



PRESS SUMMARY

23 March 2017

Lester Pitman (Appellant) v The State (Respondent)
Neil Hernandez (Appellant) v The State (Respondent) [2017] UKPC 6
On appeal from the Court of Appeal of Trinidad and Tobago

JUSTICES: Lady Hale, Lord Kerr, Lord Clarke, Lord Hughes, Lord Toulson

BACKGROUND TO THE APPEAL

These appeals are brought by defendants convicted of murder in Trinidad and Tobago. Mr Pitman was convicted of a triple murder during a robbery, while Mr Hernandez was convicted of the murder of a woman and her six-year old son with a cutlass. Both men were convicted on the basis of identification evidence and statements of confession they had made to police. In his confession Mr Pitman admitted he participated in the robbery, but blamed the murders on his co-accused; Mr Hernandez stated he had only intended to strike the victims with the flat of his blade. At trial both defendants unsuccessfully challenged the admissibility of these confessions, denying that they had made the statements recorded. Both were convicted, the jury disbelieving their denials. Their appeals against conviction were dismissed. Upon appeal to the JCPC (in 2005 and 2008 respectively) expert evidence was offered for the first time suggesting that each appellant suffered from a mental impairment. Both cases were remitted to the Court of Appeal, which concluded that this fresh evidence did not raise doubts as to the convictions. However, the death sentences were substituted with life imprisonment.

Mr Pitman now appeals his conviction on the basis that his confession ought not to have been admitted, because it was made by a person with mental impairment who had no advice or assistance from a lawyer or a person fulfilling the role of an appropriate adult which would be required by the English Codes of Practice under the Police and Criminal Evidence Act. Additionally, he seeks permission to appeal out of time on the basis that the judge misdirected the jury on the law of joint responsibility, in light of the subsequent authority of *R v Jogee and Ruddock*.

Both appellants contend that for a person suffering from their level of mental impairment, the sentence of death was unlawful. Although both death sentences have been quashed, the appeals are brought on the basis that the life imprisonment substituted is premised on the original death penalty. They rely on two arguments. Firstly, that there is a common law prohibition on the execution of those of unsound mind. Secondly, that s.5(2)(b) of the Constitution of Trinidad and Tobago prohibits cruel and unusual punishment, and the imposition of a death sentence without judicial determination of whether a defendant's mental impairment means that it amounts to such a punishment is a breach of this constitutional rule.

JUDGMENT

The Judicial Committee of the Privy Council will humbly advise Her Majesty that the appeals should be dismissed. Lord Hughes gives the advice of the Board.

REASONS FOR THE JUDGMENT

In the case of Mr Pitman, the Court of Appeal was justified in concluding that his confession was properly admitted into evidence. The test of admissibility in the present case was (a) voluntariness of the confession and (b) absence of unfairness. There is no rule in Trinidad and Tobago which requires an appropriate adult to be present at the interview of a mentally vulnerable or disordered suspect. While there is a rule that a suspect must be informed of his right to instruct a lawyer, a breach thereof would not automatically result in unfairness and in any event the judge found that Mr Pitman was well aware that he had such a right. The expert evidence disclosed an identifiable mental impairment in the form of learning difficulties, but suffered from significant overstatement and was undermined by other evidence which plainly showed that Mr Pitman was able to say what he wanted to say. There could be no legitimate fear that the making of the confession or its content owed anything to Mr Pitman's mental impairment. Nothing in the fresh evidence bears on the question of voluntariness, nor gives grounds on which the confession ought to have been excluded as unfair. [12-21]

The judge's direction to the jury did not set out the correct condition for guilt in joint enterprise, as has now been established by *Jogee and Ruddock*, and to that extent it was a misdirection. However, the law as it stood at the time had been faithfully applied by the judge, and exceptional leave out of time should only be granted if substantial injustice would be done to the defendant if it were refused. This was not the case here. Joint enterprise was not needed to establish Mr Pitman's guilt, as the elements of felony-murder had clearly been made out. This is not to substitute a verdict for a different offence, but is to recognise that the defendant was unarguably guilty of the offence of which he was convicted, namely murder. [22-24]

An examination of the history of the English law on execution does not support the suggestion that there is a common law rule that the insane are not to be subjected to statutorily imposed death penalties. In Trinidad and Tobago, the mandatory sentence of death for those convicted of murder has been on a statutory footing since 1842. No common law rule may detract from that position. In any event, express statutory provisions prohibit the death penalty in the cases of minors or expectant mothers, but not in any other case, leaving no room for the suggested common law rule to operate. [34-39]

It is well established that the Constitutional prohibition on cruel and unusual punishment does not invalidate the mandatory death penalty which is an existing law predating the Constitution and preserved by it. However, the creation of the defence of diminished responsibility has significantly modified the law since the Constitution, and represents legislative recognition that the mental impairment of a defendant at the time of the offence may be a reason why the offence becomes manslaughter and does not attract the mandatory penalty for murder. In order to give effect to this modification and to s.5(2)(b) of the Constitution it needs to be recognised that there may be cases where the level of mental impairment met that involved in diminished responsibility but the partial defence was not raised for some good reason. In those cases, the Constitution should be given effect through the operation of the prerogative of mercy, which is subject if necessary to control by judicial review. [40-50]

In Mr Pitman's appeal, diminished responsibility was disclaimed, and it is unlikely that his learning difficulties would meet the level required for that defence. The mental impairment suffered by Mr Hernandez may well reach the level required for diminished responsibility, and cases such as his might be the subject of the prerogative of mercy as previously explained. However, as it is, neither appellant faces a death sentence. The minimum terms attached to their life sentence were a matter for the Trinidadian courts, and were determined according to the gravity of the crimes. [51-54]

NOTE

References in square brackets are to paragraphs in the judgment. This summary is provided to assist in understanding the Committee's decision. It does not form part of the reasons for that decision. The full opinion of the Committee is the only authoritative document. Judgments are public documents and are available at: www.jcpc.uk/decided-cases/index.html.