[2009] CA (Bda) 8 Crim

The Court of Appeal for Bermuda

CRIMINAL APPEAL No. 4 of 2006

Between:

DENNIS ALMA ROBINSON

Appellant

-v-

THE QUEEN

Respondent

Before: **Zacca, President**
Nazareth, J.A.
Evans, J.A.

Date of Hearing: **5 November 2008**
Date of Judgment: **28 November 2008**
Reasons for Judgment: **19 June 2009**

Appearances: Mr. J. Perry, QC with Mr. Charles Richardson for the Appellant
Ms. Cindy Clarke assisted by Ms. Tyndale for the Respondent

Reasons for Judgement

Nazareth J. A.

On 28 November 2008 we allowed Robinson's appeal against sentence and replaced the fifteen-year statutory restraint upon application or grant of parole with a recommendation that neither should be allowed prior to at least twelve years being served.

We now give our reasons.

The issues

Robinson's appeal against sentence raised the following issues:

1. The jurisdiction of this court to entertain the appeal against sentence.
2. The interpretation of section 288(1) of the Criminal Code (the Code), and the constitutionality of its effect.

The First Issue
Jurisdiction to entertain appeal against sentence

1. The respondent's submission, which precipitated this issue, is that the sentence being plainly fixed by law the court would not have jurisdiction to entertain the appeal. The submission is based upon the combined effect of section 17 (1)(c) of the Court of Appeal Act 1960 and section 288(1) of the code which read:

> Right of appeal
> S17(1)(c)
>
> "A person convicted of summary judgement and whose appeal to the Supreme Court....has not been allowed may appeal to the Court of Appeal –
> (a).....
> (b).....
> (c) with the leave of the Court against sentence passed on his conviction unless the sentence is fixed by law" (emphasis added)

> Punishment of murder
> 288 (1)
>
> Any person who commits the offence of murder shall be sentenced to imprisonment for life:
>
> Provided that where any person is sentenced under this section, such person shall, before any application for his release on licence may be entertained or granted by the Parole Board established by the Parole Board Act 2001, serve at least fifteen years of the term of his imprisonment.

2. The appellant's submission is that the combined effect of relevant statutory human rights and constitutional provisions entitles him to seek appropriate remedies in respect of his sentence.

The Bermuda Constitution (the Constitution), unlike those of many of the Caribbean independent states of the Commonwealth, does not declare that the Constitution is the supreme law of Bermuda; but that position is achieved by the Bermuda Constitution 1967, which by Order-in-Council applied the Bermuda Constitution to Bermuda, in conjunction with the Colonial Laws Validity Act 1865, which provides by Section 2:

> 2 Colonial Laws, when void for repugnancy
>
> Any colonial law which is or shall be in any respect repugnant to the provisions of an Act of Parliament extending to the Colony which such law may relate or repugnant to any order or regulation made on the authority of such Act of Parliament or having in the Colony the force and effect of such Act shall be read subject to such Act order or regulation and shall, to the extent of such repugnancy but not otherwise, be and remain absolutely void and inoperative.

Thus, as submitted, the effect of Section 2 of the Act of 1865 is that any law passed in Bermuda will be void to the extent of any inconsistency with the Bermuda Constitution.

3. The appellant relies upon the following rights and freedoms in Chapter 1 of the Constitution:

> Section1(a)
> The right to "...liberty, security of the person and the protection of the law.
>
> Section 3(1)
> The right that "No person shall be subjected to torture or to inhuman or degrading treatment or punishment
>
> Section 5 (1)(a)

The right that "No person shall be deprived of his personal liberty save as may be authorised by law in any of the following cases:-

a) in execution of the sentence or order of a court.... in respect of a criminal offence of which he has been convicted

As mentioned, reliance is also placed upon Section 15, also in Chapter 1:

Enforcement of fundamental rights

15 (1) If any person alleges that any of the foregoing provisions of this Chapter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress

(2) The Supreme Court shall have original jurisdiction –

(a) to hear and determine any application made by any person in pursuance of subsection (1) of this section; and

(b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3) of this section.

and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the foregoing provisions of this Chapter to the protection of which the person concerned is entitled:

Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law.

…….

(4) An appeal shall lie as of right to the Court of Appeal from any final determination of any application or question by the Supreme Court under this section, and an appeal shall lie as of right to Her Majesty in Council from the final determination by the Court of Appeal of the appeal in any such case…….

……

4. The appellant also relies similarly upon the following human rights recognised and protected by both the European Convention on Human Rights, and the Human Rights Act 1981. The following are the human rights in the Convention which are relied upon:

> Article 3
> No one shall be subjected to torture or to inhuman or degrading treatment or punishment.
>
> Article 5
> 2 Everyone has the right to liberty and security of person.
> No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law……[Appellant's emphasis]…..
> 4 Everyone who is deprived of his liberty by …. detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release resolved if the detention is not lawful. [Appellant's emphasis]
> ……..
>
> Article 6
> 1 In the determination …… any criminal charge …. everyone is entitled to a fair and public hearing…. by an independent and impartial tribunal established by law…… [Appellant's emphasis]
>
> …….

5. The Human Rights Act, as proclaimed in its preamble makes better provision to affirm human and fundamental rights and freedoms, including an appropriate measure of primacy of the Act by section 30B (1):

> Primacy of this Act
> 30B (1) Where a statutory provision purports to require or authorise conduct that is a contravention of anything in Part II, this Act prevails unless the statutory provision specifically provides that the statutory provision is to have effect notwithstanding this Act.
> .....

6. Patently, Section 15 confers original jurisdiction under subsection 1 in respect of contravention of fundamental rights in Chapter 1.

   It may be mentioned that the above provisions of Section 15 and also its subsection (5) are materially identical to the corresponding provisions of The Bahamas Constitution. They were addressed by the Board in a similar context in *Forrester Bowe* ([2006] UKPC10, paras 6-12) an appeal from The Bahamas, and support the appellant's contention that this Court has jurisdiction to entertain the appeal.

   We accordingly had no hesitation in concluding that this Court has jurisdiction to entertain the appeal.

The Second Issue
Section 288 (1) – Interpretation and Constitutionality of effect

7. The appropriate sentence for the offence of simple murder is specified in section 288(1) of the Criminal Code Act 1907 as amended by the Criminal Law Amendment Act 1980 and the Parole Board Act 2001. As amended, section 288(1) reads –

   i. "288. (1) Any person who commits the offence of murder shall be sentenced to imprisonment for life:
   ii. Provided that where any person is sentenced under this section, such person shall, before any application for his release on licence may be entertained or granted by the Parole Board established by the Parole Board Act 2001, serve at least fifteen years of the term of his imprisonment."

8. The reference to "simple" murder is necessary, because section 286 of the Act, as amended in 1980 and 1999, creates the separate offence of premeditated murder, with "premeditated" being defined in section 286B and the sentence for that offence specified in section 286A(2) ("imprisonment for life without eligibility for release on licence until the person has served twenty-five years of the sentence"). Nothing in this judgment is concerned with the meaning or effect of those separate provisions.

9. Issues are raised in this Appeal as to the correct interpretation of section 288(1) as amended, and with regard to its constitutionality in the light of other statutory provisions, found in Part IV of the Act, as amended (sections 53–55, Purpose and Principles of Sentencing"), and in The Bermuda Constitutional Order 1968 (Schedule 2, "The Constitution of Bermuda"), specifically sections 1 (Fundamental rights and freedoms of the individual), 3 (Protection from inhuman treatment) and 5 (Protection from arbitrary arrest or detention). It is submitted on behalf of the Appellant –

> iii. "(1) that the proviso [to section 288(1)] should be declared "absolutely void and inoperative";
>
> (2) that "the word "shall" in section 288(1) should be read as "may" and thus the section should be construed as authorising a discretionary and not a mandatory sentence of life imprisonment"; and
>
> (3) that the sentence of life imprisonment should be quashed and the case remitted to the Trial Judge to receive evidence and hear submissions in mitigation and thereafter to pass such sentence as is deemed appropriate giving effect to PART IV of the Criminal Code Act 1907."

10. These wide-ranging submissions were supported by reference to the impressive body of authority that has developed during the past half-century regarding the correct interpretation and constitutionality of the statutory penalties for the offence of murder in many jurisdictions around the world. So diverse have been these provisions, and so comprehensive the judicial discussion of them, that it is important that we should focus on the wording of the Bermudian statute and interpret it in accordance with the principles that have been established. We begin with a brief summary of the Bermudian history.

11. The 1907 Act as originally enacted created the offence of murder (section 286) for which the punishment was death (section 288). With effect from 24 June 1980, the Criminal Law Amendment Act 1980 created the offence of premeditated murder, for which the sentence remained death (section 286A) and altered section

288(1) to its present form, but providing for early release by "the Minister responsible for treatment of offenders". This was replaced in 2001 by the present reference to the Parole Board. Meanwhile, the death penalty was abolished by the Abolition of Capital and Corporal Punishment Act 1999 which substituted life imprisonment as the sentence for premeditated murder in the terms of section 286A(2), quoted above.

12. These amendments to the Bermudian statute have reflected changes in the United Kingdom, where the death penalty was abolished in two stages, 1957 and 1965, and the sentence for murder became life imprisonment. There was provision in the 1965 Act (Murder (Abolition of Death Penalty) Act 1965) for the trial judge to recommend to the Home Secretary the minimum period which should elapse before the prisoner was released on licence under statutory powers(section 1(2)), and it was stipulated that no person convicted of murder would be released on licence unless the Home Secretary had previously consulted the Lord Chief Justice and the trial judge, if available (section 2). In 1967 the Parole Board was created, and procedures evolved which culminated in an announcement by the Home Secretary in November 1983 "that he would continue to look to the judiciary for advice on the time to be served to satisfy the requirements of retribution and deterrence and to the Parole Board for advice on risk; and secondly, that the new procedures he was announcing would separate consideration of the requirements of retribution and deterrence from consideration of risk to the public" (see generally the speeches of Lord Mustill in *Ex parte Doody* [1994] 1 A.C.531 and Lord Bingham in *R.(Anderson) v. Sec. of State for the Home Department* [2002] UKHL 46).

13. In *Anderson's* case, however, the House of Lords held that the power to fix the minimum period that the prisoner must serve is a judicial function which should only be exercised by an impartial tribunal. This followed the decision of the European Court of Human Rights in *Stafford v. United Kingdom* (2002) 35 E.H.R.R.32. The so-called tariff period is the appropriate punishment for the

individual offence committed, in terms of retribution and deterrence. When that period has been served, the determining factor is the degree of risk, if any, which early release will represent to the community. Assessing that risk is properly within the preserve of the Parole Board, established in Bermuda in 2001. In consequence of the *Anderson* decision, the role of the Secretary of State was transferred to the trial judge, by the Criminal Justice Act 2003 (see the judgment of Lord Woolf LCJ in *R. v. Sullivan and others* [2004] EWCA Crim 1762).

14. Interpreting section 288(1) (as amended) against this background, it is immediately apparent that the legislature recognised three things. First, that the sentence of life imprisonment will not necessarily be served in full, nor is it intended that it shall be. Secondly, that the question of early release becomes, in due course, a matter for the Parole Board. Thirdly, that a minimum period of detention must be served, as the appropriate punishment for the crime that has been committed. Then the sub-section goes further, by specifying the minimum period which the legislature intends shall be served in every case. It is not clear that the sentencing judge can properly increase the minimum, in his discretion, in cases where the circumstances warrant a longer period. Certainly, it does not permit him to reduce the period below fifteen years, even when a shorter period would be appropriate punishment and "sufficient to satisfy the requirements of retribution and deterrence". In short, it is the legislature which has fixed the tariff period in all such cases, possibly for every case, not the judge or another judicial body.

15. Turning to the words of the sub-section, the reference to life imprisonment is followed by a proviso which recognises that the Parole Board may order early release but restrains the exercise of that power until after the expiry of the minimum period. On a strict analysis, the proviso only qualifies the requirement of a life sentence on the assumption that the Parole Board may shorten the period actually served; what follows is a restriction on that power, rather than on the life

sentence itself. The issue which arises is whether the legislature is constitutionally entitled to impose that restriction, in every case.

16. The authorities to which we have referred make it clear that the offence of murder can take many different forms. In *Anderson*, Lord Bingham stated the following as a non-controversial proposition –

    i. "Secondly, the crime of murder so defined embraces acts of widely varying culpability, including horrific and brutally sadistic conduct at one end of the spectrum and "almost venial, if objectively immoral" conduct at the other…" (speech, para.2).

17. It follows from this that, where the legislature itself has prescribed the tariff period, that minimum applies in all cases, regardless of the circumstances of the individual case. Yet it is now well-settled, and equally uncontroversial, that determining the minimum period is part of the sentencing process, and a judicial function. A person sentenced in this way can legitimately claim that the sentence has not been assessed in accordance with section 54 of the Criminal Code Act 1907, as amended ("proportionate to the gravity of the offence and the degree of responsibility of the offended"). We would reject any argument to the effect that as a matter of construction section 54 is overridden by section 288(1) in this respect.

18. The remaining question is whether the legislature can specify the minimum period, notwithstanding the fact that, were the task delegated to others, it would be a judicial function which only a judicial authority could perform. Whilst the legislature can determine what conduct is to be regarded as criminal, and what sentences may be passed for each offence, this power can only be exercised in general terms. The legislature cannot act *in hominem* (*Liyanage v. The Queen* [1967] 1 A.C. 259, JCPC), nor may it determine what sentence shall be passed in individual cases. The underlying principle was discussed in the judgment of the Privy Council in *Forrester Bowe (Junior) and Trono Davis v. The Queen* [2006] UKPC 10 which was concerned primarily with the "clear line of demarcation

between the power and authority of the judiciary and the power and authority of the executive" (per Lord Bingham at para.36) but which also referred to the question whether "judicial power was intended to be shared with the legislature" and to the "clear distinction between the prescription of a fixed penalty and the selection of a penalty for a particular case", quoting from the judgment of the Supreme Court of Ireland in *Deaton v. Attorney-General and the Revenue Commissioners* [1963] IR 170. If it is argued that the tariff fixed by section 288(1) in substance is a fixed penalty for the offence of murder, it appears to us that the authorities to which we have referred are clear and unambiguous; such a provision would offend, not only the requirement of a proportionate sentence under section 54 (above) but also the individual person's fundamental right to his liberty (sections 1 and 5 of the Constitution of Bermuda, and Article 5(1) of the European Convention on Human Rights). We therefore hold that section 288(1) is unconstitutional insofar as it purports to impose a minimum 'tariff' period of fifteen years for all cases of murder, regardless of the circumstances of the individual case and offender.

19. This does not mean, however, that the whole of what is expressed as the proviso to section 288(1) is void and of no effect. If our analysis of the sub-section is correct (para. 9 above), it is only the express restriction on the powers of the Parole Board which must be disregarded. The implied recognition of the role of the Parole Board remains, and in any event the Board can exercise its statutory functions without express authorisation in the section. But, without the fifteen-year period, there is no statement of the appropriate tariff, and the question arises, by whom should the tariff now be set?

20. We have no doubt that this is primarily a matter for the trial judge, and we would have power to remit this part of the sentencing process to him, as the Appellant has invited us to do. But it seems infinitely preferable that we should perform the process in this Court, in the circumstances of the present case, and we are satisfied that we have jurisdiction to do so. That is because the Court of Appeal can and

must pass its own sentence, when an appeal against sentence is allowed, and secondly, in the present case, the application is also made under section 15 of the Constitution of Bermuda, with the same effect.

21. These were horrific killings of two innocent victims, and if the Appellant had been the prime mover, or even an equal participant, it might well be said that they justified a whole-life tariff, certainly a period longer than fifteen years. However, his part was vastly different from that. There was no evidence that he intended, or knew that his co-accused intended from the start to inflict serious injury on the two men. His active participation in the killings was limited to the extent described in the Court's judgment dismissing his appeal against conviction. He actively assisted in the callous disposal of the bodies, and although he cannot claim that he was coerced into doing what he did, or that he was not a willing participant at that stage, we have little doubt that fear for his own safety was a significant factor for him. We take account of the legislature's view that fifteen years should be regarded as the minimum period for simple murder, and that he might well feel a sense of injustice if his case was not differentiated from his co-accused. Finally, the period of twelve years is not inconsistent with what we know of the practice in other jurisdictions, and for these crimes it could hardly be less. For these reasons, we determined the period in this Court in this case.

22. We have found nothing in the authorities which would justify interpreting “shall” as “may” in section 288(1), or entitle this Court to hold that the section should be read as authorising a discretionary, rather than a mandatory life sentence. Nor do they suggest that a life sentence coupled with recognition of the power of the Parole Board to licence early release, and a tariff requirement of the minimum period to be served before the Parole Board’s power shall be exercised, should be regarded as unconstitutional or unlawful in any way.

Conclusion

23. For the above reasons, we reject the Appellant's contentions (1) that the proviso to section 288(1) should be declared "absolutely void and inoperative", (2) that section 288(1) should be read as authorising a discretionary, not mandatory, sentence of life imprisonment, and (3) that the sentence of life imprisonment should be quashed (ref. paragraph 3 above). However, we allow the appeal to this extent –

    i. the reference to a fifteen-year minimum period in section 288(1) of the Criminal Code Act 1907,as amended, is unconstitutional and void;

    ii. when passing a sentence of life imprisonment under section 288(1) of the Act, as amended, the trial judge is required as part of the sentencing process to determine what minimum period of the sentence shall be served as the so-called tariff period, namely, for the purposes of retribution and deterrence in the circumstances of the particular case; and

    iii we determine that the Appellant shall serve a minimum period of twelve years before becoming eligible for Parole under the Parole Board Act 2001.

Signed

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Nazareth, JA

Signed

_____

Zacca, President

Signed

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Evans, JA