

Privy Council Appeal No. 52 of 1990

(1) The Attorney General of Trinidad
and Tobago and
(2) The Commissioner of Police Appellants

v.

Wayne Whiteman Respondent

FROM

THE COURT OF APPEAL OF TRINIDAD
AND TOBAGO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE
17TH APRIL 1991

Present at the hearing:-

LORD KEITH OF KINKEL
LORD TEMPLEMAN
LORD GRIFFITHS
LORD ACKNER
LORD JAUNCEY OF TULLICHETTLE

[Delivered by Lord Keith of Kinkel]

This appeal arises out of an originating motion brought by the respondent under section 14 of the Constitution of Trinidad and Tobago claiming redress for alleged contraventions in relation to him of certain provisions of that Constitution. The event leading to the respondent's motion was his arrest and detention for a period in a police cell on 24th September 1984. The respondent claims that at no time during his detention was he informed of his right to communicate with a lawyer. Various forms of relief were sought by the originating motion, but when the matter came before Deyalsingh J. it was agreed between the parties that he should first give a preliminary ruling on the question whether a person upon arrest and detention by the police has a constitutional right to be informed of his constitutional right to retain and instruct without delay a legal adviser of his choice and to hold communication with him. Deyalsingh J., in a judgment given on 18th December 1987, answered that question in the negative. On appeal by the respondent the Court of Appeal (des Iles, McMillan and Davis JJ.A.) on 13th July 1990 set aside the order of Deyalsingh J. and remitted the originating motion to the High Court to be proceeded with. The Attorney General and the

Commissioner of Police now appeal, with special leave, to this Board.

The present Constitution of Trinidad and Tobago is that of 1976. Section 4, so far as material, provides:-

"It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist, without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely -

- (a) 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;
- (b) the right of the individual to equality before the law and the protection of the law;

..."

Section 5 provides:-

"(1) Except as is otherwise expressly provided in this Chapter and in section 54, no law may abrogate, abridge or infringe or authorise the abrogation, abridgment or infringement of any of the rights and freedoms hereinbefore recognised and declared.

(2) Without prejudice to subsection (1), but subject to this Chapter and to section 54, Parliament may not -

- (a) authorise or effect the arbitrary detention, imprisonment or exile of any person;
- (b) impose or authorise the imposition of cruel and unusual treatment or punishment;
- (c) deprive a person who has been arrested or detained -
 - (i) of the right to be informed promptly and with sufficient particularity of the reason for his arrest or detention;
 - (ii) of the right to retain and instruct without delay a legal adviser of his own choice and to hold communication with him;
 - (iii) of the right to be brought promptly before an appropriate judicial authority;
 - (iv) of the remedy by way of habeas corpus for the determination of the validity of his detention and for his release if the detention is not lawful;

- (d) authorise a court, tribunal, commission, board or other authority to compel a person to give evidence unless he is afforded protection against self-incrimination and, where necessary to ensure such protection, the right to legal representation;
- (e) deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations;
- (f) deprive a person charged with a criminal offence of the right -
 - (i) to be presumed innocent until proved guilty according to law, but this shall not invalidate a law by reason only that the law imposes on any such person the burden of proving particular facts;
 - (ii) to a fair and public hearing by an independent and impartial tribunal; or
 - (iii) to reasonable bail without just cause;
- (g) deprive a person of the right to the assistance of an interpreter in any proceedings in which he is involved or in which he is a party or a witness, before a court, commission, board or other tribunal, if he does not understand or speak English; or
- (h) deprive a person of the right to such procedural provisions as are necessary for the purpose of giving effect and protection to the aforesaid rights and freedoms."

It is relevant also to notice that in 1965 the judges of Trinidad and Tobago adopted the 1964 English Judges Rules, including Appendix B, paragraph 8 of which provides:-

"8. Facilities for defence

- (a) A person in custody should be allowed to speak on the telephone to his solicitor or counsel or to his friends provided that no hindrance is reasonably likely to be caused to the processes of investigation, or the administration of justice by his doing so.

He should be supplied on request with writing materials and his letters should be sent by post or otherwise with the least possible delay. Additionally, telegrams should be sent at once, at his own expense.

- (b) Persons in custody should not only be informed orally of the rights and facilities available to them, but in addition notices describing them should be displayed at convenient and conspicuous places at police stations and the attention of persons in custody should be drawn to these notices."

In *Thornhill v. Attorney General of Trinidad and Tobago* [1981] A.C. 61 this Board had occasion to consider sections 1 and 2 of the Constitution of 1962, which were in identical terms to sections 4 and 5 of the present Constitution. The context was a refusal by the police to allow an arrested man the opportunity of communicating with his lawyer, so that section 2(c)(ii) (now 5(2)(c)(ii)) was most directly in point.

Lord Diplock said at page 70:-

"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, 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.'"

Lord Diplock went on to say that the adoption in 1965 of the 1964 English Judges Rules showed that there was a settled practice in Trinidad and Tobago of allowing an arrested person to communicate with his lawyer, so that, even if a specific right to do so had not been mentioned in section 2, section 1 included it as part of the protection of the law existing when the Constitution came into force.

The protection afforded to the individual by sections 3 and 4 is available against contravention of rights and freedoms "by the state or by some other public authority endowed by law with coercive powers". *Maharaj v. Attorney General of Trinidad and Tobago No. (2)* [1979] A.C. 385, 396. Such authority obviously includes a police officer.

So much is well settled law and was not in controversy in the present case. The argument revolved round the meaning and significance to be attributed to the words "procedural provisions" in section 5(2)(h). It was argued for the appellants that mere procedures could not properly be the subject of constitutional rights, and that the word "provisions" must have in view some specific rules of procedure, such as Rules of Court. It was further observed that if the legislature had intended that the right to be informed of the right to retain, instruct and communicate with a lawyer should be a separate constitutional right it could have said so expressly. The failure to do so indicated that such was not the intention of the legislature. It was further maintained that the adoption in 1965 of the 1964 Judges Rules did not evidence the existence of a settled practice on the lines of paragraph 8(b) of Appendix B.

The language of a Constitution falls to be construed, not in a narrow and legalistic way, but broadly and purposively, so as to give effect to its spirit, and this is particularly true of those provisions which are concerned with the protection of human rights. In this case the right conferred by section 5(2)(c)(ii) upon a person who has been arrested and detained, namely the right to communicate with a legal adviser, is capable in some situations of being of little value if the person is not informed of the right. Many persons might be quite ignorant that they had this constitutional right or, if they did know, might in the circumstances of their arrest be too confused to bring it to mind. Section 5(2)(h) is properly to be regarded as intended to deal with that kind of situation as well as other kinds of situation where some different constitutional rights might otherwise be at risk of not being given effect and protection. There are no grounds for giving a restricted meaning to the words "procedural provisions". A procedure is a way of going about things, and a provision is something which lays down what that way is to be. Given that there are some situations where the right to communicate with a legal adviser will not be effective if no provision exists for some procedure to be followed with a view to dealing with these situations, there is a clear necessity that such provision should be made. So section 5(2)(h) gives a right to such provision. Their Lordships further consider that, by necessary implication, there is a right to have the procedure provided for followed through. A procedure which exists only on paper, and is not put into practice, does not give practical protection.

Paragraph 8(b) of Appendix B to the Judges Rules adopted in 1965 requires that persons in custody should be informed orally of the rights and facilities available to them, and that notices describing these should be displayed at police stations and drawn to the attention of persons in custody. This is properly to be regarded as a provision, and it prescribes a certain procedure to be followed. The rights referred to include the right to communicate with a legal adviser. Their Lordships are of the opinion that persons who have been arrested or detained have a right to a provision of this character, by virtue of section 5(2)(h), because otherwise the right so to communicate might not receive effect. In any event paragraph 8(b) of Appendix B to the Judges Rules had been standing for over ten years when the Constitution of 1976 came into force. It superseded the Constitution of 1962 and therefore the time of its introduction is the appropriate time to consider the existence of a "settled practice" within the meaning of Lord Diplock's description in *Thornhill v. Attorney General of Trinidad and Tobago* at page 71. There is no reason to suppose that the requirements of paragraph 8(b) had not been regularly observed up until 1976, and a settled practice of doing so must therefore be held to have then existed.

Their Lordships accordingly consider that persons who have been arrested or detained have a constitutional right to be informed of their right to communicate with a legal adviser both upon a proper construction of section 5(2)(h) of the Constitution of 1976 and on the basis of a settled practice existing when that Constitution was introduced. Davis J.A. said towards the end of his judgment in the Court of Appeal:-

"I am not prepared to lay down any general rule as to the precise point in time when a person in custody ought to be informed of this right, but it should be as early as possible, and in any event before any 'in-custody interrogation' takes place."

Their Lordships would endorse that. It is possible to envisage circumstances where it would not be practicable to inform the person of his right immediately upon his arrest. They would add that it is incumbent upon police officers to see that the arrested person is informed of his right in such a way that he understands it. He may be illiterate, deaf, or unfamiliar with the language. It is plain that the mere exhibition of notices in the police station is insufficient in itself to convey the necessary information.

For these reasons their Lordships dismiss the appeal and affirm the order of the Court of Appeal. The appellants must pay the respondent's costs.