[2010]JMCA Civ 24

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 86/2009

BEFORE: THE HON. MR JUSTICE PANTON P
THE HON. MR JUSTICE MORRISON JA
THE HON. MISS JUSTICE PHILLIPS JA

BETWEEN	**ATTORNEY GENERAL**	**APPELLANT**
AND	**NEVILLE WHYTE**	**RESPONDENT**

Curtis Cochrane, Director of State Proceedings for the appellant

Lord Anthony Gifford QC and Mrs Helene Coley-Nicholson instructed by Gifford, Thompson & Bright for the respondent

25, 29 January and 4 June 2010

PANTON, P

[1] I have read the judgment of my brother Morrison JA. I agree with his reasoning and conclusion and have nothing further to add.

MORRISON JA:

Introduction

[2] On 29 January 2010 this appeal was dismissed, with costs to the respondent to be agreed or taxed. The court also ordered that the order of Cooke JA (Ag) (as he then was), made pursuant to section 5A of the Parole Act on 17 December 2003 should be set aside and that the

respondent's application for parole should be heard and considered by the Parole Board ("the Board"). These are my reasons for concurring within that decision.

[3] This is an appeal from a judgment of the Full Court of the Supreme Court (Marva McIntosh, Marsh and Campbell JJ - "the constitutional court") given on 3 June 2009 on application by the respondent for constitutional redress, pursuant to section 25 of the Constitution of Jamaica ("the Constitution"). The application was granted in the following terms:

> "1. A Declaration that the Claimant was entitled to be heard and/or to make representations before a decision in his case was made by a Judge of the Court of Appeal pursuant to section 5A of the Parole Act.
>
> 2. A Declaration that the Claimant was entitled to be notified of such a decision within a reasonable time.
>
> 3. A Declaration that the decision made by the Honourable Justice Cooke on I7th December 2003 and embodied in a [sic] order dated 12th September 2007, ordering that the Claimant be not eligible for parole until 20 years had elapsed, time to commence 2nd May 1990 is null and void.
>
> 4. A Declaration that the Claimant is entitled to have his application to the Parole Board submitted on 19th February 2007 heard and determined by the Parole Board.
>
> 5. Costs

6. Liberty to apply."

[4] On appeal, the appellant does not challenge either of the declarations set out at paras. 1 and 2 of the order. It is now accepted that the respondent's constitutional rights were breached when Cooke JA (Ag) proceeded to determine his eligibility to parole without his having been given an opportunity to make representations and to be heard, and that there had been a further breach of his constitutional rights by the failure of the relevant authorities to notify him of Cooke JA's decision within a reasonable time.

[5] However, the appellant strongly contends that the constitutional court had no jurisdiction to grant the declarations at paras. 3 and 4 of the order, and has filed two grounds of appeal as follows:

> "a. The Constitutional court erred when it declared that the decision of Justice Cooke, J.A., relative to section 5A of the Parole Act, having ordered on 17th December 2003 and embodied in an order dated 12th September 2007, that the claimant (respondent) be not eligible for parole until 20 years had elapsed, time to commence on 2nd May 1990, is null and void.
>
> b. The Constitutional court erred when it declared that the claimant is entitled to have his application to the Parole Board submitted on 19th February 2007 heard and determined by the Parole Board, notwithstanding that the Parole Board was acting on the order made by a Judge of Appeal acting in his judicial

> capacity when it refused to hear the Respondent's application."

[6] The issues for decision on the appeal are therefore, firstly, whether the constitutional court had jurisdiction to quash a decision of a judge of appeal acting, as the appellant puts it, in "his judicial capacity" and, secondly, whether the constitutional court had jurisdiction to direct the Board to hear and determine the respondent's application for parole.

The background

[7] The relevant background is not in issue and can therefore be shortly stated. The respondent was convicted of murder on 5 April 1990 and sentenced to death. On 2 July 1997 his sentence was commuted to one of imprisonment for life by His Excellency the Governor-General ("the Governor-General"), acting pursuant to section 90(1)(c) of the Constitution. He has since that time been an inmate of the St Catherine Adult Correctional Centre.

[8] Pursuant to section 6(4)(b) of the Parole Act, the respondent became eligible for parole after serving seven years of his sentence and in February 2005 he applied for parole. Receipt of his application was in due course acknowledged by the Board, he was interviewed, and his family visited by a probation officer and he was also interviewed by a psychiatrist. By letter dated 17 February 2006, he was advised that the

Board had decided against granting his application "at this time", but that he would be eligible to re-apply after the expiration of one year, that is, on 15 February 2007.

[9] The respondent accordingly made a further application for parole on 19 February 2007, after which the same round of interviews and visits as before took place. He was understandably hopeful that his application would on this occasion be favourably considered.

[10] However on 21 September 2007, the respondent received a document over the hand of the Registrar of the Court of Appeal advising him that on 17 December 2003 the period to be served by him before he would become eligible for parole had been considered by Cooke JA (Ag), who had determined that period to be 20 years, commencing 2 May 1990. It is common ground that the respondent had had no prior notification that his case was to be considered by a judge of the Court of Appeal, that he had been given no opportunity to make representations to the judge and that he had not been informed of the judge's decision prior to 21 September 2007.

[11] Finally, by letter dated 23 November 2007, the respondent received formal notification from the Board that, as a result of the order of Cooke JA (Ag) dated 17 December 2003, his application for parole would not be considered until 1 May 2010.

Proceedings in the Supreme Court

[12] By fixed date claim form filed on 25 October 2007 (Claim No. 2007 HCV 04235), the respondent applied to the Supreme Court for judicial review of the decision of Cooke JA (Ag). However, on 24 October 2008 Straw J dismissed this application, on the basis, it appears, that the appropriate route of challenge for the respondent to have taken in respect of the decision of Cooke JA (Ag) was by way of appeal or, alternatively, by way of an application for constitutional relief to the constitutional court.

[13] And so it was that on 18 November 2008 the respondent commenced the proceedings in the Supreme Court for constitutional relief which have given rise to this appeal. He contended, firstly, that he had not been afforded a fair hearing before Cooke JA (Ag) and, secondly, that he had not been notified of the result of those proceedings within a reasonable time, both contrary to section 20(2) of the Constitution. Before the constitutional court, the appellant (who was the respondent in those proceedings) accepted that the respondent's rights had been infringed in the two respects claimed by him, but contended that he was not entitled to constitutional relief because of the proviso to section 25(2) of the Constitution, which prevents the Supreme Court from exercising its power to grant such relief in cases in which "it is satisfied that adequate means of redress for the contravention alleged are or have

been available to the person concerned under any other law". In particular, it was submitted, the respondent ought to have challenged the order made by Cooke JA (Ag) by way of appeal, the judge having acted in a judicial capacity.

[14] The constitutional court rejected the appellant's position. This is how Campbell J, with whose judgment both Marva McIntosh and Marsh JJ agreed, stated his conclusion:

> "That [the] mere fact of the availability of another means of redress is certainly not the end of the examination the constitutional court is required to do. It cannot be adequate to ask the applicant, in the face of the directions given by Straw, J., the prejudice that further delay entails, the concession of learned Crown Counsel, and the finding of this Court, that the fundamental right of the applicant has been breached, to now require him to go and explore what an appeal has in store. That alternative remedy is woefully inadequate."

[15] The constitutional court accordingly made the order granting the declarations sought, as set out at para. [2] above.

The submissions on appeal

[16] On appeal, Mr Cochrane for the appellant has renewed the submissions he made in the court below. I hope that I do no disservice to his able argument by summarising it in this way. Cooke JA (Ag) made his order determining the period to be served by the respondent before he

would become eligible for parole pursuant to section 5A of the Parole Act, in his capacity as a judicial officer. In the absence of a specific provision permitting an appeal from that order to the Supreme Court (such as, for instance, in section 3 of the Justices of the Peace (Appeals) Act and section 76(1) of the Income Tax Act), the respondent ought to have sought redress from the order of Cooke JA (Ag) by way of appeal to the Court of Appeal and not in the Supreme Court, either by way of judicial review or constitutional relief. In this regard, Mr Cochrane placed particular reliance on the well known statement of Lord Diplock (in ***Re Racal Communications Ltd*** [1980] 2 All ER 634, 639) that "Mistakes of law made by judges of the High Court acting in their judicial capacity as such can be corrected only by means of appeal to an appellate court". Mr Cochrane also relied on the decision of the Privy Council in ***Huntley v Attorney-General and Another*** (1994) 46 WIR 218.

[17] The purpose of the instant appeal was therefore "to determine the issue of jurisdiction as it relates to the decision of the judge of appeal pursuant to section 5A of the Parole Act and where an appeal lies, relative to the said decision" (para. 14 of the appellant's written submissions dated 30 November 2009). Mr Cochrane therefore submitted that it was for this court to make such order as it deemed fit for the purpose of redressing the wrong that had admittedly been done to the respondent.

[18] For the respondent, Lord Gifford QC pointed out that the power of review granted by section 5A of the Act was entrusted to a judge of appeal and not to the Court of Appeal, a distinction made clear by the Privy Council in the cases of ***Devon Simpson v R*** (1996) 48 WIR 270 and ***Williams & Banks v R*** (1997) 51 WIR 212, both dealing with the not dissimilar provisions of section 7 of the Offences Against the Person (Amendment) Act, 1992 ("the 1992 Act"). In these circumstances, it was submitted, there was nothing objectionable in the constitutional court declaring the order of Cooke JA (Ag) null and void: indeed, given the appellant's concession that that order had been made in breach of the respondent's constitutional rights, the court had been bound to give the appropriate redress. ***Re Racal Communications Ltd*** upon which the appellant relied, was clearly distinguishable and ***Huntley v Attorney General and Another***, carefully read, supported the respondent's case.

[19] In any event, Lord Gifford submitted further, the instances in which the Court of Appeal is empowered to hear appeals from the decision of a single judge of appeal are limited to those set out in section 32 of the Judicature (Appellate Jurisdiction) Act, none of which has any application in the present case. And as to the remedy given by the court below in ordering that the respondent's application for parole be considered by the Board, Lord Gifford referred us to the decision of this

court in ***McCordie Morrison v The Chairman of The Parole Board and Others*** (SCCA No. 24/2003, judgment delivered 2 March 2004), in which it was held that under section 5A of the Parole Act, it was the responsibility of the State to bring the case of a convicted person before a judge of appeal for examination and that where the State failed to perform that duty the convicted person should not be made to suffer as a result. In the light of the order of Cooke JA (Ag) being a nullity, therefore, the State had effectively failed in its duty and the appropriate remedy for the respondent was that given by the court below, that is, to order that his case should now be considered by the Board.

The statutory framework

[20] The backdrop to section 5A of the Parole Act is the substantial revision of the regime of punishment for the offence of murder that began in 1992. In that year, the 1992 Act was passed, introducing into the Offences Against the Person Act ("the principal Act") for the first time the concept of categories of murder. The two categories were capital murder, which after the 1992 Act came into force would continue to attract a mandatory sentence of death, and non-capital murder, the sentence for which would be imprisonment for life. The principles upon which a murder fell to be classified as capital or non-capital were fully elaborated in section 2 of the 1992 Act. (I might add as a footnote to all of this that subsequently, as a consequence of the decision of the Privy

Council in ***Lambert Watson v R*** (2004) 64 WIR 241 declaring the mandatory sentence of death for capital murder to be unconstitutional, the Offences Against the Person (Amendment) Act, 2005 was passed, as a result of which the death sentence is, of course, no longer mandatory but lies in the discretion of the sentencing judge. The distinction between capital and non-capital murder has thus become otiose and neither adjective is now to be found in the version of the principal Act currently in force.)

[21] Section 6 of the Parole Act (which was originally enacted in 1978) provides for eligibility for parole. Prior to the 1992 Act, section 6(4) provided that a person who had been sentenced to imprisonment for life or in respect of whom a sentence of death had been commuted to imprisonment for life should be eligible for parole after having served a period of not less than seven years, and section 6(5) provided that, upon the expiration of 10 years, the Board should review all cases falling within the previous subsection "for the purpose of deciding whether or not to grant parole to them". Such a person might therefore have been released on parole on his application after seven years and by the Board of its own motion after 10 years.

[22] However, section 4 of the 1992 Act, after amending the principal Act to provide that every person convicted of non-capital murder shall be sentenced to imprisonment for life (section 3A(1) of the principal Act, as

amended), introduced a new subsection, which provided that "Notwithstanding the provisions of section 6 of the Parole Act, on sentencing any person convicted of non-capital murder to imprisonment for life, the court may specify a period, being longer than seven years, which that person should serve before becoming eligible for parole" (section 3A(2) of the principal Act, as amended). Thus the eligibility to parole of persons sentenced to imprisonment for life for non-capital murder after the enactment of the 1992 Act was restricted.

[23] Section 5A was introduced into the Parole Act by the 1992 Act as a corollary of this restriction to make specific provision with regard to parole for the position of persons, such as the respondent, in respect of whom the sentence of death had been commuted by the Governor-General to imprisonment for life in respect of persons already under a sentence of death. It provides as follows:

> "5A. Where, pursuant to section 90 of the Constitution, a sentence of death has been commuted to life imprisonment, the case of the person in respect of whom the sentence was so commuted shall be examined by a Judge of the Court of Appeal who shall determine whether the person should serve a period of more than seven years before becoming eligible for parole and if so, shall specify the period so determined."

[24] Consequential amendments were also made to section 6(4) and (5) of the Parole Act. Similarly, because the provisions of the 1992 Act in respect of the two categories of murder did not apply to persons convicted of murder prior to its commencement, it was also necessary to make specific provision with regard to the punishment for the offence of murder for persons who, at the commencement of the 1992 Act were already under the sentence of death, so as to ensure that their position was no worse than that of persons convicted of murder after the coming into force of the 1992 Act.

[25] Thus section 7 of the 1992 Act established a mechanism whereby the cases of such persons were also to be reviewed by a judge of the Court of Appeal with a view to determining whether the murder for which they had been convicted was classifiable as capital or non-capital murder in accordance with the principles introduced into the principal Act by the 1992 Act and to determine the appropriate sentence accordingly. In cases where that judge determined that the murder in question was to be classified as capital, the convicted person was given the right to have the classification reviewed by three judges of the Court of Appeal designated by the President, and to appear or be represented by counsel for the purpose of the review.

Some relevant authorities

[26] One of the questions considered by the Privy Council in ***Devon Simpson v R*** was whether, on an appeal to the Court of Appeal by a person who had been convicted of murder before, but whose appeal was heard after, the 1992 Act came into force, the court had jurisdiction upon dismissing the appeal to proceed to classify the murder as capital or non-capital and to deal with the appellant accordingly. This question raised squarely the nature of the jurisdiction given to a judge or judges of the Court of Appeal by section 7 of the 1992 Act and the Privy Council, after a full review of the provisions of the 1992 Act, held that section 7 did not permit the Court of Appeal to proceed in that way. This is how Lord Goff stated the true position (at page 280):

> "Now it is plain that, in the two cases under consideration, the Court of Appeal was purporting to act in its capacity as the Court of Appeal of Jamaica in determining whether or not to classify the murders as capital or non-capital. This appears in particular from the orders made by the Court of Appeal in each case. Their lordships are clearly of the opinion that the Court of Appeal, acting as such, had no jurisdiction to carry out any such classification exercise; and indeed Mr Guthrie QC for the Crown experienced great difficulty in arguing to the contrary. First of all, it is plain that the statutory power of review is vested not in the Court of Appeal as such but in judges of the Court of Appeal, the three judges of the court who perform the second stage of the review procedure being nominated for that specific purpose by the President of the court. Second, it is also plain that there is no other provision, in the Amendment Act or elsewhere,

> from which the Court of Appeal as such derives jurisdiction to perform the classification procedure in these cases. It follows that, in the present cases, the Court of Appeal purported to make orders which it had no jurisdiction to make. Moreover this led, in particular, to the consequence that each appellant was deprived of the benefit of the first stage of review by a single judge of the Court of Appeal, and so was deprived of the possibility that the single judge might have classified his case as one of non-capital murder."

[27] Therefore, in cases in which the conviction had taken place before the 1992 Act came into force, the process of review could only be carried out under section 7 "by a single judge of the Court of Appeal and then, if appropriate, by three designated judges of the court, and not by the Court of Appeal as such…it is clear that in this review process the Court of Appeal as such has no part to play" (per Lord Goff at page 281).

[28] The decision in ***Devon Simpson v R*** was applied by the Privy Council in ***Williams & Banks v R***, in which one of the issues for decision was whether there was a right of appeal to Her Majesty in Council from a decision of the three judges of the Court of Appeal on a review of the classification by a single judge of the court pursuant to section 7(5) of the 1992 Act. Delivering the judgment of the Board, Lord Hutton referred to section 110(5) of the Constitution, which gives a right of appeal to the Privy Council from a decision of the Court of Appeal "on appeal from a court in Jamaica" and considered that the single judge carrying out a review

pursuant to section 7(2) of the 1992 Act could not be regarded as a court in Jamaica within the meaning of section 110(5), given that the exercise undertaken by the single judge was, as Lord Woolf had put it in ***Huntley v Attorney General and Another***, "a limited one" (page 227). Lord Hutton therefore concluded that the Board had no jurisdiction to hear an appeal against a classification by the three judges of the Court of Appeal because the decision of those three judges under section 7(5) of the 1992 Act was not given "on appeal from a court of Jamaica".

Analysis

[29] These decisions establish that the involvement of judges of appeal in the reclassification process pursuant to section 7 of the 1992 Act is an exercise undertaken by the judges by virtue of a special, limited statutory jurisdiction in which the Court of Appeal as such has no role to play. In my view, the position of the judge of the Court of Appeal acting pursuant to section 5A of the Parole Act is clearly analogous, with the result that the power of review given to the judge by section 5A of the Parole Act is, as Lord Gifford submitted, a power exercisable by the judge and not by the court itself. In other words, as with section 7 of the 1992 Act, "the statutory power of review is vested not in the Court of Appeal as such, but in judges of the Court of Appeal…" (per Lord Goff in ***Devon Simpson v R,*** supra).

[30] In the instant case, Cooke JA (Ag) in considering the respondent's case on 17 December 2003, did not do so as a judge of, or on behalf of, the Court of Appeal, but as the person to whom the function of review for the purposes of setting the minimum period to be served by a person under a sentence of imprisonment for life as a result of commutation of his sentence by the Governor- General has been entrusted by the Parole Act. In this regard, while it is clear that any judge of appeal involved in the exercise would naturally be expected to act judicially, it cannot be said, in my view, that the particular judge in these circumstances acted in a "judicial capacity" as a member of the Court of Appeal, as Mr Cochrane contended. It follows from this, it seems to me further, that even if the order of Cooke JA (Ag) was one which was by virtue of section 32 of the Judicature (Appellate Jurisdiction) Act subject to review by the court itself (which it was not), that section would have no application to the exercise conducted by him under section 5A of the Parole Act. It also follows from this that Mr Cochrane's suggestion that an appeal to this court was among the other adequate means of redress available to the respondent which he ought to have pursued before seeking constitutional relief postulates a legal impossibility.

[31] It appears to me that there is nothing in this view of the role of the judge of appeal pursuant to section 5A of the Parole Act that is in any respect inconsistent with Lord Diplock's dictum in ***Re Racal***

Communications Ltd upon which Mr Cochrane so heavily relied. For what Lord Diplock actually said in that case, it will be recalled, was that "Mistakes of law made by judges of the High Court **acting in their judicial capacity as such** can be corrected only by means of appeal to an appellate court" (page 639). I have supplied the emphasis in this passage to make the point that there is an obvious distinction between the kind of situation of which Lord Diplock spoke and the instant case, in which Cooke JA's (Ag) role pursuant to section 5A was plainly not in his "judicial capacity as such" (cf. Lord Goff's observation in ***Devon Simpson v R*** that "it is clear that in this review process the Court of Appeal as such has no part to play", para. [26] supra).

[32] On the other hand, it appears to me that Cooke JA (Ag) was plainly an "authority prescribed by law" for the determination of the extent of the respondent's civil rights or obligations (see section 20(2) of the Constitution). Therefore, to the extent that it is accepted by the appellant that there has been a clear breach of the respondent's rights by virtue of the manner in which the judge carried out his functions under the Parole Act in this case, the Supreme Court was the appropriate forum in which to seek vindication for the admitted breach (pursuant to section 25(2) of the Constitution). I therefore consider that the constitutional court acted well within its jurisdiction in granting the declarations which it did in this case.

[33] If, as the constitutional court declared the order of Cooke JA (Ag) order was a nullity, then it seems to me that Lord Gifford was also correct in his submission that the reasoning of this court in the ***McCordie Morrison*** case applies in this case. For if, as that case decides, it is the responsibility of the State under section 5A to ensure that the respondent's case is placed before a judge of the Court of Appeal within the seven year period, then to the extent that Cooke JA's (Ag) consideration of the respondent's case within the seven year period has been rendered completely ineffective for any purpose by the breach of his constitutional rights, then the only effective remedy in these circumstances, seven years now long having passed, must be to order that the respondent's case should be placed before the Board at the earliest reasonable opportunity.

Conclusion

[34] These are my reasons for concurring within the unanimous decision of this court embodied in the order set out at para. [1] of this judgment. I would only add that the court was advised by Lord Gifford that there were at least two other persons in the same position as the respondent, who had been advised by the Registrar of this court, nearly four years after the event, that minimum periods before eligibility for parole had been determined in respect of them without any knowledge by or input from them of any kind. While it is obviously impossible for any order to be made in their favour in these proceedings, I nevertheless think that it is

right that this court should express the hope that the authorities will take all reasonable steps to ensure, if this has not already been done, that their cases are also brought to the attention of the Board as early as it is convenient.

PHILLIPS, JA

I too agree.