

18-04-07

IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CICA No. 20/2006
(Ind. 11/01)

BETWEEN:

JASON ORLANDO HYDES

APPELLANT

and

HER MAJESTY THE QUEEN

RESPONDENT

BEFORE:

THE RIGHT HON. MR. JUSTICE ZACCA, P.
THE HON. MR. JUSTICE TAYLOR, J.A.
THE HON. MR. JUSTICE FORTE, J.A.

Appearances: Howard Hamilton, Q.C., instructed by Keith Collins & Co. for the Appellant. Samuel Bulgin, Q.C., Attorney General and Trevor Ward for the Crown.

Heard and Delivered: December 06, 2006

Reasons Given: April 18, 2007



REASONS FOR JUDGMENT

FORTE, J.A.

The appellant was convicted of manslaughter on August 2, 2001. As he was 15 years of age at the time of his conviction, the learned trial judge, in accordance with the provisions of *section 2(2) of the First Schedule of the Youth Justice Law (2001 Revision)*, ordered that he be detained "until the pleasure of His Excellency the Governor be known." In addition, he recommended that the appellant serve a "minimum of six (6) actual years of detention before release on licence and in the event that release on licence does not then take place, annual review thereafter."

Section 2(2) of the First Schedule of the Youth Justice Law 2001 Revision provides:

“Where a young person is found guilty of any other offence before the Grand Court for which a person who has attained the age of seventeen would be liable to imprisonment for life, the court shall if it considers that a custodial sentence would be appropriate, sentence him to imprisonment during Her Majesty’s pleasure.”

Although the sentence imposed by the learned trial judge is different from the wording of the Statute, no complaint has been made in that regard. Given our conclusion, (which we will express hereafter), we do no more than note the incorrectness of the terms used by the learned trial judge and point out that in any event the wording of the punishment can be changed to make it consistent with the terms of the Statute.

The provisions in *section 2(2) of the Schedule of the Law* are the subjects of challenge in this appeal. The appellant contends that the provisions are inconsistent with the Constitution, which is based on the Westminster Model, which “guarantees a separation of powers.” He argues that *section 2(2)* vests the power to determine the duration of the sentence to be served by him in the Executive Arm of the Government, i.e. in Her Majesty, exercising her powers through her representative, His Excellency the Governor of these Islands. He further contends that only the Judiciary can lawfully exercise such a power. Consequently, *section 2(2)*, which transfers that power to the Executive, is incompatible with the underlying foundation of separation of powers in the Constitution. He relies on a number of cases; some of which will be considered later. He has asked this Court to conclude, following the *dicta* in these cases, that

the sentence of detention imposed by the learned trial judge is unlawful. He also asks the Court to construe *section 2(2)* in such a manner as to bring it into conformity with the Constitution.

The Judicial Committee of Her Majesty's Privy Council has accepted the principle on which the appellant has developed his contention, in several cases. It is necessary to refer to only two of these cases to adequately deal with the issues in this appeal: These are *Hinds v The Queen* (1977) AC 195, and *DPP v Mollison* (No. 2) (2003) 2 AC 411.

As the *Hinds* case (supra) was relied upon in *Mollison* (supra) it is necessary only to examine the dicta in the latter, which considered provisions in a Jamaican Act, which are similar to the provisions of *section 2(2)*.

Before dealing with the *Mollison* case (supra) in any detail, I should state that that case deals with the *Jamaican Constitution*, which contains human rights provisions; particularly *section 20(1)* which protects the citizen's right, to a fair hearing within a reasonable time, before an impartial and independent tribunal, when charged with a criminal offence. In some cases it has been argued successfully that the requirement for an independent tribunal would be breached in cases where the determination of the length of sentence to be served by a convict is placed in the province of the Executive. In the *Mollison* case, (supra), the disputed section - *section 29 of the Jamaica Juveniles Act*- preceded the coming into effect of the Constitution. As a result, the provisions of that section could have been regarded as being saved by the provisions of *section 26(8) of the*

Constitution, (by virtue of its prior enactment to Constitution). Because of the provisions of *section 26(8)*, Counsel in the *Mollison* case (supra) proffered his arguments on the basis of the doctrine of separation of powers. This is how Lord Bingham dealt with this issue, in giving the opinion of the Board:

“Both the Director [of Public Prosecutions] and the Solicitor-General, who appeared with him, accepted at the hearing that, subject to their argument based on section 26(8) of the Constitution, section 29 of the Juveniles Act 1951 infringes the rights guaranteed by, and so is inconsistent with, sections 15(1)(b) and 20(1) of the Constitution. Given this concession, rightly made, it is unnecessary to do more than note the reasons for it. A person detained during the Governor-General’s pleasure is deprived of his personal liberty not in execution of the sentence or order of a court but at the discretion of the executive. Such a person is not afforded a fair hearing by an independent and impartial court, because the sentencing of a criminal defendant is part of the hearing and in cases such as the present, sentence is effectively passed by the executive and not by a court independent of the executive.”

In the case of the Cayman Constitution, there are no human rights provisions. Specifically, there are no expressed provisions similar to that of *section 20(1) of the Jamaican Constitution*. It could be argued, however, that such right- to have a fair hearing before an independent and impartial court- is inherently possessed by each citizen. However, like in the *Mollison* case, (supra) Counsel for the Appellant in the instant case did not pursue that contention, but was content to rely on his submission that *section 2(2) of the*

Schedule (supra) is in breach of the doctrine of separation of powers, which is guaranteed by the Constitution.

In the *Mollison* case (supra), Lord Bingham, in dealing with the arguments of the appellant, states thus:

“No doubt mindful of the obstacle presented by section 26(8), Mr. Fitzgerald, QC for the respondent (with the able support of Dr. Lloyd Barnett for the intervening parties) based his primary attack on section 29 not on its incompatibility with the specific rights guaranteed by sections 15(1)(b) and 20(1) of Chapter III but on its incompatibility with the separation of judicial from executive power which was, as he contended, a fundamental principle upon which the Constitution was built. This might at first sight seem an ambitious contention, but Mr. Fitzgerald supported it by reference to the judgment of the Board, delivered by Lord Diplock, in *Hinds v The Queen* [1977] AC 195. The main issue in that case concerned the constitutionality of a new court established by the Parliament of Jamaica under a post-independence statute to try those accused of firearms offences. There was however a subsidiary issue concerning the constitutionality of two sections of the statute, one of which prescribed a mandatory penalty of detention at hard labour during the Governor-General’s pleasure on conviction of certain offences, the other of which provided for release only by the Governor-General on the advice of a largely non-judicial review board.”

Lord Bingham then went on to cite, with approval, certain passages from the opinion of Lord Diplock in *Hinds* (supra), which are very relevant to the issue in this appeal and to which I will make reference:

1. In his exposition of the principles underlying what he called the “Westminster Model” of Constitution, Lord Diplock referred (at page

212B) to “the basic concept of separation of legislative, executive and judicial power” and observed (at page 212D):

‘It is taken for granted that the basic principle of separation of powers will apply to the exercise of their respective functions by these three organs of government.’

He went on to observe (at page 213C):

‘What, however, is implicit on the very structure of a Constitution on the Westminster model is that judicial power, however it be distributed from time to time between various courts, is to continue to be vested in persons appointed to hold judicial office in the manner and on the terms laid down in the Chapter dealing with the Judicature, even though this is not expressly stated in the Constitution. *Liyanage v The Queen* [1967] 1 AC 259, 287-288’

2. What Parliament cannot do, consistently with the separation of powers, is to transfer from the judiciary to any executive body whose members are not appointed under Chapter VII of the Constitution, a discretion to determine the severity of the punishment to be inflicted upon an individual member of a class of offenders.

In this connection their Lordships would not seek to improve on what was said by the Supreme Court of Ireland in *Deaton v Attorney General and the Revenue Commissioners* [1963] 1R 170, 182 - 183, a case which concerned a law in which the choice for alternative penalties was left to the executive:

'There is a clear distinction between the prescription of a fixed penalty and the selection of a penalty for a particular case. The prescription of a fixed penalty is the statement of a general rule which is one of the characteristics of legislation; this is wholly different from the selection of a penalty to be imposed in a particular case ... The legislature does not prescribe the penalty to be imposed in an individual citizen's case; it states the general rule, and the application of that rule is for the courts ... the selection of punishment is an integral part of the administration of justice and, as such, cannot be committed to the hands of the Executive ...'

Lord Bingham thereafter concluded:

"Whatever overlap there may be under constitutions in the Westminster model between the exercise of judicial powers on the one hand and legislative and executive powers on the other, is totally or effectively so. Such separation based on the rule of law, was recently described by Lord Steyn as 'a characteristic feature of democracies.' *R (Anderson) v Secretary of State for the Home Department* (2002) 3 WLR 1800 at 1821-1822, paragraph 50. In the opinion of the Board, Mr. Fitzgerald has made good his challenge to section 29 based on its incompatibility with the constitutional principle that judicial functions (such as sentencing) must be exercised by the judiciary and not by the executive."

For the avoidance of doubt, we should state that the Cayman Constitution is based on the Westminster Model, having as its foundation the principle of

separation of powers. The Constitution is arranged in various parts: Part I dealing with "The Governor"; Part II -Executive Council (Renamed "Cabinet" by S12003 No. 1515), Part III - Legislative Assembly; Part IV- Powers and Procedure in Legislative Assembly; Part V - The Court of Appeal; Part VA- The Grand Court and Subordinate Courts; Part VB -Complaint Commissioner and Part VI - Miscellaneous. Parts V & VA establish the Court of Appeal and the Grand Court as Superior Courts of Record and make provisions for the appointment and dismissal (in specific circumstances) of Judges of Appeal and Grand Court Judges.

The Constitution, as drafted, significantly recognizes and provides for the distinctive functions of each arm of Government i.e. the Executive, Legislative and the Judiciary. To the latter it assigns judicial functions, to the [implied] exclusion of the other arms of government. It follows then, that the Cayman Constitution is faithful to the accepted doctrine of separation of powers between the Executive, the Legislative and the Judiciary, as is the case in most democratic countries. Lord Diplock, in the cited passages from the *Hinds* case (supra), recognizes the peculiar functions of each arm and the consequent breach if there is any trespass on judicial functions by either the Legislative or the Executive Arms.

The following words of Lord Diplock in the *Hinds* case (supra), in relation to the Review Board, which had been established by the challenged Statute, are equally applicable to the instant case. He said:

“If consistently with the Constitution it is permissible for the Parliament to confer the discretion to determine the length of custodial sentences for criminal offences upon a body composed as the Review Board is, it would be equally permissible to a less well-intentioned Parliament to confer the same discretion upon any other person or body of persons not qualified to exercise judicial powers, and in this way, without any amendment of the Constitution to open the door to the exercise of arbitrary power by the executive in the whole field of criminal law.”

It is not disputed in this appeal, that His Excellency the Governor is a part of the Executive and that he has no judicial powers and responsibilities. Consequently, the only conclusion must be that *section 2(2) of the Schedule of the Law*, which gives His Excellency the power to determine the length of sentence to be served, is in conflict with the Constitution, which assigns that power and responsibility to the judicial arm of the government. For emphasis, I reiterate that part of the passage from *Deaton* case (supra), which was cited with approval by Lord Diplock in *Hinds* (supra), who specifically pronounced that he would not seek to improve on it. It reads:

“... the selection of punishment is an integral part of the administration of justice and, as such, cannot be committed to the hands of the executive.”

Section 2(2) of the Schedule to the Law does exactly that-commits punishment to the hands of the Executive- and must, *a fortiori*, be in breach of those Constitutional principles propounded in the *Hinds and Mollison* cases, and which are here adopted. Consequently, we had no hesitation, at the end of the arguments on the 12th December 2006, in allowing the appeal against sentence.

At that time, we set aside the sentence passed by the learned trial judge and ordered, *in lieu*, that the “appellant be imprisoned during the Court’s pleasure.”

This substituted sentence gave us some difficulty, as the Cayman Constitution does not have a comparable section, *in pari materia* to section 4(V) of the Jamaica (Constitution) Order in Council, 1962 which provides for the preservation of laws which were in force before the coming into effect of the Constitution, and which also further provides that:

“... but all such laws shall, subject to the provision of this section, be construed, in relation to any period beginning on or after the appointed day, with such adaptations and modifications as may be necessary to bring them into conformity with the provisions of the Order.”

In *Mollison* Lord Bingham, in his opinion in the Privy Council, explains the purpose of this section, as follows:

“It seems clear that section 4 had two complementary objects: to ensure that existing laws did not cease to have force on the coming into effect of the new legal order; and to provide a means by which existing laws could be modified or adapted to ensure their conformity with the Constitution and preclude successful challenge on the grounds of constitutional incompatibility.”

In all of the cases cited by Counsel for the Appellant in support of his submissions, the Constitutions with which they were concerned all had similar powers, permitting the Court to construe the questioned provisions with such adaptations and modifications as may be necessary to bring them into conformity with the provisions of those relevant Constitutions. This allowed for

adaptation and modification in respect of the questioned provisions in those cases, in order to bring them into conformity with the doctrine of separation of powers, which their Lordships concluded was the foundation of the respective Constitutions. In those cases it was a simple exercise to place the determination of the length of the sentences passed on the appellants into the province of the Court, and in so doing rectify the breach. In the instant case, we could not undertake a similar exercise because no such power is given to us in the Cayman Constitution.

Having held that the sentence imposed on the appellant was unlawful, for the reason stated, consideration had to be then given to what sentence could legally be imposed on him, he having been correctly convicted.

Section 1(1) of the First Schedule of the Youth Justice Law provides:

“... the only custodial sentences that a court may make where a young person is found guilty of an offence are the sentences mentioned in this Schedule.”

This section of the Schedule mandates that a young person, in the circumstances of the Appellant, be sentenced in accordance with *section 2(2)* of the Schedule, which directs that:

“The Court shall, if it considers that a custodial sentence would be appropriate sentence him to imprisonment ‘during Her Majesty’s pleasure’.”

Having regard to the seriousness of the offence, we agree with the learned trial judge that a custodial sentence is appropriate. *Section 5* of the same Schedule states:

“Where any sentence of detention has been passed with respect to a young person under paragraph 2 or 3, he shall be liable to be detained in such place (including a prison) and subject to such conditions as the Governor may direct, and while so detained shall be deemed to be in legal custody.”

As the sentence of detention by the Court is valid, the only breach of the Constitution is in ordering that the detention should occur “during Her Majesty’s pleasure” (instead of during the court’s pleasure) thereby giving to the Executive the power to determine the length of the sentence.

In the Irish case of the *State v O’Brien* [1973] Irish Reports 50, Walsh J expressed a view, at page 72, about *section 103 of the Children’s Act, 1908*, (which is in *pari materia* to *section 2(2) of the Schedule* (supra)), which we find persuasive and consistent with our own view. Consequently, we adopt it, in the circumstances of this case. He said:

“Section 103 of the Act of 1908, as originally framed, did not require any term to be stated by the Court, but left it to be decided by the King or the Lord Lieutenant how long the detention was to be endured. This was in contrast to s. 104 of the Act of 1908 which provides that where a child or young person is convicted on indictment of attempt to murder, or certain other offences, and the court is of opinion that no other authorized punishment under the Act is sufficient, the court may sentence the offender to be detained for such period as may be specified in the sentence. I do not think it could be contended that the Oireachtas could not by Act expressly state that a person was to be sentenced to be detained during the pleasure of the court or until such time as the court thought it fit to release such a person. The powers already enjoyed by the Courts in respect of the committal of person for civil contempt of court where

a court may order the detention or imprisonment of a person until the court is satisfied that he has purged his contempt, or where for any good reason the court may think fit to release him, are quite analogous to this power and authorize a period of imprisonment or detention at the will of the court to compel obedience to the order of the court, which imprisonment cannot be remitted or commuted by virtue of any of the powers granted by Article 13, section 6, of the Constitution. It is a matter completely within the sphere of judicial power.

In my view, the correct form of sentence now for a person falling to be sentenced under s. 103 of the Act of 1908 would be that the person should be sentenced to be detained, and he would thereupon be liable to be detained in such place and under such conditions as the Minister for Justice might direct. The statute further provides that while so detained the person concerned should be deemed to be in legal custody. In my opinion the words 'during His Majesty pleasure' were inconsistent with the provision of the Constitution of Saorstát Éireann 1922, and were inconsistent with the provisions of the Constitution of Ireland, 1937 and were not carried over as part of the law and could not be adapted."

In keeping with those words, we are of the opinion that in the circumstances of the instant appeal, as it was in the *O'Brien* case (supra), the court can sentence the Appellant to be detained, until it is satisfied that he has served sufficient time in respect of his penalty and rehabilitation, with the Court monitoring his progress from time to time. It is clear that the spirit of the legislation i.e. *section 2 of the First Schedule*, suggest that the Legislature intended to treat young offenders who commit serious crimes differently from adult offenders who commit similar crimes.

Speaking of his decision in the *O'Brien* case (supra) Walsh J shows the appropriateness of this method of punishment when he said at page 72:

“That would certainly be consonant with the original spirit of this statutory provision which was enacted in case of young persons and juveniles; the matter might be reviewed from time to time by the court concerned (though not necessarily the same judge) to enable the court to decide whether the time had come when the particular young person or juvenile might be properly released and discharged from the place of detention in which he was being confined.”

In coming to this conclusion we were also cognizant of the fact that this method of sentence was specifically designed to deal with young persons and is not the same as a sentence of life imprisonment, which would not address the special circumstances of a young person. In the *Mollison* case (supra), at page 16, Lord Bingham stated views, which are consistent with the opinion of Walsh J, and ours. He said:

“A sentence of imprisonment for life is a sentence of a different nature from a sentence of indefinite detention specifically designed to address the special circumstances of those convicted of murders committed under the age of 18. Substitution of the court for the Governor General should not lead to a change, and a change disadvantageous to the detainee, in the punishment imposed.”

In all the circumstances, we concluded that the most appropriate (and best) approach to the question of sentence was to order that the Appellant be detained during the Court's pleasure.

We take note of the directives given by the Court of Appeal of Trinidad and Tobago in the case of *Chuck Attin v The State for the Republic of Trinidad & Tobago* (C.A. No. 29 of 2004) and observe that that Court followed, in principle, the directions issued by Sir David Simmons, CJ sitting in the Court of Appeal of Barbados, in the case of *Mormon Seantlebury v The Queen* Cr. App. 34 of 2002 (unreported).

We suggest, however, that in the Cayman Islands, such guidelines for the Review Procedure should be formulated by the Hon. Chief Justice, after consultation with the Grand Court Judges.

Finally, we advise that the Attorney General consider recommending amendments to *section 2(2) of the Schedule* to bring it into conformity with the Constitution.

Zacca, P.

Taylor, J.A.

Forte, J.A.

