[2013] UKPC 29
Privy Council Appeal Nos 0050 and 0051 of 2012

JUDGMENT

Selassie (Appellant) *v* The Queen (Respondent)

Pearman (Appellant) *v* The Queen (Respondent)

From the Court of Appeal of Bermuda

before

Lord Mance
Dame Sian Elias
Lord Clarke
Lord Wilson
Lord Hughes

JUDGMENT DELIVERED BY

Lord Wilson

ON

8 October 2013

Heard on 20 June 2013

First Appellant
John Perry QC

Elizabeth Christopher

(Instructed by Simons Muirhead & Burton)

Second Appellant
John Perry QC
Craig Attridge
(Instructed by Simons Muirhead & Burton)

Respondent
Rory Field
(Director of Public Prosecutions)
Howard Stevens QC
Cindy Clarke
(Deputy of Public Prosecutions)
(Instructed by Charles Russell LLP)

LORD WILSON:

1. On 30 May 2008 Mr Selassie committed a "premeditated murder". On 4 September 2009, following his conviction by a jury on 20 August 2009, the Chief Justice of Bermuda passed upon him the mandatory sentence of life imprisonment and proceeded to direct that he should not be eligible for release on licence until he had served 35 years of his sentence. On 17 June 2011 the Court of Appeal for Bermuda (Zacca P, Evans and Auld JJA) reduced the period of 35 years to 28 years.

2. On 10 July 2009 Mr Pearman committed a "murder" (not a "premeditated murder"). On 31 January 2011, following his conviction on a plea of guilty on 25 January 2011, Greaves J passed upon him the mandatory sentence of life and proceeded to direct that he should not be eligible for release on licence until he had served 25 years of his sentence. On 8 November 2011 the Court of Appeal (Zacca P, Ward and Baker JJA) reduced the period of 25 years to 21 years.

3. Mr Selassie and Mr Pearman appeal to the Board against the directions of the Court of Appeal for their ineligibility for release until the expiry of 28 years and 21 years respectively. They contend that the directions were unlawful because they were contrary to section 286A(2) and to the proviso in section 288(1) of the Criminal Code Act 1907 ("the 1907 Act") respectively.

4. Section 286A(2) of the 1907 Act provides:

> "Any person who is convicted of premeditated murder shall be sentenced to imprisonment for life without eligibility for release on licence until the person has served twenty-five years of the sentence."

Mr Selassie contends that the effect of the subsection is that the direction for his ineligibility for release on licence could not extend beyond his service of 25 years of his sentence.

5. Section 288(1) of the 1907 Act states first that the sentence for "murder" (as opposed to "premeditated murder") shall be imprisonment for life. Then follows the proviso, which reads:

> "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."

Mr Pearman contends that the effect of the proviso is that the direction for his ineligibility for release on licence could not extend beyond his service of 15 years of his sentence. It is convenient to speak compendiously of ineligibility for release even though, as the terms of the proviso show, the ineligibility extends not only to release itself but also to the entertainment of an application for release.

6. It is also important to remember that a prisoner who is eligible for release on licence secures his release only if the Parole Board is of the opinion that he is "suitable for release" within the meaning of rule 166(2) of the Prison Rules 1980 (BR 46/1980). The Board assesses his suitability for release in the light of a number of factors, in particular the perceived level of the risk that he will re-offend.

7. Central to the argument on the appeals is the effect of the decision of the Court of Appeal (Zacca P, Nazareth and Evans JJA) in *Robinson v The Queen* [2009] CA (Bda) 8 Crim. In delivering the judgment of the court Nazareth JA explained its reasons for allowing Mr Robinson's appeal against his sentence for "murder" (not "premeditated murder") to the extent of directing that his ineligibility for release on licence should extend until the expiry of his service of at least 12 years of his sentence in substitution for the period of at least 15 years which the Chief Justice had directed.

8. It is important to discern the way in which in the *Robinson* case the Court of Appeal treated the proviso in section 288(1) of the 1907 Act. It noted at para 17 that section 54 of the same Act provided as follows:

> "A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender."

It also noted that the fixing of the period prior to eligibility for release on licence was part of the sentencing process. This was uncontroversial: in *R (Anderson) v Secretary of State for the Home Department* [2002] UKHL 46, [2003] 1 AC 837, the House of Lords had held, in the words of Lord Bingham at paras 20 and 24, that "the fixing of the tariff of a convicted murderer is legally indistinguishable from the imposition of sentence". The Court of Appeal held that, as a matter of construction, section 54 was not overridden by the proviso in section 288(1). But it did not proceed to hold that the proviso was overridden by – in other words, should be read subject to – section 54. That would have been a way of construing the proviso so as not to disable the court from fixing a period of less than 15 years prior to eligibility. Instead the Court of

Appeal *construed* the proviso as disabling the court from doing so but proceeded to strike down that part of it as being *unconstitutional*.

9. The route by which in the *Robinson* case the Court of Appeal struck down that part of the proviso begins at section 2 of the Colonial Laws Validity Act 1865, enacted by the UK Parliament. It provides:

> "Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under 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."

The Constitution of Bermuda is set out in Schedule 2 to the Bermuda Constitution Order 1968 made by the Crown pursuant to the Bermuda Constitution Act 1967 enacted by the UK Parliament. The Constitution is therefore part of an order made under authority of a UK Act of Parliament and, pursuant to section 2 of the 1865 Act, any colonial law which is repugnant to it is "to the extent of such repugnance, but not otherwise" void. Section 5(1)(a) of the Constitution provides 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..."

So the sentence has to be passed by a court and it has to be linked to a particular offence. Although at para 18 the Court of Appeal also referred to section 1 of the Constitution and to article 5(1) of the European Convention on Human Rights ("the ECHR"), the Board considers its central conclusion to have been that, in purporting to disable the court from fixing a period of less than 15 years prior to eligibility for release, the proviso in section 288(1) of the 1907 Act was repugnant to section 5(1)(a) of the Constitution. It held, in para 18, that the section was unconstitutional "insofar as it purports to impose a minimum 'tariff' period of 15 years for all cases of murder, regardless of the circumstances of the individual case and offender".

10. In its judgment in the *Robinson* case the Court of Appeal also

(a) stressed at para 8 that it was not concerned with the effect of section 286A(2) of the 1907 Act;
(b) observed at para 14 – presumably as a matter of construction – that it was not clear whether the proviso in section 288(1) entitled the court to increase the period of 15 years; and
(c) stated at para 19 that the effect of its conclusion was not that the whole of the proviso was void.

11. Prior to its judgment on the sentence passed on Mr Robinson, the Court of Appeal had dismissed his appeal against the conviction for murder. Against that dismissal Mr Robinson brought an appeal to the Board, which it dismissed ([2009] JCPC 0104). The Crown did not cross-appeal against the Court of Appeal's conclusion that the proviso in section 288(1) was unconstitutional in disabling the court from fixing a period of less than 15 years prior to eligibility for release and so the Board did not rule on the validity of that conclusion. There was, however, a limited appeal by Mr Robinson in relation to the sentence: its ground was that the Court of Appeal had not received submissions on his behalf in relation to the length of the period prior to eligibility before directing that it should be 12 years. Mr Robinson therefore sought an order that the direction be set aside and that the fixing of the period be remitted to the Court of Appeal for onwards remittal back to the trial judge. The Crown consented to that order and it was made. The Board is told that ultimately the trial judge fixed the period as 11 years.

12. In its judgment in Mr Selassie's case the Court of Appeal gave brief reasons for holding that section 286A(2) of the 1907 Act did not disable the court from directing that he should be ineligible for release for a period of more than 25 years. It said:

> "10. For the appellant it was submitted that the wording of the proviso in section 286A is different from the wording of the proviso in section 288. We do not agree. The meaning of the words is not dissimilar.
>
> 11. It was also submitted that the reference to twenty-five years is intended to be a maximum term and therefore the sentence of 35 years conferred by the learned Chief Justice cannot be supported.
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> 12. Our view is that the fixed period (25 years) in section 286A(2) of the 1907 Act has to be regarded as unconstitutional in light of the decision in *Robinson* under section 288(1) (15 years).
>
> 13. We reject the argument that the term 25 years is intended to be a maximum period. First, it would be unsatisfactory to hold that the fixed periods are unconstitutional for one purpose but invalid

> for another. Secondly, we do not believe that the analogy with a maximum sentence is correct."

It is not entirely clear whether the court there held that, as a matter of construction, the sections did not specify maximum periods or whether it held that, as a matter of construction, they did specify maximum periods and were unconstitutional in so specifying. In the light of the argument before the Board, it is possible that the Court of Appeal did not receive all the assistance which it might have expected in this regard.

13. In its judgment in Mr Pearman's case the Court of Appeal did no more than to conclude that "following the decision of the Court in *Robinson* and *Selassie*", the judge had a discretion to specify a period of more than 15 years.

14. Notwithstanding ambiguities in their submissions, written and oral, before the Board, both Mr Perry QC for the appellants and the Director of Public Prosecutions appear to agree that, as a matter of construction, the sections specify maximum periods. The dispute is whether, as the Director contends and Mr Perry disputes, the sections are unconstitutional and thus void in thereby purporting to disable a court from specifying longer periods. It is surely unusual for the Crown to contend that legislation is more widely invalid than is recognised by a defendant. Neither party contends that the decision of the Court of Appeal in the *Robinson* case was wrong. The Board agrees that it was right and so the issue surrounds the reach of the logic which underlies it.

15. The Board concludes that the parties are correct to submit that, as a matter of construction, the sections specify maximum periods. They specify maximum periods in the same way that (as was held in the *Robinson* case) they purport to specify minimum periods: in other words, as a matter of construction, they specify fixed periods, unalterable by a court. The Board confesses, however, that, prior to reaching this conclusion, it has been exercised by the inclusion in the proviso in section 288(1) of the phrase "at least" immediately prior to the words "fifteen years". Nothing analogous to the phrase is to be found in section 286(A)(2) and it would be surprising if the phrase enabled a court to increase the specified period in the case of an unpremeditated murder but not in that of a premeditated murder.

16. In the end the Board has concluded that the phrase "at least" does no more than to recognise that actual release on licence might well not take place immediately upon the expiry of 15 years. Indeed it seems that, prior to 2001, a prisoner's application for release might not even have been entertained immediately. Prior to the creation of the Parole Board in 2001 and the consequential amendment of the proviso so as to refer to it, it referred instead to the Minister for Health and Social Services but all its other terms, including the phrase "at least", were in their current form (see section

10(b) of the Criminal Law Amendment Act 1980). Prior to 2001, in respect of a release on licence, the Minister received recommendations from the Treatment of Offenders Board, which was required to report to him after one year from the date of sentence and only every four years thereafter (see the original Rule 166(1)(a) of the Prison Rules 1980). Thus, unlike the Parole Board, which is required by the current version of the rule to conduct its review when the prisoner first becomes eligible for release and annually thereafter, the Treatment of Offenders Board might not even have reported on eligibility until a few years after expiry of the period. The phrase "at least" may also therefore reflect this former reality.

17. More widely the phrase "at least" seems to the Board to be too slender a thread upon which to hang a power in the court to deprive a person of the chance of regaining his liberty for longer than the specified period. There is the principle against doubtful penalisation, one aspect of which "is that by the exercise of state power the physical liberty of a person should not be curtailed or interfered with except under clear authority of law": *Bennion on Statutory Interpretation* [2008], 5th ed, Code Section 273. Section 70P of the 1907 Act is also in point. It provides, by subsection (1), that, where no minimum period is provided before a prisoner can apply for release on licence, he must serve "at least" one-third of the term before the Parole Board can entertain or grant an application for his release on licence. But it provides, by subsection (3), that in certain circumstances the court can order that, instead, he should serve more than one-third, namely one-half or 10 years, whichever is the shorter. This shows that, where it wishes to do so, the legislature confers an express power on the court to increase the period prior to eligibility for release and that it does not regard the phrase "at least" as apt to achieve that result.

18. So the Board reaches the heart of these appeals: granted that sections 286(A)(2) and 288(1) of the 1907 Act are unconstitutional and therefore void to the extent that they purport to specify minimum periods prior to eligibility for release, are they also unconstitutional and therefore void to the extent that they purport to specify maximum periods? Section 2 of the 1865 Act, set out in para 9 above, shows that no blanket extrapolation from the former proposition can justify an affirmative answer to that question: for it is "to the extent of [their] repugnancy [with the Constitution], but not otherwise" that the sections are void.

19. The Director submits that the purported specification of maximum periods prior to eligibility for release in sections 286A(2) and 288(1) of the 1907 Act offends against section 5(1)(a) of the Constitution. He submits that paragraph (a) of subsection 5(1) requires that the sentence be "of a court" and that, by purporting to impose a maximum period, the legislature, rather than the court, was itself purporting to impose the sentence. He also submits that the paragraph authorises a deprivation of liberty pursuant to a sentence only if passed "in respect of" an offence. The terms of article 5(1)(a) of the European Convention on Human Rights, which, as a matter of international obligation, applies in the island albeit that it is not part of its domestic

law, run closely parallel with those of section 5(1)(a) of the Constitution; and in this regard the Director is certainly entitled to rely on the construction placed on article 5(1)(a) by the European Court of Human Rights ("the ECtHR") in *Weeks v UK* (1987) 10 EHRR 293, para 42, namely that it requires "a sufficient causal connection between the conviction and the deprivation of liberty at issue". A legislative maximum, submits the Director, disables the court from discharging its duty to make the punishment fit particularly heinous examples of the two crimes, such as (so the Court of Appeal in each case found) those perpetrated by the two appellants. The Director's central contention is that, just as in the *Robinson* case the Court of Appeal held, at para 18, that the vice of specifying a minimum period in the proviso in section 288(1) was the imposition of a tariff "regardless of the circumstances of the individual case and offender", the vice of specifying a maximum period in the two sections is the same: for the specifying of a period, whether minimum or maximum, is arbitrary.

20. At a level of generality the Director's argument is right: it is as arbitrary to impose a maximum as it is to impose a minimum. Nevertheless the argument misses the point. For it is through the prism of a deprivation of liberty that the analysis must be conducted. In *Engel v The Netherlands (No1)* (1976) 1 EHRR 647 the ECtHR stated at para 58 (and it has repeated it many times since) that the aim of article 5(1) "is to ensure that no one should be dispossessed of [his] liberty in an arbitrary fashion". A period of detention will be arbitrary if it is not proportionate to the offence and other relevant circumstances: *R v Governor of Brockhill Prison, ex p Evans (No2)*, [2001] 2 AC 19, 38 (Lord Hope). An arbitrary provision, such as the specification of a minimum period, which *deprives* a person of his liberty (or, in this case, of the chance of regaining it), irrespective of the circumstances, offends against article 5(1) and, more relevantly, against section 5(1) of the Constitution. An arbitrary provision, such as the specification of a maximum period, which *disables a court from depriving* a person of his liberty (or, in this case, of the chance of regaining it) for longer than the specified period, even in the light of the circumstances, is entirely, and inversely, different. Maximum periods, albeit usually of terms of imprisonment rather than of periods prior to eligibility for release, are written across large tracts of criminal legislation. There is no vice in them.

21. The Board will humbly advise Her Majesty to allow both of the appeals to the extent of reducing the periods of imprisonment to be served prior to eligibility for release on licence to 25 years in the case of Mr Selassie and to 15 years in the case of Mr Pearman.