[2016 Gib LR 64]

BONNICI v. ATTORNEY-GENERAL

SUPREME COURT (Dudley, C.J.): February 17th, 2016

Estoppel—res judicata—issues available in previous proceedings—no re-litigation of issues which could and should have been raised in previous proceedings—not abusive for offender to apply under 2006 Constitution, s.16 to challenge system for recommending of minimum term of imprisonment for life sentence even if could have been raised at time of sentencing

Sentencing—life sentence—recommended minimum term—court not Minister to decide minimum term—Criminal Offences Act 1960, s.59(2), Crimes Act 2011, s.149(3) and Criminal Procedure and Evidence Act 2011, s.513(1) construed under 2006 Constitution, Annex 2, s.2(1) so as to avoid violation of 2006 Constitution, s.8

The claimant applied to have his minimum term of imprisonment set aside.

The claimant had been sentenced to life imprisonment for, *inter alia*, attempted murder. The Supreme Court had recommended to the Minister for Justice under s.59(2) of the Criminal Offences Act 1960 (now the Crimes Act 2011, s.149(3)) that he serve a minimum term of 17 years and 55 days' imprisonment before being considered for release on licence. He applied under s.16 of the Constitution to have this minimum term set aside.

He submitted that the provisions of the Criminal Offences Act 1960, s.59(2), the Crimes Act 2011, s.149(3) and the Criminal Procedure and Evidence Act 2011, s.513(1) whereby the court only made a recommendation and the actual decision as to the minimum term was taken by the Minister for Justice (or the Governor under s.59(2)) violated the right to a fair trial in s.8 of the Constitution.

The court also considered whether the claimant's application was barred on the grounds that he could and should have but did not raise this point during the sentencing proceedings or on appeal against sentence, or that the court's task in sentencing him had been completed when it imposed the life sentence and the recommendation as to the minimum term, making it *functus officio*.

Held, allowing the application:

(1) The application would be allowed because the fact that, under the Criminal Offences Act 1960, s.59(2), the Crimes Act 2011, s.149(3) and the Criminal Procedure and Evidence Act 2011, s.513(1), the decision as to the length of the minimum term of imprisonment was taken by the Minister for Justice rather than the court entailed a violation of s.8 of the Constitution. The imposition of a sentence and the setting of a minimum term were part of the trial process and had to be undertaken by an independent and impartial tribunal rather than by a member of the Executive. Pursuant to s.2(1) of Annex 2 to the Constitution (which enabled the court to read existing laws in such a way as to make them compatible with the Constitution), these sections would be construed as requiring the court to set the minimum term of imprisonment, and the claimant's case would be remitted to the Supreme Court to enable this (paras. 10–16).

(2) The claimant was not barred from raising this issue through an application under s.16 of the Constitution. The principle whereby a party was precluded from raising in subsequent proceedings matters which were not but could and should have been raised in earlier proceedings was intended to limit abusive and duplicative litigation and, although he could have raised the issue at the time of sentencing or on appeal against sentence, the present application was not abusive (para. 7).

(3) The court was not *functus officio* because the proceedings in which the claimant had been sentenced to life imprisonment and the minimum term had been recommended were undertaken in violation of s.8 of the Constitution and were therefore a nullity (para. 8).

Cases cited:

(1) *Arnold* v. *National Westminster Bank plc*, [1991] 2 A.C. 93; [1991] 2 W.L.R. 1177; [1991] 3 All E.R. 41; (1991), 62 P. & C.R. 490; [1991] 2 E.G.L.R. 109, referred to.

(2) *Henderson* v. *Henderson*, [1843–60] All E.R. Rep. 378; (1843), 3 Hare 100; 67 E.R. 313, distinguished.

(3) *R.* v. *Yasain*, [2016] Q.B. 146; [2015] 3 W.L.R. 1571; [2016] 2 All E.R. 686; [2015] 2 Cr. App. R. 393; [2015] EWCA Crim 1277, applied.

(4) *R. (Anderson)* v. *Home Secy.*, [2003] 1 A.C. 837; [2002] 3 W.L.R. 1800; [2002] 4 All E.R. 1089; [2003] 1 Cr. App. R. 523; [2003] H.R.L.R. 7; [2003] U.K.H.R.R. 112; (2002), 13 B.H.R.C. 450; [2002] UKHL 46, applied.

(5) *Rojas* v. *Berllaque*, 2003–04 Gib LR 271; [2004] 1 W.L.R. 201; [2004] H.R.L.R. 7; (2003), 15 B.H.R.C. 404; [2003] UKPC 76, applied.

(6) *Virgin Atlantic Airways Ltd.* v. *Zodiac Seats UK Ltd.*, [2014] A.C. 160; [2013] 3 W.L.R. 299; [2013] 4 All E.R. 715; [2013] UKSC 46, considered.

Legislation construed:

Crimes Act 2011, s.149(3): The relevant terms of this sub-section are set out at para. 9.

Criminal Offences Act 1960, s.59(2): The relevant terms of this sub-section are set out at para. 9.

Criminal Procedure and Evidence Act 2011, s.513(1): The relevant terms of this sub-section are set out at para. 14.

Gibraltar Constitution Order 2006 (Unnumbered S.I. 2006, p.11593), Annex 1, s.8(1):

> "If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law; and, except with his own consent or as may be prescribed by law, the trial shall not take place in his absence."

Annex 2, s.2(1): The relevant terms of this sub-section are set out at para. 13.

C. Salter and *J. Phillips* for the claimant;
R.R. Rhoda, Q.C. and *C. Gomez* for the defendant.

1 **DUDLEY, C.J.:** This is a Part 8 claim in which relief is sought pursuant to s.16 of the Constitution.

Background

2 The claimant ("DB") is serving concurrent sentences of life imprisonment for two offences, (i) grievous bodily harm with intent, and (ii) attempted murder. When imposing the sentence on April 16th, 2012, I made a recommendation pursuant to s.59(2) of the Criminal Offences Act 1960 (now repealed) that DB serve a minimum period of 17 years and 55 days before being considered for release on licence. Thereafter, DB appealed to the Court of Appeal. Kennedy, P., who delivered the only judgment of the court, with which the other members agreed, observed that I had been right in making a recommendation and explaining how I had reached that figure. However, the Court of Appeal held that it had no jurisdiction to hear the appeal because the legislation made provision for the making of a recommendation rather than the imposition of a sentence. Notwithstanding, the court opined that the appropriate recommendation should have been one of 12 years and 4 months from which, as at the date of that judgment, 675 days in custody would need to be deducted, with the rider that "When, if ever, it may be safe for the appellant to be released, is not something we can decide."

3 At the time that I imposed the sentences of life imprisonment with the aforesaid recommendation, I took the view that the effect of s.8 when read together with s.59 of the Criminal Offences Act (now repealed) was that

the offence of attempted murder is punishable with a mandatory sentence of life imprisonment. Mr. Salter submits that the literal construction of those provisions cannot reflect the intention of the legislature. However, that issue is not challenged because it is accepted that I was right to conclude that a life sentence was either mandatory or, if discretionary, inevitable.

4 At a directions hearing, I raised the question of whether, in view of the fact that I had made the recommendation, it was appropriate for me to deal with this claim. Having accepted Mr. Salter's submissions that I was best placed to deal with this matter, I retained its conduct.

5 The substantive issue that arises is whether the making of a recommendation of the minimum period which is to elapse before DB can be released on licence by the Minister for Justice, pursuant to s.149(3) of the Crimes Act 2011 (previously by the Governor pursuant to s.59 of the Criminal Offences Act), as opposed to specifying the minimum term to be actually served before being considered for release on licence, breaches the right to a fair trial protected by s.8 of the Constitution.

Preliminary issues

6 Two related preliminary issues arise, namely whether the principle in *Henderson* v. *Henderson* (2) is engaged and/or whether this court is *functus officio*.

7 The principle, first formulated by Wigram, V.-C. in *Henderson* v. *Henderson* and more fully examined by the House of Lords in *Arnold* v. *National Westminster Bank plc* (1), was more recently considered by Lord Sumption, J.S.C. in *Virgin Atlantic Airways Ltd.* v. *Zodiac Seats UK Ltd.* (6) ([2014] A.C. 160, at para. 17), who defined it as a principle "which precludes a party from raising in subsequent proceedings matters which were not, but could and should have been raised in the earlier ones." He went on to consider in some detail whether the principle in *Henderson* v. *Henderson* was concerned with abuse of process and/or *res judicata*. For present purposes, it is sufficient to note that the court held that the purpose of the principle was to limit abusive and duplicative litigation and that cause of action estoppel is absolute only in relation to points actually decided. The submission now being advanced on behalf of DB could very properly have been raised at the time of sentencing or at the hearing of the appeal, but advancing it now in the context of an alleged breach of a constitutional right cannot be categorized as abusive.

8 There is the related issue of whether the Supreme Court's task in sentencing DB was completed when I imposed the life sentence and made the recommendation, thereby making this court *functus officio*. The answer to that is to be found in the judgment of Lord Thomas, C.J. in *R.* v. *Yasain* (3) who, reviewing the powers of the English Court of Appeal to

reopen an appeal to correct an error said to have caused real injustice, said this ([2016] Q.B. 146, at para. 24):

> "If a hearing has taken place which in effect is a nullity, the court cannot be functus officio. There can therefore be no logical difficulty in there being a further hearing. The court has not performed its function, as the appellate proceedings have not in law taken place. The fact that the court has pronounced an order and that a record of the court's order has been made by the proper officer in records of the Crown Court, cannot alter the position."

Applying that principle to the present case, it must follow that, if the statutory regime allowing for the making of a recommendation as opposed to fixing a tariff offends the Constitution, that part of the sentencing process was in the nature of a nullity and the error must be rectified at a further hearing.

The substantive issue

9 As aforesaid, DB was dealt with pursuant to s.59(2) of the Criminal Offences Act 1960 (now repealed) which provided:

> "On sentencing any person convicted of murder to imprisonment for life the court may at the same time declare the period which it recommends to the Governor as the minimum period which in its view should elapse before the Governor orders the release of that person on licence under section 35A of the Prison Act."

Whilst, in turn, s.59(3) provided: "No person convicted of murder shall be released by the Governor on licence under section 35A of the Prison Act unless the Governor has prior to such release consulted the Chief Justice, and the trial judge if available." It is instructive to note that the provision now applicable and which is to be found in s.149(3) of the Crimes Act 2011 is of similar effect. It provides:

> "When sentencing any person convicted of murder to imprisonment for life the court may declare the period which it recommends to the Minister as the minimum period which in its view should elapse before the Minister orders the release of that person on licence under section 54 of the Prison Act, 2011."

10 This claim is predicated upon the House of Lords decision in *R. (Anderson)* v. *Home Secy.* (4), which considered a similar regime in England in which the trial judge and the Lord Chief Justice made recommendations but the decision-making power as to how long a convicted murderer should remain in prison remained with the Home Secretary. *Anderson* is authority for the proposition that, for the purposes of the right to a fair hearing guaranteed by art. 6(1) of the European

Convention for the Protection of Human Rights and Fundamental Freedoms, the imposition of a sentence is part of the trial process. In the context of that case, it was held that the Home Secretary was performing a sentencing function and that tariff fixing was legally indistinguishable from sentencing and the tariff therefore had to be set by an independent and impartial tribunal and not by a member of the Executive. For the purposes of the submissions advanced, there is no material difference between art. 6(1) of the Convention and s.8(1) of the Constitution.

11 In the skeleton argument filed on behalf of the defendant, the submission advanced was to the effect that *Anderson* could be distinguished on the basis that, in Gibraltar, s.54 of the Prison Act 2011 requires the Minister (subject to the power to seek a review by the court) to act on the advice of the Parole Board to release a prisoner on licence. That submission was properly abandoned. The Parole Board evidently plays no part in the sentencing process or in the determination of the tariff but rather, as Mr. Salter puts it, is concerned with ensuring the safety of individuals and the public in general should a prisoner be released. It is also of significance that, in respect of release on licence, s.53(1)(a) of the Prison Act provides for a process by which the Parole Board adjudicates only after a case is referred to it by the Minister. Although no formal concession is made on behalf of Her Majesty's Attorney-General, no other submission is advanced in opposition to the substantive issue.

12 Applying the principles of *Anderson* to the statutory and constitutional regime that applies in Gibraltar, I am of the view that s.59 of the Criminal Offences Act, pursuant to which I made the recommendation, and s.149(3) of the Crimes Act, which replaced it (but continues to apply a similar regime), contravene the right to a fair hearing which is protected by s.8(1) of the Constitution.

The remedy

13 Annex 2, s.2(1) of the Constitution ("Transitional and Other Provisions") provides:

> "Subject to this section, the existing laws shall have effect on and after the appointed day as if they had been made in pursuance of the Constitution and shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution."

In *Rojas* v. *Berllaque* (5), dealing with an identical provision in the Gibraltar Constitution Order 1969, Lord Nicholls said (2003–04 Gib LR 271, at para. 24):

> "In the usual course, the process of construction involves interpreting a provision in a manner which will give effect to the intention the

> court reasonably imputes to the legislature in respect of the language used. The exercise required by these transitional provisions is different. The court is enjoined, without any qualification, to construe the offending legislation with whatever modifications are necessary to bring it into conformity with the Constitution . . ."

and went on to observe that there may be cases where an offending law does not lend itself to such an approach. But in this case, as in *Rojas*, it is possible to do so. In my view, s.149(3) of the Crimes Act 2011 is to be construed in the following manner: "When sentencing any person convicted of murder to imprisonment for life the court shall state the minimum period which should elapse before the Minister orders the release of that person on licence under section 54 of the Prison Act, 2011." If the seriousness of an offence, or any such offence in combination with other offences, is exceptionally high, the minimum period can be a whole life term.

14 Section 513(1) of the Criminal Procedure and Evidence Act 2011 also falls to be construed in a manner which conforms with the Constitution. It provides: "If a person is sentenced to a mandatory life sentence for an offence, the court may state the minimum term that the court recommends the person should serve in prison, by reference to the starting points specified in the following subsections." That provision is to be construed as follows: "If a person is sentenced to a mandatory life sentence for an offence, the court shall state the minimum term that the person shall serve in prison, by reference to the starting points specified in the following subsections."

15 I shall hear counsel as to whether any other related provisions also fall to be modified so as to bring them into conformity with the Constitution. Moreover, I make the point that, in modifying these sections, I do not in any way seek to pre-empt Parliament, which can clearly enact such provisions as it considers appropriate to make these sections conform with the Constitution.

16 As regards DB, I shall instruct the Registry to relist the criminal case so that I may proceed to fix the minimum period. I shall hear submissions in that action as to how I should proceed. However, my tentative view is that establishing the minimum period has *de facto* already been both undertaken by the Supreme Court and reviewed by the Court of Appeal. It may be that all that is required is for me to fix a minimum period in line with the views expressed by the Court of Appeal.

17 Orders are made accordingly and I shall hear the parties as to costs.

Orders accordingly.