31 July 2017

PRESS SUMMARY

Lendore and others (Appellants) v The Attorney General of Trinidad and Tobago (Respondent) (Trinidad and Tobago) [2017] UKPC 25
Privy Council Appeals No 0055 of 2015 and 0086 of 2015

JUSTICES: Lord Mance, Lord Kerr, Lord Sumption, Lord Reed, Lord Hughes

BACKGROUND TO THE APPEAL

These appeals are test cases. The several appellants in this case were all convicted of murder in Trinidad and Tobago, which carries a mandatory sentence of death. Such a sentence is not unconstitutional as it was an existing law preserved at the adoption of the Constitution. Their sentences were therefore lawfully passed. However, in all cases there had been undue delay of 5 years so that the implementation of their death sentences would be unlawful, following the decision of the Board in *Pratt and Morgan v Attorney General for Jamaica* [1993] UKPC 37 ("*Pratt & Morgan*"). In that case, the Board advised that rather than waiting for prisoners to commence proceedings, an executive power of pardon could be exercised commuting the sentence to life imprisonment.

The Constitution of Trinidad and Tobago contains an executive power of pardon in s.87, which includes substituting a less severe punishment. Ss.87(3), 88 and 89 provide for the President to act on ministerial advice, and for an Advisory Committee to advise on the exercise of this power. S.70 of the Criminal Procedure Act provides for any substituted sentence imposed by the pardon to be made an order of the court. Following the procedure suggested by the Board in *Pratt & Morgan*, the Presidential power of pardon was exercised for groups of defendants at a time, without consideration of individual circumstances. The death sentences of the first group were commuted to imprisonment for the rest of the prisoners' natural lives, and to imprisonment for 75 years for the second group. The appellants, like others, have lodged motions for constitutional relief under s.14 of the Constitution, which gives the High Court very wide powers to ensure that a citizen is not deprived of his fundamental constitutional rights. Their cases, in essence, challenge the substituted sentences attached as conditions to the grants of pardon from the death sentences originally imposed on them.

JUDGMENT

The Judicial Committee ordered that the appeals should be dismissed. The judgment was given by Lord Hughes.

REASONS FOR THE JUDGMENT

Each challenge the appellant raised to the constitutional validity of the substituted sentences fails. The executive power of pardon plainly extends to a delay case of the *Pratt & Morgan* type: s.87 confers the power of pardon in respect of any person for any offence. This power includes the substitution of a lesser sentence, and the appellants' argument that the prisoner is entitled to judicial determination of his substitute sentence must be rejected. The original sentence of death was lawfully passed, indeed it was mandatory, so there could be no question of a judicial appeal. Substituting sentences through the Presidential pardon cannot be said to be an unconstitutional departure from the principle of the separation of powers because it is expressly provided for in the Constitution; moreover the President is

not carrying out a judicial function. The exercise of mercy is an extra-judicial power distinct from the application of the sentencing process **[7-25]**. The argument that s.70 empowers the court to depart from the sentence substituted under the pardon and determine sentence for itself must also be rejected. As a matter of construction, this is simply not a possible reading. S.70 requires the court not to pass a sentence of imprisonment, but to "allow to such person the benefit of a conditional pardon", which must include the conditions subject to which it was granted. A court's order is needed to give effect to a pardon and to avoid there remaining in place inconsistent directions relating to the prisoner **[26-32]**. If for any reason there has been no pardon at the time when the High Court determines an application for constitutional relief under s.14 of the Constitution, the High Court is not confined to a declaration of unconstitutionality but can proceed to substitute a lesser sentence **[33-36]**.

The appellants argue that the substitute sentences impose incarceration without any prospect of ever being released, no matter what change of circumstances there may be, and are therefore cruel and unusual punishments contrary to s.5(2)(b) of the Constitution. This argument must be rejected. The principles set out in all the case law of the European Court of Human Rights on which the appellants rely by analogy are as follows: a sentence must offer the possibility of release; there must exist a system of review; the decision to release or not cannot be arbitrary, so must be based upon either pure mercy, or an assessment of whether continued detention is justified on legitimate grounds or not. The sentences imposed meet these requirements, as in Trinidad and Tobago the Prison Rules ordain regular reviews in respect of both life sentences and determinate 75 year terms. A prisoner is also entitled to petition the President for clemency, and on such a petition, where appropriate, the Advisory Committee and the Minister advising the President must consider whether all the circumstances of the case call for continued detention or not **[39-49].** No particular form of review is required, nor does s.5 mandate a minimum "tariff" term to every life sentence or a system of parole **[55-74]**.

The review process was said to be flawed because it is administered by the executive rather than by judicial process. However, there is no general rule that all reviews must be judicial, and if there is complaint about the fairness of the review, it may be challenged by judicial review (although this would not affect the validity of the substituted sentence). Criticism before the Board of the composition of the Advisory Committee is misplaced in that it is statutorily prescribed by the Constitution. It is open to the President to include persons with judicial or sentencing experience, given the need for fairness and the public appearance of objectivity **[50-54]**.

The mere fact that the substituted sentences were imposed on groups of prisoners without consideration of their individual circumstances does not by itself mean they are cruel and unusual punishment. Sentencing by a court is an individual exercise, but the President is exercising a separate power of dispensation. Nor would it follow, even if he were exercising a sentencing function, that to impose the same sentence in multiple cases would necessarily render those sentences cruel and unusual **[75-78]**. The appellants ought to have had opportunity to make representations at the time of consideration of pardon **[37-38]**. These appellants did not have that opportunity so the appropriate substitute sentences are going to have to be reconsidered in any event. This reconsideration will be carried out by the executive, rather than by the High Court. If a defect in the pardon process is identified, as it has been, the appropriate remedy is to put the defect right, not to substitute an entirely different judicial sentencing process for the executive power of pardon **[78-79]**.

The effect of the Court of Appeal's correct order to remit the decisions to the original decision-maker, the President, to enable individual representations to be made is that each appellant's case must be individually addressed, thus removing the complaint that the earlier decisions were made in batches. Whether that will result in differential sentences will be a matter for the President. Failure thus to address them can, like other procedural unfairness, unreasonableness, or any error of law, be controlled by judicial review **[80]**.