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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 2005
BB Civil Appeal No 29 of 2004

BETWEEN

THE ATTORNEY GENERAL	**FIRST APPELLANT**
SUPERINTENDENT 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
	Mme 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 McWatt for the Second Respondent

20th and 21st June 2006

JUDGMENT
of
The Honourable Mr Justice Nelson

Delivered on the 8th day of November 2006

[1] I have had the advantage of reading the joint judgment of the learned President and Saunders J in draft and I agree with it. However, I would like to make some observations of my own to supplement what fell from those learned judges.

The facts

[2] These appeals arise out of the death of Marquelle Hippolyte on April 15, 1999 five days after he was attacked and beaten with pieces of wood by four men. The respondents, Joseph and Boyce, were jointly charged with Benn and Murray with the murder of Hippolyte. At the outset of the trial the prosecution offered to accept guilty pleas to the lesser charge of manslaughter. Benn and Murray pleaded guilty to manslaughter. Joseph and Boyce did not. Benn and Murray were sentenced to 12 years' imprisonment.

[3] It is apparent that the case against Joseph and Boyce was based on a common design with Benn and Murray to cause grievous bodily harm to the deceased. Joseph and Boyce were convicted on February 2, 2001 and sentenced to death. Joseph and Boyce appealed their conviction and sentence, but their appeals were dismissed by the Court of Appeal on March 27, 2002.

[4] On April 5, 2002 Joseph served the Barbados Privy Council ("BPC") with notice of his petition to the Privy Council for special leave to appeal in forma pauperis.

[5] After the Court of Appeal dismissed the respondents' appeals the BPC met to consider clemency for the respondents after advising them of the material it had before it and inviting written representations. The respondents made no written representations but served notice before the meeting of their application to the Judicial Committee of the Privy Council ("the Privy Council") for special leave to appeal.

[6] The meeting proceeded nonetheless and death warrants were read to the respondents although the special leave applications were pending.

[7] The respondents, Joseph and Boyce, immediately filed constitutional motions ("the first motions") seeking a stay of execution pending the hearing and determination of their appeals to the Privy Council or until further order. A stay of execution for 28 days was granted on June 28, 2002. The stay was never extended, and the first motions were not then proceeded with. However, the appeal, which ultimately became one of a trilogy of cases heard together by the Privy Council on the constitutionality of the mandatory nature of the death penalty, was dismissed on July 7, 2004: see *Boyce v The Queen*[1]. By a 5-4 majority the Privy Council held that the mandatory death penalty was not unlawful or unconstitutional.

[8] On July 9, 2004 the respondents' solicitors in London gave notice of their intention to make a complaint to the Inter-American Commission on Human Rights ("IACHR") and requested a stay of execution. The BPC was formally told on September 4, 2004 that the IACHR applications were filed. Nevertheless the BPC met on September 13, 2004 and considered the order of the Privy Council of July 7, 2004 dismissing the respondents' appeals. The BPC advised against commutation, and death warrants were read to the respondents a second time.

[9] On September 16, 2004, the respondents filed constitutional motions ("the second motions") seeking *inter alia* a stay of execution pending the determination of their applications before the IACHR. The orders for a stay of execution were eventually granted.

[10] The first and second motions were consolidated and heard by Greenidge J. The learned judge dismissed the motions on December 22, 2004 granting a stay of execution for 6 weeks pending an appeal. An appeal was filed on January 18, 2005. The Court of Appeal extended the stay until the hearing and determination of the appeals. By order dated May 31, 2005 the Court of Appeal (Colin Williams, Waterman and Peter Williams JJ A) allowed the appeals and commuted the death sentences of Joseph and Boyce to life imprisonment. Pursuant to final leave granted

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[1] *Boyce v The Queen* [2005] 1 AC 400; (2004) 64 WIR 37

by the Court of Appeal of Barbados on November 25, 2005 the Crown now appeals the order of the Court of Appeal.

[11] Meanwhile on September 17, 2004 the IACHR had admitted the petitions of Joseph and Boyce and invited the Barbados Government to respond. The IACHR also applied to the Inter-American Court on Human Rights ("the Inter-American Court") for provisional measures aimed at preserving the lives of Joseph and Boyce. On September 17, 2004 the President of the Inter-American Court made that order and the full court of the Inter-American Court confirmed it on November 25, 2004. These orders came before the respondents had exhausted the issues raised by their constitutional motions of September 16, 2004, and no further reference is made to them in this judgment.

[12] I need not rehearse the findings of the Court of Appeal at this stage other than to say that it held that the decisions of the BPC were subject to judicial review and that the ratified but unincorporated treaties i.e the American Convention on Human Rights and the International Covenant on Civil and Political Rights 1966 (ICCPR) gave the respondents the right to have their petitions to these human rights bodies processed and the reports of these bodies placed before the BPC for consideration before it made a decision on clemency. The Court of Appeal therefore considered that the BPC's decisions in 2002 and 2004 not to recommend clemency constituted a breach of the respondents' right to the protection of the law (section 11(c) of the Constitution). The Court of Appeal commuted the death sentences to life imprisonment for the following reasons:

> *"Judicial deference to the BPC and the limited time before the expiry of the five-year period therefore dictate that we should not order a stay of execution pending the report from the IACHR. In view of the time frame and the circumstances of the case, the proper order is to commute the sentences*."

[13] Ultimately the Court of Appeal felt that the real ground for allowing the appeal was that the delay between conviction and execution was long enough to amount to *"inhuman or degrading punishment"* within the meaning of section 15(1) of the Constitution as explained in the *Pratt and Morgan*[2] guidelines.

[14] By the time this appeal was heard the fifth anniversary of the conviction of Joseph and Boyce had passed, as the Court of Appeal presciently predicted. Leading counsel for the Crown, Mr Forde QC, therefore conceded that if his appeal were successful he could not properly ask for the reinstatement of the death sentences in the light of *Pratt and Morgan v Attorney-General for Jamaica*[2]. No issue was taken for this purpose with the aggregation of the time taken to pursue domestic appeals with the time spent before international human rights tribunals.

Ambivalence of the statutory and constitutional provisions

[15] In cases such as the present involving the mandatory death penalty the courts are faced with a paradox. In the first place, the trial judge must, if the jury finds the accused guilty, sentence him to death: see section 2 of the Offences Against the Person Act 1994 (No 18). Secondly, section 78(3) of the Constitution commands the Governor General (upon the sentence of a person to death) to convene a meeting of the BPC to advise him or her on the exercise of the powers of clemency particularized in section 78(1) of the Constitution. Although Lord Bingham of Cornhill reminds us that the grant of mercy is an executive responsibility (*Reyes v The Queen*[3]**)** the effect of the exercise of a power of reprieve may be to change a sentence of death into a sentence of a term of years. Thirdly, as Lord Goff of Chieveley in his dissenting speech in *Thomas v Baptiste*[4] said: "*The commissions espouse a policy of discouraging capital punishment wherever possible…"* Barbados has not incorporated such treaties into domestic law, so that abolition of capital punishment is not official domestic policy. Nonetheless, on the international plane Barbados has accorded its citizens the right of

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[2] *Pratt and Morgan v Attorney-General for Jamaica* [1994] 2 AC 1 (PC); (1993) 43 WIR 340
[3] *Reyes v The Queen* [2002] 2 AC 235, 257; (2002) 60 WIR 42, 68
[4] *Thomas v Baptiste* [2002] 2 AC 1, 35e; (1998) 54 WIR 387, 435

access to international human rights commissions whose declared commitment is toward the abolition of capital punishment.

[16] Thus, the mandatory death penalty is prescribed, but the Constitution prevents the sentence from being carried out without a clemency hearing by the BPC, which, according to *Lewis v Attorney-General*[5], must await the report of international human rights tribunals which favour abolition before it can decide on clemency. A further element in the paradox is that pursuant to *Pratt and Morgan* (supra) after an approximate period of five years after conviction a sentence which was mandatory ceases to be so.

[17] Barbados, in relation to persons sentenced to death after September 5, 2002, has passed the Constitution (Amendment) Act 2002 (No 14) in an attempt to resolve some elements of the paradox. However, it is not clear that these amendments have resolved all the difficulties, an issue which need not detain us in the instant appeal.

[18] It is important to remember that the process under scrutiny is one by the executive i.e the carrying out of a sentence of death with proper regard for the fundamental rights and freedoms of a condemned man.

Power to review decisions of the BPC

[19] In *Riley v Attorney-General of Jamaica*[6] Lords Scarman and Brightman in a dissenting speech later vindicated in *Pratt and Morgan* (supra) said this of the constitutional provisions which relate to the prerogative of mercy:

> "*Though they derive as a matter of history from the Crown's prerogative of mercy, they are now statutory in character. They are part of the written Constitution… It is to be noted that this is an executive power subject to the*

[5] *Lewis v Attorney-General* [2001] 2 AC 50; (2000) 57 WIR 275
[6] *Riley v Attorney-General of Jamaica* [1983] AC 719; (1982) 35 WIR 279

sort of safeguard, i.e the confidential advice of a distinguished independent body, which is a familiar feature in administrative and public law."

[20] Nor does it matter that the source of the prerogative is the common law, statute or the Constitution. In *CCSU v Minister for the Civil Service*[7] Lord Scarman for the majority said:

"*The law relating to judicial review has now reached the stage where it can be said with confidence that, if the subject matter in respect of which prerogative power is exercised is justiciable… the exercise of the power is subject to review in accordance with the principles developed in respect of the exercise of statutory power."*

[21] It is therefore clear that the procedures of the BPC are subject to judicial review, as in fact the majority held in *Lewis v Attorney-General of Jamaica* (supra) where the Privy Council refused to follow its own decision in *de Freitas v Benny*[8] and *Reckley v Minister of Public Safety and Immigration (No 2)*[9]. Decisions as to the grant or refusal of mercy should be arrived at by procedures which are fair and proper.

Does the ouster clause bar review of BPC decisions?

[22] Counsel for the Crown then submitted that the decisions of the BPC were immune from challenge because of the ouster clause in section 77(4) of the Constitution. Section 77(4) provides:

"*The question whether the Privy Council has validly performed any function vested in it by this Constitution shall not be inquired into in any court."*

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[7] *CCSU v Minister for the Civil Service* [1985] AC 374, 407
[8] *de Freitas v Benny* [1978] AC 239; (1975) 27 WIR 318
[9] *Reckley v Minister of Public Safety and Immigration (No. 2)* [1996] AC 527; 1996) 47 WIR 9

[23] I endorse what fell from the President and Saunders J in this regard, particularly their reliance on *Thomas v Attorney-General of Trinidad and Tobago*[10]. However, it would seem that since all decisions of bodies like the BPC are reviewable for errors of law, such as alleged breaches of the Constitution, and for procedural fairness, ouster clauses such as section 77(4) will rarely be effective.

[24] Whether decisions of the BPC are subject to substantive review on the grounds laid down by Lord Diplock in *CCSU v Minister for the Civil Service* (supra) at pp 410-11 i.e. illegality, irrationality, procedural impropriety or proportionality has not been argued in the present appeal. In my judgment any unlawfulness found in consequence of a review on such grounds would also constitute a breach of the constitutional rights of the condemned man and trigger the wide remedies under section 24 of the Constitution. Indeed, on the facts of the instant case there may be a serious question as to the proportionality of the death sentence imposed on the respondents as against the sentence of 12 years meted out to their fellow perpetrators. The Court of Appeal in my view properly took this factor into consideration in deciding whether to commute the death sentences imposed on the respondents.

The effect of petitions to international human rights bodies

[25] A major issue between the parties was whether the respondents had the right to have the report of the IACHR on their case placed before the BPC for consideration and whether the BPC had a concomitant duty to await such report before taking the decisions they took in 2002 and 2004 not to recommend commutation of their death sentences. The Court of Appeal held that it was bound by *Lewis v Attorney-General of Jamaica* (supra) and adopted the conclusion of Lord Slynn of Hadfield in *Lewis* (supra) at p 85 E:

> *"Execution consequent upon the Jamaican Privy Council's decision without consideration of the Inter-American Commission report would be unlawful."*

[10] *Thomas v Attorney-General of Trinidad and Tobago* (1981) 32 WIR 375, 393-4

In *Lewis* (supra) the Privy Council held that as a general rule ratified but unincorporated treaties afforded no rights to individuals enforceable in domestic courts. However, when a state acceded to such treaties and allowed individuals to petition international human rights bodies the protection of the law afforded by section 13 of the Constitution entitled the petitioner not only to complete that procedure and to obtain reports of such bodies for the consideration of the Jamaica Privy Council before determination of an application for mercy but also to have a stay of execution till such reports were received and considered.

[26] The question whether unincorporated human rights treaties signed and ratified by the executive accord rights to condemned men in death penalty cases has received inconsistent answers in five Caribbean cases decided by the Privy Council and discussed by the President and Saunders J.

[27] The dilemma which the Privy Council faced in those cases was how to maintain a rigid dualist approach to the relationship between international law and municipal law and yet introduce international human rights norms into municipal law where treaties embodying those norms were ratified but not incorporated.

[28] That dilemma might be resolved by considering whether there are any exceptions to the rule that international law and municipal law travel along distinct, non-tangential paths. In my judgment there is such an exception when there is a legitimate expectation on the domestic plane that there would be compliance with international obligations not incorporated into the municipal law. It is well settled that a decision-maker may create a legitimate expectation in a person by reason of the decision maker's established past practice: see *O'Reilly v Mackman*[11] per Lord Diplock. Other methods of creating a legitimate expectation may be a specific representation to a person as to how a power will be exercised or an express or implied policy statement attributable to the decision-maker.

[11] *O'Reilly v Mackman* [1983] 2 AC 237, 275D

[29] The legitimate expectation in the instant case is based on the established practice in Barbados after a condemned man has exhausted his local appeals. The judgment of the Court of Appeal refers to this "established practice" at paragraph 17 and sets out the steps to be followed in bringing a complaint before the IACHR or the Inter-American Court.

[30] Alternatively, the conduct of the Barbados government in complying with its obligations in respect of this petition to the IACHR amounts in my judgment to a representation by conduct that the benefit of the Inter-American system of review would be accorded to the respondents.

[31] In the result I would arrive at the same conclusion as the Privy Council in *Lewis* (supra) but by the slightly different route of anchoring the need to await the termination of the Inter-American review process in a legitimate expectation derived from established practice in Barbados or the representations of the Barbados authorities by conduct in this case.

[32] I agree with the analysis of the President and Saunders J of the legal consequences of such a legitimate expectation. If it were necessary to decide the point in this case I would have held that once an applicant to the BPC has been denied fairness or natural justice by the BPC it may not be safe in a matter of life and death to remit the same case to the same body since there would always be a lurking doubt and sense of injustice if the BPC ignored a report favourable to the respondents and persisted in its refusal of clemency.

Commutation?

[33] Counsel for the Crown, Mr. Forde QC, also raised the question whether the Court of Appeal could properly commute the death sentence. The point now seems academic in the light of the concession made by him that the decision in *Pratt and Morgan v Attorney-General* (supra) applied on the facts of the instant appeal, more than five years having elapsed since conviction. In any event the Court of Appeal properly

regarded itself as bound by *Bradshaw v Attorney-General*[12] in which the Privy Council commuted a sentence of death where there was a delay in excess of eight years after conviction on the basis of the principles in *Pratt and Morgan v Attorney-General* (supra), and we have not been invited to depart from *Bradshaw v Attorney-General* (supra).

[34] In my judgment a breach of the right to the protection of the law occurred when the BPC made its decisions not to recommend clemency before the respondents could obtain any material for its consideration from the international bodies they had petitioned, thus impairing the fairness of the hearing. This breach brought into play the full range of remedies under the redress clause. Accordingly the Court of Appeal could properly have made its order pursuant to section 24 of the Constitution on the basis of a breach of the Constitution other than section 15 if it had been minded to do so.

[35] In any event the powers of the courts under the supreme law clause would appear to be wide enough to provide a declaration and consequential relief in respect of any law or executive action in breach of the Constitution. However, in the absence of full argument I express no concluded view on this point.

Conclusion

[36] In the final analysis for the reasons given by the President and Saunders J I too would dismiss this appeal with costs to each of the respondents certified fit for two attorneys-at-law.

s/ R. F. Nelson

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Rolston F Nelson

[12] *Bradshaw v Attorney-General* [1995] 1 WLR 936 (PC); (1995)46 WIR 62