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IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BARBADOS

CCJ Appeal No CV 2 of 2006
BB Civil Appeal No 29 0f 2004

BETWEEN

THE ATTORNEY GENERAL	**FIRST APPELLANT**
SUPERINENDENT OF PRISONS	**SECOND APPELLANT**
CHIEF MARSHAL	**THIRD APPELLANT**

AND

JEFFREY JOSEPH	**FIRST RESPONDENT**
LENNOX RICARDO BOYCE	**SECOND RESPONDENT**

Before The Rt Honourable	**Mr Justice de la Bastide, President**
And The Honourables	**Mr Justice Nelson**
	Mr Justice Pollard
	Mr Justice Saunders
	Madam Justice Bernard
	Mr Justice Wit
	Mr Justice Hayton

Appearances

Mr Roger Forde QC and Mr Brian L St Clair Barrow for the Appellants

Mr Maurice Adrian King and Ms Wendy Maraj for the First Respondent

Mr Alair Shepherd QC Mr Douglas Mendes SC Mrs Peta Gay Lee-Brace and Mr Phillip Mc Watt for the Second Respondent

20th and 21st June 2006

JUDGMENT
of
The Honourable Mr Justice Hayton

Delivered the 8th day of November 2006

[1] Having had the advantage of reading the joint judgment of the learned President and Saunders J in draft, for the reasons given by them I agree that:-

(a) the procedural fairness of the exercise of the prerogative of mercy under s 78 of the Barbados Constitution is subject to judicial review, and this is not ousted by s 77 (4);

(b) the reasoning of the majority of the Judicial Committee of the Privy Council ("JCPC") in *Thomas v Baptiste*[1], applied by the majority of the JCPC in *Neville Lewis v Att-Gen of Jamaica*[2], does not justify the JCPC's conclusions that rights purportedly conferred on individuals by ratification of an international treaty, the American Convention on Human Rights, have become part of the domestic criminal justice systems respectively of Trinidad and Tobago (under the "due process of law" clause in s 4(a) of its Constitution) and of Barbados (under "the protection of the law" clause in s 11(c) of its Constitution);

(c) the crucial protection provided to condemned murderers by the JCPC in these two cases can, instead, be justified on the basis that the treaty-compliant behaviour of a Government can give rise, as in this case, to an indefeasible legitimate expectation of the condemned man that he will not be executed until a reasonable time has been allowed for the Inter-American Human Rights system to run its course and the results thereof to have been considered by the Barbados Privy Council (BPC") under s 78 of the Barbados Constitution;

(d) the Court of Appeal was right to hold itself bound to follow *Neville Lewis* and to use its power under s 24 of the Constitution to commute the death sentences of the respondents to life imprisonment when it was apparent that their imprisonment was inevitably going to infringe the period laid down in *Pratt and Morgan v Att-*

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1 [2000] 2 AC 1; (1998) 54 WIR 387

2 [[2001] 2 AC 50; (2000) 57 WIR 275

Gen for Jamaica[3] as contravening s 15 of the Constitution prohibiting inhuman treatment; and thus

(e) the appeal must be dismissed (with costs to each of the respondents certified as fit for two counsel).

[2] It is noteworthy that counsel for the respondents rested their submissions simply on the need to accept the correctness of the reasoning in *Neville Lewis* and to follow that decision. Thus, no argument was heard on the possibility of developing judicial review of the prerogative of mercy in accordance with *Wednesbury* irrationality principles (named after *Associated Provincial Pictures Ltd v Wednesbury Corporation*[4]) nor of developing a broad principle that rights conferred by international human rights treaties are part of domestic law, irrespective of any alleged "mediation" provided by "due process" or "protection of the law" clauses in Constitutions. It may be that the law will so develop but, before coming to any far-reaching conclusions, I consider that full detailed inter partes argument on these specific points is required. True, we did not have the benefit of such forensic argument on indefeasible legitimate expectations, but we could not possibly accept the reasoning of the majority of the JCPC in *Thomas*, uncritically applied by the majority in *Neville Lewis*, because it was based on assertion rather than analysis, though reaching a just outcome. Necessity thus became the mother of invention, but the furtherance of justice in this particular case requires only incremental inventive development of the law.

Relative roles of the BPC and the court

[3] In this respect, I have some comments on the relationship between s 24 and s 78 of the Barbados Constitution which concerns the role of the court and the role of the BPC. On a breach of "the provisions of sections 12 to 23" of the Constitution, s 24 confers on the Courts exceptionally flexible positive powers (e.g. to commute a death sentence to some lesser sentence). The question arises as to what is the position if a convicted murderer

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3 [1994] 2 AC 1; (1993) 43 WIR 340

4 [1948] 1 KB 123

successfully alleges that there has been a breach of his right to procedural fairness in the exercise of the prerogative of mercy under s 78 of the Constitution. Must the court refer the matter back to the BPC or can it deal with the matter itself?

[4] Back in 1966, when the Constitution of Barbados became law, the orthodox view was that the exercise of the prerogative of mercy was not judicially reviewable (as witness *de Freitas v Benny*[5]), while ousting the jurisdiction of the courts could be valid (as witness *Smith v East Elloe RDC*[6]). Thus the Constitution would have been premised on there being no possibility of the court's powers under s 24 being applicable to any exercise of the prerogative of mercy, which was the exclusive preserve of the Governor-General acting as directed by the BPC. However, we have held – as did the JCPC in *Neville Lewis* – that, in the light of modern developments, the exercise of the prerogative of mercy is judicially reviewable and is not ousted by s 77(4). The court's powers on a successful judicial review of a disputed decision are, of course, negative powers involving the quashing of the relevant decision (perhaps, out of an abundance of caution, coupled with the grant of a prohibitory injunction), so that the decision-making body has to make a fresh decision, but only acting in a proper fair manner. Moreover, where the decision concerns the exercise of an executive body's apparently exclusive discretionary power to commute a *mandatory* death sentence to one out of a variety of lesser punishments, one would expect the mandatory nature of the death sentence to oust any inherent judicial sentencing input.

[5] While, as we have held, the right to procedural fairness in s 78 mercy matters (and other matters) is part of the protection of the law of Barbados in s 11 (c), this section is merely a preamble reciting the fundamental rights and freedoms of every person in Barbados before providing "the *following provisions* of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions." Section 18, by its heading and content, is the provision "to secure protection of the law" but, as might be expected when

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5 [1976] AC 239

6 [1956] AC 736

it was drafted in 1966, its wording does not stretch to the discretionary exercise of mercy once there has been a due conviction under the protection of the law, it being considered that it is up to the BPC to exercise mercy (via the Governor-General), not the court.

[6] In these premises it seems that only the standard judicial review powers are available for breach of procedural fairness in the exercise of the prerogative of mercy under s 78. On such a breach the BPC's decision will be quashed so that the BPC, as a responsible body, can re-consider the matter in the light of the court's judgment providing guidance as to what is a procedurally fair process. It may be suggested that once there has been a breach of procedural fairness by the BPC it may not be safe to remit the case to the BPC ("one strike and it is out"), so that inevitably the court would have to exercise what was hitherto the BPC's exclusive prerogative of mercy. To my mind, this tilts the constitutional balance between the executive and the judiciary further in the judiciary's favour than contemplated by the Constitution. Even if the law develops on *Wednesbury* irrationality lines, it seems to me that the court should go no further than quashing an irrational decision of the BPC to refuse commutation of a death sentence decision while making clear that such refusal is not an option available to the BPC, leaving it to the BPC to determine the appropriate lesser sentence, whether imprisonment for life or 20 or 12 years or some lighter sentence.

[7] It is, of course, open to this Court to find that s 24 of the Constitution confers this positive power upon the courts and not the BPC once a BPC decision is procedurally unfair or *Wednesbury* irrational. Thus, s 12, as part of a living Constitution, could be interpreted as if either having the word "due" necessarily inserted therein, so as to read "No person shall be deprived of his life intentionally save in *due* execution of the sentence of a court…", as the learned Justice Wit has indicated in his judgment, or as having "in accordance with the protection of the law" necessarily inserted so as to read "…save in execution, *in accordance with the protection of the law*, of the sentence of a court". The powers in s 24 are then available to enable the court directly to exercise the same flexible powers as the BPC. Alternatively, a "broad brush approach" can be taken as in the joint judgment of the learned President and Saunders J to find at [65] that "the courts have an

inherent jurisdiction, and a duty, to grant an appropriate remedy for any breach of that right" to procedural fairness as part of the protection of the law under s 11, though they envisage at [67] that the appropriate relief *normally* would be to quash the decision of the BPC and remit the matter to it for a further but procedurally fair consideration of the matter.

[8] In the circumstances of the present case, where a breach of s 15 of the Constitution clearly triggers the court's powers under s 24, there is to my mind no need yet to go down a road that would enable the court to supplant the mercy role of the BPC once the BPC has come to a procedurally unfair decision.

[9] A further point is that, while endorsing the final section "Disposing of the Appeal" at [138]-[144] of the joint judgment of the learned President and Saunders J, I think it should be made clear that, although the BPC must consider any report received from the Inter-American Human Rights Commission ("the IAHRC"), the Court of Appeal is wholly wrong at [83] of its judgment in requiring the BPC to state its reasons if it decides not to follow the Commission's recommendations for clemency. In my view, the BPC is not bound to give any reasons for its decision either to commute or not to commute the death sentence: the courts are not entitled to require its reasons from the BPC (though it is free to supply them if it wishes so as to counter possible adverse inferences). However, the courts, in the light of court records and the further material before the BPC, can look at the BPC's decision that is the result of reasoning as to which the courts are in the dark. If it then appears that the decision not to commute the death sentence is an extraordinary one that no rational properly-informed body could have made if acting in a procedurally fair fashion, the court will be able quash the decision if it is prepared to apply *Wednesbury* principles as earlier mentioned, but this issue is for another day.

Problems with the IAHRC and *Pratt and Morgan*

[10] Finally, I believe it appropriate to endorse the criticism of the learned President and Saunders J of the five year rule developed by *Pratt and Morgan*, which simply encouraged the IAHRC to pursue its apparent anti-death penalty agenda by not producing

its reports on condemned murderers in timely fashion. This ensured that the five year period was exceeded, so that all murderers sentenced to death could themselves commute their death sentences to life imprisonment simply by petitioning the IAHRC – and so wholly undermining the Constitutional death penalty.

[11] Just as the poorest of countries have to organise themselves to produce timely justice for murderers, so should the IAHRC arrange for production of timely reports on anxious condemned murders on death row, rather than leave their hopes dangling for considerable periods that are in excess of eighteen months. "Justice delayed is justice denied", and the least that can be expected of an international body that cares for murderers on death row is that it should produce reports on them within eighteen months at the outermost limit. Court-imposed guidelines on bodies should encourage such bodies to perform their tasks in good faith with as much expedition as possible and not with the least expedition possible. Thus, there is much to be said for the local Court of Appeal to be expected to deliver judgment within twelve months of the accused's conviction for murder (giving priority to murder cases), the Caribbean Court of Justice to deliver judgment within twelve months of the Court of Appeal's judgment and the IAHRC to deliver its report within eighteen months of the CCJ's judgment (assuming no delay has been caused by the tardiness of a Government's response to a request from the IAHRC). If the IAHRC does then take more than eighteen months to produce a report for the benefit of the murderer, it and he ought to accept the burden of a longer than necessary sojourn on death row without this amounting to prohibited cruel and inhuman punishment which has to be remedied by commutation of the death sentence: no benefit without the concomitant burden. However, resolving particular time limits should await detailed inter partes argument with supporting evidence, so this is yet another issue peripheral to this case but of much significance which remains to be finally resolved another day.

/S/ David Hayton

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David Hayton