THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

FEDERATION OF SAINT CHRISTOPHER AND NEVIS
SAINT CHRISTOPHER CIRCUIT

CLAIM NO. SKBHCV2015/0129

BETWEEN:

EVANSON MITCHAM

Claimant

and

THE ATTORNEY GENERAL OF SAINT CHRISTOPHER AND NEVIS

Defendant

Appearances:-

Ms. Talibah Byron for the Claimant
Mrs. Simone Bullen-Thompson, Solicitor General, for the Defendant

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2018: October 22

JUDGMENT

[1] VENTOSE, J.: After a trial before Baptiste J and a jury, the Claimant was sentenced to death on 26 June 2002 for the murder of Vernal Nisbett. He succeeded in his appeal against sentence on 3 November 2003 and was sentenced to death for murder by the trial judge on 2 June 2004. The Advisory Committee on the Prerogative of Mercy (the "Committee") met on 24 April 2007, after which the Prime Minister, in a letter dated 18 May 2007, advised the Governor General that the sentence of death should be carried out on the Claimant as quickly as possible.

[2] On 12 June 2007, just before the fifth anniversary of his first sentence of death, the Claimant was informed that he would be executed on 19 June 2007. The

Judicial Committee of the Privy Council (the "Privy Council") in London issued a stay of execution pending his appeal against conviction. The Privy Council on 11 December 2008 dismissed his appeal, providing its reasons for so doing on 16 March 2009: R v Mitcham [2009] UKPC 5.

[3] On 1 July 2008, the Court of Appeal granted the Claimant's application for leave to appeal sentence out of time. This was confirmed in an email from the Chief Registrar to counsel for the Claimant on 18 November 2008. However, in a file note of a conversation between the Chief Registrar and counsel for the Claimant dated 30 April 2009, it was noted that the Chief Registrar informed counsel that there was no appeal pending before the Court of Appeal for the Claimant. In addition, the Chief Registrar explained that the grant of leave to appeal against sentence out of time was a mistake and that the single judge of the Court of Appeal had no jurisdiction to grant it. In a letter dated 12 December 2013, the Chief Registrar further informed counsel that if leave to appeal out of time was granted, no notice of appeal was filed pursuant to the grant of leave and there was no appeal in respect of the Claimant pending for the Court of Appeal's determination.

[4] The Claimant did not exhibit an order of the Court of Appeal granting permission to appeal his sentence out of time, or any subsequent decision or order of the Court of Appeal to retract that permission. The evidence indicates that the Registrar explained to counsel for the Claimant that if the permission was granted, there was no notice of appeal filed pursuant to that grant of leave. There is nonetheless an email from the Chief Registrar to counsel stating that the Court of Appeal had on 1 July 2008 granted permission to the Claimant to appeal his sentence out of time. However, for present purposes, I will assume, without deciding, that the Court of Appeal retracted its decision to grant the Claimant leave to appeal his sentence out of time.

[5] The Claimant via originating motion filed on 4 June 2015 sought, among other things: (1) a declaration that, in accordance with the decision of the Privy Council in Pratt and Morgan v Attorney General of Jamaica [1994] 2 AC 1, to execute

him would amount to inhuman and degrading punishment or other treatment contrary to section 7 of the Constitution of St. Christopher and Nevis since he had been on death row for 12 years; (2) a declaration that his right to life and protection of the law were infringed when a warrant for his execution was read to him without his case being considered by the Committee and/or without being given an opportunity to be heard by the Committee; (3) an order quashing the sentence of death; (4) a declaration that, in accordance with the decision of Cannonier v Director of Public Prosecutions (2012) 80 WIR 260, he was denied his right to secure protection of the law contrary to section 10 of the Constitution because of the retraction of permission granted to him to appeal his sentence out of time; and (5) an order substituting a fixed term of imprisonment for the sentence of death as redress for the constitutional breaches.

Prolonged delay between sentence and execution

[6] The central holding of the Privy Council in Pratt and Morgan is that "in any case in which execution is to take place more than five years after sentence there will be strong grounds for believing that the delay is such as to constitute 'inhuman or degrading punishment or other treatment'" (at p. 35). The Privy Council stated (at p. 29) that:

> There is an instinctive revulsion against the prospect of hanging a man after he has been held under sentence of death for many years. What gives rise to this instinctive revulsion? The answer can only be our humanity; we regard it as an inhuman act to keep a man facing the agony of execution over a long extended period of time.

[7] The Privy Council continued, explaining "a state that wishes to retain capital punishment must accept the responsibility of ensuring that execution follows as swiftly as practicable after sentence, allowing a reasonable time for appeal and consideration of reprieve" (at p. 33).

[8] Although the Privy Council in Pratt and Morgan never said that to execute a person more than five years after sentence will constitute "inhuman or degrading punishment or other treatment", subsequent decisions of the Privy Council and Caribbean courts have taken the period of five (5) years as the benchmark for a

breach of section 7 of the Constitution. When the originating motion was filed in 2015, the Claimant was on death row for 11 years and as of 2018 he has been on death row for 14 years. It is of interest to note that in Pratt and Morgan the Privy Council stated that "[t]he total period of delay *is shocking* and now amounts to almost 14 years" (emphasis added).

[9] The case at bar falls squarely within the *ratio* of Pratt and Morgan in that to execute the Claimant more than 14 years after sentence will constitute "inhuman or degrading punishment or other treatment". In Pratt and Morgan, the Privy Council after finding that the prolonged delay amounted to a constitutional breach ordered: "the sentences of the applicants be commuted to life imprisonment".

Denial of Access to the Courts

[10] The Claimant stated that his right to the protection of the law guaranteed by section 10(1) of the Constitution was breached because his application for leave to appeal his sentence out of time was granted by a single judge of the Court of Appeal on 1 July 2008 but was retracted sometime before April 2009. The basis for the retraction was that the single judge of the Court of Appeal who granted the extension had no jurisdiction to grant it, arguably in breach of section 52(2) of the Eastern Caribbean Supreme Court (St. Christopher and Nevis) Act 1975 (as amended) (the "Court Act"). Section 52(2) provides that:

> (2) Except in the case of a conviction involving sentence of death, the time within which notice of appeal or notice of an application for leave to appeal may be given, may be extended at any time by the Court of Appeal.

[11] In Cannonier v Director of Public Prosecutions (2012) 80 WIR 260, the Court of Appeal had to consider the constitutionality of section 52(2) of the Court Act. In that decision, the Court of Appeal had earlier dismissed the appellants' application for an extension of time to appeal on the basis that it had no jurisdiction to extend the time for filing his notice of appeal pursuant to 52(2) of the Court Act. The Court of Appeal explained (at [210]) that:

> Implicit in this right of access to the Court of Appeal, are the guarantees laid down by s 10(1) of the Constitution as regards both the organisation and composition of the court and the conduct of the proceedings, and

> together they make up the right to a fair hearing. The appellants' right of access to the Court of Appeal would also involve the right to present their case properly and satisfactorily to a court that is independent and impartial and has full jurisdiction over the subject matter and to have a hearing in this court so that their applications for extension of time and/or their complaints in their grounds of appeal may be resolved. This is to be implied in the meaning of fair hearing in the context of art 10(1) of the Constitution.

[12] Applying the test for proportionality accepted by the Privy Council in de Freitas v Permanent Secretary of the Ministry of Agriculture, Fisheries, Lands and Housing (1998) 53 WIR 131, the Court of Appeal held (at [213]) that there was no public interest justification for retaining the limitation in section 52(2). The Court of Appeal reasoned (ibid) that:

> All human systems are fallible, and any justice system can miscarry. It is in the public interest that the courts be able, through the appeal process, to correct error in a timely and expeditious manner. This is extremely important for public acceptance of the criminal trial process by judge and jury, particularly in murder cases involving the death penalty.

[13] The Court of Appeal recognized that the need for expeditious disposals of appeals in capital cases could be equally met by a discretionary time limit, with the Court of Appeal only granting extensions where properly appropriate to do so (at [39]). Consequently, the Court of Appeal held (at [218]) it would modify section 52(2) of the Court Act to bring it in conformity with section 10(1) of the Constitution by deleting the words "Except in the case of a conviction involving sentence of death" (at [39] and [218]).

[14] There is no question that the reasoning of the Court of Appeal in Cannonier applies here. The failure by the Court of Appeal to grant the Claimant an extension of time, in the circumstances mentioned above, was a breach of his right to the protection of the law found in section 10(1) of the Constitution.

[15] It is of interest to note that in Cannonier, where the Court of Appeal held that section 52(2) of the Court Act breached section 10(1) of the Constitution, the remedy granted to the appellants was the leave to extend the time for filing their notices of appeal against conviction and sentence of death. The Claimant in the instant case filed his originating summons six (6) years after he was informed that

the leave granted was retracted. That specific remedy granted to the appellants in Cannonier is no longer available to the Claimant because of the inordinate delay in challenging that decision.

Advisory Committee on the Prerogative of Mercy

[16] Sections 66-68 of the Constitution contain a detailed process in relation to the exercise of the prerogative of mercy that must be followed for any person convicted of any criminal offence under any law. The Governor General is given specific powers in respect of the sentence of any convicted person (section 66(1)). However, section 66(2) provides that this power shall be exercised by him or her in accordance with the advice of such Minister as may from time to time be designated by the Governor General, acting in accordance with the advice of the Prime Minister. Section 67 provides for the membership of the Committee.

[17] Where any person has been sentenced to death (otherwise than by a court-martial) for a criminal offence under any law, section 68(1) of the Constitution applies. The procedure is as follows: first, the Minister shall cause a written report to be prepared of the case from the trial judge (or the Chief Justice, if a report from the trial judge cannot be obtained) together with such other information derived from the record of the case or elsewhere as he or she may require. Second, that report or other information must be taken into consideration at the meeting of the Committee. Third, after obtaining the advice of the Committee the Minister shall decide in his or her own deliberate judgment whether to advise the Governor General to exercise any of his or her powers under section 66(1) of the Constitution.

[18] In a letter dated 18 May 2007, the Prime Minister (the designated Minister in accordance with section 66(1) of the Constitution) wrote to the Governor General informing him that the Committee met on 24 April 2007 and advised that the sentence should be carried out as quickly as possible. The letter makes it clear that the Committee met on 24 April 2007 and tendered its advice to the Minister. However, before the Committee could meet to consider the case of any person who has been sentenced to death (otherwise than by a court-martial) for a criminal

offence, it must have before it a written report of the case from the trial judge (or the Chief Justice, if a report from the trial judge cannot be obtained) together with such other information derived from the record of the case or elsewhere as the Minister may require. This is specifically required by section 68(1) of the Constitution. More importantly, the Committee is mandated by section 68(1) to take into consideration any such report or other information at the meeting of the Committee where the case of any person who has been sentenced to death for a criminal offence is considered. The evidence does not indicate whether the Committee had before it or considered any such report or other information.

[19] The question raised squarely for decision in Lewis v Attorney General of Jamaica [2001] 2 AC 50 was whether a person under sentence of death is entitled to see that report or other information and to put further material before the Jamaican Privy Council (the equivalent of the Committee) and to comment on that report or other information. The Privy Council explained that although the merits of the decision of the Governor General are not for the courts to review, "[i]t does not at all follow that the whole process is beyond review by the courts" (at p. 75). It explained (at pp. 75-76) that:

> The fact that section 91 of the Constitution requires the Jamaican Privy Council to have the judge's report and such other information as the Governor General, on the Jamaican Privy Council's recommendation, requires does not mean that the Jamaican Privy Council is precluded from looking at other material even if the right to have such material before the Jamaican Privy Council must be based on some other rule than the express provisions of the Constitution.

[20] The Privy Council continued that "[o]n the face of it there are compelling reasons why a body which is required to consider a petition for mercy should be required to receive the representations of a man condemned to die and why he should have an opportunity in doing so to see and comment on the other material which is before that body" (at p. 76). First, this was the last chance to ensure that proper procedural standards are maintained. Second, material might be put before the body by persons palpably biased against the convicted man or which was demonstrably false or which was genuinely mistaken but capable of correction.

Third, information might be available which, by error of counsel or honest forgetfulness by the condemned man, had not been brought out before. Fourth, if it was said that the opinion of the Jamaican Privy Council was taken in an arbitrary or perverse way—on the throw of a dice or on the basis of a convicted man's hairstyle—or was otherwise arrived at in an improper, unreasonable way, the court should prima facie be able to investigate.

[21] The Privy Council was of the view that there were no reasons in principle to exclude the decisions of the Jamaican Privy Council from judicial review and that "[t]he fact that the matters to be taken into account on the merits of the application for mercy go beyond, or are different from those relevant to, guilt or sentence does not lead to the conclusion that judicial review of the procedure is excluded" (Ibid). The Privy Council concluded that the process of considering the petition of a person condemned to death is open to judicial review. The requirements of fairness in this process include the following: (1) the condemned man should be given notice of the date when the Jamaican Privy Council (or Committee) will consider his case; (2) notice should be adequate enough for him or his advisers to prepare representations before a decision is taken; (3) the condemned man must be given all (not merely a summary or the gist) of the material available to the Jamaican Privy Council (or Committee); (4) when a report of the international human rights bodies is available it should be considered and if the Jamaican Privy Council (or Committee) does not accept the report it should explain why; (5) the representations should normally be in writing unless the Jamaican Privy Council (or Committee) adopts a practice of oral hearing; and (6) although the Jamaican Privy Council (or Committee) is required to look at the representations of the condemned man, that did not mean that they were bound to accept them – they are bound to consider them.

[22] In the instant case, none of these procedural safeguards were put in place. There is no evidence that the Claimant was informed that the Committee would meet on 24 April 2007. I find that there a failure to inform the Claimant of the meeting of the Committee and to provide him with all the material that was before the Committee,

thereby preventing him from making any written representations to or put further material before the Committee when it met on 24 April 2007. Consequently, there was a breach of the rules of fairness, of natural justice, which meant that the Claimant did not enjoy the "protection of the law" either within the meaning of section 10 of the Constitution or at common law.

The Appropriate Constitutional Remedy

[23] The Claimant was sentenced to death a second time on 2 June 2004 after a further sentence hearing. The requirement for a sentence hearing for convictions for murder was the direct result of the decision of the Privy Council in R v Hughes [2002] 2 AC 259. The Claimant now seeks to have this court reopen the question of the appropriate sentence for murder in light of the alleged constitutional infringements. At that second sentence hearing, after considering the social inquiry reports, psychiatric reports and hearing from counsel for the Claimant and the Director of Public Prosecutions, the trial judge ruled that:

> The murder of Nisbett was committed in the course of a serious crime, namely robbery. Evans Mitcham fired the fatal shot. With respect to Mitcham the murder was committed in circumstances which rendered the sentence of death as the only appropriate penalty
>
> The Court therefore imposes the penalty of death by hanging upon Evanson Mitcham.

[24] Counsel for the Claimant submits that based on the alleged constitutional breaches the court should exercise its power under section 18(2) of the Constitution to commute the Claimant's death sentence to a fixed term sentence of imprisonment.

[25] Section 18(2) of the Constitution provides that:

> The High Court shall have original jurisdiction
>
> (a) to hear and determine any application made by any person in pursuance of subsection (1); and
>
> (b) to determine any question arising in the case of any person that is referred to it in pursuance of subsection (3)

> and may make such declarations and 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 provisions of sections 3 to 17 (inclusive):

[26] The enforcement section found in section 18(2) of the Constitution was intended to create a new remedy whether or not there was already some other existing remedy (Maharaj v Attorney-General of Trinidad and Tobago (No 2) (1978) 30 WIR 310, 319). The cases cited by counsel for the Claimant for the view that the court should commute the Claimant's sentence of death to a fixed term of imprisonment are not applicable to the situation with which we are here presented. Harris v Attorney General of Belize (No. 339/2006 dated 1 December 2006) concerned the constitutionality of the mandatory death sentence imposed on the applicant. The Chief Justice applied the decision of the Privy Council in Reyes v R (2002) A.C. 235 that held that the mandatory death penalty amounted to "inhuman or degrading punishment or other treatment" within the meaning of that expression in the Constitution of Belize. The Privy Council in Reyes approved the reasoning of Chief Justice Sir Dennis Byron in Spence v R and Hughes v R [2002] 2 LRC 531 that:

> [46] I am satisfied that the requirement of humanity in our Constitution does impose a duty for consideration for the individual circumstances of the offence and the offender before a sentence of death could be imposed in accordance with its provisions.

[27] The Privy Council quashed the sentence of death and remitted the matter to the Supreme Court of Belize to enable a trial judge to pass an appropriate sentence after hearing or receiving such evidence and submissions as may be presented and made. In Harris, the Chief Justice, applying the reasoning of the Privy Council in Reyes, held that the mandatory death sentence imposed on Mr. Harris was unconstitutional. The Chief Justice, after examining the evidence before him and taking into account the relevant circumstances, substituted a sentence of 20 years imprisonment for the mandatory death sentence. Similarly in Baptist v Attorney General of Belize (No. 250/2015) a sentence of 25 years was substituted for the mandatory death sentence after a consideration of the evidence and relevant circumstances. These two cases and others cited by counsel for the Claimant

arose in circumstances where the trial judge quashed the mandatory death sentence imposed on the applicants and proceeded by way of sentence hearing to determine the actual sentence that should be imposed. The fixed term sentences imposed in these cases were dictated by the nature of the constitutional claim and the result of the sentencing hearing conducted by the trial judge where the evidence and relevant circumstances were taken into consideration.

[28] The Claimant was afforded a second sentence hearing at which, to borrow the words of Chief Justice Sir Dennis Byron in Hughes and Spence, consideration of the individual circumstances of the offence and of Mr. Mitcham were taken into account before the sentence of death was imposed on him in accordance with the provisions of the Constitution. In other words, there was a second judicial determination of the sentence of death on the Claimant. Therefore, it is not open to this court to re-open the issue of sentence by way of a further sentence hearing to give effect to constitutional breaches that have been identified. Counsel for the Claimant has provided no authority for this approach and has articulated no principled justification why this is the most effective remedy for the identified constitutional infringements. Moreover, counsel was not able to explain how exactly, or to provide any guidance on the manner in which, the constitutional infringements alone were directly or indirectly to transform a sentence of death to one of a fixed term of imprisonment.

[29] I agree with the submission of the Solicitor General that the Claimant, in asking the court to quash the sentence of death and substitute a fixed term of imprisonment, is actually asking the court for a re-sentence for the offence of which he was found guilty. However, I disagree with the alternative submission of Solicitor General that this court is entitled to have the matter set before the criminal court for a full sentence hearing. A judge hearing a constitutional claim can, in an appropriate case, such as Harris and Baptist, determine the sentence provided there is sufficient evidence upon which to do so.

[30] In Pratt and Morgan, the Privy Council pursuant to the “redress clause”, found in section 25(1) of the Constitution of Jamaica, ordered the sentences of the

appellants be commuted to life imprisonment because to execute them after a delay of 14 years would constitute inhuman or degrading punishment contrary to section 17(1) of the Constitution of Jamaica. In Lewis, the Privy Council set aside the sentences of death and commuted them to ones of life imprisonment. Additionally, in that case, the length of delay before execution, as in the instance case, breached the five-year limit established in Pratt and Morgan. There was no question in Lewis of quashing the sentence of death and substituting a fixed term sentence of imprisonment.

[31] A further hearing on sentence is not an appropriate remedy in light of the discussion above. The Claimant has had the benefit of two sentence hearings where the sentence of death for murder was imposed on both occasions. Where there has been a judicial determination of a sentence of death, it is not open to the court on an application for constitutional relief either to: (1) determine the sentence by way of re-hearing; or (2) order that a sentence re-hearing take place before the criminal court. One exception that comes readily to mind is where the constitutional infringement occurs in the sentencing exercise itself. Consequently, the Claimant is not entitled to a fixed term sentence of imprisonment to be determined by this court or by the "criminal court" in substitution for the sentence of death.

Disposition

[32] For the reasons explained above, I make the following orders:

(1) A Declaration is granted that to execute the Claimant now would amount to inhuman or degrading punishment or other treatment contrary to section 7 of the Constitution.

(2) A Declaration is granted that the Claimant's right to the protection of the law under section 10(1) of the Constitution was infringed when he was not allowed to make representations to the Committee when it considered his case on 24 April 2004.

(3) A Declaration is granted that the Claimant's right to the protection of the law under section 10(1) of the Constitution was infringed when the permission

previously granted to him by the Court of Appeal to appeal against his sentence out of time was subsequently retracted.

(4) The Claimant is not entitled to a fixed term sentence of imprisonment to be determined by this court or the "criminal court" in substitution for the sentence of death.

(5) The sentence of death by hanging imposed on the Claimant on 2 June 2004 be commuted to life imprisonment.

(6) Each party to bear its own costs.

Eddy D. Ventose
High Court Judge

By the Court

Registrar