Privy Council Appeal No. 32 of 1978

Terrence Thornhill – – – – – – – *Appellant*

v.

The Attorney General of Trinidad and Tobago – – *Respondent*

from

THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH NOVEMBER, 1979

Present at the Hearing:

LORD DIPLOCK
VISCOUNT DILHORNE
LORD EDMUND-DAVIES
LORD SCARMAN
LORD LANE

[*Delivered by* LORD DIPLOCK]

This appeal raises important constitutional questions as to the true construction of those provisions dealing with "The Recognition and Protection of Human Rights and Fundamental Freedoms" that were contained in Chapter I, sections 1, 2, 3 and 6 of the Constitution of Trinidad and Tobago which came into operation on 31st August, 1962, and was in force at the time of the events that are the subject of these proceedings. They are reproduced in similar terms in the current Republican Constitution where they are numbered respectively sections 4, 5, 6 and 14. Their Lordships will refer to these sections by the numbers that they bore in the 1962 Constitution.

The relevant facts are set out with clarity and in detail in the judgment of Georges J. in the High Court and repeated, though in less detailed form, in that of Rees J.A. who delivered the leading judgment in the Court of Appeal. To identify the issues of constitutional law that are involved in this appeal it is not necessary for their Lordships to do more than summarise the facts very briefly.

In the early afternoon of 17th October, 1973, after what has been described as a "shoot-out" with the police, the appellant was arrested by a police officer and taken to a police station where he was detained and charged with offences arising out of the shooting incident. He was suspected by the police of many other crimes about which they wanted to interrogate him. He was not brought before a judicial authority until these interrogations had been completed and an identity parade had been held. In the meantime he remained in custody in one or other of two police stations. A legal adviser retained on his behalf came to the police station where he was detained at 5.30 p.m. on 17th October for the purpose of seeing him but was denied an opportunity of doing so; requests to the police for an

opportunity for the appellant to communicate with his legal adviser were repeated in both morning and afternoon of 18th October but were also refused and it was not until after the conclusion of the identity parade at 12.45 p.m. on 20th October, 1973, that the appellant was granted his first opportunity of communicating with his lawyer. At the times when these requests were made on 18th October, the appellant was not being interviewed by the police and, as the judge found, there was nothing in connection with the investigation that would have made it inconvenient for him to be allowed to consult his legal advisers. The only reason why he was not allowed to do so was that the police officers concerned were of opinion that if the appellant were advised as to his legal right to decline to reply to questions the answers to which might incriminate him, they would be less likely to obtain from him extra-judicial confessions that he had committed the earlier offences of which he was suspected and with which he had not yet been charged.

On 1st November, 1973, the appellant applied to the High Court for redress under section 6 of the Constitution. By his notice of motion he claimed three kinds of redress, of which their Lordships are concerned only with the first. This is a declaration that the refusal by the police to allow him to instruct and communicate with his legal adviser between 5.30 p.m. on 17th October and 12.45 p.m. on 20th October, 1973, while he was under arrest and in their custody amounted to a contravention of his constitutional right to do so. The second form of redress was a declaration that all statements taken from him during that period were unconstitutional, null and void; and the third consisted of orders designed to prevent the use of any of those statements in any prosecution of the appellant or other proceedings in which he might be concerned.

Georges J., by whom the application was dealt with in the High Court, made the first declaration prayed. He refused to grant the two other forms of relief. He held, in their Lordships' view quite rightly, that they involve questions that cannot appropriately be decided by anyone except the judge who will preside over the trial of the appellant for the offences to which the statements relate, and before whom full oral evidence as to the circumstances in which the statements came to be made can be called on the *voir dire*. The claims to these two forms of relief were not further pursued by the appellant after their rejection by the High Court; so their Lordships need say no more about them.

Much of the judgment of Georges J., to whose lucidity and cogency their Lordships would desire to pay respectful tribute, deals with the facts and his findings upon disputed factual issues. Two questions of law were argued before him: one was of substantive law; the other was procedural. The question of substance was whether the combined effect of sections 1, 2 and 3 of the Constitution was to give to the appellant when he had been arrested and detained a constitutional right in the terms set out in section 2(*c*)(ii), viz.

> "the right to retain and instruct without delay a legal adviser of his own choice and to hold communication with him".

The procedural question was whether the first declaration prayed for was a form of redress which the judge in the proper exercise of his discretion ought to grant.

On the first question it was argued on behalf of the Attorney General and the police officers who had been made respondents to the application that the effect of section 3 of the Constitution was to reduce the ambit of sections 1 and 2 to rights of the individual which can be shown to have been legally enforceable by him in Trinidad and Tobago, prior to the coming into effect of the 1962 Constitution, under a written law or an unwritten rule of common law that was in force in Trinidad and Tobago on 31st August, 1962. At that date, it is common ground that no written

law in force conferred on any person who had been lawfully arrested and detained by the police any right while in their custody to consult a lawyer for the purpose of obtaining advice as to his legal rights and as to what should be done to protect his interest; and, it was submitted for the respondents, there is no authority to be found in the decided cases which shows that at common law such a right would have been enforceable by the prisoner against the police in a court of justice, in the event of their refusal to allow him to do so. So, the argument concluded, there had been no contravention of any of the provisions of sections 1 or 2 upon which the appellant could base a claim to redress under section 6.

The learned High Court judge, whose judgment was delivered on 31st May, 1974, rejected this argument. He held that since the right on the part of a person in the situation in which the appellant had found himself on 17th to 20th October, 1973, to consult a lawyer of his choice had been spelt out specifically in section 2(*c*)(ii) of the Constitution and proclaimed by section 1 to be one that had existed at the time of the coming into force of the Constitution and was to continue to exist, the burden lay on the respondents to establish that on 31st August, 1962, there was a law in force in Trinidad and Tobago, whether written or as part of the unwritten common law, which empowered a police officer to prevent a person in the situation of the appellant from exercising that right. This the respondents in the arguments they had addressed to him had never attempted to do. The judge held also, in the alternative, that the right described in section 2(*c*)(ii) already existed at common law in Trinidad and Tobago at the time the 1962 Constitution came into force.

On the procedural question Georges J. held that a declaration was an appropriate form of redress in all the circumstances of the case. He accordingly exercised the wide discretion conferred on him under section 6 by granting it.

This judgment was delivered some twelve months before that of the Judicial Committee of the Privy Council in *de Freitas v. Benny* [1976] A.C. 239. The learned judge's analysis of sections 1, 2 and 3 of the Constitution, however, anticipates and conforms to what was said by the Judicial Committee both in that case (pp. 244–246) and in the subsequent case of *Maharaj v. Attorney General of Trinidad and Tobago (No. 2)* [1978] 2 W.L.R. 902.

Sections 1 to 3 of the Constitution proceed on the presumption that the human rights and fundamental freedoms that are referred to in sections 1 and 2 were already enjoyed by the people of Trinidad and Tobago under the law in force there at the commencement of the 1962 Constitution. The enacting words of section 1 are that the then existing rights and freedoms that are described in paragraphs (*a*) to (*k*) "shall continue to exist". In those paragraphs the rights and freedoms that are declared to have existed on 31st August, 1962, and are to continue to exist, are not described with the particularity that would be appropriate to an ordinary Act of Parliament nor are they expressed in words that bear precise meanings as terms of legal art. They are statements of principles of great breadth and generality, expressed in the kind of language more commonly associated with political manifestos or international conventions, like the United Nations' Universal Declaration of Human Rights of 1948, and the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) to which, indeed, Chapter I of the Constitution of Trinidad and Tobago and similar provision in the Constitutions of other Commonwealth countries owe their origin (cf. *Minister of Home Affairs v. Fisher* [1979] 2 W.L.R. 889 at p. 894).

It was held by the Judicial Committee in *Maharaj v. A.G.* (at p. 909) that the protection afforded to the individual by these sections was against contraventions of those rights and freedoms "by the state or some other

public authority endowed by law with coercive powers" and not by another private individual; Chaper I of the Constitution does not deal with purely private wrongs.

The lack of all specificity in the descriptions of the rights and freedoms protected contained in section 1, paragraphs (*a*) to (*k*), may make it necessary sometimes to resort to an examination of the law as it was at the commencement of the Constitution in order to determine what limits upon freedoms that are expressed in absolute and unlimited terms were nevertheless intended to be preserved in the interests of the people as a whole and the orderly development of the nation; for the declaration that the rights and freedoms protected by that section already existed at that date may make the existing law as it was then administered in practice a relevant aid to the ascertainment of what kind of executive or judicial act was intended to be prohibited by the wide and vague words used in those paragraphs (*Maharaj v. A.G. ubi sup.* at p. 908). But this external aid to construction is neither necessary nor permissible where the treatment complained of is of any of the kinds specifically described in paragraphs (*a*) to (*h*) of section 2.

Section 2 is directed primarily to curtailing the exercise of the legislative powers of the newly constituted Parliament of Trinidad and Tobago. Save in the exceptional circumstances referred to in section 4 or by the exceptional procedure provided for in section 5 the Parliament may not pass any law that purports to abrogate, abridge or infringe any of the rights or freedoms recognised and declared in section 1 or to authorise any such abrogation, abridgment or infringement. But section 2 also goes on to give, as particular examples of treatment of an individual by the executive or the judiciary, which would have the effect of infringing those rights, the various kinds of conduct described in paragraphs (*a*) to (*h*) of that section. These paragraphs spell out in greater detail (though not necessarily exhaustively) what is included in the expression "due process of law" to which the appellant was entitled under paragraph (*a*) of section 1 as a condition of his continued detention and "the protection of the law" to which he was entitled under paragraph (*b*). So there is no need to consider whether before the commencement of the Constitution a person arrested and detained by the police would have had at common law a legal remedy if he had been prevented from exercising what is specifically described in section 2(*c*)(ii) as "the right to retain and instruct without delay a legal adviser of his own choice and to hold communication with him". If justification is to be found anywhere for any exclusion or limitation of the right so described, it must be sought in section 3.

Moreover, even if the treatment complained of by the appellant had not been specifically described in section 2, the fact that section 1 uses terms of great breadth and generality to describe those rights and freedoms then existing for which (in conjunction with section 6) it provides legal protection in the future, is no ground for cutting down the amplitude of any of the descriptions of those rights and freedoms contained in paragraphs (*a*) to (*k*) by restricting them to rights for contravention of which the victim would before the commencement of the Constitution have had some legal remedy either in public law or private law which he could enforce in a court of justice. In the context of section 1, the declaration that rights and freedoms of the kinds described in the section have existed in Trinidad and Tobago, in their Lordships' view, means that they have in fact been enjoyed by the individual citizen, whether their enjoyment by him has been *de jure* as a legal right or *de facto* as the result of a settled executive policy of abstention from interference or a settled practice as to the way in which an administrative or judicial discretion has been exercised. The hopes raised by the affirmation in the Preamble to the Constitution that the protection of human rights and fundamental freedoms was to be ensured would indeed be betrayed if Chapter I did not preserve to the People of Trinidad and Tobago all those human rights and fundamental freedoms

that in practice they had hitherto been permitted to enjoy. This construction of section 1 makes it unnecessary to examine whether the ability of an arrested person while in police custody to communicate with his lawyer for the purpose of instructing him and obtaining his advice, was enjoyed by him as a matter of legal right or in consequence of a settled practice on the part of the police as to the way an administrative discretion to grant or refuse him leave to do so was exercised. That such a right was enjoyed in Trinidad and Tobago at least as a matter of settled practice is apparent from Appendix "A" to the Judges' Rules published in England in 1964 and adopted in identical terms by the judges of Trinidad and Tobago in 1965. This appendix to the Rules refers to five "principles" which, it says, are not affected by the Rules themselves. The third of these "principles" is

> "That every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor. This is so even if he is in custody provided that in such a case no unreasonable delay or hindrance is caused to the processes of investigation or the administration of justice by his doing so".

Thus far their Lordships have been dealing with sections 1 and 2. Section 3 to which they must now turn is in the following terms:

> "Sections 1 and 2 of this Constitution shall not apply in relation to any law that is in force in Trinidad and Tobago at the commencement of this Constitution".

Like section 2 *but unlike* section 1 it deals only with "laws". Both section 2 and section 3 are principally concerned with written laws but section 105(1) of the 1962 Constitution expressly provides that the expression "law" includes any unwritten rule of law, so that it is capable of covering a restriction on the liberty of the subject of which the only legal source is the common law itself, such as the restriction of the liberty of the person resulting from the exercise by a constable of his common law powers of arrest or by a judge of his common law power to commit for contempt of court. Section 3 excludes wholly from the operation of section 2, the terms of which would otherwise be wide enough to cover them, all laws (in this extended sense) which were in existence in Trinidad and Tobago on 31st August, 1962. So section 2 does not operate to repeal or to amend any then existing law.

In contrast to section 2, section 1, as has already been pointed out, deals not only with rights and freedoms that prior to the commencement of the Constitution had been enjoyed by the private citizen *de jure* as a matter of legal right but also with those that he had enjoyed *de facto* only as a result of a settled policy of abstention from interference by the executive or a settled practice as to the way an administrative or judicial discretion had been exercised. In respect of rights and freedoms in this category what section 1 does by declaring that they shall continue to exist, is to convert them into rights and freedoms which henceforth are to be enjoyed not simply *de facto* but also as a matter of legal right for contravention of which a legal remedy is provided by section 6. All that section 3 does is to say that if the failure of the executive or public authority or officer to prevent individuals from acting in a particular way in the exercise of any of the rights or freedoms described in section 1 was contrary to a mandatory provision of a law in existence at the commencement of the Constitution which required them to prevent it, then to that extent the *de facto* exercise of the right or freedom is not preserved and converted into a legally enforceable right by section 1. In other words, section 1 does not operate to repeal any existing law.

So, in their Lordships' view, Georges J. was right in saying that the burden lay on the respondents to the application to show that the settled practice of allowing an arrested person to consult a lawyer of his choice at the earliest opportunity, when to do so would not cause unreasonable

delay or hinder the processes of investigation or the administration of justice, was contrary to law at the time of commencement of the 1962 Constitution, despite the facts that almost contemporaneously the judges of both England and Trinidad and Tobago are to be found referring to it as a principle that should be followed; and the Constitution makers in section 2(*c*)(ii) describe it as being one of an arrested person's rights.

This is a burden which the respondents to the application clearly could not fulfil. Their Lordships would point out that although the language in which the "principle" is expressed in the Judges' Rules is not identical with that in which the "right" is described in section 2(*c*)(ii), the substance is the same. "Delay" is a word which connotes not simply a lapse of time but one which in the circumstances is longer than it should have been. Since the only hindrance to the processes of investigation which it was suggested by the police officers might be occasioned by the appellant's being allowed to consult a lawyer at the time the requests were made was that they would be less likely to succeed in obtaining self-criminating statements from him if he were advised about his legal right to decline to answer questions, any delay for which this was the only reason was clearly an unreasonable delay.

Accordingly their Lordships would uphold the finding of the learned High Court judge that the appellant's constitutional rights had been contravened. That being so and the question being one of wide application and great public importance, a declaration to that effect is, in their Lordships' view, an eminently appropriate remedy in the public interest as well as the personal interests of the appellant.

The respondents' appeal from the judgment of Georges J. was heard after the publication of the advice of the Judicial Committee in the Jamaican case of *Hinds v. The Queen* [1977] A.C. 195 but before their decision in *Maharaj v. A.G. of Trinidad and Tobago (ubi sup.). Hinds v. The Queen* was not a case arising out of an alleged violation of human rights and fundamental freedoms under the provisions of the Jamaican Constitution which correspond to Chapter I of the 1962 Constitution of Trinidad and Tobago. It was a case concerning the structure of that Constitution (which also follows the Westminster model) and the separation thereunder of legislative, executive and judicial powers. In discussing the various limitations which such a constitutional structure imposes on the legislature, the executive and the judiciary, the Board mentioned that the provisions of a Chaper on Human Rights and Fundamental Freedoms "impose a fetter on the exercise by the legislature, the executive and the judiciary of the plenitude of their respective powers". (p. 213.)

Rees J. A., although he considered that the conduct of the respondents might well have been a contravention of the appellant's constitutional rights under section 1(*a*) or section 1 (*b*), found it unnecessary to make a positive finding on that point, as the learned justice of appeal was of opinion that since a police officer was not in his view a legislator nor a member of the judiciary nor an agent or member of the executive, section 6 of the Constitution did not operate to give to the appellant any right to apply to the High Court for redress for any contravention of his constitutional rights by a police officer. This was the only ground on which Rees J. A. allowed the appeal.

Their Lordships do not find it necessary to consider to what extent (if any), despite the provisions of the Constitution relating to the Police Force and its officers, the Police Service Act, 1965, and the Crown Liability and Proceedings Act, 1966, the old common law rule that those persons who at various times in English legal history have been responsible for appointing a "constable" were not vicariously responsible for tortious acts done by him in purported exercise of his common law powers of arrest has survived in Trinidad and Tobago as respects tortious acts which do *not* involve any contravention of section 1 of the 1962 Constitution. It is beyond

question, however, that a police officer in carrying out his duties in relation to the maintenance of order, the detection and apprehension of offenders and the bringing of them before a judicial authority is acting as a public officer carrying out an essential executive function of any sovereign state—the maintenance of law and order or, to use the expression originally used in England, "preserving the King's Peace". It is also beyond question that in performing these functions police officers are endowed with coercive powers by the common law, even apart from any statute. Contraventions by the police of any of the human rights or fundamental freedoms of the individual that are recognised by Chapter I of the Constitution thus fall squarely within what has since been held by the Judicial Committee in *Maharaj v. A. G. of Trinidad and Tobago* (*ubi sup.*) to be the ambit of the protection afforded by section 6, viz. contraventions "by the state or by some other public authority endowed by law with coercive powers" (p. 909). In this context "public authority" must be understood as embracing local as well as central authorities and including any individual officer who exercises executive functions of a public nature. Indeed, the very nature of the executive functions which it is the duty of police officers to perform is likely in practice to involve the commonest risk of contravention of an individual's rights under section 1(*a*) and (*b*), through overzealousness in carrying out those duties.

Their Lordships do not doubt that if the appeal had come before the Court of Appeal after the judgment of the Judicial Committee in *Maharaj* instead of before, neither Rees J. A. nor either of the other members of the Court (Hyatali C. J. and Corbin J. A.) who expressed their agreement with his judgment would have adopted, as a ground for allowing the appeal, that section 6 of the Constitution had no application to contraventions of human rights or fundamental freedoms by the police.

The Chief Justice, with whom Corbin J. A. agreed, would also have allowed the appeal upon the further ground that sections 1, 2 and 3 of the Constitution protected only rights that were legally enforceable in a court of law against a contravener under the law in force at the commencement of the 1962 Constitution. He held that no such legally enforceable right to consult a lawyer as is described in section 2(*c*)(ii) existed at common law or under statute on 31st August, 1962. He regarded as irrelevant any settled practice that fell short of a mandatory rule of law and, for that reason, attached no importance to the fact that the Judges' Rules referred to it as being an accepted principle that a person who had been arrested should be allowed to communicate and consult privately with a lawyer where this would not unreasonably delay or hinder the process of investigation or the administration of justice. With this branch of the argument for the respondents, however, their Lordships have already dealt.

For these reasons this appeal must be allowed and the order of the High Court restored. The respondent must pay the appellant's costs here and in the Court of Appeal.

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v.

THE ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

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Printed by HER MAJESTY'S STATIONERY OFFICE
1979