



JUDGMENT

Everton Welch (Appellant) v The Attorney General of Antigua and Barbuda (Respondent)

From the Court of Appeal of Antigua and Barbuda

before

**Lord Hope
Lady Hale
Lord Kerr
Lord Wilson
Lord Hughes**

**JUDGMENT DELIVERED BY
LORD KERR
ON**

9 JULY 2013

Heard on 24 April 2013

Appellant

Dr David Dorsett Ph.D
Mr Fitzmore Harris

(Instructed by MA Law
(Solicitors) LLP)

Respondent

Justin Simon QC
(Attorney General)
Carla Brookes-Harris
(Crown Solicitor)
(Instructed by Charles
Russell LLP)

LORD KERR:

1. In the early hours of 8 January 1993, Everton Welch and Eustace Armstrong were disturbed by Rolston Samuel while they were engaged in burglary of Mr Samuel's house. Welch and Armstrong turned on Mr Samuel and beat him so severely that he died of his injuries some short time later. Post mortem examination of Mr Samuel's body established that he had sustained multiple wounds to his face, scalp and neck.

2. Welch was two months short of his eighteenth birthday at the time of the murder. He was arrested on 10 February 1993. He was held in custody until his trial in June 1994. On 20 June 1994 he was convicted of Mr Samuel's murder and was sentenced to be detained during Her Majesty's pleasure. He remained in prison on foot of this sentence until 14 December 2011. The sentence was passed under section 3(1) of the Offences against the Person Act. In its material part this provides:

“Upon every conviction for murder, the court shall pronounce sentence of death ... provided that sentence of death shall not be pronounced on or recorded against a person convicted of an offence if it appears to the court that at the time when the offence was committed he was under the age of eighteen years; but in lieu thereof the court shall sentence him to be detained during Her Majesty's pleasure; and if so sentenced he shall be liable to be detained in such place and under such conditions as the Governor-General may direct ...”

3. In *Browne v The Queen* [2000] 1 AC 45, the Board, following the decision of the House of Lords in *R v Secretary of State for the Home Department Ex p. Venables* [1998] AC 407, held that a sentence of detention at the Governor-General's pleasure was contrary to the constitution of Saint Christopher and Nevis because it constituted a deprivation of liberty otherwise than in execution of an order or sentence of the court. Since the Governor-General was part of the executive and since the selection of punishment was an integral part of the administration of justice, a sentence which depended on the pleasure of the Governor-General was not compatible with the constitutional separation of powers.

4. In *Director of Public Prosecutions of Jamaica v Mollison* [2003] 2 AC 411 the respondent had been convicted of a murder committed when he was 16 years old and was sentenced to be detained during the Governor-General's pleasure in accordance with section 29 of the Juveniles Act 1951. On his appeal against sentence the Court of Appeal of Jamaica ruled that the sentence was unconstitutional and that section 29

should be modified in accordance with section 4(1) of the Jamaica (Constitution) Order in Council 1962 (SI 1962/1550) to provide for detention at the court's pleasure. The Director of Public Prosecutions appealed that decision to the Judicial Committee of the Privy Council. The Board, dismissing the appeal, held that, by giving the Governor-General as an officer of the executive the power to determine the measure of an offender's punishment, section 29 of the 1951 Act infringed the principle of the separation of powers implicit in all constitutions based on the Westminster model, including that of Jamaica; that section 4(1) of the 1962 Order empowered the court to modify and adapt existing laws so as to bring them into conformity with the Constitution; and that, accordingly, section 29 of the 1951 Act ought to be modified throughout by substituting the words "the court" for "Her Majesty" or "the Governor-General".

5. Section 5(1)(b) of the Antigua and Barbuda Constitution Order 1981 provides that no person shall be deprived of his liberty save as may be authorised by law in execution of the sentence or order of a court in respect of a criminal offence of which he has been convicted. On foot of this provision and in light of the decisions of the Board in *Browne* and *Mollison*, Everton Welch applied on 21 December 2009 for a declaration that his right to liberty under section 5 of the Constitution had been contravened on the basis that the sentence of detention during Her Majesty's pleasure was unconstitutional. He claimed other relief including an order that he was entitled to compensation for deprivation of his liberty. That claim was made under section 5(7) of the Constitution. It provides:

“Any person who is unlawfully arrested or detained by any other person shall, subject to such defences as may be provided by law, be entitled to compensation for such unlawful arrest or detention from the person who made the arrest or effected the detention, from any person or authority on whose behalf the person making the arrest or effecting the detention was acting or from them both ...”

6. Delivering judgment in the High Court on 4 March 2011 Michel J held that in accordance with the Board's decisions in *Browne* and *Mollison* section 3(1) of the Offences against the Person Act contravened the Constitution and that the sentence imposed on Welch was invalid. He further held that the section should be modified by substituting “the court's pleasure” for “Her Majesty's pleasure”. The sentence on Welch was therefore “corrected” to a sentence of detention at the court's pleasure. In para 21 of his judgment Michel J ordered that a review of the prisoner's detention should be undertaken:

“21. The court directs that the claimant should be brought before a court at the earliest convenient time on an application to review the detention of the claimant at Her Majesty's Prison from 1993 to 2011 so that the

court can make its pleasure known in relation to the continued detention of the claimant. It may well be that the time already served in prison by the claimant and his behaviour whilst in prison may earn him immediate release from prison, but this is to be determined by the court upon application by the claimant to the court to make known its pleasure.”

7. The review ordered by Michel J took place before Floyd J on 28 October 2011. On 14 December 2011 the judge gave his ruling. Having reviewed a number of authorities and the appellant’s personal circumstances, he concluded that “to incarcerate Mr Everton Welch any further would not serve the interests of justice”. Welch’s immediate release was ordered.

8. In delivering judgment on the appellant’s claim in March 2011, Michel J stated at para 22 that he did not consider that “any award of damages – whether compensatory or exemplary – [was] appropriate”. An appeal against this judgment was heard before the Court of Appeal (Pereira P, Baptiste JA, and Mitchell JA (acting)) on 19 May 2011. The appeal was dismissed. In a short *ex tempore* ruling, Mitchell JA (acting), delivering the judgment of the court, stated that the appellant was not entitled to compensation as he “would have been imprisoned in any event”.

9. The basis on which the Court of Appeal concluded that the appellant would have been in prison “in any event” was not explained and the Board is satisfied that, at the time that its judgment was delivered, the court did not have material before it on which it could properly reach that conclusion. The review of the appellant’s sentence which Michel J had ordered did not take place until some five months after the Court of Appeal had given its decision. The review of the relevant judicial authorities carried out subsequently by Floyd J amply demonstrates that a period served of significantly less than that which the appellant had already served (of just less than 19 years) might well have been the outcome of a constitutionally correct sentence.

10. On the hearing before Floyd J, counsel for Welch had relied principally on two previously decided cases on sentencing, *Elvon Barry v The Queen* (unreported) 14 May 2007 (ECSC Criminal Appeals Nos 5, 9 and 10 of 2004 and *Peter Solomon v The Queen* (unreported) 18 June 2007 ECSC Criminal Appeal No 4 of 2005). In the *Barry* case three defendants were convicted of a murder committed during a robbery. One of the three, a Zoyd Clement, was less than 18 years old at the time of sentencing. He was ordered to be detained at the pleasure of the court for a period not exceeding 15 years and it was ordered that the sentence was to be reviewed every 5 years. In the case of *Solomon* the appellant was convicted of the murder of his uncle. He was 16 years old when he committed the offence. He had been sentenced to twenty-five years imprisonment. On appeal, this was reduced to the same sentence as had been imposed in the *Barry* case. The Court of Appeal stated that this was “to maintain a consistency of practice within the jurisdiction”.

11. On the strength of these decisions, counsel for the appellant submitted to Floyd J that the appropriate sentence in the present case was the same as had been imposed in *Barry and Solomon*. The judge held that those cases did not establish “a ceiling of 15 years for crimes of murder where the offender was under the age of 18 years.” The Board considers that he was correct so to find. The facts of both cases differ significantly from each other and from the particulars of the present appeal. Of course, the youth of the offenders is similar in all three cases but this is merely one factor to be taken into account. In the present case, for instance, evidence was available to Floyd J of a significant reform on the part of the appellant over the time that he had spent in prison. Such evidence could not have been available to the sentencing courts in the *Barry and Solomon* cases because the sentencing exercise in each of those cases was conducted at a time much more proximate to the commission of the offences.

12. It is notable that Floyd J did not express a view as to what the appropriate sentence on the appellant *ought* to have been, merely that the interests of justice would not be served by the appellant’s continued incarceration. The Board is of the clear view that, before any decision on the question of the appellant’s entitlement to compensation under the provisions of section 5(7) of the Constitution can be reached, a judgment must be made as to what sentence should have been passed and what period of imprisonment ought to have been served by him, had the requirements of the Constitution been observed. It was accepted by the respondent that the correct sentence would have included a provision for periodic review of whether the appellant should continue to be detained. This consideration must inform any assessment of how long the appellant would in fact have served had that stipulation been made.

13. It has also been accepted by the respondent that the appellant is entitled (at least) to nominal damages in that he was detained under an order of the court that has been subsequently found to be invalid. But compensatory damages beyond nominal compensation may only be awarded if it is shown that the appellant has been detained for a longer period than he would otherwise have been if the appropriate and lawful sentence had been passed.

14. In *R (WL (Congo)) v Secretary of State for the Home Department (JUSTICE intervening)* [2012] 1 AC 245 (“WL”) the claimants were detained pending deportation, under the Immigration Act 1971 following the completion of their prison sentences. Between April 2006 and September 2008, the Secretary of State’s published policy on detention of foreign national prisoners under her immigration powers was that there was a presumption in favour of release, although detention could be justified in some circumstances. However, during that period the Secretary of State applied a quite different unpublished policy (“the unpublished policy”). On 9 September 2008, the Secretary of State published a policy which included a presumption of detention and withdrew all references to a presumption of release. The claimants succeeded in challenging the lawfulness of their detention on the ground they had been unlawfully

detained by the Secretary of State as a result of her application of the unpublished policy. On their claim for compensatory and vindictory damages, by a majority, the Supreme Court held that the claimants had suffered no loss or damage as a result of the unlawful exercise of the power to detain. If the power to detain had been exercised by the application of the policies and in application of the correct principles it was inevitable that the claimants would have been detained. They should receive no more than nominal damages.

15. At para 95 Lord Dyson, who delivered the leading judgment for the majority said this:

“The question here is simply whether, on the hypothesis under consideration, the victims of the false imprisonment have suffered any loss which should be compensated in more than nominal damages. Exemplary damages apart, the purpose of damages is to compensate the victims of civil wrongs for the loss and damage that the wrongs have caused. If the power to detain had been exercised by the application of lawful policies ... it is inevitable that the appellants would have been detained. In short, they suffered no loss or damage as a result of the unlawful exercise of the power to detain. They should receive no more than nominal damages.”

16. It is therefore clear that the question of the sentence which should have been served must be addressed before it can be decided whether the appellant is entitled to recover compensatory damages. The Board is satisfied that this issue should be determined by a judge of the Eastern Caribbean Supreme Court sitting in Antigua and Barbuda familiar with sentencing levels and guidelines in that jurisdiction. It may, moreover, be necessary to receive evidence in order to determine that issue and, plainly, it would be more suitable that this be received and assessed by a first instance judge. The Board will therefore remit the matter to the Supreme Court in order to determine whether, if the proper sentence had been passed, the appellant would have been released earlier than he was on foot of Floyd J’s ruling and, if so, to what amount of compensation he should be entitled.

17. The judge who deals with the appellant’s claim on remittal will have to consider the question of whether compensatory, vindictory or exemplary damages should be recovered by the appellant. As to compensatory damages, if he or she concludes that the appellant was detained longer than he ought to have been, the judge will need to consider, in addition to compensation for being detained for such longer period, whether the lack of any review of his detention during the period of his imprisonment had any particular effect personal to the appellant, on him. This possible aspect of a claim to compensation was touched on by Lord Hope of Craighead, delivering the judgment of the Board in *Seepersad v Attorney General of*

Trinidad and Tobago [2012] UKPC 4, [2013] 1 AC 659, a case with many features similar to the present appeal. Although some review of the appellants' detention had been conducted, it was held that they fell well short of the kind of review that was regarded as necessary in *R v Secretary of State for the Home Department, Ex p Venables* [1998] AC 407, [1997] 3 All ER 97, [1997] 3 WLR 23 and *R (Smith) v Secretary of State for the Home Department* [2005] UKHL 51, [2006] 1 AC 159 [2006] 1 All ER 407. In consequence, Lord Hope at para 39 said:

“There is no indication in the reports that the Board has been shown that any consideration was being given to the question as to how long it would be appropriate for the appellants to be detained or to their progress and development while they were in custody. They were given no reason to think that their detention was not to continue indefinitely. The possibility that this breach of their constitutional rights had a significant effect on them cannot be entirely ruled out. There is, therefore, something to be said for the view that an award of damages might be appropriate.”

18. The Board considers, therefore, that the question whether the absence of a review in the appellant's case bore on his psychological reaction to his sentence is something which should be carefully evaluated.

19. As to vindictory damages, this is an aspect of compensation for false imprisonment which is not free from controversy. In *WL* at paras 222-233 Lord Collins of Mapesbury conducted a valuable survey of decisions from a number of countries on the circumstances in which this species of compensation might be awarded. The Board commends this survey to the judge who will deal with the case. It would be wrong to pre-empt his or her consideration of the matter but useful guidance can perhaps be obtained from the observations of Lord Nicholls of Birkenhead in *Attorney General of Trinidad and Tobago v Ramanoop* [2006] 1 AC 328 para 19:

“An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach and deter further breaches. All these elements have a place in this additional award ... Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the

latter sense is not its object. Accordingly, the expressions “punitive damages” or “exemplary damages” are better avoided as descriptions of this type of additional award.”

20. It may perhaps be said that if there is any scope for the award of vindicatory damages where exemplary damages are not appropriate, it must be very limited indeed. Such an award could only be justified where the declaration that a claimant's right has been infringed provides insufficiently emphatic recognition of the seriousness of the defendant's default – see para 256 of *WL*.

21. While it will be for the judge who deals with the remitted hearing to determine the question of exemplary damages, should they be claimed, it does not appear to the Board that this is a case in which punitive compensation is appropriate, largely for the reasons given by Lord Dyson in para 150 of *WL*:

“The relevant principles are not in doubt. Exemplary damages may be awarded in three categories of case: see per Lord Devlin in *Rookes v Barnard* [1964] AC 1129. The category which is relevant for present purposes is that there has been 'an arbitrary and outrageous use of executive power' (p 1223) and 'oppressive, arbitrary or unconstitutional action by the servants of the government' p 1226. In this category of case, the purpose of exemplary damages is to restrain the gross misuse of power: see *AB v South West Water Services Ltd* [1993] QB 507, 529 per Sir Thomas Bingham MR. It must be shown that the 'conscious wrongdoing by a defendant is so outrageous, his disregard of the claimant's rights so contumelious, that something more [than compensatory damages] is needed to show that the law will not tolerate such behaviour' as a 'remedy of last resort': see *Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 AC 122 para 63 per Lord Nicholls.”

22. Whatever may be said about the recoverability of exemplary damages, it would not be appropriate to award both exemplary *and* vindicatory damages. Lord Nicholls's recognition that an award of vindicatory damages covered much the same ground as that involved in exemplary or punitive damages is reflected in the more recent decision of the Privy Council in *Takitota v Attorney General* [2009] UKPC 11, [2009] 4 LRC 807 where Lord Carswell said at para 16:

“[I]t would not be appropriate to make an award both by way of exemplary damages and for breach of constitutional rights. When the vindicatory function of the latter head of damages has been discharged,

with the element of deterrence that a substantial award carries with it, the purpose of exemplary damages has largely been achieved.”

23. Whatever may be the outcome of the judge’s deliberations on the question of compensation, the Board is therefore of the view that an award of both exemplary and vindicatory damages would be duplicative and could not be justified.