STATE OF SAINT VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CONSTITUTIONAL: PUBLIC LAW

1999 No. 447

IN THE MATTER OF THE CONSTITUTION OF
SAINT VINCENT AND THE GRENADINES 1979

AND

IN THE MATTER OF AN APPLICATION BY
EVERSLEY THOMPSON
A PERSON ALLEGING THAT THE RIGHTS
GUARANTEED TO HIM BY SECTIONS 1(a) AND 5
OF THE CONSTITUTION ARE BEING OR ARE LIKELY
TO BE CONTRAVENED IN RELATION TO HIM
FOR REDRESS IN ACCORDANCE WITH
SECTION 16 OF THE SAID CONSTITUTION

AND

IN THE MATTER OF AN APPLICATION BY
EVERSLEY THOMPSON
FOR AN INTERIM STAY OF EXECUTION OF THE
SENTENCE AND FOR A CONSERVATORY ORDER

BETWEEN:

EVERSLEY THOMPSON — APPLICANT

AND

SUPERINTENDENT OF PRISON
(Bernard Marksman)
REGISTRAR OF THE HIGH COURT
(Judith Jones-Morgan)
THE ATTORNEY GENERAL OF
ST. VINCENT & THE GRENADINES — RESPONDENTS

Mr. Haymant Balroop, Director of Public Prosecutions and Mr. Donald Browne, Solicitor General for the Respondents

Mr. Victor Cuffy for the Applicant

SEPTEMBER 17, 1999
DELIVERED: SEPTEMBER 24, 1999

JUDGMENT

Adams J.

On the 21st of June 1995 Eversley Thompson was convicted of the crime of murder and sentenced to death. That sentence is mandatory under the Criminal Code of the State when a person has been found guilty of that crime.

Thompson after conviction appealed to the Court of Appeal of the Eastern Caribbean Supreme Court whereupon his appeal was dismissed on February 15th January, 1996.

Thompson was allowed leave to appeal to the Privy Council and having so done, his appeal to that court was dismissed on the 16th February, 1998. It is of some importance to note that before dismissing the appeal the Privy Council had remitted the matter back to the Court of Appeal so that that Court could offer its view as to what effect the Police and Criminal Evidence Act 1984 U.K. did have on the law of evidence of this State if any, and the possible implications of the trial judge having considered the admissibility of statements made by the applicant not under the United Kingdom Act, but rather those rules well known to lawyers as the Judges Rules.

Eversley Thompson now seeks through the efforts of counsel certain orders and declarations. I will set them out verbatim for ease of reference:

1. A declaration that the execution of the sentence of death on the applicant will be unconstitutional null and void and of no effect in that it would be a contravention of the applicant's right to life, liberty and the security of the person and the right not to be deprived thereof except with due process of law and/or with the protection of the law guaranteed to him by Section 1(a) of the Constitution of St. Vincent and the Grenadines.

2. A declaration that the execution of the sentence of death on the applicant will be unconstitutional null and void and of no effect

in that it will be done in contravention of the applicant's right not to be subjected to inhuman or degrading punishment or other treatment guaranteed to him by Section 5 of the Constitution of Saint Vincent and the Grenadines 1979.

3. A declaration that conditions in which the applicant has been held in death row constitute inhuman and degrading treatment in violation of the Constitution of St. Vincent and the Grenadines.

4. A declaration that a condemned man, in this case the applicant, has a constitutional right to have his application to the Human Rights Committee under the optional protocol to the United Nations Government on civil and political rights determined before sentence of death may be carried out on him.

5. An order vacating the sentence of death against the applicant and committing the said sentence of death to life imprisonment.

6. An order staying the execution of the applicant.

7. An interim order staying the execution of the sentence of death on the applicant or alternatively a conservatory order directing the respondents to undertake that the execution of the sentence of death on the applicant will not be carried out pending the hearing and determination of this motion or further order.

8. All such orders, writs, directions as may be necessary or appropriate to secure redress by the applicant for a contravention of the Human Rights and Fundamental Freedom guaranteed to him by the Constitution of Saint Vincent and the Grenadines.

The declarations above numbered (3) and (4) were sought at commencement of this hearing by way of amendment to the notice of motion; no objection was taken by the State. I propose at this stage to examine the applicant's claim to the first declaration sought and in relation to which it is being alleged the applicant was denied the due process of law and protection of the law guaranteed him by the Constitution of this State, more particularly Section 1(a) thereof. There is literally no "due process" clause in the Constitution of St. Vincent but I should nonetheless accommodate the arguments as put forward in relation to the concept, indifferent to the absence of the actual words "due process" in our Constitution.

In a judgment apparently given jointly in the case of Thomas and Hillaire v Attorney General of Trinidad and Tobago and others P.C. 60 of 1998, referring to Trinidad and Tobago as "the Republic" Lord Goff of Chieveley and Lord Hobhouse of Woodborough had this to say about "due process of law":

> "The phrase "due process of law" has a long history, being first found in English legislation some six and a half centuries ago. It is derived from the use of the words in Article 39 of the Magna Carta: "but by the lawful judgment of his peers or by the law of the land". The expression "due process of law "came to be used as a synonym for the expression "law of the land". Thus "due process of law" was used instead in later legislation and Coke in his Institutes Part 2 Vol. 1 (1641) treated the two expressions as interchangeable". (Chapter 29 of 24 Edw. I).
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> Due process of law was also the expression used in various charters granted to the American colonies in the 17th and 18th centuries and it is by that route that it then came to be used in the constitutional documents of the United States of America and its constituent states. The United States courts have continued to make clear that it has the same meaning as according to the "law of the land". (Walker v Sauvinet (1879) 92 U.S. 90; Hurtado v State of California (1883) II0 U.S. 516, particularly at p. 521 et seq).
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> It is the law of the land which gives the concept of due process its broader meaning, for example, the principles of natural justice, burden of proof etc. (.Holden v Hardy (1897) 169 US. 366) and

shows that it does not necessarily preclude reference in cross-examination to previous convictions. (Adamson v State of California (1946) 332 U.S. 46). This approach of the courts of the United States is fully consistent with the approach adopted by the Constitution of the Republic and those of other Caribbean countries. The due process of law provision fulfils the basic function of preventing the arbitrary exercise of Executive power and places the exercise of that power under the control of the Judicature. It also limits the power of the Legislature to legislate so as to derogate from that requirement: the Hurtado and Adamson cases provide instances of this, as did the Trinidadian case to which we were referred Lassalle v. Attorney General (1971) 18 W.I.R. 379 In that last case, Phillips J.A. summarised the requirement as being -

"(i) reasonableness and certainty in the definition of criminal offences

(ii) trial by an independent and impartial tribunal and

(iii) observance of the rules of natural justice."

The understanding that the law referred to is the municipal law is confirmed to be correct: indeed, no authority has been cited to contradict this. The rights which are protected are those set out in the Constitution, including those previously existing in the law of the Republic. This does not include (without more) expectations raised by treaties entered into by the Executive which have not been incorporated into the law of the Republic, though in much cases the municipal law doctrine of legitimate expectations may, where appropriate, be invoked by individual citizens." (Emphasis mine).

In the case Frank v Mangum 1915 237 U.S. 309, 347 Holmes J, made the following observation:

"Whatever disagreement there may be as to the scope of the phrase "due process of law", there can be no doubt that it embraces the fundamental concept of a fair trial, with opportunity to be heard".

The Privy Council in the case of Thomas and Hillaire v Attorney General of Trinidad and Tobago and others adopted the above statement of Holmes J. and went on to say that due process includes the right of a condemned man to complete any appellate or analogous legal process that is capable of resulting in a reduction or commutation of his sentence before the process is rendered nugatory by Executive action"

In her book "Fundamental Rights in Commonwealth Caribbean Contributions" Margaret Demerieux says "due process has been taken in the death penalty cases, to mean in accordance with existing law as saved by the operation of the special savings clause, an argument which has also been applied to the litigation of the punishment clause. The punishment of execution under the relevant pre-Bill of Rights constitutes the deprivation of life with due process."

In his argument relating to the first declaration sought, Counsel for the applicant argued that the court of trial had considered written and oral statements as confessions of the applicant in the light of Judges Rules when it should instead have been guided by the Police and Criminal Evidence Act 1984 (U.K.) which according to him became part of the law of St. Vincent and the Grenadines by virtue of the application of English Law Act 1989.

The Privy Council did, as Mr. Cuffy argued, accept the submission that Sections 76 and 78 of the Police and Criminal Evidence Act 1984 were applicable to St. Vincent and the Grenadines but took the position that since the trial judge had in her ruling indicated that the appellant had not been physically ill-treated and that the statements amounting to confessions were voluntary it meant she had considered the very questions that would have arisen had she dealt with these matters as being governed in truth by the provisions of the Police and Evidence Act 1984.

The Privy Council went on to refer to the case of Daley v Queen 1994 A.C. 117, 129 where Lord Mustil had made mention of this similarity existing between the Police and Criminal Evidence Act and the Judges Rules when he spoke of:

"the long standing duty of the Judge now embodied in section 76(2) of the Police and Criminal Evidence Act 1984 to rule on whether a confession by the accused has been, or may have been obtained by oppression, or in consequence of anything said or done which was likely to render it unreliable."

In the result I find that this argument being made now by counsel for the appellant i.e. that the United Kingdom Act should have been applied is correct but cannot support the submission that this applicant was .tried without due process and without the protection of the law; I hold that while the sections of the Police and Criminal Act 1984 were not considered by the trial judge, nonetheless she applied her mind, using the judge's rules to resolve the very issues that would be considered under those provisions of the Police and Criminal Evidence Act.

The declaration sought by the applicant's complaint that his trial was without due process and the protection of the law must be refused.

The second declaration relates to the allegation by the applicant's counsel that the carrying out of the death sentence is unconstitutional in St. Vincent and the Grenadines being in contradiction of section 5 thereof which runs as follows:

"5. No person shall be subjected to torture or inhuman or degrading punishment or other treatment."

Now the St. Vincent and the Grenadines Constitution Order 1979 reads in section (1) thereof as follows:

"The Constitution set out in the first schedule shall come into effect in St. Vincent and the Grenadines at the commencement of this Order subject to the transitional provisions set out in the second schedule to this Order"

When one examines these transitional provisions in the second schedule one comes face to face with the following:

"10. Nothing contained in or done with the authority of any law shall be held to be inconsistent with or in contravention of

> Section 5 of the Constitution to the extent that the law in question authorises the infliction of any description of punishment that was lawful in St. Vincent and the Grenadines immediately before 27th October, 1969 (being the date on which St. Vincent and the Grenadines became an associated state)."

This Section 10 by its terms validates hanging as the punishment for murder since that punishment was provided for by laws prior to St. Vincent and the Grenadines becoming an associated state. The laws are Section 71 of the Indictable Offences Ordinance 1912 to be found at Chapter 24 of the Laws of St. Vincent Vol. (1) 1926 and the Capital Punishment Procedure Act 1868. Section 71 reads:

> "Every person who commits murder, shall be guilty of felony and being convicted thereof, shall be liable to suffer death as a felon".

A similar view was expressed in the judgment of St. Vincent Floissac CJ (as he then was) when dealing with similar provisions of the Constitution of St. Christopher and Nevis. This is what he had to say as he dealt with analogous provisions of that state:

> "Therefore the combined effort of Section 3 of the Constitution Order and paragraph 9 of the transitional provisions is to exclude death by hanging from the provision of Section 7 of the Constitution and to assert the validity of that type of punishment, without the need to engage in endless philosophical controversies as to whether such punishment is tortuous, inhuman or degrading."

It is clear that the Chief Justice was saying in what was a unanimous decision of the Court of Appeal that death by hanging was perfectly permissible having regard to the provisions of the constitution of St. Christopher and Nevis. (See case of Richards v Attorney General of St. Kitts and Nevis 44 W.I.R. p. 141).

Required as I am to follow the decision of the Court of Appeal of the Eastern Caribbean Supreme Court and bearing in mind the similarity between the constitutional provisions of these two island states, I reject the argument that death

by hanging is contrary to the constitution of the state of St. Vincent and the Grenadines, as did the learned Chief Justice in relation to St. Christopher and Nevis The second declaration sought is accordingly refused..

In relation to the third declaration sought by Mr. Cuffy on his client's behalf he refers to poor prison conditions and suggests that they amount to inhuman and degrading treatment, in violation of Constitution of St. Vincent and the Grenadines. I think that in rejecting this submission I would do well to look at the prominent case of Tyrer v The United Kingdom 1978 2 EHRR 1, and heard in the European Court of Human Rights. Certain principles were enunciated and I set them out below:

(1) In order to amount to inhuman treatment the suffering occasioned must attain a certain level before it can be so determined.

(2) In considering whether the complaining citizen has suffered degrading treatment it has to be remembered that humiliation may arise from the mere fact of being criminally convicted. However, what it was relevant to show was that he was humiliated not by his conviction but by the execution of the punishment which was imposed upon him.

(3) The assessment as to whether punishment was degrading or inhuman is in the nature of things relative; it depends on the circumstances of the case and in particular the nature and context of the punishment itself and the manner and method of execution.

(4) A punishment does not lose its degrading character just because it is believed to be or actually is an effective deterrent or aid to crime control.

(5) It must be remembered that the conventions which deal with protection of human rights are living instruments and that the courts must be influenced by the developments and commonly accepted standards of the countries in which these issues arise.. (Emphasis mine)

In my view the Privy Council in the case of Darren Thomas and Hanif Hillaire v the Attorney General of Trinidad and others (P.C. Appeal No. 60 of 1998) adverted to a vital consideration when Lord Millet who read the majority judgment of the court had this to say:

> "Prison conditions in Third World Countries often fall lamentably short of minimum standards which would be acceptable in more affluent countries. It would not serve the cause of human rights to set such demanding standards that breaches were common place. That conditions in which the appellants were kept amounted to cruel and unusual treatment is a value judgment in which it is necessary to take account of local conditions both in and outside prison,.... even if the prison conditions in themselves amounted to cruel and unusual treatment however and so constituted an independent breach of the appellants constitutional rights, commutation of the sentence would not be the appropriate remedy....The fact that the conditions in which the condemned man had been kept prior to execution infringe his constitutional rights does not make a lawful sentence unconstitutional."

In my view when one reads the affidavit of the applicant only paragraph (6) thereof points emphatically to conditions of which complaint is being made. That paragraph reads as follows:

> "I was kept confined in a small cell. The only thing I have been given therein are a blanket and a slop pail. That is a bucket provided which I use at a toilet to defecate and urinate. I sleep on the floor. There is no bed. Electronic lights are kept on day and night which affect my ability to sleep. I have been kept in the cell twenty-three hours each day and only allowed out for one hour in the yard to have a bath and exercise. I am only allowed two visits a month which are restricted in relation to time."

At page 764 of the 4th Edition of the book :"Civil Liberties (cases and materials)" by Bailey, Harris and Jones, instances of what amounts to inhuman and degrading treatment are referred to. This is what is there stated:

"Inhuman treatment may also result from the conditions in which a person is detained. The conditions in which many political detainees were kept in the Greek case were held to be "inhuman treatment" by reference to overcrowding and to inadequate heating, toilets, medical facilities, sleeping arrangements, food, recreation and provisions for contact with the outside world. In Cyprus v Turkey (1984) EHRR 482, 541 the withholding of food and water, medical treatment from detainees was "inhuman treatment". In Guzzardi v Italy 1980 3 EHRR 333 the preventive detention of a Mafia suspect in a dilapidated insanitary building in a restricted part of an isolated island was held not to be.

In A v United Kingdom 1980 2 DRE Coma: H.R.5 a Broadmoor offender patient complained of a breach of article 3 because of conditions (cell conditions, clothing, lack of exercise and of association with others) of his detention when placed in seclusion for five weeks on suspicion of starting a fire. A friendly settlement was reached by which the U.K. agreed to pay 500 pounds compensation without admitting liability.

In B v United Kingdom 1984 6 EHRR 204, the committee of Ministers, agreeing with the Commissioner report, held that the conditions in which B had been kept in Broadmoor were not in breach of Article 3 although "There was no doubt that there was deplorable overcrowding in the dormitory accommodation... Solitary confinement or segregation of prisoner is not in itself a breach of Article 3; it is permissible for reasons of security or discipline or to protect the segregated prisoner from other prisoners or vice versa. (Emphasis mine). It may also be justified in the interests of the administration of justice e.g to prevent collusion between prisoners in respect of pending proceedings. In each case "regard must be had to the surrounding circumstances including the particular conditions; the stringency of the measures, its duration, the objective pursued and its effect on the persons concerned."

In the case of Delazarus v U.K. (unreported) a prisoner in solitary confinement complained inter alia of the general conditions of detention at Wandsworth prison.

Relying upon reports of the European Prevention of Torture Committee and the Chief Inspector of Prisons in England and Wales, the Commission referred in particular to overcrowding, the confinement of prisoners to their cells for twenty three hours a day and the use of chamber pots in cells. The Commission declared the claim inadmissible, however because the applicant being in solitary confinement could not complain of overcrowding and was less affected by the need to use chamber pots".

It seems to me that a survey of the cases suggests that in deciding whether treatment has been inhuman in relation to the death sentence the Court should concern itself with "the manner in which it is imposed or executed; the personal circumstances of the condemned person, and a disproportionality to the gravity of the crime committed as well as the conditions of detention while awaiting execution, are examples of factors capable of bringing the treatment or punishment received by the condemned person within the proscription under Article 3. Present day attitudes in the Contracting States to capital punishment are relevant for assessment as to whether the acceptable threshold of suffering or degradation has been exceeded." (See "Cases and Materials" cited above p 762).

Taking into account all that I have said and mindful of what Lord Millet had to say when referring (in my view quite appropriately) to Third World prison conditions, I find in the first place that the applicant was not subject to inhuman and degrading treatment, and even if he had been, such treatment would not make the sentence of death unconstitutional. The third declaration sought is therefore refused.

And now to the fourth and final declaration.

This declaration requires that the Court should hold that the applicant has a constitutional right to have his petition which was forwarded to the Human Rights Committee considered before the sentence of death may be carried out on him. That argument comes alive from the fact that the State of St. Vincent and the Grenadines is a party to the Optional Protocol to the International Covenant on Civil and Political Rights 1966. By virtue of that Protocol, this State undertook in

1981 to allow its citizens the right to petition the Human Rights Committee when under the sentence of death with the objective of having that sentence reviewed and leading possibly to its commutation to imprisonment for life.

When the hearing of this matter was undertaken there was no documentary evidence to show whether a petition had actually been lodged with the Human Rights Committee. After the hearing however and through the diligence of Mr. Balroop for the State and Mr. Cuffy for the Applicant, I have been given documentary evidence (acceptable to counsel on both sides) showing -

(a) the day after Eversley Thompson's appeal was dismissed by the Privy Council a petition was sent by lawyers acting on his behalf

(b) a fax receipt showing that the fax was sent to St. Vincent's Permanent Representative in New York

(c) the Government of St. Vincent and the Grenadines was asked to respond to the petition by submitting its observations about the petition and providing information relevant to the matter.

(d) the case put forward by the applicant's lawyer indicating that the death sentence should not be carried out

It is accepted by Mr. Balroop that no communication was sent by the Government of St. Vincent and the Grenadines in response to the Human Rights Committee's invitation to comment on the Applicant's case.

Whatever the reasons might be for the failure of the Government of this State to respond in accordance with a treaty signed by them, and intending to benefit its citizens, I am required to determine whether Eversley Thompson as a citizen of this country had a right by the law of this State, to have his petition considered bythe Human Rights Committee with of course the necessary participation of the Government.

The law in relation to this question of the binding force of treaties indicates that treaties entered into by the Executive which have not been incorporated into the laws of a particular State are not law which is enforceable in the courts of such a State. The citizen cannot claim a legal right not conceded to him by the common

or statute law of his country . At paragraph 2.03 page 15 of "Human Rights Law and Practice" by Lester and Pannick is to be found this:

> "The general principle of United Kingdom law is that a treaty is not part of the (domestic) law until it has been incorporated into the law by legislation."

A good example of what would happen if treaties entered into were to by mere ratification be considered as creating legal obligations is given by the joint dissenting judgment of Lords Goff and Hobhouse in the case of Thomas and Hillaire v Attorney General of Trinidad and Tobago when they said:

> "The conclusion will disappoint those who contend for the application of unincorporated international human rights conventions in municipal legal proceedings, so that such rights will be directly enforced in national courts as if they were rights existing in municipal law. The widest possible adoption of human standards is undoubtedly to be aspired to. But it is not properly to be achieved by subverting the constitutions of the states nor by a clear misuse of legal concepts and terminology; indeed the furthering of human rights depends upon confirming and upholding the rule of law. Suppose that an international treaty declares certain conduct to be criminal wherever committed (and such examples exist) unless and until the legislature of a state party to the treaty has passed a law making such conduct criminal under its municipal law, it would be contrary to due process (and in the Republic contrary to section 4 of the Constitution) for the Executive of the State to deprive any individual of his life, liberty, or property on the basis of the international treaty. It would be clear breach of that individual's constitutional rights. An unincorporated treaty cannot make something due process; nor can such a treaty make something not due process unless some separate principle of municipal law makes it so."
> (Emphasis mine)

It is my view that the Government of St. Vincent and the Grenadines could not through its executive branch (which is the organ of Government responsible for

making of treaties) confer a right on its citizen Eversley Thompson to appear before an internationl body that would bind this government in law whatever its moral obligation might be.

Accordingly, I hold that the applicant under the law of his country has no right in law to approach the Human Rights Committee of the United Nations and no decision of that body can legally bind the Government of St. Vincent and the Grenadines unless by legislation of its Parliament it is so bound. For this reason therefore the fourth declaration sought is refused. The orders sought by the notice of motion are refused , except that I order that there be a stay of execution of the sentence of death up to and including 5th October, 1999 to allow Eversley Thompson to appeal against this judgment if he so wishes.

The indisputable fact remains, perhaps hauntingly so, to the opponents of human rights that the State of St. Vincent and the Grenadines, I am advised, in 1981 became a party to what is called the Optional Protocol to the International Covenant on Civil and Political rights. By virtue of its signature to the protocol, it incurred an obligation that it would allow those citizens sentenced under its laws to death, to appeal to the Human Rights Committee to exert efforts on their behalf to have the Government of St. Vincent change its mind about the sentence of death and put in its stead a sentence of life imprisonment.

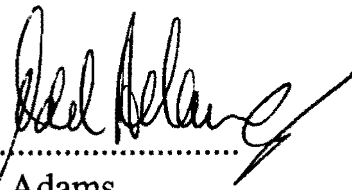
Among the documents shown to me by Counsel is one putting forward the case of Eversley Thompson in which they allege basically that his rights have been violated and asking that appropriate remedy should be granted him. In this case I expect that the remedy referred to would be the commutation of his sentence.

Counsel for the Government have said that those documents never reached St. Vincent but Counsel accept that from those received there is the strong indication that those documents reached the Embassy of St. Vincent and the Grenadines in New York.

Without laying blame at the feet of anyone for this regrettable flaw it must be said that the fact that the documents may have been misplaced and the process of

dialogue between the Government of St. Vincent and the Grenadines and the Human Rights Committee frustrated, is not the fault of Eversley Thompson.

Against this background Counsel for the State have indicated to Mr. Cuffy and me that they are anxious to pursue the process leading to dialogue with the Human Rights Committee of the United Nations. They are therefore leaving the Court having given an undertaking in writing that "we will hold our hand with the execution and communicate with the Commissions immediately for a speedy consideration of the matter before it, limiting the time within which the decision must be made".



Odel Adams
HIGH COURT JUDGE