Privy Council Appeal No. 37 of 1978

Stanley Abbott - - - - - - - - - *Appellant*

v.

The Attorney General of Trinidad and Tobago and others - - - - - - - - - *Respondents*

FROM

THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

REASONS FOR THE DECISION OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF THE 4TH APRIL 1979, DELIVERED THE 12TH JUNE 1979

Present at the Hearing:

LORD DIPLOCK

LORD MORRIS OF BORTH-Y-GEST

LORD EDMUND-DAVIES

LORD FRASER OF TULLYBELTON

[*Delivered by* LORD DIPLOCK]

At the conclusion of the hearing on 4th April, 1979, their Lordships dismissed this appeal. They now give their reasons for doing so.

Nearly six years ago, on 16th July, 1973, the appellant, Stanley Abbott, was convicted of murder at Port-of-Spain Criminal Assizes. He was sentenced to suffer death as a felon which is the mandatory penalty for murder under section 4(1) of the Offences against the Person Ordinance. The time that has elapsed since his sentence falls into three distinct periods.

First he appealed to the Court of Appeal against his conviction. The appeal was dismissed on 9th July, 1974. He next appealed in the Judicial Committee of the Privy Council and this appeal was in turn dismissed on 20th July, 1976. The process of appeal against conviction initiated on his behalf accounts for the first three years.

On 26th July, 1976, a petition was presented to the Governor-General on behalf of the appellant for the exercise of the prerogative of mercy under section 70 of the former Constitution of Trinidad and Tobago. That Constitution was revoked on 1st August, 1976, and replaced by the new Constitution of the Republic of Trinidad and Tobago. The Governor-General thereupon became the President in whom the prerogative of mercy, now called the power of pardon, became vested under section 87 of the Republican Constitution. There followed a general election on 13th September, 1976, and the Advisory Committee on the Power of Pardon, for which section 88 of the Republican Constitution

provides, was not in fact constituted until 13th December, 1976. The appellant's petition was then considered by the Advisory Committee. The Minister designated under section 87(3) then tendered his advice to the President who acted on it by rejecting the petition on 23rd February, 1977, and on 12th March, 1977, he issued his warrant under section 59 of the Criminal Procedure Ordinance directing that the appellant be executed on 22nd March, 1977. Thus a period of somewhat less than eight months had elapsed between the dismissal by the Judicial Committee of the appellant's appeal against his conviction and the issue by the President of the Republic of the warrant for his execution.

The third period started on 15th March, 1977, when the appellant filed an originating motion under section 14 of the Constitution claiming that the execution of the sentence of death would contravene his fundamental human rights and freedoms under section 4 of the Constitution, because (among other things) of the delay from 26th July, 1976, to 12th March, 1977, in dealing with his petition for reprieve. (His originating motion raised a number of other grounds on which he contended that his fundamental human rights and freedoms had been infringed, but these have been abandoned before their Lordships and do not call for any further mention.) The motion was dismissed by Mr. Justice Bernard on 5th May, 1977. This judgment was affirmed by the Court of Appeal on 5th May, 1978. From the decision of the Court of Appeal, the appellant has exercised his right under section 109(1)(*c*) of the Constitution to appeal to the Judicial Committee of the Privy Council. Thus the third period between the filing of the appellant's notice of the motion and the hearing of his appeal in the Judicial Committee extends over two years.

That so long a total period should have been allowed to elapse between the passing of a death sentence and its being carried out is, in their Lordships' view, greatly to be deplored. It brings the administration of criminal justice into disrepute among law-abiding citizens. Nevertheless their Lordships doubt whether it is realistic to suggest that from the point of view of the condemned man himself he would wish to expedite the final decision as to whether he was to die or not if he thought that there was a serious risk that the decision would be unfavourable. While there's life, there's hope. At any rate, as in *de Freitas v. Benny* [1976] A.C. 239, it has to be conceded that the appellant cannot complain about the delay totalling three years preceding his petition for pardon caused by his own action in appealing against his conviction or about the delay totalling two years subsequent to the rejection of his petition caused by his own action in appealing against the sentence on constitutional grounds. His case as advanced before their Lordships has depended solely on the period of somewhat less than eight months sandwiched between the two longer periods, which was allowed by the State to elapse between the lodging of his petition for pardon and its rejection by the President. This it is claimed amounted to delay so inordinate as to involve a contravention of his constitutional rights.

The argument for the appellant, which was presented with great skill and clarity by counsel on his behalf, involved the following steps.

Reference was made to sections 87 to 89 of the Republican Constitution which deal with the exercise of the power of pardon and are in similar, though not identical, terms to sections 70 to 72 of the former Constitution which were the subject of consideration by the Judicial Committee of the Privy Council in *de Freitas v. Benny* (*ubi sup.* at pp. 247/8). Section 87(1) of the Republican Constitution vests the power of pardon in the

President and subsection (3) provides that the President shall exercise that power " in accordance with the advice of a Minister designated by him, acting in accordance with the advice of the Prime Minister ". Section 88 provides for the constitution of an Advisory Committee on the Power of Pardon. It consists of

(*a*) the designated Minister as chairman, (*b*) the Attorney General, (*c*) the Director of Public Prosecutions and " (*d*) not more than four other members appointed by the President, after consultation with the Prime Minister and the Leader of the Opposition ".

This Advisory Committee differs in composition from the Advisory Committee on the Prerogative of Mercy constituted under section 71 of the former Constitution in that not only is there an additional member in the person of the Director of Public Prosecutions, but also the appointed members under the former Constitution were mere government nominees appointed by the Governor-General acting in accordance with the advice of the Prime Minister.

Section 89, on which this part of the argument turns, deals with the functions of the Advisory Committee. It reads as follows:

" (1) Where an offender has been sentenced to death by any court for an offence against the law of Trinidad and Tobago, the Minister shall cause a written report of the case from the trial judge, together with such other information derived from the record of the case or elsewhere as the Minister may require, to be taken into consideration at a meeting of the Advisory Committee.

(2) The Minister may consult with the Advisory Committee before tendering any advice to the President under section 87(3) in any case not falling within subsection (1).

(3) The Minister shall not be obliged in any case to act in accordance with the advice of the Advisory Committee.

(4) The Advisory Committee may regulate its own procedure.

(5) In this section ' the Minister " means the Minister referred to in section 87(3)."

The effect of this section is that in every case where the death sentence has been imposed the designated Minister is required to submit the trial judge's report, and any other information he may think desirable, to the Advisory Committee for their consideration and advice. Their Lordships would accept that it is a necessary implication from subsection (1) that in all capital cases the designated Minister, before he advises the President on whether to exercise the power of pardon and if so how to do so, must himself obtain (though he is not obliged to follow) the advice of the Advisory Committee as to how he should advise the President.

The obligation on the Minister to submit the matter to the Advisory Committee for their advice is not dependent upon the condemned man having brought a petition for reprieve. It applies in all capital cases even where no step with a view to reprieve has been taken by the condemned man or on his behalf. It follows that the President ought not to issue his warrant under section 59 of the Criminal Procedure Ordinance, for carrying out the sentence of death, until after the Advisory Committee has considered the case and proffered its advice to the designated Minister and the designated Minister has tendered his own advice (which may differ from that of the Advisory Committee) to the President.

Since the section imposes duties arising under public law upon the designated Minister and upon the Advisory Committee, a person aggrieved by any failure to perform those duties with reasonable dispatch would, in their Lordships' view, be entitled to apply to the High Court for an appropriate remedy in public law such as an order of mandamus requiring the Minister to refer the case to the Advisory Committee and the Advisory Committee to proceed with the consideration of it. Their Lordships recognise that it is hardly realistic to expect the person primarily affected by tardy performance of those duties, the condemned man himself, to take that course: and delayed performance of a public duty for which no express time limit is set is not generally *ultra vires*.

As the Judicial Committee has recently had occasion to point out in *Kemrajh Harrikissoon v. The Attorney General of Trinidad and Tobago* (15th January, 1979), the fact that an executive authority has failed to perform a duty imposed upon it under public law, even where that law is part of the Constitution itself, does not in itself entitle any person who claims to be aggrieved by the failure to apply for redress to the High Court under section 14(1) of the Constitution. He can only do so in cases where the failure amounts also to a contravention of one of the fundamental human rights and freedoms recognised and declared by section 4 of the Constitution.

Counsel for the appellant has submitted that in the instant case the failure of the executive authorities concerned to deal more swiftly with his petition for a pardon, amounts to a contravention of one of his rights, the right to life, declared by section 4(*a*), which is in the following terms:

> "the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law".

In *Maharaj v. Attorney General of Trinidad and Tobago* [1978] 2 W.L.R. 902 the Judicial Committee considered the legal nature and extent of the rights and freedoms which are referred to in broad and absolute terms in the various paragraphs of section 4. The rights and freedoms which Chapter I of the Constitution preserves and protects are those which existed on 1st August, 1976, and their legal nature and extent are to be ascertained by examining the extent to which rights of the individual, which are capable of falling within the broad descriptions in the various paragraphs of section 4, were at that date entitled to protection by the State or free from interference by it or by some other public authority endowed by law with coercive powers. Similarly "due process of law" means procedures for the determination of an individual's rights and obligations vis-à-vis the State and other public authorities, which conform to the standards of administration of justice in Trinidad and Tobago prior to 1st August, 1976, and are described in greater detail though not necessarily exhaustively in section 5(2). See *de Freitas v. Benny* (*ubi sup.* at p.245). It is also implicit from the reference to punishment in section 5(2)(*b*) that "due process of law" does not end with the delivery of judgment in a civil matter or the pronouncement of sentence in a criminal matter; it includes enforcement of judgments and the carrying out of sentences.

The Criminal Procedure Ordinance under which the death sentence of the appellant was respited and he was detained in prison from 26th July, 1976, to 12th March, 1977, pending the President's decision whether to exercise any of his powers of pardon in favour of the appellant, and under which the President on 12th March, 1977, issued his warrant directing the Marshal to carry out the death sentence, was a law that was

in existence on 1st August, 1976. The law relating to the exercise of the power of pardon under the Republican Constitution is in substance the same as it was under the former Constitution save for the transfer of the power from the Governor-General to the President and changes in the composition and method of appointment of the appointed members of the Advisory Committee.

So unless the appellant can establish that his execution after a lapse of time of between seven and eight months from the lodging of his petition for reprieve would be unlawful under the Criminal Procedure Ordinance read with sections 87 to 89 of the Constitution, he cannot point to any contravention of his rights and freedoms under section 4(*a*) of the Constitution for which he is entitled to apply for redress under section 14.

In their Lordships' view the proposition that, in the circumstances of the instant case, the fact that seven or eight months elapsed before the appellant's petition for reprieve was finally disposed of by the President made his execution at any time thereafter unlawful, is quite untenable. Their Lordships accept that it is possible to imagine cases in which the time allowed by the authorities to elapse between the pronouncement of a death sentence and notification to the condemned man that it was to be carried out was so prolonged as to arouse in him a reasonable belief that his death sentence must have been commuted to a sentence of life imprisonment. In such a case, which is without precedent and, in their Lordships' view, would involve delay measured in years, rather than in months, it might be argued that the taking of the condemned man's life was not " by due process of law "; but since nothing like this arises in the instant case, this question is one which their Lordships prefer to leave open.

The trial judge and all three members of the Court of Appeal were of opinion that in the instant case the time taken in dealing with the appellant's petition for reprieve was not unreasonably long. Their Lordships agree with the Court of Appeal that the Advisory Committee on the Prerogative of Mercy under the former Constitution was not preserved by the transitional provisions contained in the Constitution of the Republic of Trinidad and Tobago Act, 1976. They also agree that the Advisory Committee on the Power of Pardon under the Republican Constitution could have lawfully been set up under those transitional provisions without waiting for the results of the general election. Hyatali C.J. and Corbin J.A. considered that having regard to the composition of the Advisory Committee and the manner of appointment of its members it was reasonable to defer setting it up until the caretaker government had been replaced by one formed after the election. Having regard to the fact that capital punishment is a controversial question and to the functions of the designated Minister and the Advisory Committee, their Lordships agree that deferment of the setting up of the Advisory Committee until after the election and the appointment of the new government was reasonable. So the starting point in any consideration of unreasonable delay must be well after mid-September, 1976, to allow time for the necessary consultations to enable the new Advisory Committee to be set up.

Kelsick J.A. differed from the majority in that he thought that in deciding whether delay in setting up the new Advisory Committee was reasonable only legal as distinct from political obstacles could be considered. He concluded that if it had been set up under the transitional provisions it could have been in operation by the beginning of September,

1976, instead of some three months later. He was, however, of opinion that even on this assumption, to take six months to reach a decision on the appellant's petition for reprieve was not unreasonable.

Their Lordships would in any event hesitate long before substituting their own opinion for that of judges in Trinidad and Tobago, as to what constitutes a reasonable time for dealing with petitions for reprieve in that country. Judges who sit in the courts in Trinidad and Tobago know the practice in these matters and the local circumstances much better than their Lordships can hope to do. There was no evidence in the instant case, as there had been in *de Freitas v. Benny*, of what was the average interval of time between the passing of the death sentence and its being carried out. The evidence which is referred to in the judgment of the Judicial Committee in that case was that the *average* time spent in the condemned cell between sentence and execution under the former Constitution was substantially more than five months. It is not, of course, "evidence" in the instant case but that this is how the procedure for dealing with reprieve in capital sentences in Trinidad and Tobago operates in practice is a matter of which, if it lies within their knowledge, judges sitting in that country may take judicial notice, in deciding whether the delay of seven and a half months in the instant case was reasonable or not.

In their Lordship's view the order of the Court of Appeal upholding the dismissal of the appellant's application under section 14 of the Constitution was clearly right.

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In the Privy Council

STANLEY ABBOTT

v.

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO AND OTHERS

DELIVERED BY
LORD DIPLOCK

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