of powers that I, too, would allow the appeal and order the resentencing of the Appellants.”¹²

The decision of **Nervais & Severin** has ushered in a new dawn in the justice system of my country. One that embraces the full scope of the rights that our Constitution encapsulates. It is the CCJ’s condemnation of the mandatory death penalty and all it represents. While this decision does not abolish the death penalty in Barbados, it the first step to embracing that path.

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¹² Paragraph 114 Nervais & Severin v R