

**IN THE COURT OF APPEAL OF BERMUDA
ON APPEAL FROM THE SUPREME COURT
CIVIL APPEAL NO. OF 2021**

**IN THE MATTER OF SECTIONS 8, 9 AND 15(1) OF THE BERMUDA CONSTITUTION
ORDER 1968**

**AND IN THE MATTER OF ARTICLES 9 AND 10 OF SECTION ONE OF THE EUROPEAN
CONVENTION ON HUMAN RIGHTS**

BETWEEN:

THE QUEEN

Appellant

and

BARBI BISHOP

Respondent

NOTICE OF APPEAL

TAKE NOTICE that the Appellant, being dissatisfied with the decision of the Supreme Court contained in the judgment and order of the Hon. Chief Justice Narinder K. Hargun CJ dated 27th August 2021, as stated in paragraph 2, does appeal to the Court of Appeal upon the grounds set out in paragraph 3, and will at the hearing of the appeal seek the relief set out in paragraph 4.

AND the Appellant further states that the names and addresses of the persons directly affected by the appeal are those set out in paragraph 5.

2. The Appellant appeals against the following finding, declaration and Order of the Hon. Chief Justice namely:

- (i) That the said criminal proceedings under section 68(1)(a) of the Electronic Communications Act 2011 are more than necessary to accomplish the legitimate aim being pursued, because the Respondent was facing disciplinary proceedings for gross misconduct based upon the same facts which, if proved, may result in dismissal.
- (ii) That the said criminal proceedings against the Respondent under section 68(1)(a) of the Electronic Communications Act 2011 (*The Queen v Barbi Bishop 20CR00455*) are in breach of the Respondent's fundamental right to freedom of expression under section 9 of the Constitution.

- (iii) That the said criminal proceedings against the Respondent be dismissed.

3. The Grounds of Appeal are as follows.

In respect of s. 9 (1) of the Constitution

- (i) The learned Chief Justice, at paragraph 61-66, misconstrued the principles of constitutional interpretation in deciding whether a measure is proportionate as explained by the Privy Council in e.g. de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69, 80
- (ii) As a result, the learned Chief Justice omitted reference to an overriding requirement which featured in the judgment of Dickson CJ in R v Oakes [1986] 1 SCR 103, from which this approach to proportionality derives: the need to balance the interests of society with those of individuals and groups.
- (iii) As a result, the learned Chief Justice, at paragraph 66, ought not to have considered the fact that the Respondent was facing disciplinary proceedings for gross misconduct based upon the same facts which, if proved, may result in dismissal.
- (iv) Further at paragraph 55 and 56, the Learned Chief Justice placed too much weight on the Guidelines on prosecuting cases involving communications sent via social media failing to recognise that the Guidelines are not intended to and do not lay down any rule of law, bind the Director of Public Prosecutions to follow any particular course in any individual case, nor does it fetter the Director, or her counsel in the proper exercise of any discretion conferred on any of them to consider any particular case or set of circumstances on its own merits.
- (v) As a further result, the learned Chief Justice mistakenly found that he had the jurisdiction to dismiss a criminal prosecution, when the criminal matter was not properly before that jurisdiction.

4. The relief sought from the Court of Appeal is:

- (1) An order that the judgment of the Hon. Chief Justice be set aside, in so far as the learned Chief Justice found and declared:
 - (i) That the present criminal proceedings under section 68(1)(a) of the Electronic Communications Act 2011 are more than necessary to accomplish the legitimate aim being pursued, because the Respondent

was facing disciplinary proceedings for gross misconduct based upon the same facts which, if proved, may result in dismissal.

- (ii) That the said criminal proceedings against the Respondent under section 68(1)(a) of the Electronic Communications Act 2011 (*The Queen v Barbi Bishop 20CR00455*) are in breach of the Respondent's fundamental right to freedom of expression under section 9 of the Constitution.
- (iii) That the said criminal proceedings against the Respondent be dismissed

- (2) An order dismissing the Respondent's claims against the Appellant.
- (3) An order providing for the costs of the application before the Supreme Court and of this appeal.

5. Persons directly affected by the appeal:

- (i) the Appellant
Barbi Bishop
c/o Victoria Greening, Resolution Chambers
- (ii) the Respondent
The Queen
c/o Attorney General's Chambers

Dated this 8th day of October 2021



Attorney-General's Chambers
Attorneys for the Appellant

TO: The Court of Appeal Registry
3rd Floor
Dame Lois Browne-Evans Building
58 Court Street
Hamilton HM 12

AND TO: Victoria Greening, Resolution Chambers
Attorney for the Respondent

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