

Greene Browne

Appellant

v.

The Queen

Respondent

FROM

**THE COURT OF APPEAL OF ST.
CHRISTOPHER AND NEVIS**

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL,

Delivered the 6th May 1999

Present at the hearing:-

Lord Slynn of Hadley
Lord Mackay of Clashfern
Lord Clyde
Lord Hobhouse of Woodborough
Sir Patrick Russell

[Delivered by Lord Hobhouse of Woodborough]

The appellant was born on 14th May 1978. On 9th November 1994, he was convicted after a trial in the High Court of St. Christopher and Nevis, before Mrs. Justice Hylton and a jury, of the murder of Rohan Brandy on 30th October 1993. At the time of the offence the appellant was 15 years old and at the time of his conviction he was 16. The judge sentenced him to be “detained until the pleasure of the Governor-General be known”. In so sentencing the appellant, the judge intended to sentence him in accordance with the proviso to section 3(1) of the Offences against the Person Act 1873 (as amended) but the words she should have used were “detention during the Governor-General’s pleasure”.

The section reads:-

“Upon every conviction for murder, the Court shall pronounce sentence of death, and the same may be carried onto execution ...

Provided that sentence of death shall not be pronounced on or recorded against a person convicted of an offence if it appears to the Court that at the time the offence was committed he was under the age of eighteen years; but in lieu thereof the Court shall sentence him to be detained during [the Governor-General’s] pleasure; and if so sentenced he shall be liable to be detained in such place and under such conditions as the Administrator in Council may direct and, while so detained, be deemed to be in legal custody.”

The appellant appealed to the Court of Appeal of the Eastern Caribbean States against his conviction but his conviction was upheld and is not now questioned any further. The point raised on this appeal to their Lordships’ Board relates to the legality of the sentence. Clearly the sentence has to be corrected to follow the prescribed statutory wording and this has not been contested by the State on this appeal. But there is a more fundamental point which was not considered by the Court of Appeal: this is whether the prescribed sentence is in accordance with the Constitution of St. Christopher and Nevis.

On this appeal the Board has been assisted by the submissions of Mr. Delano Bart, the Attorney-General. He said that the present case is the first occasion that a judge of St. Christopher and Nevis has had to pass a sentence in accordance with the proviso to section 3(1). He explained that the State was seeking the assistance of the Board in finding the right solution to the constitutional question which the sentence of detention during the Governor-General’s pleasure raised. He made two important concessions. He expressly accepted the decisions in *Reg. v. Secretary of State for the Home Department Ex parte Venables and Thompson* [1998] A.C. 407 and *Hinds v. The Queen* [1977] A.C. 195 and their applicability to the present case.

In *Ex parte Venables* one of the points arising for decision was the character of the sentence “detention during Her Majesty’s pleasure” under section 53(1) of the Children and Young Persons Act 1933 as amended (which replaced section 103 of the Children and Young Persons Act 1908 and which

for all material purposes used the same wording as the St. Christopher and Nevis statute): was it a form of life sentence or was it a sentence for discretionary custody of such duration as should thereafter be decided? There was a division of opinion on this question in both the Court of Appeal and the House of Lords. The view which prevailed was that it was not a life sentence but was a wholly discretionary sentence. Lord Browne-Wilkinson said at p.498:-

“... detention during Her Majesty’s pleasure is wholly indeterminate in duration: it lasts so long as Her Majesty (*i.e.* the Secretary of State) considers appropriate. ... [It is] not a sentence of the same kind as the mandatory life sentence imposed on an adult murderer, the duration of which is determined by the sentence of the court and is for life. In cases of detention during Her Majesty’s pleasure the duty of the Secretary of State is to decide how long that detention is to last, not to determine whether or not to release prematurely a person on whom the sentence of the court is life imprisonment.”

Lord Steyn and Lord Hope expressed similar views at pp.521 and 531-2. All three of their Lordships explain the policy which underlies such an approach which is to maintain flexibility and to enable the duration of the defendant’s detention to take into account his welfare, the desirability of reintegrating him into society and his developing maturity through his formative years. (See per Lord Browne-Wilkinson at pp.499-500.) But it was also accepted that punishment was part of the purpose of the sentence and therefore that the Secretary of State, in exercising his statutory discretion regarding the duration of the detention, should have regard to the need to punish the defendant. (See particularly per Lord Steyn at pp.519-20.) Thus, at pp.522-3, Lord Steyn said:-

“Parliament differentiated between the two sentences. An order of detention during Her Majesty’s pleasure involves merely an authority to detain indefinitely. That means that the Home Secretary must decide from time to time, taking into account the punitive element, whether detention is still justified. Life imprisonment involves an order for custody for life.”

It will be appreciated that it follows from this that the Attorney-General has accepted that in England under section

53(1) and in St. Christopher and Nevis under section 3(1), the sentence is not one which is determined by the court but one which is determined by the Secretary of State or the Governor-General, including its punitive element. Under Chapters III and V of the Constitution of St. Christopher and Nevis, the Governor-General is part of the Executive, not the Judiciary. This makes relevant the second case which the Attorney-General has accepted to be applicable.

Hinds was a decision of the Privy Council on appeal from the Court of Appeal of Jamaica. Jamaica, like St. Christopher and Nevis, has a constitution which follows the “Westminster” model. These constitutions are drafted upon the principle of separation of powers. A statute had set up a “Gun Court” to try persons charged with firearms offences. Section 8 of the statute prescribed a mandatory sentence of detention at hard labour during the Governor-General’s pleasure for certain offences, determinable by the Governor-General on the advice of a five-man review board of which only the chairman was a member of the judiciary. Various defendants who had been convicted before the court and sentenced in accordance with section 8 appealed contending that the sentence was unconstitutional. The appeals succeeded. Lord Diplock giving the opinion of the Board said, at pp.225-6:-

“In the field of punishment for criminal offences, the application of the basic principle of separation of legislative, executive and judicial powers that is implicit in a constitution on the Westminster model makes it necessary to consider how the power to determine the length and the character of a sentence which imposes restrictions on the personal liberty of the offender is distributed under these three heads of power. ... In the exercise of its legislative power, Parliament may, if it thinks fit, prescribe a fixed punishment to be inflicted upon all offenders found guilty of the defined offence - as, for example, capital punishment for the crime of murder. Or it may prescribe a range of punishments ... 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.”

He adopted a statement of the Supreme Court of Ireland (*Deaton v. The Attorney General* [1963] I.R. 170, 183): “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”. (*Hinds v. The Queen, supra*, p.227) *Deaton v. The Attorney General* was followed and applied in *The State v. O’Brien* [1973] I.R. 50. A similar decision was arrived at by the European Court of Human Rights under the European Convention in *Hussain v. United Kingdom* 22 E.H.R.R. 1.

It follows that the sentence prescribed by section 3(1) is contrary to the Constitution of St. Christopher and Nevis and that the sentence passed on the appellant was, even after correction of the verbal error, an unlawful sentence which the courts were not entitled to pass or uphold. The sentence must be set aside.

The validity of the provision is not saved by any provision of the Constitution which preserves the validity of previous laws. The Constitution, unlike those of other Caribbean countries, does not include a general preservation of the validity of all pre-existing law. Paragraph 9 of the second schedule does preserve existing law in relation to inhuman treatment referring back to section 7. But the relevant provision for present purposes is section 5(1). Deprivation of liberty otherwise than in execution of the sentence or order of a court is contrary to the Constitution. Paragraph 2 of the Schedule provides that:-

“The existing laws shall, as from 19th September 1983, 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.”

Therefore, it is the duty of the court to decide what modifications require to be made to the offending provision in the proviso and to give effect to it in its modified form, not to strike down the proviso altogether. (See also *Vasquez v. The Queen* [1994] 1 W.L.R. 1304.)

This conclusion suffices to resolve the remaining dispute between the parties before us; what sentence should have been passed: what order should the Board make. The appellant, through his counsel, Mr. Fitzgerald Q.C., put

forward a number of alternatives. First, he submitted that since the only prescribed sentence had been declared unlawful, no sentence could lawfully be passed and the appellant should be released. Next he relied upon section 67 of the Criminal Procedure Act (Chapter 20) which provides that where a person is convicted of a felony, and no punishment is specially provided, he shall be liable to be imprisoned for any term not exceeding seven years. However, section 68 of the same Act provides:-

“When imprisonment is to be awarded for any offence and no definite period is fixed by law, the term of such imprisonment shall always be in the discretion of the Court passing the sentence ...”

In the light of paragraph 2, counsel rightly recognised the difficulties in his arguments that the appellant should have been released immediately without punishment or only sentenced to some limited term. But in any event, sections 67 and 68 of the Criminal Procedure Act cannot apply as such since the sentence is not a sentence of imprisonment but something radically different (*Ex parte Venables, supra*). Nor is the crime of murder by one under 18 years old, an offence for which no punishment is specially provided. It is a clear example of an instance where a special punishment has been provided having special and peculiar characteristics. (*ib.*) But section 68 provides an analogy, if one is required, for the sentencing court having the power to decide for how long the appellant should be detained. The decision and reasoning of the Supreme Court of Ireland in *The State v. O'Brien (supra)* also supports the conclusion that the correct construction of the proviso read with the Constitution is that the sentence should be detention during the Court's pleasure.

In their Lordships' judgment the answer to this part of the case is to identify the element of unconstitutionality in the relevant statutory provision and then to consider what change is necessary to give effect to the requirements of the Constitution and the appellant's constitutional rights. So far as the first part of this exercise is concerned, the relevant element is apparent from what has already been said. It is the fact that the decision on the length of the sentence is entrusted to the Executive not to the Judiciary. It follows from this that what is required to make the provision comply with the Constitution is that the decision should be made by a

court. If this is done the only objectionable part of the sentencing process is removed.

The sentencing court has a discretion as to the length of the detention. The sense and purpose of the concept “during pleasure” is that it is not a once and for all assessment that is made at the time that the defendant is first before the court after his conviction. Its purpose, as was pointed out in *Ex parte Venables* particularly by Lord Browne-Wilkinson at pp.499-500, is that it enables the position to be reviewed from time to time. The submission of the appellant that he should have received a determinate sentence runs counter to that purpose and the proper objective of the proviso. The sentence which he should have received was detention during the court’s pleasure and that is the sentence which must be substituted. However, in view of the passage of time between his conviction and the time that he will, pursuant to this judgment, return to be re-sentenced, it is to be recognised that, after having passed the sentence of detention during the court’s pleasure, the court may consider that the stage has been reached in the appellant’s rehabilitation and maturity where an order pursuant to that sentence can be made by the court which will limit the length of his further detention.

The appeal against sentence should accordingly be allowed and the case remitted to the Court of Appeal for that court to exercise its powers under section 39(4) of The West Indies Associated States Supreme Court (Saint Christopher, Nevis and Anguilla) Act 1976-17, or other relevant provision.