EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APEAL

COMMONWEALTH OF DOMINICA

DOMHCVAP2018/0004

BETWEEN:

[1] ANTOINE DEFOE
[2] EDINGCOT ST. VALLE
[3] MERVIN JOHN BAPTISTE

Appellants

and

[1] ROOSEVELT SKERRIT
[2] REGINALD AUSTRIE
[3] RAYBURN BLACKMORE
[4] CASSIUS DARROUX
[5] JUSTINA CHARLES
[6] KATHLEEN DANIEL
[7] IAN DOUGLAS
[8] JOHNSON DRIGO
[9] COLIN MC INTYRE
[10] ROSELYN PAUL
[11] IAN PINARD
[12] PETTER ST. JEAN
[13] IVOR STEPHENSON
[14] KELVAR DARROUX
[15] KENNETH DARROUX

Respondents

Before:

The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mr. Mario Michel	Justice of Appeal
The Hon. Mr. Paul Webster	Justice of Appeal [Ag.]

Appearances:

Ms. Cara Shillingford for the Appellants
Mr. Anthony Astaphan, SC with Mr. Lennox Linton and Ms. Jodie Luke for the Respondents

2019: October 3;
2020: May 28.

Civil Appeal — Treating — Election petition — Election offences — Pre-election allegations — Whether a charge against a member of the House of Assembly for treating can be instituted and prosecuted in the Magistrates' Court in Dominica — Exclusive jurisdiction of High Court to hear complaints against elected members — Modification of statute to conform with Constitution — Paragraph 2 of Schedule 2 of Constitution Order — Sections 59 and 61 of the House of Assembly (Elections) Act — Whether section 59 of the House of Assembly (Elections) Act conflicts with section 40(1)(a) of the Constitution — Whether the Magistrate was correct in quashing the summonses and complaints for the offence of treating that were issued against the respondents — House of Assembly (Elections) Act — Magistrate's Code of Procedure Act — The Constitution of the Commonwealth of Dominica

At the conclusion of the general election held in the Commonwealth of Dominica on 8th December 2014, the Dominica Labour Party ("DLP"), led by The Honourable Mr. Roosevelt Skerrit, won the majority of the seats in the House of Assembly and formed the new Government. The 15 respondents were the successful candidates in the election for the DLP. The appellants are members of the United Workers Party ("UWP") which lost the elections.

Prior to the holding of the elections, on the 28th November 2014 and 6th December 2014, two free public concerts were held in Roseau and are alleged to have been sponsored by the respondents. No election petition was filed following the general election. However, on 28th May 2015, several months after the election, the appellants filed criminal complaints in the Magistrates' Court against the respondents. As a consequence, summonses were issued by the learned Magistrate. In the complaints, the appellants alleged that the respondents held the free public concerts for the purpose of corruptly influencing the Dominican electorate to vote for the candidates of the DLP in the upcoming general election; and thereby they had committed the offence of treating contrary to section 56(a) of the House of Assembly (Elections) Act ("the Elections Act" or "the Act").

The respondents thereafter filed a judicial review claim in which they sought to quash the appellants' complaints, and the summonses issued by the Magistrate, on the grounds that: they did not disclose an offence under section 56 of the Elections Act; the complaints are time-barred having been filed outside of the 21-day limitation period under section 65 of the Elections Act for filing an election petition; the complaints were an attempt to subvert the time restriction in section 65; and the Magistrate acted in excess of his jurisdiction in issuing the summonses. The appellants opposed the claim.

The learned judge in the High Court held: (i) that the effect of the charges of treating, brought by the appellants, is to challenge the validity of the election of the respondents; (ii) that no election or return to Parliament may be questioned except by election petition in

accordance with section 65 of the Act; (iii) that it was not the legislature's intention to create a summary jurisdiction to dictate the composition of the House of Assembly; (iv) that section 40(1)(a) of the Constitution confers jurisdiction solely on the High Court to hear election matters; (v) that the Act and the Code preceded the Constitution of Dominica and that any conflict between them and the Constitution must be resolved by construing them in a manner that brings them into conformity with the Constitution; and (vi) that section 59 of the Act which permits trial for the offence of treating by the Magistrate is in conflict with section 40(1)(a) of the Constitution. Accordingly, the judge ruled that the complaints/summonses that were before the Magistrate could not be sustained. The judge further concluded that the learned Magistrate acted in excess of his jurisdiction when he issued the summonses. The judge therefore quashed the complaints and by extension, the summonses. No order for costs was made.

The appellants, being dissatisfied with the decision of the judge, appealed. The appeal revolves around the main issue of whether a charge against a member of the House of Assembly for treating can be instituted and prosecuted in the Magistrates' Court in Dominica and whether the Judge was correct in quashing the summonses and complaints.

Held: (Per Webster JA, [Ag.] and Michel JA, Blenman JA dissenting) allowing the appeal and setting aside the order of the learned judge, ordering the reinstatement of the complaints filed by the appellants and the summonses issued by the Magistrates' Court, discharging the stay of proceedings granted by the High Court, directing the Chief Magistrate to assign a magistrate to hear the complaints filed by the appellants, and ordering each party to bear his or her own costs in the appeal and in the court below, that:

1. Section 59 of the Act permits a Magistrate to summarily try and sentence a person for the offence of treating. This is coterminous with the relief that the appellants were seeking in the complaints that were lodged in the Magistrates' Court. The complaints have nothing to do with an undue election or undue return of any of the respondents and are separate from any possible proceedings before the High Court to prevent a convicted person from retaining his seat as a member of the House of Assembly under section 40 of the Constitution The Magistrate therefore had jurisdiction under section 59 to try the respondents for the offence of treating since such a trial is not a challenge to the validity of their election under the Constitution, and the appellants were entitled to use the summary procedure in section 59 of the Act to charge the respondents for treating, and to do so within the 6-month period prescribed by section 68 of the **Magistrate's Code of Procedure Act** for prosecuting offences in the Magistrates' Court.

   Per Michel JA (concurring):
   There are several types of proceedings the outcome of which can lead to a member of the House of Assembly being disqualified from retaining his seat as a member and which are also not proceedings to invalidate the election of a member of the House. These include bankruptcy proceedings, proceedings to determine a person's citizenship status, or to determine the state of his mental health, or a criminal trial for a charge unrelated to elections but which can result in a sentence exceeding 12 months' imprisonment. It could not be that all such proceedings,

once involving a member of the House of Assembly, must be instituted by an election petition brought within 21 days of the election of the member, as required by section 68 of the Act, especially having regard to the fact that the conduct leading to these proceedings may have occurred more than 21 days after the election of the member.

Wingrove George v The Senior Magistrate and Another SKBHCV2018/0188 (delivered 15th January 2019, unreported) considered; Sections 59 and 61 of the **House of Assembly (Elections) Act** Cap 2.01 of the Laws of the Commonwealth of Dominica (1951, last amended 1990) considered; Section 68 of the **Magistrate's Code of Procedure Act** Cap. 4.20 of the Laws of the Commonwealth of Dominica (1891, last amended in 1991) applied; Section 40 of the **Constitution of the Commonwealth of Dominica** enacted as Schedule 1 of the Commonwealth of Dominica Constitution Order 1978 (S.I. 1978 No. 1027) considered.

2. If there is a challenge to the validity of a member's election, the challenge must be pursued by an election petition under section 65 of the Elections Act. There is no requirement that a claim under section 40 must be brought by election petition, except in relation to a challenge to the validity of an election under section 40(1) of the Constitution. Such a challenge does not come into play in this case. If the respondents are convicted, section 40(1)(d) may operate to cause that member to vacate his seat. This stage has not been reached in this case. In the circumstances, section 59 of the Elections Act is not inconsistent with section 40 or any other provision of the Constitution, and an elected member of the House of Assembly can be prosecuted by a magistrate for the offence of treating.

   Section 40(1) of the **Constitution of the Commonwealth of Dominica** enacted as Schedule 1 of the Commonwealth of Dominica Constitution Order 1978 (S.I. 1978 No. 1027) considered; **The Attorney General of St Christopher and Nevis v Dr. Denzil Douglas** SKBHCV2018/0008 (delivered 2nd July 2018, unreported); SKBHCVAP2019/0007 (delivered 12th March 2020, unreported) considered.

3. The judge's decision effectively created two types of offenders under the Elections Act, namely ordinary citizens who can be charged, convicted and sentenced under section 59, and members of the House of Assembly who are immune from prosecution under the Act. This duality of offenders is not apparent from a reading of the Elections Act. If it was intended to create immunity from prosecution for members of the House the lawmakers would have had to use very clear language. Neither the Act nor the Constitution contains language suggesting that this was Parliament's intention,. The judge therefore erred when she, by her decision, created two classes of offenders under the Elections Act and found that the Magistrate did not have jurisdiction to try the respondents for the offence of treating.

   Sharma v Brown-Antoine and others (2006) 69 WIR 379 considered; **Eric**

Matthew Gairy et al v The Attorney General of Grenada (1999) 59 WIR 174 considered; Sections 59 and 65 of the **House of Assembly (Elections) Act** Cap 2.01 of the Laws of the Commonwealth of Dominica (1951, last amended 1990) considered.

4. While the High Court has an exclusive jurisdiction to try election petitions challenging the validity of a member's election, the jurisdiction to try the offence of treating is not exclusive to the High Court. The judge therefore erred by giving the expression "exclusive jurisdiction" a wide interpretation, covering not just matters relating to the election of members, but also any matter that may ultimately affect the composition of the House of Assembly. The authorities relating to the High Court's exclusive jurisdiction to try election petition cases are those dealing with the validity of the election of members to the House, which is not germane to this appeal. They are therefore not relevant, far less decisive, and do not affect the overall finding that the Magistrate has jurisdiction to try the respondents for the offence of treating.

   Ram v The Attorney General and Others [2019] CCJ 10 (AJ) distinguished.

Per Blenman JA (dissenting):

1. The allegations of treating which formed the basis of the complaints and summonses are very traditional examples of undue election which are dealt with by election petitions. The allegations therefore served to question whether the respondents were validly elected, or at the very least, whether they could have retained their seats on the basis that they have committed the offence of treating. As a matter of law, once there is a conviction in the Magistrates' Court for the offence of treating, disqualification of the member would inevitably follow. To say that challenges to the validity of an elected member or the ability to retain his seat are triable in the Magistrates' Court under section 59, but that the sanction of disqualification can only be imposed by the High court under section 61 would make a mockery of the jurisprudence. It would, therefore, be artificial to try to bifurcate the process by which election disputes of this nature are heard and determined. It is clear that sections 59 and 61 should be read together.

   Sections 59 and 61 of the **House of Assembly (Elections) Act** Cap 2.01 of the Laws of the Commonwealth of Dominica (1951, last amended 1990) considered; **Ram v The Attorney General and Others** [2019] CCJ 10 (AJ) considered.

2. Where it is alleged that an elected member is disqualified from sitting in the House, by virtue of some act done prior to an election, a challenge to the validity of that election must be by way of election petition in the High Court. The recent decision in **Ram v The Attorney General and Others** has definitively and authoritatively put this matter beyond any dispute. The courts in the independent Commonwealth Caribbean have consistently interpreted constitutional provisions which are in *pari materia* with section 40(1)(a) of the Constitution of Dominica as

conferring exclusive and exclusionary jurisdiction on the High Court to hear allegations of pre-election infractions against members of the House. There is no difference between treating at common law and the statutory offence of treating. Therefore, sections 59 and 61 of the Act do not apply to a case where, as here, the pre-election allegations of treating are made against elected members. The correct forum to ventilate such issues is, therefore, the High Court.

Gladys Petrie and others v The Attorney-General and others (1968) 14 WIR 292 applied; **William Bruce Williams v Emanuel Henry Giraudy and Eudes Bourne** (1975) 22 WIR 532 applied; **Ram v The Attorney General and Others** [2019] CCJ 10 (AJ) applied; **Russell (Randolph) et al v Attorney General of St. Vincent and the Grenadines** (1995) 50 WIR 127 applied; **Eugene Hamilton v Cedric Liburd and Others** SKBHCVAP2005/0011; SKBHCVAP2005/0011A (delivered 3rd April 2006, unreported) applied; **Julian Prevost v Rayburn Blackmore et al** DOMHCV2005/0177 (delivered 14th September 2005, unreported) applied; **Wingrove George v The Senior Magistrate and Another** SKBHCV2018/0188 (delivered 15th January 2019, unreported) distinguished; **The Attorney General of St Christopher and Nevis v Dr Denzil Douglas** SKBHCV2018/0008 (delivered 2nd July 2018, unreported); SKBHCVAP2019/0007 (delivered 12th March 2020, unreported) distinguished; Section 40 (1)(a) of the **Constitution of the Commonwealth of Dominica** enacted as Schedule 1 of the Commonwealth of Dominica Constitution Order 1978 (S.I. 1978 No. 1027) considered; Sections 59 and 61 of the **House of Assembly (Elections) Act** Cap 2.01 of the Laws of the Commonwealth of Dominica (1951, last amended 1990) considered.

3. The distinction between election offences and election charges or allegations in relation to elected members is merely linguistic, denoting two sides of the same coin– the Constitution confers exclusive jurisdiction on the High Court to hear any pre-election allegation of treating by way of election petitions. Consequently, where section 59, when read together with section 61, grants jurisdiction to the Magistrate (to try the offence of treating), in so far as it concerns elected members, it cannot coexist peacefully with the Constitution. The framers of the Constitution could never have intended for the High Court and the Magistrates' Court to have concurrent jurisdiction to hear and determine pre-election allegations of treating by elected members in relation to their ability to take up or retain their seats. Section 59, when read together with section 61, in so far as these provisions concern the pre-election infraction of treating by elected members, should therefore be read down or modified under paragraph 2 of Schedule 2 of the Constitution Order so as to bring it into conformity with section 40(1)(a) of the Constitution. Accordingly, the learned judge did not err in holding that the Magistrates' Court did not have the jurisdiction to hear the complaints against the respondents.

Sharma v Brown-Antoine and others (2006) 69 WIR 379 distinguished; **Eric Matthew Gairy et al v The Attorney General of Grenada** (1999) 59 WIR 174

distinguished; Section 40 (1)(a) of the **Constitution of the Commonwealth of Dominica** enacted as Schedule 1 of the **Commonwealth of Dominica Constitution Order** 1978 (S.I. 1978 No. 1027) considered; Sections 59 and 61 of the **House of Assembly (Elections) Act** Cap 2.01 of the Laws of the Commonwealth of Dominica (1951, last amended 1990) considered; Paragraph 2 of Schedule 2 of the **Commonwealth of Dominica Constitution Order** 1978 (S.I. 1978 No. 1027) applied; **Hinds v R** [1977] AC 195 applied.

4. Having found that the Magistrate did not have the jurisdiction to hear the criminal complaints, the judge was justified in quashing the summonses and complaints against the respondents. It was not open to the judge to hold otherwise since to do so would have resulted in internal inconsistency in the decision or judgment and would have been contrary to the express dictates of the Constitution. There is therefore no basis to impugn the decision of the judge to quash the complaints and by extension, the summonses.

JUDGMENT

[1] **BLENMAN JA**: I have had the benefit of reading, in draft, the judgment of my learned brother Webster JA [Ag.], with which my learned brother Michel JA has concurred, and I am unable to agree with his reasoning and conclusion. This appeal interrogates the very important issues of the constitutionality of provisions of a pre-independence legislation in circumstances where section 40(1)(a) of the **Constitution of the Commonwealth of Dominica**,[1] (the "Constitution"), which was enacted at independence in 1978 and based on the Westminster model, addresses the same matter. This appeal examines the constitutionality of section 59 of the **House of Assembly (Elections) Act**[2] (the "Act" or the "Elections Act") when viewed in light of section 40(1)(a) of the Constitution. This appeal further exemplifies the failure of legislative reform to keep pace with decades of jurisprudential developments in relation to the jurisdiction of election petitions or pre-election allegations, the purpose of which is to question the validity of the election of a member of the House of Assembly ("the House" or "the House of Assembly"). At the heart of this appeal is the issue of whether in relation to elected

[1] Enacted as Schedule 1 of the Commonwealth of Dominica Constitution Order 1978 (S.I. 1978 No. 1027).
[2] Cap 2.01 of the Laws of the Commonwealth of Dominica (1951, last amended 1990).

members, pre-election allegations of treating (which is a well-known election infraction that is usually heard by the High Court) can be heard by the Magistrates' Court. As a corollary, this appeal examines the question whether the High Court of the Commonwealth of Dominica ("Dominica") has exclusive and exclusionary jurisdiction to hear complaints of pre-election allegations of treating that are made against elected members of the House.

[2] This appeal also discusses the important role of the court in modifying pre-independence laws so as to bring them in conformity with the mandates of the written Constitution of Dominica. It recognises that the Constitution is no ordinary legislation but is the fundamental law and therefore all legislation must comport with its dictates.

[3] It is important to indicate the circumstances which gave rise to the present appeal.

Background

[4] On 8th December 2014, a general election was held in the Commonwealth of Dominica.[3] They were mainly contested by the Dominica Labour Party ("DLP") and the United Workers Party ("UWP"). The Honourable Roosevelt Skerrit led the DLP. He, together with the other 14 named respondents (together referred to as "the respondents"), contested the elections.

[5] Prior to the holding of the elections, two music concerts were held and are alleged to have been sponsored by the respondents, who are members of the DLP. The DLP won the elections, and the Honourable Roosevelt Skerrit, together with the other respondents, were elected to the House of Assembly and formed the government. No election petition was filed following the general election on 8th December 2014.

[3] Another general election was held in Dominica on 6th December 2019 and the Hon. Roosevelt Skerrit and the DLP were returned to government.

[6] Several months after the 2014 elections, Mr. Antoine Defoe, Ms. Edingcot St. Valle and Mr. Mervin John Baptiste ("the appellants"), who are members of the UWP, filed criminal complaints against the respondents on 28th May 2015. As a consequence, summonses were issued by a learned Magistrate. In the complaints, the appellants alleged that the respondents had committed the offence of treating contrary to section 56(a) of the Election Act, by their involvement in the musical concerts.

[7] The summonses were served on the respondents for them to appear before the Magistrate and answer to the criminal complaints of treating. Having been served with the summonses, the respondents filed a judicial review claim in which they sought various remedies and orders including the quashing of the summonses. The appellants, who were the interveners in the judicial review claim, opposed the claim. Against that background, several issues arose for determination by the High Court.

Proceedings in the court below

[8] Among the issues that the respondents raised on their judicial review claim are two very important matters, namely: (i) the issue of the proper construction of, among other things, section 56 of the Elections Act; and (ii) whether it is permissible or contrary in law for any person to ignore the time limits under the Act and make and file a criminal complaint for the offence of treating against an elected member of the House of Assembly several months after the elections; an offence which carries the consequence of disqualification on conviction. It must be highlighted that as part of the case management of the fixed date claim, the respondents, who were the claimants in the court below, filed the claimants' list of issues in which they specifically raised the question of whether or not section 68 and the other relevant provisions of the **Magistrate's Code of Procedure Act**[4] ("the Code") have been impliedly or expressly repealed by the provisions of the Constitution and the Act which expressly created and vested the election

[4] Cap. 4.20 of the Laws of the Commonwealth of Dominica (1891, last amended in 1991).

jurisdiction in the High Court.

[9] It is clear that against that background, and having read the judgment in the court below, three main issues arose for the High Court to determine.

Issues in the court below

[10] The essential issues that arose in the High Court to be determined were: (i) whether the Magistrate had jurisdiction to hear complaints for the offence of treating in relation to elected members; and (ii) whether the Magistrate possessed the jurisdiction to question the constitution of the House of Assembly. Equally of significance, was the issue of whether section 59 of the Act was inconsistent with section 40(1)(a) of the Constitution and if so, whether it needed to be modified so as to bring it into conformity with the Constitution. Mainly, the respondents sought to have the complaints and by extension, the summonses in the Magistrates' Court struck out on the basis that it was unconstitutional for the Magistrates' Court to try the offence of treating pursuant to section 59 of the Elections Act. In the High Court, their primary argument, as reflected in the judgment, was that with the advent of the written Constitution in Dominica, the allegation of treating could only have been dealt with by way of election petition filed in the High Court. [5]

Judgment in the Court Below

[11] The learned judge held that: (i) the effect of the charges of treating that were brought by the appellants was to challenge the validity of the election of the respondents; (ii) that no election or return to Parliament may be questioned except by election petition and purported to rely on section 65 of the Act; (iii) it was not the 'intention of the legislature to create a summary jurisdiction to dictate the composition of the [House of Assembly]';[6] (iv) section 40(1)(a) of the Constitution confers jurisdiction solely on the High Court to hear election matters; (v) the Act and the Code preceded the Constitution of Dominica and that any conflict between

[5] Ms. Shillingford quite properly accepted that the issue in the court below was whether the appellants should have filed their complaints within 21 days as distinct from 6 months from the date of the election.
[6] See: paragraph 66 of the judgment in the court below.

them and the Constitution must be resolved by construing them in a manner that brings them into conformity with the Constitution; and (vi) section 59 of the Act which permits trial for the offence of treating by the Magistrate is in conflict with section 40(1)(a) of the Constitution. which provides that the High Court shall have jurisdiction to hear any question regarding the validity of the election of a candidate to the House of Assembly. Accordingly, the judge ruled that the complaints/summonses that were before the Magistrate could not be sustained. The judge further concluded that the learned Magistrate acted in excess of his jurisdiction when he issued the summonses. The judge therefore quashed the complaints and by extension, the summonses. No order for costs was made.

Grounds of appeal

[12] Being dissatisfied with the decision of the judge, the appellants have appealed and have filed thirteen grounds of appeal. There is no need to recite them in detail for reasons which will become clear shortly. However, it is of significance that during oral arguments before this Court, Ms. Shillingford did not pursue ground of appeal 12 in which the appellants complained that the constitutionality issue was neither raised nor pleaded before the judge and therefore it was not open to the judge to make any finding in that regard. Learned counsel, Ms. Shillingford, acknowledged that the "crux of the appeal is the constitutionality of the Elections Act and the Code in relation to section 40(1) of the Constitution". Ms. Shillingford entirely resiled from her original position and acknowledged during her oral arguments in this Court that in the claimants' list of issues, they had specifically raised the question of, "whether the relevant provisions of the Code have been expressly or impliedly repealed by the Constitution and the Elections Act which expressly created and vested election jurisdiction to determine the election offences by elected members in the High Court". She further explained that the constitutional issue was raised in the High Court and that once it was raised, the court had a duty to properly address it.

Refined issues on appeal

[13] Based on the grounds of appeal that were pursued in this Court and taking into account Ms. Shillingford's concessions and refinement of her grounds of appeal during her oral arguments, three main issues arose for this Court's determination:

(i) Whether the learned judge erred, as a matter of law, in concluding that section 40(1)(a) of the Constitution conferred exclusive and exclusionary jurisdiction on the High Court to hear complaints against elected members in relation to their election;

(ii) Whether the learned judge erred as a matter of law in holding that section 59 of the Act, when read with section 61, conflicts with section 40(1)(a) of the Constitution and must be modified to bring it into conformity with the Constitution; and

(iii) Whether the learned judge erred in quashing the complaints and by extension, the summonses for the offence of treating that were issued against the respondents.

Appellants' submissions

[14] In order to underpin the real issues in this appeal, as indicated above, I will recite the submissions of counsel in some detail. As earlier indicated, Ms. Shillingford, during oral submissions before this Court, abandoned her complaint that the learned judge dealt with the issue of constitutionality in circumstances where it was neither pleaded nor raised in the arguments before the judge. She conceded that the respondents/claimants, in the claimants' list of issues, had specifically raised the issue of constitutionality of section 59 and this was a live issue before the learned judge. Permeating the entirety of the oral arguments before this Court, were the issues of the constitutionality of section 59 of the Elections Act in circumstances which questioned whether the learned judge had erred in holding that it was unconstitutional. Before this Court, it would be correct to say that the oral arguments focused on whether the learned judge erred in concluding that

section 59 of the Act infringed section 40(1)(a) of the Constitution and therefore had to be read down, with the latter conferring exclusive jurisdiction on the High Court; and secondly, whether the judge erred in holding that the offence of treating must be dealt with by way of election petition.

[15] Ms. Shillingford posited that section 40(1)(a) of the Constitution does not confer exclusive jurisdiction on the High Court to hear election matters. To support her contention, Ms. Shillingford, throughout her oral submissions, emphasised that sections 59 and 61 must be read together. She further argued that the clear and unambiguous words of section 56(a) of the Act, when read together with sections 59 and 61, indicated that the Magistrate had jurisdiction to hear the criminal complaints of treating that were filed against the respondents, who were elected members. She highlighted that section 59 of the Act expressly states that every person who is guilty of bribery, treating or undue influence under the provisions of the Act is liable on summary conviction to a fine of $5,000.00 or imprisonment for 6 months. She further contended that the use of the words "every person" at the beginning of the section shows that this was so, whether or not the person prosecuted is an elected member. She underscored the fact that a person who is found guilty of the offence of treating is likely to be disqualified from retaining their seat if they are a member. Ms. Shillingford argued that section 59 of the Act, is consistent with section 40(1)(a) of the Constitution, though predating it.

[16] Ms. Shillingford maintained that section 59 and section 61 of the Act must be read together so that an elected member who is summarily convicted for the offence of treating would be disqualified from serving as a member of the House for 7 years. It was no part of her argument that section 59 of the Act should be desegregated from section 61. In fact, to the contrary, she was adamant and repeatedly underscored that they should be read together so as to disqualify the respondents from sitting. In my view, it was quite wise for her not to have argued for the separate treatment of the two sections, for reasons which will become apparent shortly.

[17] Ms. Shillingford stated that there was no conflict between section 59 of the Act and section 40(1)(a) of the Constitution and therefore, the judge erred in so holding. She purported to rely on **Watson (Lambert) v R**[7] and the Board's decision in **Boyce (Lennox) and Joseph (Jeffrey) v R**[8] for the proposition that existing laws should not be held to be inconsistent with the Constitution. She nevertheless acknowledged that paragraph 2 of Schedule 2 to the **Commonwealth of Dominica Constitution Order**[9] (the "Constitution Order") stated that existing laws shall, from the commencement of the Constitution, be construed with such modifications, as may be necessary to bring them into conformity with the Constitution and the Supreme Court Order.

[18] Ms. Shillingford's overarching submission was that section 59 of the Act was constitutional and she further referred to sections 32(3), 35(3) and section 35(4) of the Constitution in support of her rejection of the proposition that it (the Constitution) provides a separate regime for elected members which is distinct from the Act. She also argued that there is a clear distinction between the matters that can be the subject of an election petition and what amounts to an election offence, insisting that the court was engaged in determining whether an election offence had been committed and this had nothing to do with an election petition.

[19] Finally, Ms. Shillingford contended that the Constitution recognises the regime for election offences as stated in the Act thereby allowing election offences to coexist with the regime in the Constitution providing for election petitions. Emphasising that what was before the judge was not an election petition, she therefore asserted that section 40(1)(a) was irrelevant to the appeal at bar. However, as an alternative argument, Ms. Shillingford was adamant that section 40(1)(a) of the Constitution did not state that the High Court should have exclusive and exclusionary jurisdiction to hear and determine election complaints against elected members.

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[7] (2004) 64 WIR 241.
[8] (2004) 64 WIR 37.
[9] Cap 1.01, Laws of the Commonwealth of Dominica (S.I. 1978 No. 1027).

[20] Relying on section 20 of the Code, Ms. Shillingford maintained that the Magistrate did not exceed his jurisdiction in issuing the summonses. In support of her contention that the summonses were properly issued, she referred this Court to the observations that were made by the High Court in **Wingrove George v The Senior Magistrate and Another**[10] as authority for the proposition that the validity of the election of a member of the House of Assembly can be challenged in court other than by way of an election petition. She pointed out that the learned judge in **Wingrove** was of the opinion that, in relation to an election offence, it was permissible to try an elected member of the House of Assembly through the ordinary criminal process in the Magistrates' Court.

[21] In view of all of the above, Ms. Shillingford urged this Court to allow the appeal and set aside the judgment in its entirety.

Respondents' submissions

[22] Learned Senior Counsel, Mr. Anthony Astaphan, argued that the learned judge quite correctly held that section 40(1)(a) of the Constitution conferred exclusive and exclusionary jurisdiction in the High Court to determine all election matters and offences concerning or committed by an elected member. He said that, in so far as elected members of Parliament are concerned, this was a new and exclusive jurisdiction created by section 40(1)(a) of the Constitution. He maintained that the Magistrate has no jurisdiction to hear election charges against elected members. He asserted that section 68 of the Act requires that a petition alleging the commission of the election offence of treating committed by an elected member be filed within 21 days. Mr. Astaphan, SC emphasised that section 59 of the Act predated section 40 of the Constitution and therefore if there is any apparent conflict between the two, the latter prevails. He further argued that there is no distinction between an election petition and an election offence since section 68 of the Act expressly addresses corrupt practices. He reminded the Court that treating is a corrupt practice and that the law in relation to corrupt practices, which

[10] SKBHCV2018/0188 (delivered 15th January 2019, unreported).

is cognisable under section 68(1) of the Elections Act, must be read in conjunction with section 40 of the Constitution.

[23] In support of his contention, Mr. Astaphan, SC, referred this Court to section 32(3) of the Constitution and stated that, based on a close reading of that section, two separate and distinct processes were created by the Act; one that is relevant to elected members and the other is not. If the allegation is made against an elected member, it must be addressed in an election petition as mandated by section 40 of the Constitution. However, if the offence is alleged to have been committed by a person who has not been elected, the ordinary criminal law process will be engaged.

[24] Mr. Astaphan, SC reminded this Court that for over a century, treating has been regarded as an election offence and if someone is found guilty, that can invalidate the election. He further argued that all of the established authorities, both from this Court and the Board, have long established that if there are any allegations of corrupt practices, of which treating is one, against an elected member it must be prosecuted by way of an election petition. He opined that this principle is so well-known that he did not see the need to cite any authority for this proposition.

[25] Mr. Astaphan, SC, further explained that the matter of which the appellants complain in the summonses falls within the classification of claim of undue election. He relied on numerous authorities from this Court in support of his argument that the High Court has exclusive and exclusionary jurisdiction to deal with an undue election or return to determine election offences by a candidate. These include **Browne v Francis-Gibson and Another**,[11] **Russell (Randolph) et al v Attorney-General of St. Vincent and the Grenadines**,[12] **Eugene Hamilton v Cedric Liburd and Others**,[13] and **Julian Prevost v Rayburn Blackmore et**

[11] (1995) 50 WIR 143.
[12] (1995) 50 WIR 127.
[13] SKBHCVAP2005/0011; SKBHCVAP2005/0011A (delivered 3rd April 2006, unreported).

al.[14] He was adamant that the Magistrates' Court does not have jurisdiction to hear election charges against elected members.

[26] To buttress his argument, he relied on the Caribbean Court of Justice ("the CCJ") decision of **Ram v The Attorney General and Others**[15] which, he argued, confirmed the exclusive and exclusionary jurisdiction of the High Court to hear matters which question the validity of the election of an elected member. He underscored the fact that the presentation of election petitions has very strict rules which are mandatory including timelines within which the petitions must be filed. Mr. Astaphan, SC, reiterated that it was not the intention of the framers of the Constitution to permit persons to circumvent section 40(1)(a) and, by extension, the very important safeguards that are attached to election petitions, by proceeding with criminal charges in the Magistrates' Court. He said that this is, in essence, what the appellants have tried to do by bringing election charges in the Magistrates' Court many months after the general election was held in Dominica.

[27] Mr. Astaphan, SC, reiterated that the learned judge was correct in her analysis and application of the law. He made several criticisms of the judgment in **Wingrove**. Nothing will be gained from reciting them. However, suffice it to say that he indicated that the criticisms in **Wingrove** of the judgment of the court below are not grounded in a correct appreciation of the facts in the appeal at bar or the law. In relation to the appeal at bar, he further said that the judge in **Wingrove**:

> "…wholly failed in paragraph 56 of the judgment to appreciate and consider that the High Court was vested with exclusive jurisdiction to determine whether the election offence of Treating created by the Act was committed, and that under the common law and the Act a finding of Bribery or Treating goes to the very root, lawfulness or validity of an election. The judge compounded his error when he said that there is no provision in the Act which says that the offence of Treating is a ground on which an election may be challenged or questioned. This finding or ruling runs counter to not only section 68 of the Act, but jurisprudence of an ancient vintage from the United Kingdom and Commonwealth."

[14] DOMHCV2005/0177 (delivered 14th September 2005, unreported).
[15] [2019] CCJ 10 (AJ).

[28] Mr. Astaphan, SC was adamant that the appellants could take no refuge in **Wingrove**. He contended that the appellants' argument is flawed and in any event the position that was adopted by the judge in **Wingrove** has been roundly rejected by the CCJ. He posited therefore, that it is clear that the learned judge in the court below did not err in concluding that section 59 of the Elections Act should be modified so as to bring it into conformity with section 40(1)(a) of the Constitution, and that the judge acted quite properly in quashing the summonses that were issued against the respondents. In concluding, Mr. Astaphan, SC, urged this Court to dismiss the appeal in its entirety.

Discussion

[29] Before addressing the issues that have been identified, I will first refer to the relevant constitutional and statutory provisions.

The Constitution

[30] Paragraph 2 of Schedule 2 of the Constitution Order provides as follows:

> "The existing laws shall, as from the commencement of the Constitution, be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution and the Supreme Court Order."

[31] Section 32 outlines the circumstances which would disqualify persons from being elected or appointed as a member of Parliament. Section 32(3) states that:

> "If it is so provided by Parliament, a person who is convicted by any court of law of any offence that is prescribed by Parliament and that is connected with the election of members or who is reported guilty of such an offence by the court trying an election petition shall not be qualified, for such period (not exceeding seven years) following his conviction or, as the case may be, following the report of the court as may be so prescribed, to be elected or appointed as a member."

[32] Section 40(1) confers jurisdiction on the High Court to determine questions of membership to Parliament and states:

> "The High Court shall have jurisdiction to hear and determine any question whether –
> (a) any person has been validly elected as a Representative or Senator;
> (b) any person has been validly appointed as a Senator;

(c) any person who has been elected as Speaker from among persons who were not members of the House was qualified to be so elected or has vacated the office of Speaker; or
(d) any member of the House has vacated his seat or is required, under the provisions of section 35(4) of this Constitution, to cease to perform any of his functions as a member of the House."

[33] Section 117, provides for constitutional supremacy and states that:

> "This Constitution is the supreme law of Dominica and, subject to 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."

The House of Assembly (Elections) Act

[34] In relation to the offence of treating, section 56 provides:

> "The following persons shall be deemed guilty of treating within the meaning of this Act:
> (a) every person who corruptly, by himself or by any other person, either before, during or after an election, directly or indirectly, gives, or provides or pays wholly or in part the expenses of giving or providing any food, drink, entertainment, or provision to or for any person for the purpose of corruptly influencing that person, or any other person, to vote or to refrain from voting at the election, or on account of that person or any other person having voted or refrained from voting at the election;
>
> (b) every voter who corruptly accepts or takes any such food, drink, entertainment, or provision."

[35] Section 59 of the Act stipulates the penalty for a person found guilty of treating. It provides:

> "Every person who is guilty of bribery, treating or undue influence under the provisions of this Act is liable on summary conviction to a fine of five thousand dollars or to imprisonment for six months."

[36] Section 61 stipulates that any person who has been found guilty of treating or any other named offence, shall, in addition to any other punishment, be disqualified from: (i) being registered as an elector or from voting; (ii) or from being elected or if elected before his conviction, then from retaining his seat.

[37] Section 65 allows persons to challenge the election of a member by petition. It reads as follows:

> "A petition complaining of an undue return or undue election of a member of the House of Assembly, in this Act called an election petition, may be presented to the High Court by any one or more of the following persons:
>
> (a) some person who voted or had a right to vote at the election to which the petition relates;
>
> (b) some person claiming to have had a right to be returned at the election;
>
> (c) some person alleging himself to have been a candidate at the election."

[38] Section 66 provides for the trial of election petitions and reads:

> "Every election petition shall be tried before the High Court in the same manner as a suit commenced by a writ of summons. At the conclusion of the trial, the Judge shall determine whether the member of the House of Assembly whose return or election is complained of or any and what other person was duly returned or elected, or whether the election was void, and shall certify the determination to the President and, upon the certificate being given, the determination shall be final; and the return shall be confirmed or altered, or a writ for a new election shall be issued, as the case may require, in accordance with the determination."

[39] Section 68 outlines the time-critical procedure to be followed for presenting an election petition. It provides that election petitions should be presented within 21 days and outlines the other conditions which must be satisfied to present same.

[40] Issues 1 and 2 are inextricably linked. It is therefore convenient to address them together.

Issue 1 – Whether the learned judge erred, as a matter of law, in concluding that section 40(1)(a) of the Constitution conferred exclusive and exclusionary jurisdiction on the High Court to hear complaints against elected members in relation to their election

Issue 2 – Whether the learned judge erred as a matter of law in holding that section 59 of the House of Assembly (Election) Act, when read with section 61, conflicts with section 40(1)(a) of the Constitution and must be modified to bring it into conformity with the Constitution

[41] Let me say straightaway that the constitutionality of section 59 of the Act permeated the entirety of the oral arguments before this Court. Also, it would have been unfair to criticise the learned judge for having grappled with the constitutionality issues that were joined before the court below since this is precisely what she was required to do. In view of the belated concession by Ms. Shillingford in this Court, who quite professionally and commendably acknowledged that the constitutional issue was before the learned judge, it would be unwarranted to criticise the judge for answering the questions that were specifically posed to the court.

[42] The gravamen of this appeal scrutinises the interrelationship between two legal frameworks. The first is the Elections Act, a pre-independence statute, and the second is the Constitution. In order to answer the two issues identified above, it has to be determined whether section 59 of the Act (which provides for a summary conviction in relation to the offence of treating), when read together with section 61 (which disqualifies persons from being elected or if elected before conviction, then from retaining their seat), conflicts with section 40(1)(a) of the Constitution and if this is so, what, if anything, is to happen.

[43] It is well-settled that electoral laws are dynamic and respond to constitutional principles and tenets. In independent Commonwealth Caribbean countries such as Dominica, it has been long recognised that matters of constitutional importance must be determined in the High Court. It is self-evident that the question of whether a member of the House of Assembly has been validly elected or should retain his seat in the House is one of very high constitutional importance. This view is reinforced by the fact that section 40 of the Constitution specifically addresses this matter. Buttressing this, are the philosophical or policy bases of the electoral laws specifically in relation to elected members, the main aim of which is to disqualify persons who have infringed the law from sitting and not merely to secure convictions of elected members. Indeed, there have been consistent judicial pronouncements to this effect; they are well known and do not need any recitation. Equally, of constitutional importance is the certainty of governance which should

be determined expeditiously.

[44] Ms. Shillingford has made much about the fact that it was not an election petition before the judge. That much was obvious and beside the point. The essential question the judge in the court below had to grapple with, and did frontally address, was the constitutionality of section 59 of the Act in its pristine form vis-à-vis section 40(1)(a) of the Constitution. Even without Ms. Shillingford's concession on this point, I fail to see how the judge could have been properly criticised for closely examining the constitutional issues that were raised by the respondents before the High Court.

[45] In my view, the judge gave a careful and coherent judgment, setting out the relevant statutory provisions and the guiding authorities, and properly analysed the relevant law and applied it correctly in arriving at her conclusion. The judge carefully examined the oral arguments made, much of which was repeated before this Court. By way of elaboration, the judge held that the High Court has exclusive and exclusionary jurisdiction to hear elections charges in relation to elected members. The judge also held that the effect of the complaints of treating is to, in fact, question and challenge the validity of the elections of the 15 named respondents. This can only be questioned by election petition complaining of an undue election or undue return in the High Court. The judge therefore granted certiorari removing the complaints to the High Court and quashing the complaints and summonses.[16]

[46] It is important to reiterate that this Court has dealt with election petitions in which allegations of treating have been made. There is therefore nothing novel about this. I turn now to briefly discuss the allegation of treating in relation to the elected members in the present appeal. There is no doubt that the learned judge quite correctly determined that the effect of the complaints was to assert that the respondents had engaged in the corrupt practice of treating. The question therefore that has to be resolved is whether the judge correctly concluded that

[16] See paragraph 77 of the judgment below.

such a challenge ought to have been by way of election petition. At the heart of this judgment, is the determination of whether section 40(1)(a) of the Constitution confers exclusive and exclusionary jurisdiction on the High Court (the "election court") to hear those matters. It would be surprising if the judge had refused to examine the comprehensive legislative scheme provided for questioning whether a person was validly elected and whether an election petition should have been filed given the totality of the circumstances. To criticise the judge for so doing seems to be unfair, for reasons which will be revealed shortly, considering the respondents were elected members of the House.

[47] The pre-election infraction of treating is of great antiquity.[17] No authority needs to be provided for the well-established principle that treating is an election infraction which can be instituted against an elected member and has the consequence of disqualification from sitting in the House if found guilty. This is so whether it exists at common law or is statute based. There is a strong stream of jurisprudence from the Commonwealth spanning several decades in which judicial recognition has been given to this actuality and therefore the authorities need not be recited. In any event, section 56 of the Act recognises treating as a corrupt practice.

[48] For decades now, the courts in the independent Commonwealth Caribbean have consistently interpreted constitutional provisions which are in *pari materia* with section 40(1)(a) of the Constitution of Dominica as conferring exclusive and exclusionary jurisdiction on the High Court to hear allegations of pre-election infractions against members of the House. It is also settled law that the question of whether or not a member has been validly elected is determined by way of election petition in the High Court. This has long been given judicial recognition in the locus classicus, **Gladys Petrie and others v The Attorney-General and others,**[18] where Sir Harold Bollers CJ enunciated that the court's jurisdiction in this regard is not at large and not inherent; it is derived from the Constitution. The

[17] See for example: Wallingford Case 19 LT 766; Rochester Borough Case (1892) 4 O'M & H 156.
[18] (1968) 14 WIR 292. See also: Seecomar Singh And Another v R C Butler (1973) 21 WIR 34 and Devan Nair v Yong Kuan Teik [1967] 2 All ER 34 per Lord Upjohn.

learned Chief Justice, as he then was, having examined article 71 of the Constitution of Guyana, which is analogous to section 40 of the Constitution of Dominica, stated:

> "...I must accept the submission of the Attorney-General on the first point as being sound, and refuse to entertain this application on the ground that this court has no jurisdiction since **the questions raised in the summons pertain to a class of questions enunciated by art 71 of the Constitution exclusively within a special jurisdiction of the court, and must be presented by way of an election petition after the result of the election has been made known**." (emphasis added)

[49] Davis CJ in the Court of Appeal of Grenada and the West Indies Associated States in **William Bruce Williams v Emanuel Henry Giraudy and Eudes Bourne**,[19] in interpreting the meaning of section 34(1) of the **Constitution of Saint Lucia**, which is similarly worded to section 40, stated that:

> "On a perusal of the provisions of the Constitution, this section is the only one which confers jurisdiction on the High Court in election matters. Counsel for the applicant submitted that this section did not give jurisdiction to the High Court in election petitions but rather dealt with membership only. I do not agree with this submission. Section 34 (1) (a) states that the court shall have jurisdiction to hear and determine any question whether any person has been validly elected as an elected member of the House of Assembly. **In my view, this sub-paragraph gives jurisdiction to the court in election petitions and the means by which a question is determined whether a person is validly elected or not is by an election petition. The position is made quite clear by the provisions of sub-s (5) (a), (b) of the same section**…" (emphasis added)

Those above observations must be accorded every respect, and I respectfully adopt them.

[50] For reasons which will become apparent shortly, based on the existence of the written Constitution which confers exclusive jurisdiction on the High Court to hear election petitions by virtue of section 40(1)(a), the distinction between election offences and election charges or allegations in relation to elected members is merely linguistic, denoting two sides of the same coin.

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[19] (1975) 22 WIR 532.

[51] Section 117 of the Constitution, the supremacy provision, is also brought into focus. It is trite law that the Constitution of Dominica is supreme. The supremacy of the Constitution ought to prevail and it is the duty of the courts to ensure that that obtains at all times. This much has been borne out in the seminal Privy Council decision of **Hinds v R**[20] and needs no extensive recitation. The modification provision as stated in paragraph 2 of Schedule 2 of the Constitution Order also arises for consideration. The latter provision stipulates that if there is any conflict between another law and the Constitution, that law has to be modified so as to bring it into conformity with the Constitution and the Supreme Court Order.

[52] In so far as section 40(1)(a) of the Constitution addresses elected members, based on the supremacy of the Constitution**,** it seems clear that that would take precedence over any conflict that may exist in section 59 of the Act in relation to elected members. It has been recognised in a strong stream of jurisprudence from this Court, and other courts of the Commonwealth, that the question of whether an elected member has been validly appointed or has the ability to retain his seat has to be determined by the election court. I shall revert to this shortly to refer to a few well-known authorities which bear this out. It is equally settled that the election court possesses exclusive jurisdiction to hear election petitions which are used to question whether a person has been validly elected. The only point of divergence between the two sides is whether the High Court has the exclusive and exclusionary jurisdiction to determine pre-election allegations of treating.

[53] In fairness to Ms. Shillingford, it was no part of her case that section 59 should be bifurcated or read separately from section 61 in so far as the Magistrates' jurisdiction and the consequences of that jurisdiction are concerned and, in my view, quite wisely so. It is well-established that the primary purpose of the electoral laws in relation to elected members is to bar members who have been disqualified from sitting. The allegations of treating which formed the basis of the complaints and summonses are very traditional examples of undue election which are dealt

[20] [1977] AC 195.

with by election petitions. Irrespective of how the appellants have formed their case, it must be remembered that during her oral arguments, Ms. Shillingford was adamant that the appellants desired to have the respondents be disqualified from sitting if they were found guilty of perpetuating the infractions of treating. Stripped of all its niceties, it questions whether the respondents were validly elected or at the very least, whether they could have retained their seats on the basis that they have committed the offence of treating. It is beyond dispute that these are matters that traditionally fall within the ambit of election petitions.

[54] Furthermore, it is noteworthy that the allegations of treating that are made against the respondents were said to have occurred before the general election of 2014. The Commonwealth Caribbean jurisprudence has consistently held that these matters must be ventilated by way of an election petition. In my view, if there was the slightest room for debate as to the correctness of this position, this matter has been definitively settled once and for all by the CCJ decision in the **Ram** case. I shall treat with the **Ram** case in more detail shortly.

[55] In view of Ms. Shillingford's consistent arguments to the contrary, I am not of the view that this Court could unilaterally go against her arguments in which she underscored the need for sections 59 and 61 to be read together, and instead seek to separate them. In any event, I am of the view that it is eminently sensible to read them together. It is indisputable that once an elected member is convicted of an offence under the pristine section 59, the member would inevitably be disqualified from sitting. This, Ms. Shillingford quite properly recognised to be the correct legal effect of sections 59 and 61. I have no doubt that to allow the Magistrate to try cases of treating against elected members, in effect, would be to give the Magistrate jurisdiction to determine the validity of the election of elected members of the House. For emphasis, this could not have been the intention of the framers of the Constitution in an independent Dominica, even though there were very good policy reasons for that obtaining in colonial Dominica. All of this is self-evident and need no further expansion. It is worth repeating that it is

jurisprudentially accepted that in Commonwealth Caribbean countries which have written Constitutions that are based on the Westminster model, electoral laws, wherever they are found, must comport with the dictates of the Constitution, the latter which has supremacy.

[56] The fact that the election court has the exclusive and exclusionary jurisdiction to deal with the question of whether or not a person has been validly elected has for decades been definitively determined by our courts and courts in the wider Commonwealth. The framers of the Constitution, in their wisdom, determined that the validity of an election, and hence membership of Parliament, should be determined quickly according to statutes. It has been judicially recognised that a claimant cannot approach the court other than by the prescribed petition.[21] Several cases from the Commonwealth Caribbean spanning over decades bear this out and, in my view, remain good law. One such case which demonstrates the uncompromising and stringent requirement of the election petition procedure is **Daven Joseph v Chandler Codrington et al**.[22]

[57] Indeed, there is much learning on this point. In **Russell (Randolph) et al v Attorney General of St. Vincent and the Grenadines**, the issue before this Court was whether the High Court had jurisdiction to grant a declaration under section 96 of the **Constitution of Saint Vincent and the Grenadines** (the redress clause) that a Constituency Boundaries Commission should have been appointed following a census under section 33(3)(a) of the Constitution. This declaration would have prevented a general election from being held before the boundaries had been reviewed. However, the court observed that the ultimate question for determination was whether the persons had been validly elected as representatives. This would have therefore fallen in section 36 of the **Constitution of Saint Vincent and the Grenadines** and excluded from section 96; the latter being the section under which the appellants applied to the High Court for relief.

[21] For example, in Browne v Francis–Gibson and Another (1995) 50 WIR 143), it was stated that the specific rules of filing election petitions must be followed. Failure to do so is fatal.
[22] ANUHCV2009/0147 (delivered 30th June 2009, unreported).

The learned Sir Vincent Floissac CJ stated that:

> "The jurisdiction to determine questions as to the validity or otherwise of elections to the House of Assembly and other questions referred to in section 36 of the Constitution has been excluded from the jurisdiction conferred by section 96 because the former jurisdiction is a peculiar and special jurisdiction. It is essentially a parliamentary jurisdiction conveniently assigned to the judiciary by the Constitution and by legislation."

[58] Furthermore, in **Eugene Hamilton v Cedric Liburd**, Alleyne CJ held that the jurisdiction conferred on the court by virtue of section 36(1) of the **Constitution of the Federation of Saint Christopher and Nevis**, to hear and determine questions of whether any person has been validly elected as a representative to the National Assembly, is a special jurisdiction which is distinct from the ordinary jurisdiction of the High Court in civil matters. Similarly, in **Julian Prevost v Rayburn Blackmore**, it was observed that the relevant statutes and related regulations provided a scheme by which election disputes are to be resolved. Rawlins J, as he then was, stated that:

> "It is a special jurisdiction with mandatory rules, which are designed to ensure, inter alia, that disputed election proceedings are brought to completion expeditiously. This is because it is not desirable that the legitimacy of a government should long remain in question while the Parties pursue a lengthy pleading process before an election dispute is determined."

Accordingly, he concluded that the effect of Mr. Prevost's challenge was to invoke the jurisdiction of the election court to invalidate the election. In light of this, the proceedings should have been brought by way of an election petition rather than as a constitutional challenge by way of fixed date claim form.

[59] In view of the above judicial pronouncements, which I adopt, I am not of the view that the framers of the Constitution intended that two parallel systems should co-exist in relation to the validity of elected members. I fail to see on what basis and the wisdom on which it could be bifurcated where Magistrates could hear criminal complaints and thereafter the law would follow for the elected member to be disqualified. It is clear that there is no other method permissible for seeking to

challenge matters of this nature. Whatever is stated in sections 59 and 61 of the Act, in relation to elected members, must be read subject to the constitutional dictate in section 40(1)(a) of the Constitution and the modification provision. To put it another way, since the advent of the Constitution the jurisdiction, in so far as it concerns elected members in independent Dominica, has been taken from the Magistrates' Court altogether. Therefore, the fundamental difficulty with the appellants' submissions is that they failed to address the fact that section 40(1)(a) of the Constitution, when read in conjunction with the strong stream of jurisprudence, effectively ousts the Magistrates' jurisdiction.

[60] It is noteworthy that in Dominica, lay magistrates have the jurisdiction to hear both civil and criminal matters. If the appellants are correct, it would mean that the lay magistrates have jurisdiction to hear this highly important matter of constitutional significance. This would be a remarkable proposition.[23] It could not have been the intention of the framers of the Constitution which conferred exclusive and exclusionary jurisdiction on the High Court to hear election matters to retain that colonial relic.

[61] I have no doubt that sections 59 and 61 do not apply to a case where, as here, the pre-election allegations of treating are made against elected members of the House of Assembly. In so far as elected members are concerned, there is no real distinction between election offences and election allegations since the election court is clothed with jurisdiction to hear and determine all allegations of election infractions, such as treating and bribery, that are made against members of the House. The situation would have been vastly different if the respondents were not elected members. It is evident that this question has to be approached on the basis that the persons against whom the allegations of treating are made are elected members of the House. I am of the opinion that the correct forum to ventilate these issues is the High Court.

[23]This would also mean that persons who are not attorneys-at-law would have the power to convict elected members of pre-election infractions with the consequence of that conviction unseating them on those bases.

[62] I agree with Ms. Shillingford that one has to look at the conjoint effect of sections 59 and 61. For emphasis, section 61 stipulates that a person who has been found guilty of treating or other offences, shall, in addition to any other punishment, be disqualified from being registered as an elector or from voting or from being elected or if elected before conviction, then from retaining his seat. Once there is a conviction in the Magistrates' Court for the offence of treating, disqualification of the member follows as sure as day follows night. Since it is inevitable that disqualification would follow, it would be artificial to try to bifurcate the process by which election disputes of this nature are heard and determined. To hold that a Magistrate has jurisdiction to hear criminal complaints for the offence of treating under section 59, and thereafter the law would follow, which is in effect to say that the disqualification in section 61 would follow, is incongruous. It is clear therefore that sections 59 and 61 should be read together. To say that challenges to the validity of an elected member or the ability to retain his seat are triable in the Magistrates' Court, but that the sanction of disqualification can only be imposed by the election court would make a mockery of the jurisprudence. In my view, there is no sensible way to separate the two. The Constitution has created a comprehensive legislative framework in so far as it relates to elected members.

[63] My conclusions in relation to issues 1 and 2 are foreshadowed by my acceptance that the judge was plainly correct to conclude that the election court has exclusive and exclusionary jurisdiction to determine whether a person was validly elected or can retain his seat. To put the matter beyond any doubt, section 59 of the Act does not provide a facility for ignoring the constitutional provisions which specifically addresses elected members, namely section 40(1)(a). There are many prerequisites that must be satisfied before an election petition can be filed and there are obvious policy reasons for this which need not be stated in this judgment, but it is essential to reiterate that they provide for certainty and promptitude which are critical to the proper and clear functioning of the House of Assembly.

[64] I am fortified in my conclusion that section 59, when read together with section 61, in so far as these provisions concern the pre-election infraction of treating by elected members, should be read down or modified so as to bring it into conformity with section 40(1)(a) of the Constitution. In my view, there is no impediment placed before the judge to have prevented her from concluding that section 40(1)(a) of the Constitution prevailed and overrode the jurisdiction of the Magistrates' Court. It is simply that the Constitution has provided a complete and distinct legislative scheme that has to be followed if there are challenges to the validity of elected members of the House based on allegations of pre-election infractions of treating. On any view of the facts, the appellants' appeal amounts to a challenge to the validity of the election of the 15 named respondents as members of the House. Against that background, it seems to me that the force of criticism of the judge's decision is nullified.

[65] To the extent that section 59 of the colonial Elections Act, in its pristine form, when read together with section 61, is in conflict with section 40(1)(a) of the Constitution, in so far as the jurisdiction to hear a pre-election allegation against an elected member is concerned, there is an obvious conflict. In these circumstances, paragraph 2 of Schedule 2 of the Constitution Order enables it to be read down so as to bring it into conformity with the Constitution.

[66] I am fortified in the above view, and from a reading of section 68 of the Act which requires an election petition to be filed in 21 days and outlines other strict procedural rules in relation to petitions, that such requirements are mandatory. I would go further and state that allegations of pre-election infractions against elected members cannot be dealt with by a side wind under a criminal complaint in the Magistrates' Court. The fact that a determination of such a criminal complaint in the Magistrates' Court, if successful, will inevitably undermine the composition of the House of Assembly cannot be ignored. In my respectful view, this clearly amounts to a circuitous manner to challenge the validity of the elected members of the House.

[67] It will become apparent that the obiter dicta in **Wingrove**, in so far as it relates to the validity of members of the House, cannot stand in view of the guiding principles that were clearly pronounced by the CCJ in **Ram**. I will expand on this in more detail. Indeed, there are good policy reasons, as elucidated in the case of **Ram**, for the swift determination of disputes as to the validity of an election of a member to the House or whether a member of the House can retain his/her seat. These are self-evident and include the need to have certainty as to the valid composition of the House of Assembly. It is apparent that there is the need to satisfy the public interest on the validity of an election and hence membership of Parliament should be quickly determined according to the strict rules and procedure that are applicable to election petitions. It need not be said that there is extensive public interest in securing, at an early date, a final determination of any challenges to the composition of the House of Assembly.

[68] It is well-established that cases must be read in their contexts. I have no doubt that the appellants cannot properly draw comfort from the dicta in **Wingrove** since it conflicts with a long line of authorities of this Court. In any event, the facts in **Wingrove** are markedly different and distinguishable from the appeal at bar since it had absolutely nothing to do with whether a member of Parliament was validly elected. Therefore, the observations made by the judge in **Wingrove** could not undergird the discussion of the validity or otherwise of an elected member to the House. In a word, it is irrelevant to the issues in this appeal. At the heart of **Wingrove** was the issue of whether the acting Supervisor of Elections had acted unlawfully in that capacity. More to the point, and of relevance, are the decisions of the court that frontally examine the validity of election of members of the House in circumstances where allegations of elections misbehaviour have been made that preceded the general election.

[69] In this regard, there is a strong stream of jurisprudence from the Commonwealth Caribbean that has been consistently developed and applied which has settled that all such matters must be dealt with by way of election petitions. This has

culminated in the recent authoritative pronouncement of the CCJ in **Ram** which has crystallised the election law, at least in relation to Guyana. It is noteworthy that the CCJ is the apex court of Dominica. In my view, **Ram** is highly persuasive if not binding on Dominica. A close reading of **Ram** indicates that it is authority for the proposition that if an elected member does something prior to the election which would disqualify him from sitting in the House, any challenge to the validity of that election must be by way of election petition.

[70] In **Ram**, Mr. Persaud, a member of the current government, joined the opposition in voting for the motion of no confidence in the said government. This was done three and a half years after the general election held on 11th May 2015. It was also found out that Mr. Persaud had been a Canadian citizen and the Constitution of the Co-operative Republic of Guyana, by virtue of section 155(1)(a), disqualifies non-Guyanese and dual citizens from being elected to membership of Parliament. One of the issues that was considered in the CCJ was whether the court had jurisdiction to enquire into the issue of Mr. Persaud's disqualification from being a member of the National Assembly. President Saunders, in delivering the judgment of the court, having examined the statutory regime for determining questions of qualification of members of Parliament in the National Assembly (Validity of Elections) Act and the Constitution of the Co-operative Republic of Guyana, held that claims which are brought to challenge the validity of a person to be elected to the National Assembly must be by way of election petitions. The learned President Saunders, in delivering the judgment of the court, stated that:

> "Under the existing rules prescribed by parliament, therefore, it matters not that the election date has long passed and the information about the member's disqualification did not surface until after the time limits set out by parliament. Nor can a claimant approach the court by a method other than the prescribed election petition. The National Assembly (Validity of Elections) Act provides a complete code for challenging the validity of an election on the ground that a person is not qualified to be elected. The Act provides a 28-day period from the election within which the Respondents could challenge Mr. Persaud's election. This time having expired, the court lacked jurisdiction to disqualify Mr. Persaud."

[71] Prior to this conclusion, the learned President Saunders, commenting on the restrictive jurisdiction of the High Court in these matters and having reviewed the relevant legislation and authorities made the authoritative judicial pronouncements at paragraphs 38 to 39 that:

> "[38] In our view, assumption by the courts of an 'inherent power' to interrogate qualifying and disqualifying criteria in relation to election to the National Assembly will constitute overreach on the part of the judiciary. It will evince a trespass by the courts on the affairs of parliament by disregarding the method and manner by which the Constitution specifically requires the courts to determine such questions. As the National Assembly (Validity of Elections) Rules indicate (in the words italicised and bolded at [36] above), the Court has no jurisdiction to determine matters which must be raised by way of an election petition filed otherwise than as prescribed by Parliament. The court cannot take it upon itself, in violation of those Rules, to enlarge its jurisdiction to disqualify a member of the Assembly because the member was aware on nomination day that he was disqualified but nevertheless consented to have his name placed on the List. If parliament desires the court to have such an enlarged jurisdiction, then parliament must so specifically provide. In light of these circumstances the Court, by a majority, refused a request by the Attorney General to allow him to adduce fresh evidence to the effect that Persaud was aware that, as a dual citizen, he was not qualified to be placed on his party's list. That evidence, even if admitted and established, would be of no significance to the outcome of these proceedings. Neither Persaud's awareness or another member's lack of such awareness could alter the fact of the court's lack of jurisdiction.
>
> [39] The view that the court's jurisdiction is a restricted one is not novel. It has been long recognised and made clear in cases such as the Guyanese High Court decision of *Petrie v A-G* that the Court's jurisdiction in this regard is not at large and not 'inherent.' The jurisdiction is derived from the Constitution. The Constitution specifies that this jurisdiction is as ordained by Parliament. What is prescribed by parliament in this regard must strictly be followed by the courts. This means that, for example, the time limitations set out in legislation governing the presentation and progression of an election petition are construed as condition precedents to the validity of the petition. Rawlins CJ explained this in *Joseph v Reynolds* noting that:
>
> > 'In keeping with the strict approach, our courts have generally insisted that the provisions in elections legislation must be strictly complied with ... Our election courts have consistently stated that they have little or no discretion to waive non-compliance with the applicable statutory requirements. Accordingly, the consistent result is that failure to comply is fatal to the petition rendering it a nullity, unless the court finds that the failure goes to form. The jurisprudence in our courts states that time and other electoral

> proceedings statutory requirements are conditions precedent to instituting a proper electoral challenge, which are mandatory and peremptory. The election court has no power to extend time or allow amendments filed out of time unless election legislation so provides.'"

President Saunders further enunciated as follows:

> "[40] There are two important policy reasons for the Constitution denying the court an inherent jurisdiction in this realm and allowing that jurisdiction to be specifically conditioned by rules laid down by parliament. Firstly, as previously indicated, this is a jurisdiction that concerns membership of parliament itself. As an element of the separation of powers, the Constitution recognises that it is Parliament, and not the court under any inherent jurisdiction of the court, that should be at liberty to define the contours of a jurisdiction that peculiarly concerns membership of Parliament. Secondly, as Bollers CJ stressed in *Petrie*, it is in the public's interest that the validity of an election and hence membership of parliament should be quickly determined according to strict rules and procedures that are pre-determined by parliament."

[72] From a close reading of **Ram**, it is beyond dispute that it has decided that if the plaintiffs' claim relates to pre-election allegations and the effect of it is to challenge the validity of an elected member of the House to sit, this can only be dealt with by way of an election petition. **Ram** has effectively put an end to any scintilla of lingering doubts that may have existed. Much of the argument that was advanced by Ms. Shillingford was precisely similar to the primary submissions in **Ram** that were advanced very cogently by eminent senior counsel and rejected by the CCJ. Ms. Shillingford did not and could not neutralize or disarm the respondents' reliance on **Ram**, the latter providing a comprehensive answer to the appeal; namely, whether the respondents against whom the allegations of treating are made can retain their seat. In my view, there is no difference between treating at common law and the statutory offence of treating. It is not necessary or practical for the sake of this judgment to differentiate between it as an election offence or a charge brought pursuant to an election petition. I remind myself that Ms. Shillingford argued that the election petition cases are not relevant. Ms. Shillingford's primary submission is that election offences are different from charges. With respect to her skilful and forceful arguments, on the face of it, this

submission in relation to elected members of the House has nothing to the point. It is a notable feature of this case that the appellants have not provided this Court with any authorities in which the pre-election allegations of treating or any other pre-election infraction, which questions (in a country with a written Constitution) the validity of an elected member, were dealt with in the Magistrates' Court.

[73] In my view, and of great significance, is the fact that the CCJ held in **Ram** that pre-election infractions, the effect of which could undermine the validity of a member of the House to sit, must be prosecuted by way of an election petition. It must be noted that in **Ram**, one of the principal arguments advanced was that the respondent should not have retained his seat as he had been guilty of conduct which undermined the validity of his election. The question which the CCJ answered has far wider significance than Mr. Persaud's eligibility to run but also encompassed the authoritative answer to the question of whether he could have retained his seat. A notable feature of **Ram** is that the appellants sought by various constitutional routes to have the court rule that Mr. Persaud ought not to have been seated. It clearly emerges from **Ram** that the court had no doubt that the effect of the appellants' case was to question the validity of election to the House and this could only be done by election petition. I am in agreement with the cogent views of Mr. Astaphan, SC that there is no discernible difference between the principles that emanate from **Ram** and those contended for by the respondents in this appeal. I therefore apply them to the facts of this case without any reservations. I am fortified that the obiter dicta by the High Court in **Wingrove** cannot stand in view of the law as laid down in **Ram**.

[74] Section 40(1)(a) of the Constitution has placed great impediment to section 59 of the Act having any life in relation to elected members of the House. The two cannot co-exist peaceably. Similar challenges to that which Ms. Shillingford launched in this appeal were canvassed in **Ram** before the CCJ and they were all rejected. **Ram** has effectively put to rest any vestiges that remained as to what is the correct procedure to follow in similar circumstances. It is quite impossible to

conclude that in the face of **Ram**, there is any merit to the criticisms that have been levelled against the learned judge. The judge directed herself impeccably on the law and applied it well. By way of emphasis, President Saunders' pronouncements in **Ram** are the guiding principles that must be applied to the appeal at bar.

[75] What becomes evident from a review of the jurisprudence is that, in so far as the appellants had any grounds to mount the challenge on the basis of allegations of the pre-election infraction of treating, they should have done so by way of an election petition in the election court. Furthermore, the regime provided for by the Constitution must trump the old one, in keeping with the principles of constitutional supremacy and the modification provision. Accordingly, in light of the foregoing, I have no hesitation in preferring Mr. Astaphan's persuasive submissions on the correctness of this position.

[76] Turning briefly to the passing comment made by Ms. Shillingford about discrimination, in my judgment, this comment amounts to a mischaracterisation of the case. I am of the opinion that it would be injudicious of me to comment fully on the matter of a breach of the Constitution on the basis of discrimination due to the fact that I have not had the benefit of forensic arguments from the parties on this point. It suffices to say that there is nothing to that comment. The short answer is that the law has provided a separate statutory regime which must be complied with if the allegations are made against elected members – this is by way of election petition. By way of emphasis, if the respondents were not members of the House, the ordinary process of the law could have been used to determine whether they had committed any offences. There is no issue here of discrimination. It is simply that there are two distinct and separate regimes that are relevant to two distinct and separate categories of persons, namely elected and unelected persons.[24] Judicial recognition is given to the fact that it has been several decades since the

[24] It must be noted that if an elected member commits any offence other than one related to his election to office, he can be prosecuted under the criminal law.

constitutions in our respective countries conferred exclusive and exclusionary jurisdiction on the High Court. To do as Ms. Shillingford has invited this Court, would be to view the matter from an entirely wrong perspective.

[77] Though forcefully, yet courteously, presented by Ms. Shillingford, I am unable to accept the appellants' submissions in the face of highly persuasive authority of the Commonwealth Caribbean and the binding authority of the CCJ decision of **Ram**. In my view, based on a close reading of section 40(1)(a) of the Constitution, it is clear that the framers of the Constitution intended that disputes which questioned the validity of the elected members to the House must be heard and determined by the election court in accordance with the procedure and timelines stipulated in the Act.[25] There is no basis for holding that in independent Dominica, a person can challenge the validity of a person being elected to the House of Assembly other than by way of the election petition.[26] In a word, it is impermissible post the Constitution to challenge the validity of an elected member through a criminal complaint in the Magistrates' Court. The jurisprudence has long moved on and the position that the court may have taken in pre-independence Dominica based on section 59 and 61 of the Act can no longer be the law. It cannot sit peaceably with section 40(1)(a) of the Constitution. Indeed, when the Magistrates' Court had the jurisdiction to hear these election matters, this was in colonial times. However, in closing the circle of independence, this jurisdiction has now been exclusively conferred on the High Court.

[78] It is obvious from all that I have said, that I have arrived at the conclusion that the High Court has exclusive and exclusionary jurisdiction to hear pre-election allegations about the validity of the offices of elected members. Accordingly, I am unable to accept that the judge erred in her analysis of the law. What is evident is that the legislature in Dominica has failed to amend its statute so as to make it conform with several decades of consistent jurisprudence from this Court that

[25] See paragraph 90 of Ram v Attorney General et al [2019] CCJ 10 (AJ).
[26] See Elsroy Nathaniel Dorset v The Honourable G.A. Dwyer Astaphan and others SKBCV2007/0259 (delivered 21st December 2007, unreported).

address pre-election allegations made against members of the House of Assembly. It is usual for Parliament to continually revise its statutes so as to ensure that they comport with the Constitution and the consistent development of the law by the highest courts.

[79] If Ms. Shillingford's arguments are correct, it would mean that the appellants could have filed election petitions against the respondents alleging treating within 21 days of the hearing of the election. If the petitions were heard and they were unsuccessful, the appellants would, on the same allegations of treating, have been able to file complaints in the Magistrates' Court within 6 months of the 2014 elections on the same basis of treating. In my view, it is sufficient to state those propositions in order for them to be rejected.

[80] For the sake of completeness, Ms. Shillingford's reliance on the dicta of Byron CJ in **Eric Matthew Gairy et al v The Attorney General of Grenada**[27] and the Board in **Sharma v Brown-Antoine v Others**[28] which seems to have fallen on fertile ground with the majority, in my view, is totally misplaced. Indeed, she took the comments out of context since in the case at bar, the factual circumstances were markedly different from the circumstances in the cases relied on. In the present case, there was legal recourse to the appellants by way of filing election petitions pursuant to section 40(1)(a) of the Constitution. While the observations made by the Board and Byron CJ are excellent ones, in my view, they are not applicable to the facts that undergird this appeal. In sum, the guiding principle is that where allegations are made against elected members in relation to infractions committed prior to elections, in order to unseat them, election petitions must be filed. In view of everything that I have indicated, it is difficult to find any error with the learned judge's reasoning and conclusion. This is contrary to the view essayed by the majority opinion which seems to indicate that the judge should have adopted a restricted approach by bifurcating section 59 from section 61.

[27] (1999) 59 WIR 174).
[28] (2006) 69 WIR 379.

[81] In view of the totality of the circumstances, there is no reason for me to deviate from the well-reasoned and comprehensive decision of the learned judge. The judge's reasoning and conclusion coincide with mine namely that in independent Dominica, the Magistrates' Court has no jurisdiction to hear or try the election offences of treating in relation to members of the House. This is a jurisdiction that falls exclusively within the province of the High Court and must be exercised on the basis of an election petition. Consequently, I am unable to accept the appellants' submissions and would dismiss their appeal in its entirety and affirm the judgment of the learned judge.

[82] In passing, I observe that **The Attorney General of St Christopher and Nevis v Dr Denzil Douglas**[29] is a vastly different and distinguishable case from the appeal at bar. **Douglas** concerned post-election infractions that were committed approximately 5 months after the general election was held in Saint Christopher and Nevis. Given the time sensitive nature of election petitions, in that they must be filed within 21 or 28 days of the return date, as the case may be according to section 95(1)(a) of the **National Assembly Elections Act**, it could not have been reasonably argued that the Attorney General of Saint Christopher and Nevis ought to have filed an election petition. In my respectful view, there is no doubt that the procedure adopted by the Attorney General was the correct procedure and the only one available to him based on the factual circumstances of that case since the offending act occurred several months after the deadline for filing election petitions.

[83] Before addressing the third issue, it should be underscored that Ms. Shillingford was, during her oral arguments, adamant that if the respondents were convicted in the Magistrates' Court, they would be automatically disqualified from sitting in the House of Assembly for 7 years. With this in mind, I pause to observe that it has been more than 5 years since the general elections in 2014; another election has

[29] SKBHCV2018/0008 (delivered 2nd July 2018, unreported); SKBHCVAP2019/0007 (delivered 12th March 2020, unreported)

since been held and there has been no resolution as to whether the 15 named respondents were validly elected in the 2014 elections. This state of affairs, to my mind, very clearly undermines the statutory framework designed to facilitate an expeditious and conclusive resolution of questions as to the validity of elected members by the election court. It cannot be that with such a matter of great public interest, and for which the framers of the Constitution have gone to great lengths to create this special statutory regime by virtue of the Constitutional provisions, persons could be allowed to evade the restrictions imposed simply by adopting another form of proceeding to challenge the validity of elected members; that is, through instituting criminal complaints in the Magistrates' Court. With the greatest of respect to Magistrates, I go further to state that it would be strange, to say the least, that matters of such significance which properly fall within the jurisdiction of the election court, could be tried by the Magistrates' Court, a court for which the judiciary does not enjoy the same security of tenure as the election court and upon which the Constitution has not vested this exclusive and exclusionary jurisdiction. The matter of selecting a government ought to be speedy and decisive. The public interest cannot be served if the administration of the affairs of the country is held in limbo based on the uncertainty as to who are the validly elected members of parliament.

Issue 3 - Whether the learned judge erred in quashing the complaints and by extension, the summonses issued against the respondents for the offence of treating

[84] In view of the conclusions above on the first two issues, it has become unnecessary to address the third issue since those conclusions would effectively dispose of the appeal. However, out of respect for the submissions of learned counsel, I will now address the third issue namely whether the judge erred in quashing the criminal complaints and summonses against the respondents.

[85] This is a short point. The obvious answer is that the judge was justified in quashing the summonses and therefore there is nothing objectionable, since the

judge having found that the Magistrate did not have the jurisdiction to hear the criminal complaints against the respondents thereafter quashed the said complaints. In essence, the basic issue is what the judge should do, having determined that the learned Magistrate has no jurisdiction to hear the summons against elected members. The answer was axiomatic. I therefore reject the appellants' submissions that the judge erred in quashing the complaints and summonses, straightaway.

[86] It was not open to the judge to hold otherwise since to do so would have resulted in internal inconsistency in the decision or judgment. This determination followed on the two previous issues as day follows night. To hold otherwise would be contrary to the express dictates of the constitutional provision and significantly undermine the doctrine of supremacy of the Constitution. In any event there is no force in the appellants' submissions. It is apparent from all that has been stated that there is no basis to impugn the decision of the judge to quash the complaints and by extension, the summonses. Accordingly, the appeal on this third issue also fails.

[87] In my view, this appeal highlights the need for the Parliament of Dominica to revise its pre-independence statutes so as to ensure that they comport with the Constitution of the Commonwealth of Dominica and the decades of consistent judicial pronouncements.

Costs

[88] In view of the public importance of this appeal and taking into account rule 56.13(6) of the **Civil Procedure Rules 2000**, the appropriate order is that each party shall bear its own costs on this appeal.

Summary of conclusions

[89] Based on the totality of the circumstances, the following represents the summary of conclusions:

(i) The 1978 Constitution of the Commonwealth of Dominica is the fundamental and supreme law. Any written law that is inconsistent with the Constitution has to be modified so as to bring it in conformity with the Constitution. Paragraph 2 of Schedule 2 of the Order mandates courts to modify written laws so as to ensure that they comport with the Constitution.

(ii) Section 40(1)(a) of the Constitution confers exclusive and exclusionary jurisdiction on the High Court to hear allegations of pre-election infractions which are said to have been committed by members of the House of Assembly in relation to the validity of elections.

(iii) Treating is a well-recognised election infraction which, if proven, serves to undermine the validity of election of a member of the House of Assembly.

(iv) The well-established procedure for challenging the validity of the election of a member of the House is by way of an election petition. Section 59 of the Elections Act predates the Constitution of Dominica and in so far as section 59 of the Act, in its pristine form, when read together with section 61, conflicts with section 40(1)(a) of the Constitution, the Court has a duty to modify it so as to bring it into conformity with section 40(1)(a). Consequently, where section 59 grants jurisdiction to the Magistrate, in so far as it concerns elected members, it cannot coexist peacefully with the Constitution. Indeed, the framers of the Constitution could never have intended for the High Court and the Magistrates' Court to have concurrent jurisdiction to hear and determine pre-election allegations of treating by elected members in relation to their ability to take up or retain their seats.

(v) The learned judge quite properly modified or read down section 59 of the Elections Act, a pre-independence legislation passed in 1951, so as to ensure that it did not infringe section 40(1)(a) of the Constitution. Accordingly, the learned judge properly held that the Magistrates' Court did not have the jurisdiction to hear the complaints against the respondents.

(vi) The learned judge also correctly held that the appellants' challenges to the validity of the respondents' election on the basis of pre-election infraction of treating should have been by way of election petition in the High Court. Accordingly, the judge did not err in quashing the complaints filed in the Magistrates' Court and the summonses that were issued against the respondents.

(vii) The appropriate costs orders on this appeal shall be that each party shall bear its own costs.

Disposition

[90] For the reasons given, I am unable to accept the appellants' submissions and would dismiss the appeal in its entirety and affirm the judgment of the learned judge. The parties shall bear their own costs on this appeal.

[91] I gratefully acknowledge the assistance of all learned counsel in providing succinct and helpful submissions.

[92] **WEBSTER JA [AG.]**:I have read in draft the judgment of my learned sister, Blenman JA, and, for the reasons set out below, I disagree with the order dismissing the appeal.

Background

[93] A detailed account of the background facts and the submissions of counsel, Mr. Anthony Astaphan, SC for the respondents and Ms. Cara Shillingford for the

appellants, is set out in the judgment of Blenman JA and are repeated in this judgment only where necessary.

[94] At the conclusion of the general election held in the Commonwealth of Dominica on 8th December 2014 the Dominica Labour Party ("DLP") led by Mr. Roosevelt Skerrit won the majority of the seats in the House of Assembly and formed the new Government. The 15 respondents were the successful candidates in the election for the DLP. The appellants are members of the United Workers Party ("UWP") which lost the election.

[95] Shortly before the election, the DLP held two free public concerts in Roseau. The appellants contend that the concerts amounted to the election offence of treating. They filed complaints in the Magistrates' Court against the respondents alleging that they had committed the offence of treating contrary to section 56 of the **House of Assembly (Elections) Act**[30] ("the Act" or "the Elections Act").[31] The particulars of the complaints, and the summonses issued by the Magistrate, are that on the 28th November 2014 and 6th December 2014 the respondents held free public concerts at Windsor Park in Rousea, Dominica, with performances by international gospel and reggae stars, for the purpose of corruptly influencing the Dominican electorate to vote for the candidates of the DLP in the upcoming general election, contrary to section 56 of the Elections Act.

[96] The appellants did not apply by election petition under section 65 of the Elections Act to challenge the election of the respondents and there is nothing in the complaints or the summonses that challenge the validity of the election of any of the respondents. The complaints were filed within the six-month limitation period specified in section 68 of the **Magistrate's Code of Procedure Act**[32] for bringing complaints in the Magistrates' Court.

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[30] Cap 2.01 of the Laws of the Commonwealth of Dominica (1951, last amended 1990).
[31] Copies of the complaints are at pages 60-65 of the record of appeal.
[32] Cap. 4.20 of the Laws of the Commonwealth of Dominica (1891, last amended in 1991).

[97] Having been served with the summonses, the respondents filed an application for judicial review in the High Court seeking to set aside and quash the complaints on the grounds that they did not disclose an offence under section 56 of the Elections Act; the complaints are time-barred having been filed outside of the 21 day limitation period under section 65 of the Elections Act for filing an election petition; they are an attempt to subvert the time restriction in section 65; and the Magistrate acted in excess of his jurisdiction in issuing the summonses. It is noteworthy that there is no allegation in the claim that the appellants' constitutional rights were breached, and there was no claim for relief under the **Constitution of the Commonwealth of Dominica**[33] (the "Constitution").

[98] The contested application was heard by the learned trial judge ("the Judge"), who found that the appellants' attempt to charge the respondents with the election offence of treating could not be heard by a magistrate. The charges could only be heard by the High Court by way of an election petition brought in accordance with the provisions of the Elections Act. The Judge concluded that the learned Magistrate ("the Magistrate") acted in excess of his jurisdiction by entertaining the complaints and issuing the summonses and quashed them.

[99] Being dissatisfied with the Judge's decision the appellants appealed to this Court listing 13 grounds of appeal. The grounds of appeal raise several important issues that revolve around the main issue in this appeal of whether the Magistrate had jurisdiction to try the respondents for the statutory offence of treating. In resolving the issues, I have divided this judgment into five sections:

I. The trial of offences under the Elections Act;
II. The role of the Constitution;
III. Consequences of the Judge's findings;
IV. Miscellaneous points; and
V. Conclusion and disposal.

[33] Enacted as Schedule 1 of the Commonwealth of Dominica Constitution Order 1978 (S.I. 1978 No. 1027).

Part I – Trial of election offences under the Elections Act

[100] The trial of election offences is dealt with in part V of the Elections Act which is appropriately headed "Election Offences". Section 56 defines the offence of treating in this way-

> "The following persons shall be deemed guilty of treating within the meaning of this Act:
>
> (a) every person who corruptly, by himself or by any other person, either before, during or after an election, directly or indirectly, gives, or provides or pays wholly or in part the expenses of giving or providing any food, drink, entertainment, or provision to or for any person for the purpose of corruptly influencing that person, or any other person, to vote or to refrain from voting at the election, or on account of that person or any other person having voted or refrained from voting at the election;
>
> (b) every voter who corruptly accepts or takes any such food, drink, entertainment, or provision."

[101] Section 59 of the Act prescribes the mode of trial and the penalty for a person found guilty of the election offences of bribery, treating or undue influence. The section reads:

> "Every person who is guilty of bribery, treating or undue influence under the provisions of this Act is liable on summary conviction to a fine of five thousand dollars or to imprisonment for six months."

The section provides for the summary trial of persons alleged to have committed the offence of treating. This was confirmed by the Judge at paragraph 45 of her judgment and there is no dispute that treating is a summary offence. Section 59 also sets out the punishment for committing any of the offences listed in the section. That is the extent of the Magistrate's power under the section which is coterminous with the relief that the appellants were seeking in the complaints that were lodged in the Magistrates' Court.

[102] Section 61 goes on to provide that -

> "Every person who is convicted of … treating… shall (in addition to any other punishment) be incapable during a period of seven years from the

date of conviction –

(a) of being registered as an elector, or voting at any election of a member of the House of Assembly;

(b) of being elected a member of the House of Assembly or if elected before his conviction, of retaining his seat as such member." (Underlining added)

In my opinion this section has nothing to do with the Magistrate's power under part V of the Act. The Magistrate's power is restricted to imposing a fine or ordering the imprisonment of the convicted person as prescribed by section 59. The consequence of a conviction for treating having the ultimate effect of the convicted person being incapable of retaining his seat as a member of the House of Assembly is entirely a matter of law brought about by the operation of section 61 of the Act, which may follow as a consequence of action taken under section 40 of the Constitution and section 61 of the Act which to some extent are in *pari materia*. That is the clear intention of Parliament to be gleaned from a reading of sections 59 and 61 of the Act. If Parliament had intended to give the Magistrate power to order that a sitting member of the House could no longer retain his seat or is incapable of being an elector or being elected for a period of seven years after conviction it would have said so.

[103] The Judge took a broader view of the relevant provisions of the Elections Act. Her findings are set out in paragraphs [51] to [54] the judgment-

> "[51] It can be considered that treating being a summary offence means that the complaints which were filed by the Interveners [the appellants] against the Claimants [the respondents] alleging that they have committed the said offence of treating, fall squarely within section 20(2) of the MCPA [Magistrates Code of Procedure Act] and that in the circumstances the first named Respondents [the Magistrate] clearly has the jurisdiction to issue the summons.
>
> [52] However, the effect of the charges as brought by the Interveners is that they are in fact questioning and challenging the validity of the elections of the Claimants. It is established law that no parliamentary election and no return to Parliament may be questioned except by petition, complaining of an undue election or undue return.

> [53] At the heart of the Claimants' contention is that the penalty for the offence is removal from the Parliament… [of] those persons who have already been sworn in and the disqualification of the convicted persons for seven years.
>
> [54] The Claimants contend that this is in fact a determination of the [c]onstitution of the Parliament and that it is the contemplation of the framers of the legislation that this ought to be done in a timely manner as laid down in the many cases."

In summary, the Judge found that while the Magistrates' Court has jurisdiction to try persons for the offence of treating, the effect of the charges against the respondents, as elected members of the House, is to challenge the validity of their election to the House; the Magistrate therefore has power to determine the composition of the House of Assembly and this is inconsistent with the general principle that the High Court has exclusive jurisdiction to determine questions as to the qualification of members of the House of Assembly;[34] and, a challenge to the election of a member can only be done by an election petition to the High Court under the provisions of part VI of the Elections Act.

[104] The Judge proceeded to find that the hearing of the complaints by the Magistrate would conflict with section 40(1) of the Constitution which provides that any question regarding the election of a candidate to the House of Assembly must be dealt with by the High Court, and this must be done by way of election petition following the strict rules for pursuing such petitions. Therefore, the actions of the appellants to seek to pursue summary prosecution of the respondents cannot be sustained.[35] I refer to this issue in this judgment as "the constitutional issue" and I will deal with it in further detail in Part II of this judgment.

[105] I do not share the trial judge's interpretation of the Elections Act. The election petition procedure is contained in part VI (sections 65 – 68) of the Elections Act.

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[34] The principle of the exclusive jurisdiction of the High Court is dealt with in further detail in paragraphs [126] – [127] below.

[35] Paragraphs 73-75 of the judgment in the court below.

Section 65 sets out the basic rule that defines the scope of the election petition procedure. It provides that –

> "A petition complaining of an undue return or undue election of a member of the House of Assembly, in this Act called an election petition, may be presented to the High Court by any one or more of the following persons:
>
> (a) some person who voted or had a right to vote at the election to which the petition relates;
>
> (b) some person claiming to have had a right to be returned at the election;
>
> (c) some person alleging himself to have been a candidate at the election." (Underlining added)

The election petition procedure in section 65 deals with the "undue election or undue return" of a member of the House of Assembly. The complaints filed by the appellants and the use of the summary procedure in section 59 of the Elections Act was not an attempt to question the election or return of the respondents. There was no challenge to the respondents' election after the return of election following the 2014 general election. What the appellants asked the Magistrate to do, within the time prescribed by section 68 of the **Magistrate's Code of Procedure Act**, was to try the respondents for the offence of treating and, if convicted, to impose sentences within the limits prescribed by section 59 of the Elections Act. If the Magistrate were to go further and make an order regarding the disqualification or unseating of the convicted members he would be acting beyond the scope of his jurisdiction and his further order would be inconsistent with section 40 of the Constitution and the general principle relating to the High Court's exclusive jurisdiction to hear and determine complaints relating to the undue return or undue election of members of the House of Assembly.

[106] I agree with the submissions of Ms. Shillingford that the complaints that were before the Magistrate have nothing to do with the undue election or undue return of any of the respondents. By causing the complaints to be made against the respondents, the appellants were exercising their right to cause the prosecution of the respondents in the Magistrates' Court for the summary offence of treating. The Magistrate was being asked to do nothing more than to exercise his undoubted jurisdiction to try the offences. If any of the respondents is convicted, the

Magistrate will impose such punishment as prescribed by section 59 as he thinks is appropriate.

[107] The criminal trial of the offence of treating does not fall within the exclusive jurisdiction of the High Court to try petitions for the undue election or undue return of a member. In my opinion the judge erred by giving the expression "exclusive jurisdiction" a wide interpretation covering not just matters relating to the election of members, but also any matter that may ultimately affect the composition of the House of Assembly.

[108] The summary jurisdiction of the Magistrates' Court to try offences related to elections was recently considered by the High Court sitting in St Christopher in **Wingrove George v The Senior Magistrate and Another**.[36] The Court had to consider the validity of two common law charges of misbehaviour in public office against the supervisor of elections in his handling of the results of the February 2017 elections. The supervisor issued an application for leave to apply for judicial review of the actions of the respondents in issuing the charges against him in the Magistrates' Court and sought orders to quash the charges. Ventose J heard the application and refused leave to apply. In coming to his decision Ventose J referred to the decision of the Judge, which is the subject of this appeal, and the effect of charging a member of the House summarily for the statutory offence of treating, and made the following observations -

> "[56] [the Judge] stated, first, 'the effect of the charges as brought by the Interveners is that they are in fact questioning and challenging the validity of the elections of the Claimants' (at [52]); and second, '[o]ne of the grounds that an election may be set aside if found to have been committed, is the offence of Treating' (at [61]). The fact that a conviction of a member of the House of Assembly for treating results in that member being disqualified from retaining his or her seat in the House of Assembly and therefrom for a further seven years does not mean that a charge for treating is 'questioning' or 'challenging' the validity of the elections. No doubt it has an impact on the candidate who was successful in the last election and who is now a member of the House of Assembly. A charge for treating laid against a sitting member of the House of Assembly is not

[36] SKBHCV2018/0188 (delivered 15th January 2019, unreported).

> at all a challenge to, or questioning of, the election of that member to the House of Assembly to engage the application of section 65 of the DA Elections Act. That person remains a validly elected member of the House of Assembly until he or she is convicted of treating by a magistrate thereby becoming disqualified from retaining his or her seat as a member of the House of Assembly. Such a charge for treating is not required to be brought under section 65 which provides that a complaint to be made for an undue return or undue election of a member of the House of Assembly to be (sic) made by way of an election petition. A charge for treating is not a complaint in respect of an undue return or election of a member of the House of Assembly. Nowhere in the DA Election[s] Act does it state that a conviction for, or committing, the offence of treating is a ground on which the election of a member of the House of Assembly can be challenged or questioned."

The decision in the **Wingrove George** case is distinguishable because it dealt with a common law offence, and no attempt is made in this case to question the decision in the **Wingrove George** case which is also on appeal to this Court. However, the passage cited above encapsulates my conclusion that the instant appeal is about the validity of summary charges for treating brought against the respondents in the Magistrates' Court. The charges do not challenge the return or election of the respondents and were not required to be brought by election petition under section 65 of the Elections Act.

[109] To sum up, as a matter of construing the provisions of the Elections Act and applying the relevant provisions to the facts of this case, I find that the Magistrate had jurisdiction under section 59 of the Act to try the respondents. The trial of the respondents by the Magistrate is not a challenge to the validity of their election during the December 2014 election. If they are convicted, the Magistrate will impose such sentence as he sees fit under 59 of the Act. Thereafter, it becomes open for the law to take its course by a person engaging the process set out under section 40 of the Constitution.

Part II - The Constitutional Issue

[110] I will now deal with the constitutionality of the relevant provisions of the Elections Act. The Judge found that the summary trial of the respondents for the offence of

treating conflicts with section 40(1) of the Constitution. This finding was an integral part of the Judge's overall finding that the Magistrate did not have jurisdiction to try the respondents for the offence of treating.

[111] Section 40(1) provides that any question regarding the election of a member or whether he has vacated his seat shall be tried by the High Court. The relevant parts of the section read –

> "(1) The High Court shall have jurisdiction to hear and determine any question whether –
>
> (a) any person has been validly elected as a Representative or Senator;
>
> …
>
> (d) any member of the House has vacated his seat or is required, under the provisions of section 35(4) of this Constitution, to cease to perform any of his functions as a member of the House."

[112] The Judge considered section 40 in paragraphs 70 to 75 of her judgment. Her findings are contained in paragraphs 70 and 72 to 75. In paragraph 70 the Judge found that –

> "Section 40 (1) of the Constitution provides for the determination of question of membership of the House of Assembly. This section confers jurisdiction solely on the High Court to deal with election matters. The High Court is to hear and determine any question whether any person has been validly elected as a member of the House of Assembly. This section has been interpreted to mean *'the means by which a question is determined whether a person is validly elected or not is by election petition' Per Davis CJ in the* Court of Appeal of Grenada and of the West Indies Associated States case of **William Bruce Williams –v– Emanuel Henry Giraudy and another** at Page 535 paragraph f the court in this instance was interpreting the meaning of the words of S34(1) of the Constitution of St Lucia which is couched in similar language of the Dominica Constitution."

[113] The Judge's conclusion that the procedure for determining whether or not a person has been validly elected is by election petition should be considered in context. If there is a challenge to the validity of a member's election the challenge must be pursued by an election petition under section 65 of the Elections Act following the strict procedures relating to time and security for costs in section 68 of the Act.

[114] On the other hand, if the challenge is to disqualify a sitting member from continuing to sit as a member of the House the procedure to be followed is by application by fixed date claim form, and not by an election petition. This is illustrated by the recent decision of this Court in **The Attorney General of St Christopher and Nevis v Dr. Denzil Douglas**.[37] Dr. Douglas was a successful candidate in the February 2015 general elections in St Christopher and was a sitting member of the National Assembly. In July 2015 he was issued with a diplomatic passport by the Commonwealth of Dominica. The Attorney General brought proceedings in the High Court against Dr. Douglas by fixed date claim form under section 36(1)(a) of the Constitution of St. Christopher, which is substantially the same as section 40(1) of the Constitution of the Commonwealth of Dominica. The claim sought, (among other things), a declaration that by being issued with a foreign passport, albeit a diplomatic passport, Dr. Douglas became under allegiance to a foreign power in breach of section 28 of the Constitution and was therefore required to vacate his seat in the National Assembly. There was no issue as to the procedure of a fixed date claim form used by the Attorney General to launch the proceedings in the High Court. This is not surprising because the claim against Dr. Douglas was not as to the validity of his election in the recently concluded general elections which would have required a trial by election petition. The claim was whether Dr. Douglas, by virtue of his own act, was under allegiance to a foreign power by holding and using a diplomatic passport issued by the Commonwealth of Dominica. The High Court judge found that he was not under such allegiance and dismissed the claim. The Attorney General appealed. The Court of Appeal reversed the trial judge's decision, finding that Dr. Douglas had breached section 28(1)(a) of the Constitution and was required by section 31(3)(c) to vacate his seat in the National Assembly.

[115] As in the High Court proceedings, there was no issue in the Court of Appeal as to the use of the fixed date claim form procedure by the Attorney General, even

[37] SKBHCV2018/0008 (delivered 2nd July 2018, unreported); SKBHCVAP2019/0007 (delivered 12th March 2020, unreported).

though the case dealt indirectly with composition of the National Assembly. Similarly, in this appeal, the prosecution of the respondents for the offence of treating is not a challenge to their election to the House of Assembly in Dominica. The only matter that was before the Magistrate was the trial of the respondents for the summary offence of treating. If the trial had proceeded and the respondents were convicted, the conviction may then form the basis for a challenge to the High Court requiring that the members vacate their seat pursuant to section 40 of the Constitution (which incorporates section 35(4) of the Constitution)[38]. The consequence does not follow automatically. The jurisdiction to make such a pronouncement is given to the High Court under section 40 of the Constitution. However, that issue is not before this Court and I will not deal with it in detail and I make no findings. Indeed, that stage has not been reached. This case is about the Magistrate's jurisdiction to try the respondents for the summary offence of treating.

[116] The Judge's further findings on the constitutional issue are set out in paragraphs [73] to [75] of her judgment –

> "[73] Therefore in the case at bar, where the HOAE Act makes reference to 'summary conviction' for the offence of treating which would mean the complaint is to be heard by the Magistrate, this is in conflict with section 40(1) of the Constitution which provides that any question regarding the election of a candidate to the HOA must be dealt with by the High Court and that this must be done by way of election petition which are subject to very strict rules of procedure, including and not restricted to the requirement that [the petition] must be brought within 21 days of the election.
>
> [74] Therefore in the case at bar, the attempt to charge the Claimants who are all duly elected and sworn in members of the Parliament with the election offence under the HOAE Act of treating must be dealt with by the High Court, and must be brought by way of election petition. Therefore the actions of the Interveners [respondents] to seek to pursue summary prosecution of the Claimants cannot be sustained.
>
> [75] The Interveners cannot in the circumstances of this case try to circumvent the requirements of the Constitution of Dominica and the HOAE Act by seeking to file complaints against the Claimants in the Magistrates' Court and charging them for the offence of treating. I am

[38] See paragraph [118] below.

satisfied that the jurisdiction to question elections or the jurisdiction to question the Constitution (sic) of the House of Assembly lies solely in the High Court, and therefore the Learned Magistrate acted in excess of his jurisdiction when he signed the complaints, thus his actions are therefore liable to be quashed."

[117] I have two observations about the judge's findings in these paragraphs:

(a) There is no requirement in section 40 of the Constitution that a claim under the section must be brought by election petition. Claims under the section can be brought by fixed date claim form as is illustrated by the **Denzil Douglas** case.[39] The claim against Dr. Douglas was brought under section 36(1) of the Constitution (section 40 for Dominica) for him to vacate his seat, not to question the validity of his election.

(b) It follows from my findings above regarding the construction of the Elections Act that the appellants were entitled to use the summary procedure in section 59 of the Elections Act to charge the respondents for treating, and to do so within the 6-month period prescribed by section 68 of the **Magistrate's Code of Procedure Act** for prosecuting offences in the Magistrates' Court. Prima facie, this was not an attempt to circumvent the requirements of part VI of the Elections Act.

[118] In my opinion section 40(1) does not come into play in this case. Shorn of the constitutional issues that were canvassed on appeal, this case is about the Magistrate's jurisdiction to try the respondents for the offence of treating, a jurisdiction which I have found that the Magistrate has. If the respondents are convicted, section 40(1)(d) may come into play because the section refers to section 35(4) of the Constitution. Section 35(4) provides that if a member of the House is "…adjudged to be of unsound mind, declared bankrupt or convicted or reported guilty of an offence relating to elections …" he shall vacate his seat.

[39] Supra paragraphs [114] and [115] above.

Treating is an offence relating to elections and a conviction of an elected member would, by section 35(4), give the High Court jurisdiction under section 40(1)(d) to determine whether he or she is required to cease to perform any of his functions as a member of the House. But this stage has simply not been reached. It would be improper for this Court to speculate as to whether it will in fact be reached at all. In all other respects section 40 is not relevant to this appeal.

Conclusion on the constitutional issue

[119] For all of the above reasons I find that section 59 of the Elections Act is not inconsistent with section 40 or any other provision of the Constitution, and that an elected member of the House of Assembly can be prosecuted before a magistrate for the offence of treating. In coming to this conclusion, I reject the Judge's interpretation of the Elections Act that the Magistrate did not have jurisdiction to hear the complaints against the respondents.

Part III - Effect of the Judge's findings

[120] The effect of the Judge's decision is that if a member of the House commits or is alleged to have committed any of the offences of treating, bribery or undue influence, the only way of proceeding against the member is by election petition under section 65 of the Elections Act, challenging the validity of his election. The petition has to be brought within 21 days of the return of the general election. If the deadline is missed, or if the offence is committed between elections after the 21-day period, no other proceeding can be taken against the sitting member. On the other hand, any other person who is alleged to have committed any of these offences at any time can be prosecuted under section 59 of the Elections Act, and sentenced by a magistrate. The Judge's decision effectively created two types of offenders under the Elections Act, namely ordinary citizens who can be charged, convicted and sentenced, and members of the House of Assembly who are immune from prosecution under the Act. This duality of offenders is not apparent from a reading of the Elections Act. If it was intended to create immunity from prosecution for members of the House the lawmakers would have had to use very

clear language. I have not found any language in the Act to suggest that this was Parliament's intention, nor in the provisions of the Constitution itself which is anchored in the rule of law and has enshrined within it the principles of protection of the law and equality before the law.

[121] It also follows from the finding of duality of offenders that an offending member can be charged by election petition within 21 days of the return of the election, but after that the immunity referred to in the preceding paragraph applies and he can freely commit offences of treating, bribery and undue influence, as often as he wishes, and the only possible sanction is that if he is successful in the next general election his election can be challenged by filing an election petition within 21 days after that election. Such an odd result could only have been created by clear language in the Elections Act and further clearly expressed within the Constitution itself being the supreme law of the land.

[122] The duality of offenders has the further effect, as alluded to above, of having the real possibility of running afoul of the rule of law. Ms. Shillingford relied on this principle and referred the Court to the advice of Lord Bingham in the Privy Council opinion in **Sharma v Brown-Antoine and others**[40] where his Lordship said -

> "The rule of law requires that, subject to any immunity or exemption provided by law, the criminal law of the land shall apply to all alike. A person is not to be singled out for adverse treatment because he or she holds a high and dignified office of State, but nor can the holding of such an office excuse conduct which would lead to the prosecution of one not holding such an office. The maintenance of public confidence in the administration of justice requires that it be, and be seen to be, even-handed."

Ms. Shillingford also referred to **Eric Matthew Gairy et al v The Attorney General of Grenada**[41] where Chief Justice Byron said -

> "Litigation between the citizen and the State has always been considered problematic. In constitutional democracies under the rule of law, however, the courts have assumed jurisdiction to hear and determine all disputes of

[40] (2006) 69 WIR 379.
[41] (1999) 59 WIR 174.

> a justiciable nature. The principle of equality before the law, where everyone whatever his rank or condition, is subject to the ordinary law, must result in every official from the Prime Minister down to a junior clerk having the same responsibility for every act done without lawful justification, as any other citizen." [42]

[123] These statements of principle from eminent jurists suggest that if it was intended to shield the members of the House from prosecution for election offences under the Elections Act the lawmakers would have had to use very clear language to create the immunity. There is nothing in the Elections Act that suggests that such immunity was intended. To read or imply such an immunity into the Act would, in my opinion, offend the hallowed principle of the equality of all persons before the law. There is also the possibility that the duality of offenders created by the Judge's interpretation of the Elections Act could offend section 13(1) of the **Constitution of the Commonwealth of Dominica** which prohibits the making of any law "…that is discriminatory either of itself or in its effect". But that issue is not before the Court and it is not necessary for me to make a finding on the issue. The finding that I make is that the Judge erred when she, by her decision, created two classes of offenders under the Elections Act and found that the Magistrate did not have jurisdiction to try members of one of these two classes - the respondents.

[124] The points made in the preceding paragraphs reinforce my conclusion that section 59 of the Elections Act is not unconstitutional. The clear intention of the section is to provide for the summary prosecution of <u>all</u> persons who are alleged to have committed any of the three listed offences.

Part IV - Miscellaneous Points

[125] For completeness, I would mention two points.

[126] The Judge relied heavily on the principle that the High Court has an exclusive jurisdiction to try matters relating to the election of a member of the House. The Judge did not use the word "exclusive" but it is clear from her judgment that she

[42] Ibid at paragraph 9.

found that only the High Court can deal with issues relating to the election of a member, and that this can be done only by an election petition under section 65 of the Elections Act.[43] Insofar as her finding relates to the High Court's jurisdiction relating to the trial of election petitions challenging the validity of the election of a member, I agree with her that the High Court has an exclusive jurisdiction. However, the jurisdiction to try other issues relating to an election is not exclusive. The High Court has jurisdiction to try matters that fall under section 40 of the Constitution by fixed date claim form and the Magistrates' Court has jurisdiction under section 59 of the Elections Act, as in this case, to try the election offences of treating, bribery and undue influence.

[127] The cases cited by Mr. Astaphan, SC relating to the High Court's exclusive jurisdiction to try election petition cases are cases dealing with the validity of the election of members to the House and are not relevant in this appeal because they deal with a different point. The most recent of these cases is the consolidated appeals heard by the Caribbean Court of Justice in 2019 in **Ram v The Attorney General and others**.[44] The case involved a challenge to the validity of the election of an elected member, Charrandas Persaud. Unsurprisingly, the CCJ decided that the challenge had to be brought by election petition. At paragraph 41 of the leading judgment delivered by President Saunders he said "The National Assembly (Validity of Elections) Act provides a complete code for challenging the validity of an election on the ground that a person is not qualified to be elected." This finding is very clear and summarises the exclusive jurisdiction of the High Court to try election petitions challenging the validity of the election of members of the House.

[128] As I have found above, the instant appeal does not involve a challenge to the validity of the election of the respondents. The respondents challenged the validity of the complaints filed against them on grounds that the they did not disclose an

[43] See for example paragraph 70 of her judgment which is set out in paragraph [112] above.
[44] [2019] CCJ 10 (AJ).

offence under section 56 of the Elections Act, they were time-barred and the Magistrate exercised his discretion improperly in issuing the summonses. The issue of the constitutionality of section 59 of the Elections Act first arose in the Judge's judgment and then in the Court of Appeal. I have found that these issues are not germane to this appeal and the cases on the election petition procedure are not relevant, far less decisive. They do not affect my overall finding that the Magistrate has jurisdiction to try the respondents.

Part V – Conclusion and disposal

[129] We have heard interesting submissions on the law relating to the High Court's jurisdiction to hear and determine challenges to the election of members of the House of Assembly. However, I take the position that the real issue in this case is the Magistrate's jurisdiction under section 59 of the Elections Act to try the respondents for the offence of treating. I am satisfied that the Magistrate has jurisdiction to try the respondents and that the trial of the respondents can proceed in the Magistrates' Court. I would therefore make the following orders:

(i) The appeal is allowed and the order of the Judge dated 18th April 2018 is set aside.

(ii) The complaints filed by the appellants and the summonses issued by the Magistrates' Court are reinstated.

(iii) The stay of proceedings granted by the High Court in the order dated 13th July 2015 is discharged.

(iv) The Chief Magistrate shall proceed to assign a magistrate to hear the complaints filed by the appellants.

(v) Each party will bear his or her own costs of the appeal and in the court below.

[130] **MICHEL JA**: I have read, in draft, the judgments of my learned sister, Blenman JA, and of my learned brother, Webster JA [Ag.], and I entirely agree with the

conclusion of my learned brother that the Magistrate had jurisdiction to try the respondents for the offence of treating, notwithstanding the fact that it is an offence under the **House of Assembly (Elections) Act**[45] (hereafter "the Elections Act" or "the Act"), conviction for which can lead ultimately to the disqualification of the person convicted from being elected as a member of the House of Assembly ("the House") or from retaining his seat as a member of the House. I agree too with his conclusion that section 59 of the Elections Act is not inconsistent with section 40 or any other provision of the **Constitution of the Commonwealth of Dominica**[46] (hereafter "the Constitution") and does not therefore require modification to bring it into conformity with the Constitution.

[131] There were several issues explored and several authorities cited by my learned colleagues in the course of their judgments, and I find it unnecessary to go over the territory already travelled by my colleagues. I will, however, make some brief remarks on what were the central issues in the court below and before this court.

[132] It has been said, repeated and emphasised, and is acknowledged, understood and accepted, that any question as to whether a person has been validly elected as a member of the House of Assembly, or a national parliament in the Commonwealth Caribbean by whatever name called, is to be heard and determined by the High Court. In the Commonwealth of Dominica, this is expressly stated in section 40(1) of the Constitution as follows:

> "The High Court shall have jurisdiction to hear and determine any question whether –
>
> (a) any person has been validly elected as a Representative or Senator;…".

The Elections Acts in the Commonwealth Caribbean provide for the mode and manner by which this question is heard and determined by the High Court. In the

[45] Cap 2.01 of the Laws of the Commonwealth of Dominica (1951, last amended 1990).
[46] Enacted as Schedule 1 of the Commonwealth of Dominica Constitution Order 1978 (S.I. 1978 No. 1027).

Commonwealth of Dominica, this is provided for in sections 65 and 66 of the Elections Act as follows:

> "65. A petition complaining of an undue return or undue election of a member of the House of Assembly, in this Act called an election petition, may be presented to the High Court by any one or more of the following persons:
>
> ….
>
> 66. Every election petition shall be tried before the High Court in the same manner as a suit commenced by a writ of summons. At the conclusion of the trial, the Judge shall determine whether the member of the House of Assembly whose return or election is complained of or any and what other person was duly returned or elected, or whether the election was void, and shall certify the determination to the President and, upon the certificate being given, the determination shall be final; and the return shall be confirmed or altered, or a writ for a new election shall be issued, as the case may require, in accordance with the determination."

The Act also provides, in section 68(1)(a), that "the petition shall be presented within twenty-one days after the return made by the returning officer of the member to whose election the petition relates ….".

[133] These provisions of the Constitution and of the Elections Act establish that questions as to the validity of the election of a member of the House of Assembly must be brought to the High Court by an election petition filed within 21 days of the member's election and that, at the conclusion of the trial of the petition, the court would determine whether or not the member was validly elected.

[134] There is not, therefore, any issue to be taken, and none has been taken, as to the jurisdiction of the High Court in the determination of questions as to the validity of the election of a member of the House of Assembly. This jurisdiction, and the mode and manner of its exercise, are expressly provided for in the Constitution and applicable legislation in Dominica. The fact of the exclusivity of the jurisdiction of the High Court in the hearing and determination of election petitions may not be expressly stated in the Constitutions and Elections Acts of Dominica and some of

the other Commonwealth Caribbean countries, but it is clearly implied where it is not stated and has never in any event been seriously challenged, and was certainly not challenged in this or the underlying court. The real issue though is whether a charge against a member of the House of Assembly for treating can be instituted and prosecuted in the Magistrates' Court in Dominica.

[135] The answer to this question must be in the affirmative, because the legislation under which a person is charged for treating provides for the summary conviction of a person for treating, and makes no exception for members of the House of Assembly. Section 59 of the Elections Act states:

> "Every person who is guilty of … treating … under the provisions of this Act is liable on summary conviction to a fine of five thousand dollars or to imprisonment for six months".

[136] If it was the intention of Parliament that members of the House of Assembly should be exempted from this provision, then there would be no better place to so provide than in the Act which creates the offence and specifies the penalty for it. The Constitution itself, which makes provision in sections 31 and 32 for the qualifications and disqualifications of persons to be elected as members of the House of Assembly, including disqualification resulting from a person being convicted by any court of law of any offence that is connected with the election of members, contains no exemptions for sitting members of the House.

[137] Much has been made of the fact that section 61 of the Elections Act, provides that:

> "Every person who is convicted of … treating … shall (in addition to any other punishment) be incapable during a period of seven years from the date of conviction-
>
> …
>
> (b) of being elected a member of the House of Assembly or if elected before his conviction, of retaining his seat as such member."

[138] This provision has been construed by the respondents to mean that a conviction for the offence of treating in the Magistrates' Court invalidates the election of a member of the House of Assembly and thus performs a role that only the High

Court is permitted to do on an election petition brought within 21 days of the date of the election of the member. But a conviction for the offence of treating does not invalidate the election of a member of the House. Such a conviction can lead to the disqualification of a person from being elected as a member of the House or from retaining his seat as a member if elected before his conviction, but it does not invalidate his election.

[139] Indeed, in accordance with section 40(1)(d) of the Constitution, the question of whether a member of the House has vacated his seat or is required under the provisions of section 35(4) of the Constitution to cease to perform any of his functions as a member of the House, must still be brought to the High Court to be heard and determined, though it need not be by an election petition. Section 35(4) deals with the circumstances where a person becomes disqualified from being elected as a member of the House, or from retaining his seat if he is a member, because of his conviction of an offence prescribed by Parliament which is connected with the election of members of the House. Conviction for the offence of treating would, by virtue of section 61 of the Elections Act, be a circumstance where a person becomes disqualified from being elected as a member of the House. Even if a conviction for the offence of treating was to be regarded as invalidating the election of the member so convicted, it will still not follow that a prosecution for treating is a proceeding to invalidate the election of a member of the House; the prosecution will still be a proceeding to determine whether a person has committed a particular criminal offence, albeit one associated with the election of members to the House of Assembly, and conviction for which can lead to the disqualification of a member from retaining his membership of the House.

[140] There are several types of proceedings the outcome of which can lead to a member of the House of Assembly being disqualified from retaining his seat as a member and which are also not proceedings to invalidate the election of a member of the House. These include bankruptcy proceedings, proceedings to determine a person's citizenship status, or to determine the state of his mental health, or a

criminal trial for a charge unrelated to elections but which can result in a sentence exceeding 12 months' imprisonment. It can hardly be argued even, that all such proceedings, once involving a member of the House of Assembly, must be instituted by an election petition brought within 21 days of the election of the member, especially having regard to the fact that the conduct leading to these proceedings may have occurred more than 21 days after the election of the member.

[141] This then leaves only the submission of counsel for the respondents and the findings by the trial judge that the provisions in the Elections Act dealing with the trial by a Magistrate of the summary offence of treating must be modified so as to bring them into conformity with the Constitution. This submission hinges of course on the existence of a conflict between the provisions of the Elections Act and the Constitution which requires that the Elections Act, which predated the Constitution, be modified so as to bring it into conformity with the Constitution. I have not however been able to discern this conflict between the Act and the Constitution. Section 56 of the Act defines the offence of treating, section 59 stipulates the penalty, and section 61 provides that a person convicted of the offence shall be incapable of being registered as an elector, from voting at any election of a member of the House, from being elected as a member of the House or, if elected before his conviction, from retaining his seat. Section 40 of the Constitution gives jurisdiction to the High Court to hear and determine questions as to whether a person has been validly elected as a member of the House or whether any member has vacated his seat or is required, under the provisions of section 35(4) of the Constitution, to cease to perform any of his functions as a member of the House.

[142] The respondents' difficulty, evidently shared by the judge in the court below, relates to the fact that the foregoing provisions of the Elections Act, taken together, mean that a member of the House of Assembly can be made to vacate his seat in the House arising from a trial in the Magistrates' Court commenced by complaints,

instead of by virtue of a trial in the High Court commenced by petition. They consider that the provisions of the Act and the Constitution collide at the intersection between the road to the Magistrates' Court by complaints and the road to the High Court by petition, but only when the travellers are members of the House. So that there is no conflict when the proceedings in the Magistrates' Courts are brought against non-members of the House, but not so with respect to members of the House. Criminal proceedings for the offence of treating by members of the House must be heard in a different place by a different procedure, and in so far as the provisions in the Elections Act permit members of the House to be tried in the same court as persons who are not members of the House, then these provisions are in conflict with the Constitution and must be modified to bring them into conformity.

[143] This submission by the respondents and finding by the judge in the court below would, if accepted, lead to a result that members of the House of Assembly can commit certain criminal offences with impunity, because they have immunity from prosecution for those offences once committed outside of the 21-day period following an election, by which time no election petition can be filed. So that you could not charge or prosecute a victorious election candidate for holding a post-election concert 22 days after an election, where free food, drinks and entertainment are provided to reward persons for having voted for him or her; but you can charge, prosecute, convict and imprison his or her unsuccessful opponent for doing exactly the same thing. There is much that can be said of this, but suffice it to say that Parliament could not have so intended, and that it is just such a law which would run afoul of the Constitution.

[144] I find that there is no conflict between the provisions of the Elections Act dealing with the offence of treating and the provisions of the Constitution dealing with invalidating the election of members of the House. There is therefore no modification required to bring the provisions of the Act into conformity with the Constitution.

[145] I wish to conclude my remarks by affirming my unreserved acceptance of the judgment of the Caribbean Court of Justice ("the CCJ") in the still recent case of **Ram v The Attorney General and others**[47] and the cases consolidated with it. The conclusion of the CCJ in **Ram**, that any challenge to the qualification of a person to be elected as a member of the National Assembly can only be launched in an election petition filed within the stipulated time (28 days in Guyana), is consistent with the long-established, time-honoured proposition, expressed in national constitutions and judicial decisions at least for decades, that the High Court has jurisdiction to hear and determine any question whether any person has been validly elected as a member of the national parliament. This proposition is by now hardly capable of debate, far less contradiction, but its restatement and refinement by the CCJ in **Ram** should give no comfort to an argument that summary proceedings which do not interrogate the validity of the election of a member of a national parliament should somehow be prohibited, indeed, declared unconstitutional, because they touch and concern election-related disputes which can impact the capacity of a member of parliament to retain his seat in parliament. In fact, it is clear from the judgments delivered in **Ram** by the judges of the CCJ that the question of the qualification of a person to be elected as a member of the National Assembly in Guyana is different from the question of whether a member of the Assembly is required to vacate his seat by virtue of a circumstance arising that, if he was not a member, would cause him to be disqualified for elections as a member. Indeed, section 43 of the National Assembly (Validity of Elections) Act in Guyana (referred to by Mr. Justice Wit in paragraph 68 of the judgment) is quite telling in that regard.

[146] In all of the circumstances, I agree with the proposed disposition of the appeal by Webster JA [Ag.] – allowing the appeal, setting aside the judgment of the judge in the court below and making consequential orders.

[47] [2019] CCJ 10 (AJ).

[147] I accordingly concur with the judgment of Webster JA [Ag.] and will add nothing further.

By the Court

Chief Registrar