Privy Council Appeal No 70 of 2007

Roger F.P. de Boucherville *Appellant*

v.

The State of Mauritius *Respondent*

FROM

THE COURT OF APPEAL OF MAURITIUS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Delivered the 9th July 2008

Present at the hearing:-

Lord Bingham of Cornhill
Lord Rodger of Earlsferry
Lord Carswell
Lord Brown of Eaton-under-Heywood
Lord Mance

[Delivered by ***Lord Bingham of Cornhill****]*

1. This appeal requires the Board to examine the effect and constitutionality of the sentence of imprisonment which the appellant (Mr de Boucherville) is currently serving.

2. On 5 January 1984 a brutal murder was committed of which, on 21 February 1986, the appellant was convicted. He was sentenced to death. The imposition of that sentence on an adult convicted of murder was mandatory under section 222(1) of the Criminal Code of Mauritius 1838 as it then stood.

3. From 21 February 1986 until 14 December 1995 the appellant was held in prison on death row awaiting execution. On the latter date he was removed from death row and became subject to a sentence of penal servitude for life.

4. The reason for this change lay in the Abolition of Death Penalty Act 1995 which came into force on 14 December. Section 2 of that Act amended the law in three significant ways. First, it abolished the death penalty (section 2(1)). Secondly, it provided that where under any enactment a court was empowered to impose a sentence of death it should instead of the death sentence impose a sentence of penal servitude for life (section 2(2)). Thirdly, it provided that where any person had been sentenced to death, and the sentence had not, at the commencement of the Act, been executed, that person should be deemed to have been sentenced to penal servitude for life and should undergo that sentence (section 2(3)). The appellant plainly fell within that subsection. Section 5(1) of the 1995 Act made what was described as a consequential amendment or repeal of section 222 of the Criminal Code by deleting subsection (1) and replacing it with a subsection which read:

> "Any person who is convicted of–
> (a) murder or murder of a newly born child, shall be sentenced to penal servitude for 45 years;
> (b) attempt at murder or attempt at murder of a newly born child, shall be liable to penal servitude for 45 years."

A person sentenced to 45 years' penal servitude under this provision would, if entitled to remission of one third of the sentence, be entitled to release after 30 years.

5. By letters dated 5 March and 23 April 2004 the prison authorities informed the appellant's counsel that the appellant's sentence would expire on 20 February 2016 and that he was expected to be released on or about that date. No explanation was given of how that date had been calculated, but it was exactly 30 years after the date of sentence. On 27 February 2006 the Commissioner of Prisons informed the appellant that the penalty inflicted upon him was to be served for life and that therefore there was no expected date of discharge.

6. With effect from 18 June 2007 the law was amended again, this time by the Criminal Procedure (Amendment) Act 2007. In section

222(1) of the Criminal Code as amended the references to "45 years" were deleted and replaced by

> "for life or, where the Court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence and has entered those circumstances on the record of the proceedings, for a term not exceeding 60 years."

Thus a defendant convicted of murder could be sentenced to penal servitude for life or, if there were mitigating circumstances, for a fixed term of up to 60 years. That was the effect of section 4(1)(b)(i) of the 2007 Act and applied to those sentenced after the Act came into force. Section 5 contained transitional provisions applicable to prisoners sentenced before it came into force. So far as material the section provided:

> (1) Any person who has, before the commencement of this Act, been sentenced, in respect of an offence other than the offence of manslaughter, to penal servitude for life or for a mandatory term of 45 or 30 years, which he is still serving, may make an application to the Supreme Court for the Court to review the sentence.
>
> (2) The Court, in considering an application under subsection (1) -
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> (a) may consult the record of the original case; and
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> (b) may take into consideration a report on the original case by the Judge or Magistrate, as the case may be, who presided at the trial, or, where a report cannot be obtained from that Judge or Magistrate, a report by the Chief Justice, together with such other information derived from the record of the original case or from any other relevant official source.
>
> (3) The Court, after considering an application under subsection (1), shall –
>
> (a) in the case of a sentence of penal servitude for life, either maintain that sentence or

substitute therefor a sentence of penal servitude for a term not exceeding 60 years;

(b) in the case of a mandatory sentence of penal servitude for a term of 45 or 30 years, substitute therefor a sentence of penal servitude for a term not exceeding 45 or 30 years, as the Court may determine to be appropriate.

(4) For the purposes of this section, 'original case' means the case in which the person who is the subject of the application was tried at first instance before the Supreme Court or the Intermediate Court, as the case may be."

The decisions of the courts

7. In the period from 2002 to the present the courts of Mauritius have made four decisions or orders which call for consideration in this appeal.

8. The first concerns Mr Dwarkanathsing Jeetun who on 4 February 1986 was acquitted of murder but convicted of manslaughter and was sentenced on 14 February 1986 to life imprisonment. On 30 July 2002 he issued a notice of motion against the Commissioner of Police, the Commissioner of Prisons and the Director of Public Prosecutions as respondents, joining the Attorney General as a co-respondent, seeking an order "declaring and decreeing that the penal servitude for life imprisonment [sic] pronounced against him on 14 February 1986 for an offence committed in June 1983 should be 20 years". It seems that this application was prompted by receipt of a letter, similar in substance to those sent to the appellant's counsel two years later, telling him that he was due for release on or about 13 February 2016. He contended that he should be released after 20, not 30, years. This contention appears to have been founded on section 11 of the Criminal Code which, at the date of Mr Jeetun's offence, provided:

"*Penal servitude*

(1) The punishment of penal servitude is imposed for life or for a minimum of 3 years.

(2) Where in any enactment the punishment of penal servitude is imposed without a term being specified, the

> maximum term for which the punishment may be imposed is 20 years."

By Act No 1 of 1985 the figure of "20 years" in subsection (2) was increased to "30 years", but with the benefit of full remission he would still be entitled to release after 20.

9. Following due service on the parties, Mr Jeetun's motion was called on before the Chief Justice on 12 August 2002. The first two respondents were not represented, and a reference to the presence of the Attorney General in the order of the court may have been fictional. The third respondent, the Director of Public Prosecutions, was, however, represented by a senior state attorney who said that she had no objection to the order prayed for. The court accordingly declared that "the penal servitude for life imprisonment pronounced against [Mr] Jeetun … for an offence committed in June 1983 be 20 years". It was later deposed (although later still some doubt was thrown on this) that owing to unforeseen circumstances the officer who was to appear for the Attorney General and the first two respondents could not attend court on time on 12 August when the case had been called on.

10. The second relevant decision was that of the Supreme Court in the present proceedings. Prompted, it would seem, by the success of Mr Jeetun, the appellant issued a notice of motion on 19 August 2004 against the same respondents and the same co-respondent for an order "declaring and decreeing that the penal servitude for life imprisonment pronounced against the [appellant] on the 21st February 1986 for an offence committed in January 1984 should be 20 years as from 21st February 1986". After numerous adjournments the motion came before YKJ Yeung Sik Yuen CJ (Acting) and A Caunhye J on 31 January 2006 with all parties represented, and the reserved judgment of the court was given in writing on 9 February 2006.

11. In its judgment the court referred to the legislative changes noted above and referred to the case of Mr Jeetun, noting with concern the evidence that it had been intended to resist his application but that the officer had been unable to attend. The court had not been told, it said, whether the officer had "tried to have the order which amounted to a monumental 'erreur judiciaire' amended". Reference was made to the letters sent to the appellant's counsel on 5 March and 23 April 2004 stating that he would be due for release on 20 February 2016, but the court recorded that counsel for the respondents no longer stood by those letters sent by the prison authorities on the ground that they had not been vetted by the Attorney General's office.

12. The court accepted that the appellant could not be sentenced to a more severe penalty than the maximum provided by law at the date of his offence in 1984, and that the maximum sentence of penal servitude in 1984 had been 20 years in cases where no term had been specified. But on its construction of section 11(1) of the Criminal Code penal servitude for life was a punishment for a specified term, namely life. The court noted certain incongruities in the law as amended in 1995, but concluded after reference to English authority that penal servitude for life could only mean that the penalty was to be served for life. The decision in Mr Jeetun's case had been made on a wrong premise and was erroneous in law. It was for the appropriate authorities to decide how to deal with that case. Following this judgment the appellant was told on 27 February 2006 that his sentence was to be served for life with no expected date of discharge.

13. The authorities responded promptly to the Supreme Court's decision in the appellant's case, and proceedings were brought by the State of Mauritius against Mr Jeetun, with the Commissioners of Police and Prisons and the Director of Public Prosecutions named as co-respondents. Orders were sought staying the execution of the order made on 12 August 2002 and "declaring and decreeing that the penal servitude for life imprisonment pronounced against [Mr Jeetun] on 14 February 1986 for an offence committed in June 1983 be served for life". The reserved judgment of the Supreme Court (A G Pillay CJ, P Balgobin and S Peeroo JJ) on this application was given on 15 March 2006 and is the third judgment calling for attention.

14. Much of the court's judgment is devoted to exploring and addressing the anomaly which would exist if those sentenced to penal servitude for life for manslaughter were required to stay in prison for the whole of their lives whereas those convicted of the more serious crime of murder were entitled to be released after 45 years. The court ordered that all detainees sentenced to penal servitude for life for manslaughter, whether before or after the coming into operation of the 1995 Act, should be treated as if sentenced to the maximum term of 20 years' penal servitude. The order of 12 August 2002 should not have been described as a "monumental 'erreur judiciaire'". It was valid to all intents and purposes and was correct in law. The court agreed with the National Human Rights Commission that "the sentence of penal servitude for life does not mean that the detainee has to spend the rest of his life in prison". It went without saying that any person sentenced for any term of penal servitude or imprisonment might also have his sentence reviewed from time to time by the Commission and the Parole Board, and the court added:

> "In determining the sentence which a detainee has yet to serve, various factors might be taken into consideration, including pure retribution, expiation, expressions of the moral outrage of society, maintenance of public confidence in the administration of justice, deterrence, the interests of victims, rehabilitation and, last but not least, mercy."

This judgment provided the background to the 2007 Act (para 6 above).

15. The fourth relevant judgment was given by the Supreme Court (Court of Criminal Appeal) (YKJ Yeung Sik Yuen CJ, E Balancy and A Caunhye JJ) on 19 October 2007: *P Philibert v The State* [2007] SCJ 274. This was after the 2007 Act had come into force. There were a number of appellants, but it is convenient to focus on Mr Philibert, the first, who had been convicted of murder and sentenced to 45 years' penal servitude pursuant to section 222(1) of the Criminal Code as amended in 1995. In its judgment the court considered, but rightly rejected, a submission that any mandatory or mandatory minimum penalty prescribed by legislation breached the constitutional principle of the separation of powers, as an encroachment by the legislature on judicial power. But it considered, having reviewed a wide range of authority, some of it relating to the mandatory death penalty, that any particular mandatory sentence might be found by the court to be unconstitutional as breaching the requirement of proportionality. The court expressed its disagreement with the Supreme Court's second (2006) decision in the case of Mr Jeetun, but concluded that the 45 year mandatory penalty under attack was incompatible both with the right to a fair hearing guaranteed by section 10(1) of the Constitution of Mauritius and with the right not to be subjected to inhuman or degrading punishment or other such treatment guaranteed by section 7. Of the former it said:

> "In line with the principles outlined above, in relation to the statutory imposition of a mandatory death sentence, we believe that it would be equally objectionable for a law to require of the Mauritian Courts to impose any substantial amount of prison sentence which would be mandatorily fixed by the legislature and which would be binding the hands of the judiciary. There would, otherwise, be no possibility for an accused party to invoke that the mandatory prison sentence imposed by law would be disproportionate and inappropriate in spite of mitigating factors which could otherwise have been invoked, in relation to him.

> A law which denies an accused party the opportunity to seek to avoid the imposition of a substantial term of imprisonment which he may not deserve, would be incompatible with the concept of a fair hearing enshrined in section 10 of our Constitution. A substantial sentence of penal servitude like in the present situation cannot be imposed without giving the accused an adequate opportunity to show why such sentence should not be mitigated in the light of the detailed facts and circumstances surrounding the commission of the particular offence or after taking into consideration the personal history and circumstances of the offender or where the imposition of the sentence might be wholly disproportionate to the accused's degree of criminal culpability."

Of the latter right it said that section 222(1), before its amendment in 2007, contravened the principle of proportionality and amounted to inhuman or degrading treatment or other such treatment inasmuch as it indiscriminately imposed a mandatory term of 45 years in all cases. The court, however, concluded that section 222(1) of the Criminal Code was unconstitutional only insofar as it provided for a substantial mandatory prison sentence of 45 years and the section should be read down in such a way that upon conviction an offender would be liable to a prison sentence in the discretion of the court but subject to a maximum of 45 years.

16. The Supreme Court commented on the transitional provisions in section 5 of the 2007 Act in these terms:

> "We need pause here to make some observations on the apparent purport of section 5 of the Criminal Procedure (Amendment) Act which we have cited above. Although it was obviously passed with good intention, the contemplated application to the Supreme Court for a review of a mandatory sentence which had already been passed would, in our view, run counter to the sacrosanct principles of 'functus officio' and of finality of a judgment. Indeed, once a final judgment has been pronounced, the problem, if any, can no longer be a judicial one but one for the executive pursuant to section 75 of the Constitution which has constituted a prerogative of mercy."

The Board understands that, unsurprisingly in the light of this ruling, no application for review has been made under section 5 of the 2007 Act.

The argument

17. Mr Edward Fitzgerald QC, for the appellant, submitted that the mandatory sentence of death imposed on the appellant on conviction was an inhuman and degrading punishment and so breached section 7 of the Constitution. Such it plainly was and did, for all the reasons rehearsed in *Reyes v The Queen* [2002] UKPC 11, [2002] 2 AC 235; *R v Hughes* [2002] UKPC 12, [2002] 2 AC 259; *Fox v The Queen* [2002] UKPC 13, [2002] 2 AC 284; *Matthew v State of Trinidad and Tobago* [2004] UKPC 33, [2005] 1 AC 433; *Watson v The Queen* (*Attorney General for Jamaica intervening*) [2004] UKPC 34, [2005] 1 AC 472; *Bowe v The Queen* [2006] UKPC 10, [2006] 1 WLR 1623; *Coard v Attorney General* [2007] UKPC 7. Mr Fitzgerald further submitted that the prolonged incarceration of the appellant on death row was a breach of the same constitutional guarantee. Such, again, it was: *Pratt v Attorney-General for Jamaica* [1994] 2 AC 1.

18. The thrust of Mr Fitzgerald's argument was, however, directed to criticism of the Supreme Court's ruling in the appellant's case (see paras 11-12 above) that the sentence of penal servitude for life meant that he was to remain in prison for the rest of his life. Such a sentence, mandatorily imposed, was subject to almost all the vices held to be inherent in the mandatory death sentence itself. It permitted no distinction to be drawn between one offence of murder and another, despite the great and well-known disparity between the culpability of different murderers, even where an intention to kill is a necessary ingredient of the offence. It allowed no account to be taken of the youth, age, vulnerability or circumstances of the individual offender. It gave the defendant no opportunity to plead for a lesser penalty before being deprived of everything worth living for, save life itself. It permitted no account to be taken of a defendant's remorse or the prospects of his rehabilitation. A hearing which gave the court no scope to mitigate such a sentence was not a fair hearing, and a penalty so inflicted was inhuman and degrading punishment or other treatment. Thus sections 7 and 10 of the Constitution were violated, as had been rightly held, on less extreme facts, in *Philibert's* case.

19. The first response of Mr Pushpinder Saini QC, on behalf of the State, was to distinguish between the mandatory sentence of death, to which many of the authorities refer, and a mandatory sentence of life imprisonment. It is of course true that the sentence of death has a solemnity, finality and irrevocability which even a mandatory sentence of lifelong imprisonment lacks. But by no means all the authorities refer to the former: *R v Smith* (*Edward Dewey*) [1987] 1 SCR 1045 concerned a mandatory minimum sentence of seven years, and in *Philibert's* case the

Supreme Court referred to two Namibian cases to similar effect, *State v Vries* 1996 (2) SACR 638 (Nm); [1997] 4 LRC 1 and *State v Likuwa* 1999 (2) SACR 44 (Nm); [2000] 1 LRC 600. The differences between the two types of sentence can, moreover, be exaggerated, as Laws LJ said with reference to article 3 of the European Convention on Human Rights in *R (Ralston Wellington) v Secretary of State for the Home Department* [2007] EWHC 1109 (Admin), para 39 (iv):

> "The abolition of the death penalty has been lauded, and justified, in many ways; but it must have been founded at least on the premise that the life of every person, however depraved, has an inalienable value. The destruction of a life may be accepted in some special circumstances, such as self-defence or just war; but retributative punishment is never enough to justify it. Yet a prisoner's incarceration without hope of release is in many respects in like case to a sentence of death. He can never atone for his offence. However he may use his incarceration as time for amendment of life, his punishment is only exhausted by his last breath. Like the death sentence the whole-life tariff is *lex talionis*. But its notional or actual symmetry with the crime for which it is visited on the prisoner (the only virtue of the *lex talionis*) is a poor guarantee of proportionate punishment, for the whole-life tariff is arbitrary: it may be measured in days or decades according to how long the prisoner has to live. It is therefore liable to be disproportionate – the very vice which is condemned on Article 3 grounds – unless, of course, the death penalty's logic applies: the crime is so heinous it can never be atoned for. But in that case the supposed inalienable value of the prisoner's life is reduced, merely, to his survival: to nothing more than his drawing breath and being kept, no doubt, confined in decent circumstances. That is to pay lip-service to the value of life; not to vouchsafe it."

In *R v Lichniak* [2002] UKHL 47, [2003] 1 AC 903, para 8, Lord Bingham said, with the concurrence of an enlarged appellate committee:

> "If the House had concluded that on imposition of a mandatory life sentence for murder the convicted murderer forfeited his liberty to the state for the rest of his days, to remain in custody until (if ever) the Home Secretary concluded that the public interest would be better served by his release than by his continued detention, I would have

> little doubt that such a sentence would be found to violate articles 3 and 5 of the European Convention on Human Rights … as being arbitrary and disproportionate."

The same reasoning applies in the present case.

20. Mr Saini's second main response was to rely on the very recent decision of the Grand Chamber of the European Court of Human Rights in *Kafkaris v Cyprus* (Appn no 21906/04, 12 February 2008). In that case the applicant had caused the death of a father and his two children by detonating an explosive device under their car. He had been convicted on three counts of premeditated murder and had been sentenced to mandatory imprisonment for life on each count. The domestic court had ruled that life imprisonment meant imprisonment for the whole life of the convicted person. The applicant's primary complaint under article 3 of the Convention ("No one shall be subjected to … inhuman or degrading treatment or punishment") was (see para 78 of the judgment) "that the whole or a significant part of the period of his detention for life was a period of punitive detention that exceeded the reasonable and acceptable standards for the length of a period of punitive detention as required by the Convention". The Government's answer (para 86), relying on article 53(4) of the Constitution and section 14 of the Prison Law of 1996 (considered below), was that the applicant had not been sentenced to an irreducible life sentence with no possibility of early release. The Court saw its task (para 100) as being to determine whether the sentence of life imprisonment imposed on the applicant in the particular circumstances had removed any prospect of his release. By a majority of ten votes to seven the court concluded that it had not and found no violation of article 3. Mr Saini relied by analogy on the existence, under section 75 of the Constitution of Mauritius, of a Commission appointed by the President to advise on exercise of the prerogative of mercy.

21. The first of the release provisions relied on by the majority in *Kafkaris* in reaching its decision was article 53(4) of the Constitution of Cyprus which, as operative at the relevant time, empowered the President of the Republic, with the concurrence of the Attorney-General, to remit, suspend or commute any sentence passed by a Cypriot court (see paras 36-37). The Attorney-General might make recommendations or give advice to the president on the early release of prisoners sentenced to life imprisonment, but the President was not bound by such advice or recommendations (para 38). Under the Constitution (paras 61-62) the Attorney-General was an independent officer of high standing. He had the power, among others, "to institute, conduct, take over and continue or discontinue any proceedings for an offence against any person in the

Republic". Thus, as in other states, he had an important prosecutorial role.

22. The second of the release provisions referred to was section 14(1) of the Prison Law 1996 which as amended provided that (see para 59):

> "Subject to the provisions of the Constitution, the President of the Republic, with the agreement of the Attorney-General of the Republic, may order by decree the conditional release of a prisoner at any time."

23. The Grand Chamber's decision in *Kafkaris* (with which Judge Bratza agreed) turned on its finding that the sentence imposed on the applicant did not leave him without any hope or possibility of intermediate release. Thus the safeguards obtaining in Cyprus were held to be sufficient to save an otherwise disproportionate and arbitrary sentence. But no such safeguards avail the State of Mauritius or are available to the appellant if, as the Supreme Court held, the sentence passed upon him condemned him to penal servitude for the rest of his days. The provisions of the Reform Institutions Act 1988 relating to parole and remission both depend for their operation on the serving of a specified fraction of a determinate sentence, and so have no application where a prisoner is subject to lifelong incarceration. The Board considers the sentence, so interpreted, to be manifestly disproportionate and arbitrary and so contrary to section 10 of the Constitution of Mauritius. It is unnecessary to decide whether there may also have been a violation of section 7 of the Constitution, and since the possibility of the appellant's release under section 75 of the Constitution was not fully explored it is undesirable to express a concluded opinion on that point.

24. Section 17(2) of the Constitution confers power to make such orders as are appropriate for giving the protection to which a person is entitled under these sections, but such power is not to be exercised under the subsection where adequate means of redress are available under any other law. Mr Fitzgerald invited the Board to quash the appellant's sentence and itself determine whether the appellant should be released or, if not, what further term he should serve. But the Board is ill-fitted to perform such a task, and in section 5 of the 2007 Act the Parliament of Mauritius has created a procedure precisely apt to accommodate a case such as the appellant's. There can be no question of regarding the Supreme Court as functus officio when a new function is specifically conferred upon it by statute. The legislature has empowered the court, on application by a prisoner who is the victim of an unconstitutional

sentencing regime, to invite the court to undertake the judicial sentencing exercise which should have been (but under the law as understood at the time could not be) undertaken when sentence was originally passed. On an application under section 5 of the Act the Supreme Court will no doubt pay close attention to the materials specified in subsection (2)(a) and (b). But these provisions should not be understood as precluding consideration of relevant materials adduced by or on behalf of the appellant. He is now aged 78, and the court will wish to consider his conduct in prison, any steps he has taken to rehabilitate himself, his health and the degree of risk he now presents to the public, as well as the matters listed by the court in *Philibert*. It will bear in mind that the appellant was subject to an unconstitutional sentence of death, was kept on death row in breach of the Constitution for nearly ten years and has more recently been subject to an unconstitutional sentence of penal servitude for life.

25. The Board therefore allows the appeal, declares the sentence passed upon the appellant to be unconstitutional and invites the appellant to make application to the Supreme Court under section 5 of the 2007 Act.