Trinity Term

[2017] UKPC 18

Privy Council Appeal No 0066 of 2014

JUDGMENT

Lovelace (Appellant) v The Queen (Respondent)
(St Vincent and the Grenadines)

From the Court of Appeal of the Eastern Caribbean Supreme Court (St Vincent and the Grenadines)

before

Lord Kerr

Lord Wilson

Lord Reed

Lord Hughes

Lord Toulson

JUDGMENT GIVEN ON

15 June 2017

Heard on 8 November 2016

Appellant	Respondent
Paul Bowen QC Richard Thomas (Instructed by Simon Muirhead & Burton LLP)	Rowan Pennington-Benton (Instructed by Charles Russell Speechlys LLP)

LORD KERR:

Introduction

1.
This is an appeal by Patrick Lovelace against the decision of the Eastern Caribbean Court of Appeal (Saint Vincent and the Grenadines) (Mario Michel JA), dismissing his application for an extension of time to apply for leave to appeal against sentence.

2.

On 20 December 2004, Mr Lovelace had been convicted of the murder of Lokeisha Nanton and sentenced to death. The conviction was quashed on appeal on 9 October 2006 and a re-trial ordered. On 15 July 2009, following a re-trial before Bruce-Lyle J and a jury, the appellant was again convicted of murder. On 26 February 2010, he was again sentenced to death. An appeal against conviction - but not against sentence - was dismissed by the Court of Appeal on 27 February 2012. On 13 June 2012, the appellant filed in the Court of Appeal a Notice of Intention to Appeal "to the Privy Council against conviction and sentence in this matter". No such application was made.

3.
His application to extend the time for appealing against sentence was then made on 20 January 2014, and it was this application which was refused by Mario Michel JA on 5 March 2014. An application for permission to appeal was filed with the Judicial Committee of the Privy Council on 5 June 2014. Leave was granted on 11 February 2015.

4.
Various grounds of appeal were raised in the application to appeal to the Board but, on the hearing, only one of those grounds was pursued. It was that the Court of Appeal had erred in concluding it had no jurisdiction to grant an extension of time to apply for leave to appeal against sentence.

The facts of the offence and the sentencing remarks

5.
The circumstances of the murder of Miss Nanton were horrifying. She was 12 years old at the time of her death. She had been with a friend who was a few years older, a Miss Ramona Caruth. They were walking together to Miss Nanton's home, having left a street party. They were followed by the appellant, who was known to Miss Caruth. The appellant attacked Miss Nanton, knocked her to the ground and continued to assault her until she was unconscious. Despite Miss Caruth's attempts to stop the appellant, he raped Miss Nanton. He then threatened Miss Caruth and coerced her into helping him to hang Miss Nanton by the neck from a tree in order to simulate suicide. She died as a result of the hanging.

6.
Sentencing the appellant on 26 February 2010, the judge said:

"The Prosecution has the burden of proving to me that the death sentence is appropriate; and that, they must do beyond all reasonable doubt. Having balanced the submissions made by the learned DPP (as against that of the defence) at this sentencing phase, I have no doubt at all in my mind that this case is one of the worst cases of murder any society can experience and I consider it one of the worst of the worst. The brutal rape of a young 12 years' old girl and leaving her to die, having been tied by the neck to a tree limb to me is palpably brutal and heinous. I am satisfied beyond all reasonable doubt that this is a matter for which Mr Patrick Lovelace deserves the ultimate sentence. Any lesser sentence in my view would be inappropriate in all the circumstances of this case."

The jurisdiction to extend time for leave to appeal against sentence

7.
In the order of Mario Michel JA of 5 March 2014, it was stated that "the court has no jurisdiction to grant an extension of time to file an appeal, having regard to section 48(1) & (2) of the Eastern Caribbean Supreme Court (Saint Vincent and the Grenadines) Act (c 18) and the decision of the

Judicial Committee of the Privy Council in [Pollard v The Queen [1995] 1 WLR 1591]". The application for an extension of time to file an appeal was therefore refused for want of jurisdiction.

8.
Subsections (1) and (2) of section 48 provide:

"(1) Where a person convicted desires to appeal under this Act to the Court of Appeal or to obtain the leave of the court, he shall give notice of appeal or notice of his application for leave to appeal, in such manner as may be directed by rules of court, within 14 days of the date of conviction.

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

The constitutionality of section 48(2)

9.
In Pollard the appellant and a co-defendant were convicted in the Eastern Caribbean Supreme Court of murder. Both were sentenced to death. The appellant's notice of application for leave to appeal was taken to the registry for filing within the prescribed time but it was returned as defective because it had been signed by counsel rather than the appellant, as required by rule 44(1) of the West Indies Associated States Court of Appeal Rules 1968 ("the 1968 Rules"). When, after the expiry of the 14-day period, the co-defendant's appeal came on for hearing, the appellant applied to the court to extend the time for lodging his notice of application for leave to appeal. The Eastern Caribbean Court of Appeal held that, since section 48(2) of the Act did not permit an extension of the time limit for appeals where the convicted person was under sentence of death, it had no jurisdiction to hear the appeal. After making that ruling, the court heard the co-defendant's appeal. It quashed his conviction on the ground that the verdict was unsafe and unsatisfactory.

10.
The Board considered that the appellant's appeal should be allowed. Rule 11 of the 1968 Rules gave the court power to proceed with an appeal in a criminal matter notwithstanding the appellant's accidental failure to comply with them. In an obiter observation Lord Jauncey, who delivered the opinion of the Board, said at p 1593:

"Given the unequivocal terms of section 48(2) of the Act their Lordships do not see that the Court of Appeal had any alternative but to refuse the defendant's application to extend the time for lodging a notice. Indeed there are very good reasons for imposing a rigid time limit on appeals in cases involving sentence of death: see Rex v Twynham (1920) 15 Cr App R 38, 39, per Lord Reading CJ."

11.
Different times, different mores. Lord Reading CJ was dealing with section 7(1) of the Criminal Appeal Act 1907 which was in similar terms to section 48(1) and (2) of the Eastern Caribbean Supreme Court (Saint Vincent and the Grenadines) Act. He said, at p 39 of Twynham:

"There is a very good reason for the Legislature making this provision, because the mere giving of a notice of appeal or a notice of application for leave to appeal against a conviction of murder or high treason, has the effect of postponing the date of the execution. Once that notice has been given, the execution cannot take place until a certain time after the hearing of the appeal. If it were possible to extend the time, it would be open to a murderer, having failed in one appeal, to give notice asking for an extension of time in order to bring some other matter before the Court, or not give the notice until the last moment, in order to provide for a further extension of time."

12.
Such stratagems, if they were relevant in the early part of the twentieth century, are irrelevant now. They would not be tolerated in the United Kingdom nor should they be in Saint Vincent and the Grenadines. Indeed, there is no reason to suppose that such ploys are used in that jurisdiction. No suggestion to that effect was made by the respondent. In any event, active case management should eliminate the pursuit of worthless appeals.

13.
It does not appear that the Board was invited in Pollard to consider the possible unconstitutionality of section 48(2). That question was dealt with, however, in Cannonier v DPP HCRAP 2008/002 and HCRAP 2008/019 in relation to a similar provision in the Eastern Caribbean Supreme Court (St Christopher and Nevis) Act. In that case the court found that a restriction against extending time in death penalty cases in section 52 of the St Christopher and Nevis Act could not be upheld because it was contrary to the guarantee of protection of the law in section 10 of the Constitution of that country.

14.
It is significant that the Eastern Caribbean Court of Appeal was dealing with that question because the Judicial Committee of the Privy Council had remitted the case to it. If the Board had considered that Pollard had settled the issue, plainly it would not have been appropriate to decide that the Eastern Caribbean Court of Appeal should address the constitutionality question. In Cannonier the relevant provision (section 52(2)) is in almost identical terms to section 48(2) of the Supreme Court Act. It provides:

“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.”

15.
The Court of Appeal which initially dealt with the application to extend time in Cannonier dismissed that application. Subsequently, the Privy Council ordered a stay of execution and directed the Eastern Caribbean Court of Appeal to consider arguments on the constitutionality of section 52. It was submitted that section 52(2) violated the fair trial provisions of the St Kitts-Nevis Constitution (section 10). It was also argued that the protection of the law was a guarantee of due process and that in a death penalty case the right of appeal was a fundamental right.

16.
The Court of Appeal in Cannonier outlined the principal provisions of section 10 of the Constitution in para 30 of its judgment as follows:

“Section 10 of the Constitution is the familiar provision to secure protection of law. It provides that any person charged with a criminal offence shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law. He is to be presumed innocent until he has been proved or has pleaded guilty. He is to be given adequate time and facilities to prepare his defence and must be permitted to defend himself at his own expense either in person or by a legal practitioner of his own choice. He is to be afforded facilities to examine the witnesses called by the prosecution and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to the prosecution’s witnesses.”

These provisions are in broadly similar terms to the fair trial provisions in paragraph 8 of Schedule 1 to the Saint Vincent Constitution Order 1979 (SI 1979/916).

17.
In para 31 of Cannonier the court observed that the provisions of section 10 of the Constitution applied to appellate proceedings, referring to the decision of the Judicial Committee of the Privy Council to that effect in Darmalingum v The State [2000] 1 WLR 2303, 2309/10. It also remarked on the similarity of the section 10 requirements to article 6(1) of the European Convention on Human Rights and Fundamental Freedoms (ECHR), stating that "although the article does not guarantee a right of appeal from a decision of the court of first instance, wherever domestic law provides for a right of appeal, the corresponding appellate proceedings must be treated as 'an extension of the trial process' and are therefore subject to the requirements of article 6 of the Convention.".

18.
In para 32 the Court of Appeal stated that the right of access to a court is inherent in the fair trial provisions in section 10 of the Constitution and article 6 of ECHR. It accepted that the state was entitled to have procedural rules in place to regulate the right of access to a court but referred to the well-established principle that these must not restrict a person's access in such a way as to impair the essence of the right. On the question of time limits for appeals, the court cited the well-known passage from para 45 of Pérez de Rada Cavanilles v Spain (2000) 29 EHRR 109:

"The rules on time-limits for appeals are undoubtedly designed to ensure the proper administration of justice and compliance with, in particular, the principle of legal certainty. Those concerned must expect those rules to be applied. However, the rules in question, or the application of them, should not prevent litigants from making use of an available remedy."

19.
The Court of Appeal in Cannonier considered that a restriction on the availability of an extension of time within which to apply for leave to appeal is required to be proportionate, relying on the decision of the Board in De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] AC 69. In that case the applicant who was a civil servant had taken part in demonstrations against the government. The Permanent Secretary of the department in which the applicant worked decided that he had been in breach of a provision in legislation which forbade the communication by civil servants of the expression of opinion on matters of political controversy. The Permanent Secretary therefore banned the applicant from carrying out his normal duties pending disciplinary proceedings. He applied for redress under section 18(1) of the Antigua and Barbuda Constitution Order 1981 (SI 1981/1106) which guaranteed freedom of expression. It was held that the provision forbidding communication of expressions of opinion on political maters was more than was reasonably required for the performance by civil servants of their functions. Lord Clyde, delivering the opinion of the Board, adopted the formulation of Gubbay CJ in two cases from Zimbabwe, Nyambirai v National Social Security Authority [1996] 1 LRC 64 and Retrofit (Pvt) Ltd v Posts and Telecommunications Corpn [1996] 4 LRC 489, where he said that, in determining whether a legislative restriction on a guaranteed right was arbitrary or excessive, the court would ask itself:

"whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective."

20.
This seminal formula has accreted a fourth element or criterion in the human rights context, viz whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its

achievement, the former outweighs the latter - see, for instance, such cases as R (Aguilar Quila) v Secretary of State for the Home Department [2012] 1 AC 621, para 45, Bank Mellat v HM Treasury (No 2) [2014] AC 700, para 20 and para 74. This adds nothing to the present analysis of whether the time limit on applications for leave to appeal against the death penalty is proportionate.

21.
The reasons that adherence to a strict time limit in death penalty cases is no longer necessary were taken up by the Court of Appeal in Cannonier in para 33:

“The inflexible time limit for appealing in capital offences dates back to the period when executions were expected to be carried out quickly after sentence, namely within a matter of weeks. The rule was intended to facilitate that process. However, the ability of defendants in the Federation of Saint Christopher and Nevis to apply to the Privy Council means that executions can no longer be carried out within such a short time frame. Execution dates are no longer set immediately after sentence in St Kitts & Nevis. Defendants who allege they have been denied a merits review of their conviction and sentence in the Court of Appeal because of inflexible procedural rules have the right to apply to the Board for conservatory orders and stays of execution while the application for leave to appeal is being prepared, as was demonstrated in this case. In England, where the death penalty has long been abolished, appeals after a delay of 12 years are not unknown. In [R v Ashley King [2000] 2 Cr App R 391] the appellant was convicted in 1986 of murder and sentenced to life imprisonment. He sought leave to appeal over 12½ years later. Being satisfied that the conviction was unsafe, the Court of Appeal allowed the appeal.”

22.
These reasons, allied to those adverted to in paras 11 and 12 above, render reliance on Twynham no longer appropriate. Twynham was not, of course, concerned with constitutional issues and, in purporting to follow it, Pollard did not address the constitutional question which this case raises. On that account alone, the Board considers that the decision in Pollard, in so far as it relates to the construction of section 48(2) of the Eastern Caribbean Supreme Court (Saint Vincent and the Grenadines) Act and the application of a rigid, inflexible rule against extending time for applications for leave to appeal against the death sentence, should not be followed.

23.
There is also the consideration that the International Covenant on Civil and Political Rights (ICCPR) provides in article 14.5 that “Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law”. The United Nations Human Rights Committee in its General Comment 32 on article 14 of ICCPR has emphasised the importance of a right of appeal and of the availability of legal aid in death penalty cases:

“The right of appeal is of particular importance in death penalty cases. A denial of legal aid by the court reviewing the death sentence of an indigent convicted person constitutes not only a violation of article 14, paragraph 3(d) [the right to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it] but at the same time also of article 14, para 5, as in such cases the denial of legal aid for an appeal effectively precludes an effective review of the conviction and sentence by the higher instance court.”

24.

The Board considers that section 48(2) of the Eastern Caribbean Supreme Court (Saint Vincent and the Grenadines) Act is therefore in violation of paragraph 8 of Schedule 1 to the Saint Vincent Constitution Order 1979 insofar as it precludes an extension of time for appeals against the death sentence. Section 101 of the Constitution provides:

“This Constitution is the supreme law of Saint Vincent and, subject to the provisions of this Constitution, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.”

25.
This being the case, the availability of a jurisdiction in the Court of Appeal to entertain an application for an extension of time for leave to appeal against sentence can be achieved in either of two ways. The first of these is that adopted by the Court of Appeal in Cannonier viz, by treating as deleted the words, “Except in the case of a conviction involving sentence of death” in section 48(2). Alternatively, the subsection could be read subject to the qualification that the court must have a discretion in exceptional circumstances to extend time for the service of an application for an extension of time in death penalty cases. This was the course followed in Pomiechowski v District Court of Legnica, Poland [2012] UKSC 20; [2012] 1 WLR 1604. The Board considers that it is more appropriate that the offending words of section 48(2) be regarded as inoperative. This is consistent with the decision in Cannonier. More importantly, since giving any effect to those words, even to the extent of creating a position from which exception had to be established incurs the risk of undermining or weakening the constitutional right at stake. Finally the words which purport to prohibit a right to apply for an extension of time, being inconsistent with the Constitution, must be treated as void under section 101.

Conclusion

26.
The Board will therefore humbly advise Her Majesty that the appeal should be allowed and that the matter should be remitted to the Eastern Caribbean Court of Appeal (Saint Vincent and the Grenadines) for that court to determine whether an extension of time within which to appeal the appellant’s sentence should be granted. The Board expresses no view about the merits of the appellant’s application.