

**THE REPUBLIC OF TRINIDAD AND TOBAGO
IN THE HIGH COURT OF JUSTICE**

CV 2018-00854

**IN THE MATTER OF THE APPLICATION BY GARTH O'BRIEN FOR JUDICIAL
REVIEW UNDER PART 56 OF THE CIVIL PROCEEDINGS RULES 1998 AND THE
JUDICIAL REVIEW ACT 2000**

AND

**IN THE MATTER OF THE DECISION OF THE CHIEF JUSTICE IVOR ARCHIE
DATED 14TH DECEMBER 2017 TO ISSUE THE PRACTICE DIRECTION ON PRE-
TRIAL DISCLOSURE UNDER THE CRIMINAL PROCEDURE RULES 2016 AS
CONTAINED IN THE TRINIDAD AND TOBAGO GAZETTE VOLUME 56 NO 138
DATED 15TH DECEMBER 2017**

BETWEEN

GARTH O'BRIEN

CLAIMANT

AND

THE HONOURABLE IVOR ARCHIE CHIEF JUSTICE OF TRINIDAD AND TOBAGO

RESPONDENT

BEFORE THE HONOURABLE MADAME JUSTICE JOAN CHARLES

Date of Delivery: 28th May 2019

Appearances:

For the Applicant: Mr. Joseph Sookoo, Mr. Wayne Sturge, Mr. Mario Merritt
Instructed by Ms. Danielle Rampersad

For the Respondent: Mr. Keith Scotland

JUDGMENT

Background

- [1] By Fixed Date Claim filed on the 20th December 2018 the Claimant challenged the legality/constitutionality of the Practice Direction on Pre Trial Disclosure under the Criminal Procedure Rules 2016 (The Rules) issued by the Respondent¹.
- [2] The Applicant in 2005 was charged with an offence of assisting offenders for which he appeared before the Port of Spain Assizes.
- [3] On the 3rd January 2018, at a case management conference before the Honourable Mr. Justice Jack, the Applicant was ordered to file a Defence Statement by the 25th January 2018 pursuant to the Practice Direction issued on the 15th December 2017.
- [4] The Claimant sought the following reliefs:
 - i. A declaration that the decision of the Respondent dated 14th December 2017 to issue the Practice Direction on Pre Trial Disclosure under the Rules is ultra vires, unconstitutional, illegal, null, void and of no legal effect;
 - ii. An Order of Certiorari to bring up into the Honourable Court and quash the decision;
 - iii. A declaration that the directions contained in the Practice Direction are ultra vires, unconstitutional, illegal, null, void and of no legal effect;
 - iv. Costs.

¹ The Trinidad and Tobago Gazette Volume 55 No. 138 dated 15th December 2017

[5] The grounds relied on by the Claimant are that:

- i. The Practice Direction defined a 'Defence Statement' as a written document signed and dated by the Accused and his attorney setting out²:
 - a. The nature of the Accused's defence including any particular defences on which he intends to rely;
 - b. The matters of fact on which he takes issue with the Prosecution;
 - c. In the case each such matter the reason he takes issue with the Prosecution; and,
 - d. Setting out particulars of the matters of fact on which he intends to rely for the purposes of his defence.
- ii. the Practice Direction purports to place a mandatory requirement upon a defendant to prepare and file a Defence Statement after disclosure has been made by the Prosecution;
- iii. the failure to file a Defence Statement on time or at all, or the existence of any inconsistencies within the Defence Statement itself or with the case for the Accused at trial, leads to sanctions. These sanctions are not limited to and include the making of adverse comments by the Court and/or Prosecution and the drawing of adverse inferences as to the guilt of an Accused by the Court and/or jury³.

[6] The requirement for the filing of a Defence Statement is not included in the Rules, the Rules Committee having failed to and/or deliberately omitted any such requirement. The Respondent's issue of this directive by

² Trinidad and Tobago Gazette Volume 55 No. 138 dated 15th December 2017 paras 1 and 2

³ Trinidad and Tobago Gazette Volume 55 No. 138 dated 15th December 2017 para 5 (i)(a)-(d)

way of Practice Direction is unlawful and ultra vires, having been made in excess of his powers, and amounts to a usurpation of the legislative function of the Rules Committee and of Parliament.

- [7] The Practice Direction, insofar as it creates a sanction for failure to comply with same and/or places a Pre Trial requirement on an Accused person to disclose his defence, is unconstitutional as infringing his Right to a fair trial and his Right to Silence.
- [8] The Practice Direction, if unconstitutional, is also ultra vires and unlawful as it attempts to bind Parliament without its oversight and infringes the provision for the passage of constitutionally inconsistent legislation under **Sections 13⁴** and or **54⁵** of the **Constitution of Trinidad and Tobago**.
- [9] The Practice Direction, being procedural in nature, is null and void relative to any sanction since it reverses the law relative to the Right to Silence both under the Constitution and the Common Law.

⁴ (1) An Act to which this section applies may expressly declare that it shall have effect even though inconsistent with sections 4 and 5 and, if any such Act does so declare, it shall have effect accordingly unless the Act is shown not to be reasonably justifiable in a society that has a proper respect for the rights and freedoms of the individual. (2) An Act to which this section applies is one the Bill for which has been passed by both Houses of Parliament and at the final vote thereon in each House has been supported by the votes of not less than three-fifths of all the members of that House. (3) For the purposes of subsection (2) the number of members of the Senate shall, notwithstanding the appointment of temporary members in accordance with section 44, be deemed to be the number of members specified in section 40(1).

⁵ (1) Subject to the provisions of this section, Parliament may alter any of the provisions of this Constitution or (in so far as it forms part of the law of Trinidad and Tobago) any of the provisions of the Trinidad and Tobago Independence Act 1962. (2) In so far as it alters— (a) sections 4 to 14, 20(b), 21, 43(1), 53, 58, 67(2), 70, 83, 101 to 108, 110, 113, 116 to 125 and 133 to 137; or (b) section 3 in its application to any of the provisions of this Constitution specified in paragraph (a), a Bill for an Act under this section shall not be passed by Parliament unless at the final vote thereon in each House it is supported by the votes of not less than two-thirds of all the members of each House. (3) In so far as it alters— (a) this section; (b) sections 22, 23, 24, 26, 28 to 34, 38 to 40, 46, 49(1), 51, 55, 61, 63, 64, 68, 69, 71, 72, 87 to 91, 93, 96(4) and (5), 97, 109, 115, 138, 139 or the Second and Third Schedules; (c) section 3 in its application to any of the provisions specified in paragraph (a) or (b); or (d) any of the provisions of the Trinidad and Tobago Independence Act, 1962, a Bill for an Act under this section shall not be passed by Parliament unless it is supported at the final vote thereon— (i) in the House of Representatives, by the votes of not less than three-fourths of all the members of the House; and (ii) in the Senate, by the votes of not less than two-thirds of all the members of the Senate. (4) For the purposes of subsections (2) and (3) the number of members of the Senate shall, even though circumstances requiring the appointment of temporary members in accordance with section 44(1) have arisen, continue to be the number of members specified in section 40(1). (5) No Act other than an Act making provision for any particular case or class of case, inconsistent with provisions of this Constitution, not being those referred to in subsections (2) and (3), shall be construed as altering any of the provisions of this Constitution, or (in so far as it forms part of the law of Trinidad and Tobago) any of the provisions of the Trinidad and Tobago Independence Act, 1962, unless it is stated in the Act that it is an Act for that purpose. (6) In this section references to the alteration of any of the provisions of this Constitution or the Trinidad and Tobago Independence Act, 1962, include references to repealing it, with or without re-enactment thereof or the making of different provisions in place thereof or the making of provision for any particular case or class of case inconsistent therewith, to modifying it and to suspending its operation for any period.

The Claimant's Submissions

[10] The Claimant submitted that the Rules Committee is a Statutory Body created by **Section 77** of the **Supreme Court of Judicature Act (SCOJ)**⁶ and that the Respondent is one of the five members of that Committee. He submitted that the Rules Committee is empowered to create Rules of court by **Section 78.1** of the **SCOJ**. **Section 78.1 (f)** of **SCOJ** provides that the Rules Committee may make Rules:

“for regulating the means by which particular facts may be proved, and the mode in which evidence thereof may be given, in any proceedings or on any application in connection with or at any stage of any proceedings, including for providing for orders being made at any stage of any proceedings directing that specified facts may be proved at the trial by affidavit with or without the attendance of the deponent for cross-examination and that he may be produced for that purpose”.

[11] The Claimant also pointed out that Rules of Court made under the **SCOJ** are subject to negative resolution of Parliament⁷.

He went on to state that:

- a. Practice directions and their kin—practice notes and practice statements—and their ancestors—Regulae Generales and Memoranda—are not the same as rules of court made under statutory authority. They are made by the courts acting on their own

⁶ Cap 4:01

⁷ Section 78.4 of the SCOJ

authority. Most are concerned with relatively minor points of practice, but many of the more recent ones go much further.⁸

- b. Since the rules have the force of delegated legislation, they cannot be altered by judgment or practice direction.

[12] The Claimant sought to distinguish the Privy Council decision of **Sexius v The Attorney General of St. Lucia**⁹ which, in interpreting a St. Lucia statute which provided for the submission of a Defence Statement by an Accused, held that an Accused's Right to Silence is not infringed by the requirement to disclose his defence during case management of his criminal trial. He submitted that unlike the case in Trinidad and Tobago, an Accused in St. Lucia is only required to submit a defence statement which outlined his defence in general terms as opposed to the case in Trinidad and Tobago where such an Accused is required to give particulars of his defence pursuant to the Practice Direction.

[13] The Claimant submitted further, that the requirement to file a Defence Statement and the sanctions for failure to do so deprived him of his constitutional and Common Law Right to Silence.

[14] The Claimant argued that the Rules Committee, after consideration of the English Rules, declined to pass a provision requiring an Accused person to file a defence statement; the Rules implemented a Hearing Questionnaire by which the parties were mandated to indicate the issues between them. The Claimant asserted that in both the English and St. Lucian provisions the requirement for defence statements were specifically included in their Rules or Statutes unlike the present case. He further

⁸ Professor Jolowicz - The Cambridge Law Journal/2000 - Volume 59/Issue 1, 1 March/Articles/Practice Directions and the Civil Procedure Rules - The Cambridge Law Journal, 59 [2000], pp 53-61

⁹ 2017 UKPC 26

contended that the Respondent sought to bypass the intention of the Rules Committee and Parliament, bodies with the power to legislate, by passing the Practice Direction. He contended, in the round, that the Respondent acted *ultra vires* the Rules by issuing the impugned Practice Direction.

The Respondent's Submissions

- [15] The Respondent submitted that the issue for determination by the court was whether he was outwith the power granted him under the Criminal Procedure Rules¹⁰ to issue the said Practice Direction.
- [16] He agreed with the Claimant's submissions with respect to the statutory powers of the Rules Committee as outlined in the latter's submissions¹¹; in particular, that the Chief Justice is empowered by the Rules Committee under **Rule 20** of the said Rules to issue Practice Direction¹².
- [17] The Respondent argued that the Rules Committee vested him with a wide discretion to implement the Practice Direction in furtherance of the overriding objective of the Rules. He contended that it was always envisaged by the Rules that written requirements as stated by Rule 10.1(2)(g) may be necessary for the purposes of issue identification and the nature of the Defence as required by the provisions of active case management.
- [18] The Respondent submitted that the Practice Direction was *intra vires*, legal and valid since it was issued in furtherance of existing requirements for:
- a) the identification of real issues in the terms of active case management;
 - b) powers of the Court to impose any direction in managing the case; and

¹⁰ Rule 20

¹¹ Paras 18-23 of the Claimant's Submissions

¹² "20. Practice Directions and Guides

20.1 The Chief Justice may issue practice directions and practice guides in furtherance of the relevant legislation and these Rules."

c) the fact that the Court may require issues to be identified in writing.

[19] On the issue of the constitutionality of the Practice Direction the Respondent submitted that there is no absolute Right to Silence, and that in any event the Practice Direction does not abrogate the Right to Silence. Further, that the requirement for the Defence Statement only arises fifty six (56) days after the Prosecution has disclosed its evidence and other material in proof of the case against an Accused. He asserted that an Accused is not required to incriminate himself at any time nor is he compelled to answer questions which may incriminate him. His Common Law and constitutional Right to a fair trial is thereby preserved.

[20] The Respondent submitted that the case of **Sexius v The Attorney General of St. Lucia**¹³ and the principles enunciated therein by the Privy Council are applicable to this case since the provisions relating to the requirement for a Defence Statement in St. Lucia¹⁴ are markedly similar to ours in Trinidad and Tobago. He submitted that it is plainly wrong to say that the directives contained in the Practice Direction represent substantive law; he argued that it is a procedural mechanism which furthers the overriding objective by providing a vehicle for the Parties' active assistance to the court in identifying the issues in dispute before said court as part of a case management exercise.

¹³ [2017] UKPC 26

¹⁴ Section 11.3 of the Criminal Procedure Rules of St. Lucia

Issues

(a) Whether the Practice Direction is intra vires Rule 20 of Criminal Procedure Rules

(b) Is the Practice Direction in breach of an Accused's Constitutional Right to Silence and Right against self incrimination

Analysis

Issue (a)

Whether the Practice Direction is intra vires Rule 20 of Criminal Procedure Rules

[21] In order to decide this issue a detailed examination of the Rules is necessary in order to determine whether the Respondent acted outwith the power granted him by Rule 20 to issue Practice Directions in furtherance of the Rules. Of particular importance in discussing this issue is whether the said Practice Direction amounts to an attempt to plug a gap in the Rules/pass a new Rule without Parliamentary oversight.

[22] The Rules Committee is a statutory body created by **Section 77** of the **Supreme Court of Judicature Act Chapter 4:01 (SCOJ)**. The Respondent is one of five persons who make up that Committee. The Rules Committee is empowered to create Rules of Court and did so in the instant matter when it created the Rules. There is no dispute between the parties that the Rules Committee may make rules -

“for regulating the means by which particular facts may be proved, and the mode in which evidence thereof may be given, in any proceedings or on any application in

connection with or at any stage of any proceedings, including for providing for orders being made at any stage of any proceedings directing that specified facts may be proved at the trial by affidavit with or without the attendance of the deponent for cross-examination and that he may be produced for that purpose¹⁵”.

Rules of Court so made are subject to negative resolution of Parliament¹⁶.

- [23] The difference between Practice Directions and Rules of Court (delegated legislation) was summarised by Hale LJ in **In re C (Legal Aid: Preparation of Bill of Costs)**¹⁷:-

“Unlike the Lord Chancellor's orders under his 'Henry VIII' powers, the Civil Procedure Rules 1998 themselves and the 1991 Remuneration Regulations, the practice directions are not made by statutory instrument. They are not laid before Parliament or subject to either the negative or positive resolution procedures in Parliament. They go through no democratic process at all, although if approved by the Lord Chancellor he will bear ministerial responsibility for them to Parliament. But there is a difference in principle between delegated legislation which may be scrutinised by Parliament and ministerial executive action. There is no ministerial responsibility for practice directions made for the Supreme Court by the Heads of Division. As Professor Jolowicz says [2000] CLJ 53, 61, 'It is right that the court should retain its

¹⁵ Section 78.1(f) of SCOJ

¹⁶ Section 78.4 of SCOJ

¹⁷ [2001] 1 FLR 602, 607-609

power to regulate its own procedure within the limits set by statutory rules, and to fill in gaps left by those rules; it is wrong that it should have power actually to legislate'.

- [24] The Respondent is vested with the Power under the Rules to issue Practice Directions¹⁸.
- [25] It was agreed by both sides that the Rules do not make reference to a 'Defence Statement'; however, as discussed below, the Rules provide that a Court in the exercise of its Case Management function shall further the overriding objective of the Rules by identifying the real issues including the nature of the defence¹⁹.
- [26] The overriding objective of the Rules as stated therein is to decide cases justly²⁰. The court, as well 'all parties and participants at every stage of proceedings, are required to further the overriding objective²¹. It is to be noted that the term 'participant' is defined as anyone involved in any way with the conduct of a criminal case, while 'a party' includes both the party to a criminal case and an attorney at law on record for that party.
- [27] In order to determine the issue under consideration, an analysis of Rules 8, 16 and the Hearing Questionnaire must be undertaken since they deal substantively with the new procedure for the conduct of criminal trials.
- [28] The Rules mandate a court to actively manage the case by:
- (a) the early identification of the real issues, which includes–
 - (i) the identification of all possible legal issues;

¹⁸ Rule 20.1 Practice Directions and Guides "The Chief Justice may issue practice directions and practice guides in furtherance of the relevant legislation and these Rules."

¹⁹ Rules 8.1(2) and 8.2(a)(ii)

²⁰ Rule 3.1

²¹ Rule 3.2

- (ii) identification of the nature of the defence; and
- (iii) enquiring whether the defence has taken written instructions²².

[29] The effect of sub rules (i) and (ii) is to require an Accused to disclose at a case management conference its defence so that the court, in the exercise of its case management functions may identify **all possible legal issues**. The only way in which a court can comply with this Rule is if both Prosecution and Defence disclose their respective cases to the court. Further, the identification of **all possible legal issues** can only be undertaken as it relates to the Defence if an indication is given as to:

- i. the particular defence e.g self defence provocation, accident;
- ii. the factual challenge to the Prosecution case;
- iii. the legal challenge to an aspect(s) of the Prosecution case;
- iv. preliminary points of law the defence may wish to raise;
- v. the challenge (if any) to written/oral statements which the Accused alleges were involuntary or not made;
- vi. special defences – insanity, automatism and alibi;
- vii. the facts on which the Accused rely in support of his defence.

[30] The Rules also identify the scope of the court’s power to manage the trial by setting out its responsibilities under this head in Rule 16. The Rule also makes clear the responsibilities of the parties before it, relative to the disclosure of evidence on both sides, so as to establish the disputed issues with the **active assistance of the parties**²³, and to set a timetable that takes account of the disputed issues and any timetable set by a party²⁴. Pursuant to this Rule, a party may be required to identify either orally or in writing²⁵:

- (i) which witness that party wants to give evidence in person;

²² Rule 8.2(a)(i) – (iii)

²³ Rule 16.1(a)

²⁴ Rule 16.1(b)

²⁵ Rule 16.1(i),(vii),(viii)

- (vii) what facts and evidence can be agreed between the parties;
- (viii) what other material, if any, that person intends to make available to the court in the presentation of the case.

[31] Rules 8 and 16 operate to change the way in which criminal trials have been conducted in Trinidad and Tobago, by demanding of both the Prosecution and Defence a more open and cooperative process with the trial court in order to effectively and expeditiously manage the criminal trial. Prior to the introduction of these Rules, an Accused was not required to disclose his defence before trial except in the case of alibi; the Prosecution, on the other hand, was only required to disclose unused material, or witnesses which they did not intend to call. The result of this state of affairs, was that the Court and Prosecution were unaware of an Accused's defence until after the start of the trial, and very often late into the trial. This resulted in delays during trial to allow the Prosecution to respond to legal and other issues sprung by the Defence during the trial. This process, along with other difficulties, have led to an acute backlog of criminal cases.

[32] It seems to me that the Rules have attempted to address trial delays by requiring the parties to clearly identify the issues by setting forth their respective cases including the facts on which said cases rely. I am fortified in this view by the content of the Hearing Questionnaire²⁶, which must be completed by the parties before the matter is listed for a case management hearing²⁷. By that document, an Accused must indicate, inter alia, whether he is challenging any written/oral statement allegedly made by him and relied on by the Prosecution; he must also disclose the grounds of his objection to the Prosecution. The Defence is required to go even further and state whether allegations of improper conduct against a police

²⁶ Form 4

²⁷ Rule 16.3

officer(s) are being advanced; whether an application to edit the Accused's statement will be made; whether the Defence will rely on good character evidence.

[33] From the above, it is clear that the Rules provide for a sea change in the conduct of the Prosecution and Defence and in the management of a criminal trial by the Court. Whereas the Rules do not include the term 'Defence Statement', the extent of disclosure contemplated by the Rules falls within the definition of the term.

[34] I therefore hold that the Practice Direction issued by the Respondent is intra vires the Rules. The said Practice Direction is neither an attempt to pass a new Rule without Parliamentary oversight nor an attempt to plug a gap in the Rules; rather, the Direction was issued in furtherance of the Rules.

Analysis

Issue (b)

Is the Practice Direction in breach of an Accused's Constitutional Right to Silence and Right against self incrimination

[35] The Claimant's case is that the Practice Direction is unconstitutional in that it abrogates his Right to Silence which is part of the due process provision and the Right to the protection of the law as provided for in **Sections 4(a) and 4(b)** and **Section 5.2(h)** of the **Constitution of Trinidad and Tobago**.

[36] **Section 4 (a) and (b)** of the **Constitution of Trinidad and Tobago** provides:

“It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely:

(a) the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law;

(b) the right of the individual to equality before the law and the protection of the law...

[37] **Section 5 (1) and (2)(c)(d)(e)(f)(h)** of the **Constitution of Trinidad and Tobago** provides:

(1) Except as is otherwise expressly provided in this Chapter and in section 54, no law may abrogate, abridge or infringe or authorise the abrogation, abridgment or infringement of any of the rights and freedoms hereinbefore recognised and declared.

(2)(c) deprive a person who has been arrested or detained— (i) of the right to be informed promptly and with sufficient particularity of the reason for his arrest or detention; (ii) of the right to retain and instruct without delay a legal adviser of his own choice and to hold communication with him; (iii) of the right to be brought promptly before an appropriate judicial authority; (iv) of the remedy by way of habeas corpus for the determination of the validity of his detention and for his release if the detention is not lawful;

(d) authorise a Court, tribunal, commission, board or other authority to compel a person to give evidence unless he is afforded protection against self-incrimination and, where

necessary to ensure such protection, the right to legal representation;

(e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;

(f) deprive a person charged with a criminal offence of the right—

(i) to be presumed innocent until proved guilty according to law, but this shall not invalidate a law by reason only that the law imposes on any such person the burden of proving particular facts; (ii) to a fair and public hearing by an independent and impartial tribunal; or

(iii) to reasonable bail without just cause;

(h) deprive a person of the right to such procedural provisions as are necessary for the purpose of giving effect and protection to the aforesaid rights and freedoms.

[38] In **R v Director of Serious Frauds ex parte Smith**²⁸ Lord Mustill clarified the term ‘the Right to Silence’. He opined that it-

*“...does not denote a single right by rather refers to a disparate group of immunities which differ in nature, origin, incident and importance.”*²⁹

[39] He went on to identify the immunities in these terms³⁰:

a) 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.

²⁸ 1993 AC1

²⁹ 1993 AC1 pg 30(e)

³⁰ 1993 AC1 pg 30 (f)-(h), pg 31 (a)

- b) *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.*
- c) *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.*
- d) *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.*
- e) *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.*
- f) *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.*

[40] Lord Mustill made the point that the foregoing immunities were all important and concerned the protection of citizens against the abuse of powers by those investigating crimes. He stated that the Right to Silence consist of all of the immunities outlined above, some of which are distinct from each other. He highlighted the various historical reasons which gave rise to the immunities grouped under the Right to Silence³¹.

³¹ 1993 AC1 pg 31 (d)-(h) to pg 32 (a)-(d)

- [41] In **Hayden Toney v PC Joseph Corraspe**³² Bereaux JA, delivering the judgment of the Court of Appeal, held that neither the Right to Silence nor the Right against self incrimination is absolute. He went on to state that a ‘mere curtailment of fundamental rights by the enactments of laws which, in the public interest, may criminalise certain categories of behaviour does not per se render the law unconstitutional if it is reasonably directed to a clear and proper public purpose³³.
- [42] In the case before me, I do not consider that an Accused’s Right to Silence is abrogated by the Practice Direction. Firstly, the requirement that the Accused give a defence statement arises at the pre trial stage and some fifty six days after the Prosecution would have made disclosure to him. His Rights to Silence and against self incrimination when confronted by the police is preserved up to that point and beyond - to the end of the trial. The Claimant is neither compelled to answer questions which may incriminate himself nor to even disclose a defence. He is entitled to ask the Prosecution to prove its case against him without advancing a positive case³⁴.
- [43] As I indicated above, the Criminal Procedure Rules and Practice Direction were promulgated with the object of deciding criminal cases justly, expeditiously and fairly. Given the notorious backlog of criminal cases in our courts, the issuance of the Practice Direction and the Rules serve the public interest by instilling confidence in the administration of justice by convicting the guilty and acquitting the innocent in the shortest possible time. The requirement that an Accused provide the facts on which he relies for his defence serves to strike a fair balance between the general need of

³² Supra

³³ **Hayden Toney v PC Joseph Corraspe** Mag App No 68 of 2008 para 32

³⁴ Blackstone Criminal Practice D9.30; Respondent’s Submissions para 32

the public to dispense with criminal cases in a timely manner and the personal rights of the individual³⁵.

[44] The regime of the Criminal Procedure Rules and the Practice Direction aims to change the way that criminal trials are conducted in Trinidad and Tobago and to introduce new protocols that ensure that parties before the court assist it in achieving the overriding objective to deal with cases justly.

[45] In **Malcolm v The Director of Public Prosecutions**³⁶ the Court opined,

“Criminal trials are no longer to be treated as a game, in which each move is final and any omission by the prosecution leads to its failure. It is the duty of the defence to make its defence and the issues it raises clear to the prosecution and to the court at an early stage. That duty is implicit in r 3.3 of the Criminal Procedure Rules, which requires the parties actively to assist the exercise by the court of its case management powers, the exercise of which requires early identification of the real issues.....” (Emphasis Added)

[46] It should also be noted that the burden of proof remains on the Prosecution throughout the case even where the defence is required to give adequate notice of special defences such as alibi, automatism or insanity. Very importantly, the presumption of innocence of the Accused is preserved throughout the trial until a verdict is delivered in spite of these requirements.

[47] In the circumstances, the Claimant’s Right to due process of law and the protection of the law are preserved.

³⁵ **Hayden Toney v PC Joseph Corraspe**

³⁶ 2007 EWHC 363 (Admin) para 31

[48] In the Privy Council judgment of **Sexius v the Attorney General of St. Lucia**³⁷ the court there held that the requirement for an Accused to serve a defence statement was not unconstitutional. The Claimant argued that this case was distinguishable on the grounds that:

- a. The Defence Statement as outlined in **Sexius**³⁸ is not the same as in the Practice Direction. In St. Lucia, a Defence Statement is only to be given in general terms whereas the Practice Direction requires particulars.
- b. 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. The said Constitution and the later requirement under the Criminal Code in St. Lucia codified the said common law. In Trinidad and Tobago, no such requirement (save for alibi alone), ever found its way into our common law or statute. In fact, our common law has approached this issue differently.³⁹
- c. The lack of procedural safeguards in the Practice Direction, such as the requirement for the prosecution to set out a prima facie case.
- d. The existence and application of the Judge's Rules in this jurisdiction where same had been eroded in St. Lucia and England.

[49] I agree with the Respondent's Submissions that:

³⁷ [2017] UKPC 26

³⁸ Supra

³⁹ Cr. App. 12 of 2010 Paponette v The State; Mag. App 68 of 2008 Toney v PC Corraspe; Cr. Apps 13/14 of 2012 Mapp and Bissoon v The State

1. The Practice Direction does not remove the requirement that the Prosecution establish a prima facie case;
2. The Defence Statement as defined in the St. Lucia code is very similar to the Defence Statement outlined in the Practice Direction.

[50] The St. Lucia provision does not include a requirement that an Accused set out particulars of the matters of fact on which he relies for the purpose of his defence as the Practice Direction states. However, in my view, the requirement under the St. Lucia provision that an Accused outline ‘the nature of the defence’ as well as give an indication of the issues with the Prosecution’s evidence and reasons therefor, effectively entails revealing the particulars of fact on which the defence relies.

[51] Notably, while a failure to comply with the disclosure of a defence as provided in paragraph 5(i) of the Practice Direction may attract a sanction, an Accused cannot be convicted solely on the basis of an inference drawn from his non compliance⁴⁰. This is an important safeguard since a judge would be required to instruct a jury (or bear in mind) that if the Prosecution fails to discharge its burden of proof, an Accused cannot be convicted on the basis of his non compliance. As Sir Ronald Weatherup opined⁴¹:

“The onus remains on the prosecution throughout. The requirement for advance disclosure of any positive case that is to made is, in the same manner as advance notice of ‘special defence’, entirely consistent with the presumption of innocence.”

⁴⁰ Practice Directions para 5(2)

⁴¹ **Sexius v The Attorney General of Saint Lucia** [2017] UKPC 26 para 47

[52] In my view the implementation of the Practice Direction is subject to judicial control, in that the Accused can be informed by the court of the need to file a defence statement after disclosure by the Prosecution; warned of the consequences of not doing so; curtail unfair cross examination and decide the terms on which the jury should be directed on the issues. Very importantly, a direction on the issue of any inference to be drawn from a failure to file the Defence Statement, partial compliance with the Practice Direction or inconsistencies between the Accused's case at trial and the Defence Statement, is solely within the discretion of the Court which discretion must be exercised so as to ensure a fair trial⁴².

[53] The Practice Direction therefore does not abrogate an Accused's Right to Silence nor does it limit his Right against self incrimination. Additionally, as indicated above, an Accused is not compelled by the Practice Direction to give evidence at trial.

[54] Indeed, the compliance by the Defence with the Practice Direction may operate to:

- i. provide information that the Prosecution needs to identify any material that should be disclosed;
- ii. prompt reasonable lines of inquiry whether they point to or away from the Accused;
- iii. lead to prosecution discontinuances and prevent delay and inefficiency.

[55] I therefore hold that the Practice Direction does not abrogate the Accused's Constitutional Right to Silence, a fair trial or the Right against self incrimination. I also hold that the Practice Direction is intra vires the Rules.

⁴² *Sexius v The Attorney General of Saint Lucia* [2017] UKPC 26 para 57

[56] In the circumstances, I hold that:

- i. the application is dismissed.
- ii. the parties to make submissions on costs within seven days.

Joan Charles
Judge