

Hilroy Humphreys

Appellant

v.

The Attorney General of Antigua and Barbuda

Respondent

FROM

**THE COURT OF APPEAL OF
ANTIGUA AND BARBUDA**

REASONS FOR DECISION OF THE LORDS OF THE
JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, OF THE
6th October 2008, Delivered the 11th December 2008

Present at the hearing:-

Lord Hoffmann
Lord Hope of Craighead
Baroness Hale of Richmond
Lord Carswell
Lord Neuberger of Abbotsbury

[Delivered by Lord Hoffmann]

1. On 19 June 2003 the Commissioner of the Police laid a number of criminal complaints against the appellant Mr Humphreys, alleging that he had conspired on various occasions during 1999 to defraud the Medical Benefits Board of Control. The offences were triable on indictment and as the law then stood, the next step would have been to bring Mr Humphreys before a magistrate for a preliminary inquiry pursuant to the Magistrate's Code of Procedure Act Cap 255. At the preliminary inquiry, the accused was entitled to cross-examine the prosecution witnesses, call witnesses and give evidence in his defence. The accused could then submit that he had no case to answer. The magistrate would decide whether there was

evidence upon which a jury could reasonably convict; if so, he would commit the accused for trial and, if not, he would order his discharge.

2. Before any such proceedings had begun, Parliament passed the Magistrate's Code of Procedure Amendment Act, No 13 of 2004, which abolished the preliminary inquiry. It substituted committal proceedings in which the magistrate makes the decision to commit the accused for trial or discharge him entirely on the basis of written witness statements and exhibits submitted by the prosecution and, if he chooses to submit them, by the accused. There is no right to cross-examine or call or give oral evidence. By section 1(2), the 2004 Act applies to "legal proceedings pending on the commencement of this Act" as well as those instituted thereafter. There is no dispute that the Act applies to the prosecution against Mr Humphreys.

3. He has brought judicial review proceedings claiming that the abolition of the preliminary inquiry has infringed his constitutional rights; first, by retrospectively depriving him of the procedural protection to which he was entitled at the time he was charged and secondly by depriving him of the right to a fair trial. These submissions were accepted by Thomas J in the High Court but rejected by the Court of Appeal (Alleyne CJ (Ag), Barrow and Rawlins JJA). Mr Humphreys appeals to Her Majesty in Council.

4. The Board will first deal with the complaint about retrospectivity. The law deals with retrospectivity at two levels. First, a court will generally not construe legislation as intended to operate retrospectively if doing so would have an unfair result. The leading authority on this doctrine is the speech of Lord Mustill in *L'Office Cherifien des Phosphates v. Yamashita-Shinnihon Steamship Co. Ltd* [1994] 1 AC 486 at pp. 523-529. From the authorities examined by Lord Mustill, it would appear that the presumption will rarely, if ever, apply to changes in court procedure. Prospective litigants (or defendants in criminal proceedings) do not have a vested right to any particular procedure and there will generally be nothing unfair in applying whatever procedure is in force when the case comes to court. It is however unnecessary to examine the scope of the doctrine because on any view it is a principle of construction which must yield to the express language of the statute. In this case the language of the statute could hardly be clearer. The new regime is to apply to "legal proceedings pending on the commencement of this Act". Any presumption against retrospectivity is therefore rebutted.

5. The second level is that of constitutional prohibition. Section 15(4) of the Constitution of Antigua and Barbuda altogether prohibits certain specified kinds of retrospective legislation:

“No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence that is more severe in degree or description than the maximum penalty that might have been imposed for that offence at the time when it was committed.”

6. This provision clearly has no application to the present case. Conspiracy to defraud was an offence at the time when Mr Humphreys is alleged to have committed the offences and no penalty has yet been imposed upon him. Mr Fitzgerald QC, who appeared for Mr Humphreys, conceded that, on what he called a literal construction, section 15(4) had no application. The Board sees no need for the opprobrious epithet literal; it appears to it that no process which could fairly be called construction can bring this case within section 15(4). The judge nevertheless held that the application of the new committal procedure to Mr Humphreys’s case flouted the “letter and spirit” of section 15(4) and Mr Fitzgerald QC urged that the Board should come to the same conclusion, either by giving a “purposive construction” to the subsection or by holding that applying the new procedure to Mr Humphreys would deny him “the protection of the law”, contrary to section 3(a) of the Constitution. The Board does not accept either of these arguments. It considers that the plain purpose of section 15(4) was to prohibit two specific types of retrospective legislation and no others. There is no justification for giving it a wider meaning. As for the protection of the law, the argument appears to the Board to involve a circularity. Mr Humphreys is entitled to the protection of the law which, on its true construction, is applicable to his case; not some other law.

7. The alternative ground of complaint is that the abolition of the preliminary inquiry deprived Mr Humphreys (and presumably everyone else who has been committed for trial in Antigua under the new procedure) of the right to a fair hearing guaranteed by section 15(1) of the Constitution:

“If any person is charged with a criminal offence then, unless the charge is withdrawn, he shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.”

8. The reasoning by which Mr Fitzgerald invites the Board to come to this conclusion starts from the premise that the preliminary inquiry is part

of the trial for an indictable offence and section 15(1) therefore requires it to be conducted fairly within a reasonable time by an independent and impartial court established by law. From this it is said to follow that the abolition of the preliminary inquiry would deprive the accused of the right to a fair trial.

9. The basic premise, that a preliminary inquiry under the old system had to be conducted fairly, seems to the Board uncontroversial and is supported by the judgment of Peterkin JA in *Halstead v Commissioner of Police* (1978) 25 WIR 522. But, even allowing the widest effect to this proposition, the conclusion simply does not follow. It is one thing to say that if the procedure for bringing someone accused of an indictable offence to trial includes a preliminary inquiry, that inquiry must be conducted fairly, by an impartial court and so forth. It is another thing altogether to say that one cannot have a fair hearing without a preliminary inquiry. In the Board's opinion it is a mistake to argue that because the old system provided a fair hearing, the change or abolition of some element of that system results in the new system being unfair. Systems of criminal procedure may differ widely without being unfair. The question is not the extent to which the new committal proceedings differ from the old preliminary inquiries but whether the new system of committal proceedings and trial, taken as a whole, satisfies the requirements of section 15(1).

10. Mr Fitzgerald submitted that because preliminary inquiries were in existence at the time that the Constitution was enacted, they must be taken to be incorporated as a gold standard into the concept of a fair hearing. But that seems to the Board an extravagant proposition. By the same token, virtually any feature of criminal procedure (a requirement of unanimity in jury verdicts, for example) would become constitutionally protected. It is unlikely that the framers of the Constitution intended to introduce such rigidity into the law. The question in each case is whether the requirements of a fair hearing are satisfied.

11. The Board agrees with the Court of Appeal that they are. The committal proceedings are not determinative of guilt but act as a filter to enable the magistrate to screen out those cases in which there appears insufficient evidence to justify a trial. They are conducted by an independent magistrate to whom both sides may submit evidence and make submissions. The restriction to written evidence applies to both prosecution and defence. The specific requirements of section 15(2) of the Constitution are all satisfied by the composite procedure of charge, committal proceedings, indictment and trial. In particular, the accused is entitled at the trial to cross-examine the prosecution witnesses and give oral evidence in accordance with section 15(2)(e). Although it is possible

for all the requirements of section 15(2) to be satisfied but the trial nevertheless to be in some way unfair, the Board sees no grounds upon which this can be said of the new procedure. It will accordingly humbly advise Her Majesty that the appeal should be dismissed with costs.