

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L
FROM THE COURT OF APPEAL OF
TRINIDAD AND TOBAGO

B E T W E E N :

TERRENCE THORNHILL Appellant

- and -

THE ATTORNEY GENERAL OF TRINIDAD
AND TOBAGO Respondent

CASE FOR THE RESPONDENT

1. This is an appeal from a judgment of the Court of Appeal of Trinidad and Tobago (Sir Isaac Hyatali C.J., Corbin and Rees JJ.A.) dated December 22, 1976 allowing the Respondent's appeal from a judgment dated May 31, 1974 of Georges J. in the High Court of Justice of Trinidad and Tobago and ordering that the declaration granted to the Appellant by Georges J. be set aside.

Record
p.89 l.12 to p.97 l.2
p.84 ll.4-6
p.84 l.1-7;p.94 l.19
p.58 l.8 to p.75 l.44
pp. 58 et seq.
p.77 ll. 19-28
p.99 l.26

2. The question for decision in this appeal involves, inter alia, a consideration of sections 1, 2, 3 and 6 of Chapter 1, The Recognition and Protection of Human Rights and Fundamental Freedoms, of the 1962 Constitution of Trinidad and Tobago set out in the Second Schedule of the Trinidad and Tobago (Constitution) Order in Council 1962 (S.I. No. 1875 of 1962) (hereinafter referred to as the 'Constitution').

3. Section 1 of the Constitution is in these terms:-

1. It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist without discrimination by reason of race, origin, colour, religion or sex, the following human rights and fundamental freedoms, namely,

(a) the right of the individual to life, liberty, security of the person and enjoyment of property, and the right not to be deprived thereof except by due process of law;

(b) the right of the individual to equality before the law and the protection of the law;

(c) the right of the individual to respect for his private and family life;

(d) the right of the individual to equality of treatment from any public authority in the exercise of any functions;

(e) the right to join political parties and to express political views;

(f) the right of a parent or guardian to provide a school of his own choice for the education of his child or ward;

(g) freedom of movement;

(h) freedom of conscience and religious belief and observance;

(i) freedom of thought and expression;

(j) freedom of association and assembly;

and

(k) freedom of the press.

4. The material part of section 2 of the Constitution directly relevant to this appeal is paragraph 2(c)(ii) which is in these terms:-

"Subject to the provisions of sections 3, 4 and 5 of the Constitution, no law shall abrogate, abridge or infringe or authorise the abrogation, abridgment or infringement of any of the rights and freedoms hereinbefore recognised and declared and in particular no Act of Parliament shall -

(a)

(b)

(c) deprive a person who has been detained

(i)

(ii) of the right to retain and instruct without delay a legal adviser of his own choice and to hold communication with him."

5. The part of section 3 directly relevant to this appeal provides that:-

"3. (1) Sections 1 and 2 of this Constitution shall not apply in relation to any law that is in force in Trinidad and Tobago at the commencement of this Constitution."

6. Section 6 of the Constitution provides for the enforcement of the protective provisions concerning sections 1 and 2 and is in these terms:

(1) "For the removal of doubts it is hereby declared that if any person alleges that any of the provisions of the foregoing sections or section of the Constitution has been or is being or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction -

(a) to hear and determine any

application made by any person in pursuance of subsection (1) of this section; and

- (b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3) hereof;

and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of the said foregoing sections or section to the protection of which the person concerned is entitled.

7. The specific issue for determination in this appeal is whether a person who is arrested by the police for the commission of criminal offences and/or detained on suspicion of having committed others, has, under and by virtue of section 2(c)(ii) of the Constitution, the right to retain and instruct Counsel of his choice and to hold communication with him and is entitled under and by virtue of section 6 (1) of the Constitution to claim redress for the protection of such right.

8. The Appellant's case arose from an incident described as a "shoot-out" with the police which took place on the 17th October, 1973 at Riverside Road, Curepe, a village about six miles east of the city of Port of Spain.

p. 58 11.29 et seq

Some time shortly after 1.30 pm on the same day of the incident, the Appellant was arrested by the police a few miles from the scene. According to Senior Superintendent Burroughs, on his arrest the Appellant was found to have a .38 revolver containing five live rounds in its chambers and an additional six rounds on his person.

p. 25 11.40-44

p. 25 11.44 et seq.

The Appellant was charged with shooting with intent to murder, possession of an unlicensed firearm and possession of ammunition and taken to, and detained at the police station St. Joseph, a town not far from the scene of the "shoot-out".

Record

p.26 ll.7 et seq.
p. 58 ll.35-38

Apart from these charges, the Appellant had for some time been wanted by the police in connection with a number of other offences - mainly robberies and shootings and the police officers to whom had been assigned the investigation of these offences were anxious to question him.

p.58 ll.38-40; p.25

p.58 ll.38-41
p.11 ll.3 et seq.
p. 58 ll.41-43

Mr Stanley John, a barrister and cousin of the Appellant deposed in an Affidavit sworn on the 8th December 1973 in these Proceedings that shortly after 4 p.m. on the same day of the Appellant's arrest, he was retained to act professionally as the legal adviser of the Appellant by the Appellant's father, one Samuel Thornhill.

Doc. 4 pp. 8-14

p.9 ll.16-22

At about 5.30 p.m. on the same day, Mr John went to the St. Joseph Police Station and enquired about the Appellant from policemen on duty at the Station. He deposes that the policeman stated that he would not have been permitted to speak to the Appellant.

p.9 ll.23 et seq

p. 11.32-33

At about 9.00 p.m. on the night of the 17th October 1973, Mr John again went to the St. Joseph Police Station to see the Appellant. On this occasion Mr John was permitted to speak to the Appellant, who at the time was handcuffed to another prisoner at the station, and allowed to bring him refreshment and to remain with him for a brief period. Mr John alleged that he was asked to leave after about five minutes conversation with the Appellant.

p.9 ll.34 et seq.

p.10 ll.11 et seq.

On the morning of October 18, 1973, Mr John returned to the St. Joseph Police Station and sought permission of Supt. George, a senior officer of Police to see the Appellant. On refusing the request, Supt. George said that the Appellant had been brought to the station on very serious charges

p.10 ll.40 et seq.

p.11 ll.3 et seq.

and, at that stage, an interview with a lawyer was likely to impede the progress of the police investigations. Thereupon, Mr John spoke by telephone to Asst. Commissioner Burroughs who promised to give instructions that he be allowed to see the Appellant at 5.00 pm on that day.

At about 5.15 pm on the same day, October 18, 1973, Mr John, accompanied by Mr Wayne Smart, a solicitor, returned to the St. Joseph Police Station but Supt. Whitehead, the officer in charge, said that he could not allow him to speak with the Appellant.

p.11 11.39 et seq.

p.12 11.1 et seq.

On October 19, 1973, the Appellant was taken to the Criminal Investigation Department at Police Headquarters in Port of Spain. Mr John made another attempt to see the Appellant, but he alleged that on this occasion, Supt. Allman told him that the investigations had reached a stage where any interview between the Appellant and his legal adviser would impede the police investigations.

p.12 1.52; p.13 11.1 et seq.

p.13 11.13 et seq.

p.13 11.19 et seq.

At about 9.30 am on the 20th October 1973 Mr John returned to Police Headquarters in Port of Spain and was permitted to see the Appellant for two minutes but not to speak with him as the police were about to conduct identification parades.

p.13 11.29-40

p. 14 11.1-6

At about 12.30 pm on that day (20th October 1973) Mr John was allowed to speak with the Appellant who, by then, had been charged with eighteen offences and had given several written statements to the police.

p.14 1.8 et seq.

9. By an Amended Notice of Motion dated 18th November, 1973 purporting to issue by virtue of section 6(1) of the Constitution, the Appellant began proceedings against the fifteen (15) police officers of the Trinidad and Tobago Police Force named therein as Respondents, for the relief prayed therein.

pp.4-6

p.6 11.28-34
Doc. 2 pp. 4-5

10. The Appellant sought relief on the basis of five (5) grounds set out in the said Amended Notice of Motion.

Doc. 1 pp 5-6

11. In accordance with section 13 of the Supreme Court of Judicature Act, 1962 (No. 12 of 1962), Notice of the questions arising in the proceedings begun by the said Amended Notice of Motion was given to the Attorney General in Trinidad and Tobago who exercised his right under that section of the Act and appeared by Counsel.

12. At the hearing of the application instituted by the Amended Notice of Motion before Georges J., Counsel for the Appellant tendered in evidence four (4) Affidavits sworn respectively by:-

- | | | |
|-------|---|-------------------|
| (i) | Wayne Smart, Solicitor of the Supreme Court of Trinidad and Tobago, on the 8th day of December, 1973; | Doc. 3 pp. 6-8 |
| (ii) | Stanley John, Barrister, on the 8th day of December, 1973; | Doc. 4 pp. 8-14 |
| (iii) | The Appellant on the 10th day of December 1973; | Doc. 5 pp. 14-18 |
| (iv) | Samuel Thornhill, retired School Principal on the 8th day of April 1974. | Doc. 12 pp. 31-34 |

13. At the said hearing before Georges J., Counsel for the Respondent police officers, tendered in evidence six (6) Affidavits, sworn respectively by:-

- | | | |
|-------|--|-------------------|
| (i) | Samuel George, Superintendent of Police on the 28th day of March, 1974; | Doc. 6 pp. 19-21 |
| (ii) | Wilfred Allman, Superintendent of Police on the 28th day of March, 1974; | Doc. 7 pp 21-24 |
| (iii) | Randolph Burroughs, Senior Superintendent of Police, on the 28th day of March, 1974; | Doc. 8 pp 25-27 |
| (iv) | Alec Heller, Assistant Superintendent of Police, on the 28th day of March 1974; | Doc. 9 pp 27-28 |
| (v) | Clinton Whitehead, Assistant Superintendent of Police, on 28th March 1974 | Dec. 10 pp. 28-30 |

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(vi) David Jack, Sergeant of Police
on the 29th day of March 1974

Doc. 11 pp 30-31

14. At the hearing of the said Motion, none of the deponents who swore to the said Affidavits tendered on behalf of the Appellant gave any oral evidence in support of the facts to which he had deposed in his Affidavit. But three (3) of the deponents whose Affidavits were tendered in evidence on behalf of the Respondent police officers viz. Superintendent Samuel George, Senior Superintendent Randolph Burroughs and Assistant Superintendent Clinton Whitehead gave sworn testimony and were cross-examined by Counsel for the Appellant.

pp. 39-42
pp. 42-45; pp.46-49

15. In his judgment dated May 31, 1974, Georges J. granted the first Declaration but rejected the prayer for the second Declaration and for the Order sought in paragraph 3 of the said Amended Notice of Motion and ordered the Respondents to pay the Appellant's costs to be taxed fit for Counsel.

Doc. 19 pp. 58-75
p.75 1.39
pp. 4-5; p.75 11.37-38

16. After certain critical comments in a brief summary of the facts as he found them, Georges J. considered the Appellant's application on the basis of three issues which, during the course of his judgment, he posed for consideration and determination in the following terms:-

pp. 58-61

- (1) whether or not the Appellant has the constitutional right he asserts he has;
- (2) whether that constitutional right was infringed;
- (3) the remedy which the Appellant can claim by reason of the infringement of his right.

p. 62 11. 1-3
p. 69 11. 16-17
p.70 11.1-2

17. On the first issue, Georges J. held, inter alia, that:-

- (i) the right mentioned in section 2(c)(ii) of the Constitution, existed at common law in Trinidad and Tobago before August 31, 1962, and that the Constitution merely recognised its existence and ensured its continuance.

p.66 11.11-12
p.69 11.10-15

(ii) assuming that there was no such right at common law as is set out in section 2(c)(ii) of the Constitution, that it now exists because the Constitution has proclaimed that it always existed in Trinidad and Tobago and that it should continue to exist.

p.64 11.14-19

18. The Respondent respectfully submits that Georges J. was wrong in holding that under the law as it existed immediately before the commencement of the Constitution there was a right at common law that a person arrested and under investigation was entitled without delay to retain and instruct a legal adviser of his own choice and to hold communication with him.

p.62 1.46
p.63 11.1-4

19. Further, the Respondent respectfully submits that if the proper approach is to consider whether what occurred in the instant case was authorised by pre-existing law, then at common law a police officer is and was entitled, having lawfully arrested a person, to carry out the process of investigation without according that person an immediate opportunity to consult with a lawyer of his choice.

20. On the second issue, that is to say, whether the Appellant's constitutional right was infringed, Georges J. held that while he was in the custody of the police his right was infringed at least on two occasions and as well on a third.

p.69 11.17-23; p.69
11. 34-38

21. On the third issue, that is, the question of the remedy available to the Appellant, Georges J. held, inter alia, that he was compelled to grant the declaration which he made, and the Order dated 31st May 1974 in respect of paragraph 1 of the Amended Notice of Motion.

Doc. 20 pp.76-77

Doc. 2 p.4 11. 27-36

22. Georges J. held, however, that "on the authorities" he had to refuse the remedies prayed in paragraphs 2 and 3 of the Amended Notice of Motion.

p.75 11. 33-38

23. The Respondent respectfully submits that Georges J. failed to consider adequately or at all, the nature and scope of the protection

given under and by virtue of section 2 of the Constitution, and, consequently whether in the circumstances there could be any infringement of the alleged right of the Appellant.

24. The Respondent also respectfully submits that the findings of Georges J. show that there was no justification in law and on the evidence for making the declaration which he granted to the Appellant.

p.75 1.39;p.71 11.19-28

25. The Respondent submits further that on the facts found by the learned trial judge, the refusal to permit Counsel to interview the Appellant were explained by the police officers upon the basis of their honest belief that investigations were likely to be hindered and or impeded by the grant of their interviews. Although the learned trial judge considered the Judges' Rules and relied upon them for his finding that the right contended for existed at common law, it is submitted that he paid insufficient regard to the fact that the Judges' Rules expressly recognise that the police can (with the risk of the exclusion of involuntary statements at the trial) refuse access to a lawyer where unreasonable delay or hindrance to the processes of investigation may occur.

26. By a Notice of Appeal dated 12th June 1974 the police Respondents and the Attorney General appealed to the Court of Appeal of Trinidad and Tobago against the judgment granting the declaration made by Georges J.

Doc.21 pp.77-80

27. By a Notice dated 3rd April, 1975, the Appellant gave notice that he intended to contend at the hearing of the appeal, that the decision of Georges J. should be varied to include the declaration sought in paragraph 2 and the Order prayed for in paragraph 3 of his Amended Notice of Motion the claim for both of which had been rejected by Georges J. But during the hearing of the appeal before the Court of Appeal the Appellant abandoned his contention set forth in the Notice.

Doc.22 pp.81-83

Doc.82 11.6-15
Doc.2 11.16-31

p.87 11. 1-7
Doc. 26 p.99 11.27-31

Record

28. On the 22nd December, 1976, the Court of Appeal (Sir Isaac Hyatali C.J., Corbin and Rees J.J.A.) unanimously allowed the appeal of the Respondents and the Attorney General.

Doc. 23 pp. 84-94

Doc. 24 pp. 94-97

Doc. 25 p. 97

29. Rees J.A. who delivered the main judgment (which was the judgment) of the Court of Appeal, came to the conclusion that in the view he took of the Application by the Appellant, the question whether the right in section 2(c)(ii) of the Constitution existed, did not arise for decision, and that the remedy provided by section 6 of the of the Constitution of Trinidad and Tobago was not available to the Appellant in a case of this kind, and therefore, Georges J. was wrong to grant the declaration.

Doc. 23 pp. 84-94

p.88 ll. 16-18

p.92 ll.48-9; p.93 ll. 1-6.

30. In the course of his judgment, Rees J.A. said, inter alia, that:-

"(he had) not been able to find any judicial pronouncement or enunciation to the effect that a person in custody at the pre-trial or interrogation stage, had at common law, a right to instruct and hold communication with his legal adviser."

p. 88 ll. 7-15

He also observed that no conclusive authority had been produced to the Court of Appeal from which he was able to derive any assistance on this matter.

p.88 ll.12-15

31. Rees J.A. analysed the nature of the rights mentioned in sections 1 and 2 of Chapter 1 of the Constitution of Trinidad and Tobago, and in dealing with the nature and character of the rights in section 2, he applied the dictum of Lord Diplock in Michael de Freitas also called Michael Abdul Malik and George R. Benny & Ors. 1975 3 W.L.R. 388 at p. 391 (a decision of the Privy Council on appeal from the Court of Appeal of Trinidad and Tobago), that the specific prohibitions in section 2 of the 1962 Constitution of Trinidad and Tobago did not themselves create rights or freedoms.

p.91 ll.12 et seq.

p.91 ll.24 et seq.

32. The Respondent submits further that section 2 of the Constitution did not create new rights or freedoms additional to those

recognised and declared in section 1. (Vide de Freitas vs. Benny 239 supra).

33. In his judgment, Rees J.A. also said that he was not prepared to go as far as making any positive finding that the police officers infringed any right of the Appellant, but, on the assumption that they did, he held that the Appellant had no redress under section 6(1) of the Constitution against them, because, inter alia, the police were not persons entitled collectively or individually to exercise the plenitude of the legislative, executive or judicial power of the State.

p. 91 11.43-44

p.92 11.40 et seq.

Hinds vs. The Queen 1977 A.C. 195;
1976 1 All E.R. 353

34. In conclusion, Rees J.A. held that the protection of the Appellant against any irregular conduct of a police officer in the circumstances of the instant proceedings was by the ordinary law of the land.

p.92 11.40 et seq.

35. Sir Isaac Hyatali C.J. approved the reasoning and concurred with the judgment of Rees J.A., but also added his own findings and conclusions that there is no authority that the right mentioned in section 2(c)(ii) of the Constitution existed at common law; that there was no such right at common law; and that section 2(c)(ii) of the Constitution did not create any such right or any new right at all.

p.95 11. 18-19

p.96 11.22-27

p. 96 11.32-34

p.95 11.17-18;
p.96 11. 10-14

De Freitas vs. Benny 1975 3 W.L.R. 388

36. Sir Isaac Hyatali C.J. further concluded that since the law in force at the commencement of the Constitution did not contain any such right as in section 2(c)(ii) of the Constitution section 3 of the Constitution prevailed in the circumstances.

p.96 11.35-43

37. Corbin J.A. concurred with the reasons and conclusions in the judgments of both Sir Isaac Hyatali C.J. and Rees J.A.

p.97 11.22-25

38. It is further submitted that the Court of Appeal was right in holding that the acts of the police officers were not acts which could give rise to relief under section 6 of the Constitution.

The Constitution protects the rights of individuals against infringement by the State or a public authority (see Maharaj vs. Attorney General of Trinidad and Tobago 1978 2 W.L.R. 902). The acts of the police officers complained of in this appeal are in the category of acts which would give rise to a cause of action in private law for wrongful arrest, detention or assault. The conduct falls outside the area of public law, and sufficient remedies exist in tort to redress excessive or oppressive conduct by police officers.

39. On the 22nd February, 1978, the Judicial Committee of the Privy Council, made an Order granting the Appellant special leave to appeal to Her Majesty in Council against the judgment of the Court of Appeal of Trinidad and Tobago.

Doc.26 pp. 98-99

40. The Respondent respectfully submits that the judgment of the Court of Appeal is right and this appeal should be dismissed for the following (among others),

REASONS

1. Because section 2(c)(ii) of the 1962 Constitution of Trinidad and Tobago neither created nor proclaimed any right, and Georges J. therefore erred in law in holding that the section created and/or proclaimed a right in terms and guaranteed its continuance.

2. Because the right mentioned in section 2(c)(ii) of the Constitution did not exist at common law in Trinidad and Tobago immediately prior to the commencement of the Constitution and, therefore, Georges J. misdirected himself in law in holding that it so existed.

3. Because the acts of the police which the Appellant complained of were not acts of persons entitled to exercise the plenitude of the executive or the legislative or the

judicial power of the State of Trinidad and Tobago or of a public authority, and therefore, the Appellant had no redress under and by virtue of section 6(1) of the Constitution.

4. Because having lawfully arrested the Appellant, the police were entitled to refuse access to his legal adviser in circumstances where delay or hindrance to the process of investigation might have occurred.

5. Because assuming that the right mentioned in section 2(c)(ii) of the Constitution existed, at the material time, the judgment of Georges J. is unreasonable, and the declaration granted by him cannot be supported, having regard to the evidence, and in particular, because there is no evidence on which Georges J. could have found any infringement of the aspect of the alleged right which concerned the retaining of a legal adviser of the Appellant's choice.

6. Because the judgment of the Court of Appeal is right.

W.J. ALEXANDER Q.C.

C. BROOKS

G. NEWMAN

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CHARLES RUSSELL & CO

Hale Court

Lincoln's Inn

London WC2

Solicitors for the Respondent