

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CV 2007-04514

Between

GILBERT EVELYN

Claimant

And

ATTORNEY GENERAL OF TRINIDAD AND TOBAGO

Defendant

Before the Honourable Mr. Justice G. Smith

Appearances:

Mr. M. Seepersad for the Claimant

Mr. D. Byam for the Defendant

REASONS

INTRODUCTION:

1. The Claimant was charged for two murders arising from a fire he had set to a dwelling house. He was tried in 1996 and found guilty of manslaughter on the basis of diminished responsibility. The trial judge ordered that the Claimant be detained “until the President’s pleasure is known” pursuant to section 4A(6) of the Offences Against the Persons Act Ch 11:08.

The Claimant has been detained at a normal prison since his conviction. He has not been treated for any mental illness nor has his detention been reviewed at any time.

The Claimant is now challenging both (a) the order for his detention and (b) the manner of his detention.

2. I find that:

(A) the order for the Claimant’s detention is not valid as it offends against the constitutional law principle of the separation of powers. I therefore vary the order for his detention to state that he be detained “until the Court’s pleasure is known.”

(B) The manner of the Claimant’s detention offends against sections 4(a) and (b) and 5(2) a and (h) of the Constitution.

I therefore order that the Claimant is entitled to have his detention reviewed periodically and that he be brought before the High Court as soon as practicable for a review of his detention.

(C) For reasons that will be stated below, I find that the Claimant is not entitled to damages.

I also order the Defendant to pay the Claimant's costs of this action.

ANALYSIS

3. I will now analyse this motion under the following three heads:

- (A) The order for the detention of the Claimant “until the President’s pleasure is known” is contrary to the principle of the separation of powers.
- (B) The manner of the Claimant’s detention offends the Constitution.
- (C) Damages.

A: The Order for the detention of the Claimant “until the President’s pleasure is known”, is contrary to the principle of the separation of powers.

4. It is settled law that sentencing is a Judicial function. Where the length of an individual’s sentence is to be determined by the Executive arm of government this is a breach of the constitutional law principle of the separation of powers. Such a sentence is not valid.

So for instance, it has been held that detention “at the Governor General’s pleasure” is contrary to the principle of the separation of powers (see Browne v R, [1999] 54 WIR (P.C.); so too is detention “at her Majesty’s pleasure” (see The D.P.P. v Mollison

P.C. appeal 88 of 2001 and Scantlebury v R 2005 68 WIR 88 (C.A. Barbados)). In Trinidad and Tobago, “detention during the State’s pleasure” was also held to be contrary to the separation of powers. (See Chuck Attin v The A.G. H.C.A. 2175 of 2003 as impliedly affirmed in Chuck Attin v The State Cv. App. 29 of 2004 per Sharma C.J. at pages 4 and 18).

5. In the present matter the order for the detention of the Claimant “until the President’s pleasure is known” imposes an indeterminate sentence on the Claimant. Further, this “sentence” at the President’s pleasure removes the discretion as to the length of the sentence from the Judiciary (the trial judge) to the Executive (the President). This sentence is contrary to the constitutional law principle of the separation of powers and is invalid.

6. A point to note is that the Claimant’s order for detention was made pursuant to section 4A (6) of the Offences Against the Person Act Ch 11:08 (The Act). This section of the Act only became law by virtue of a 1985 amendment to the Act. This amendment to the Act was made after the 1976 Republican Constitution of Trinidad and Tobago (the Constitution). Therefore, section 6 of the Constitution which validates existing law as at the date of the 1976 Constitution (the savings clause) does not apply. The unconstitutionality of the sentence is not saved from being declared invalid. Recent cases like Matthews v The State (2004) 64 WIR 412 (P.C.), Noreiga and Fonrose v The A.G. H.C.A. 247C, of 2003 and Ian Seepersad v The A.G. H.C.A. 2658 of 2003, are not directly relevant to this argument. These latter cases turned upon sentences which were

provided for in laws which pre-dated the 1976 Constitution and which were saved from being unconstitutional by section 6 of the Constitution (the savings clause).

7. The Defendant accepts that the order for the detention of the Claimant “until the President’s pleasure is known” is contrary to the constitutional law principle of the separation of powers. However, the Defendant argues that the sentence must still stand for the following two reasons:

- (i) The sentence cannot be challenged in this motion for constitutional relief.
- (ii) The sentence is Res Judicata and the Claimant must serve the sentence as pronounced by the Court.

I disagree with both of these arguments for the reasons that follow in paragraphs 8 and 9 below.

8. With respect to argument (i) above namely, the sentence cannot be challenged in this motion for constitutional relief; the Defendant argues that section 14 (1) of the Constitution only provides for a challenge to a law upon the basis that it contravenes one of the fundamental rights enshrined in sections 4 and 5 of the Constitution. The present challenge to the Claimant’s sentence is based upon the principle of the separation of powers. This principle is not even a part of the written Constitution therefore this motion for relief cannot be pursued.

This argument cannot succeed for the following two reasons:

Firstly, the procedure to challenge to a sentence after a criminal trial by an independent constitutional, motion has been tried and impliedly approved by the Court of

Appeal in the Chuck Attin cases cited at paragraph 4 above. In those cases the fact that the challenge to the sentence was based on the principle of the separation of powers was no bar to the motions.

Secondly, section 14 (1) is not an exclusive provision. It does not rule out a challenge based only on the breach of one the fundamental human rights provision. Section 14(1) itself says that the Motion to challenge a breach of human rights is “without prejudice to any other action with respect to the same matter which is lawfully available”. Therefore where, as here, another breach of constitutional law is alleged, there is nothing to prevent such a challenge by way of a motion.

9. With respect to argument (ii) above, namely, the sentence is res judicata, Counsel for the Defendant argues that there is authority from Canada for the proposition that where a person is convicted under a law which is later found to be unconstitutional he must nevertheless serve his sentence. (R v Thomas (1999) 1 S.C.R. 713).

This argument cannot succeed for the following two reasons:

Firstly, the Canadian authority defies rulings on this issue from the highest court of Trinidad and Tobago, namely, the Privy Council (see Browne v R, The D.P.P. v Mollison op cit and Griffith v R P.C. appeal 55 of 2003). It also defies the affirmation of the reversal of an unconstitutional sentence by the Court of Appeal in the Chuck Attin cases (see paragraph 4 above).

Secondly, for the doctrine of res judicata to apply, there must be identical issues to be decided. In a criminal trial the issue for decision is the innocence/guilt of an accused and the appropriate sentence to be applied. In this motion the issue to be decided

is the constitutionality of a sentence, not its appropriateness to the crime. Therefore, on a strict interpretation, the doctrine of res judicata does not apply, since the subject matter of the proceedings is different.

10. Since the Claimant's sentence is invalid. The next issue which arises is, what is to be done about his sentence? The practice in cases such as this where a sentence is held to be in violation of the principle of the separation of powers is that the court declares that the sentence is invalid and orders that the order for detention to be at the Court's pleasure etc. (See the Chuck Attin cases, Browne v R, The D.P.P. v Mollison, op cit).

Further, since this modification can be made to the sentence as provided by law, the Courts also declare that the relevant statutory provisions be modified to read detention "at the Court's pleasure" instead of striking down the entire statutory provision. (See the Chuck Attin cases, Browne v R, the D.P.P. v Mollison op cit).

I accordingly make the orders that appear at the end of this judgment.

11. The applicant also argues that the sentence of detention "until the President's pleasure is known" is also contrary to several of the provisions which guarantee fundamental human rights in sections 4 and 5 of the Constitution. This is an arguable point, but it would make no difference to the order that I would make in this case. In any event, I have already found that the Claimant's sentence is contrary to the constitutional law principle of the separation of powers. This finding is in keeping with accepted authority and is enough to dispose of this motion. I do not propose to make findings on what are essentially matters of academic interest.

B. The manner of the Claimant's detention offends the Constitution.

12. It is not disputed that since his incarceration in 1996, the Claimant has been detained at a normal prison. Further, he has not been treated for any mental illness nor has his continuing detention been reviewed at any time. The Claimant says that this is contrary to several of his fundamental rights as provided for in sections 4 and 5 of the Constitution.

The Defendant admits that the way in which the Claimant's detention has been carried out is unconstitutional and consents to orders to give effect to this (see paragraph 29 of the Defendant's written submissions).

I therefore declare that the Claimant is entitled to have his sentence reviewed periodically by the High Court commencing as soon as practicable. I also declare that the failure to review the continued detention of the Claimant is unconstitutional as it offends the following provisions of the Constitution.

- (i) Section 4(a), the right to liberty ...and the right not to be deprived thereof except by due process of law.
- (ii) Section 4 (b), the right of the individual to the protection of the law.
- (iii) Section 5 (2) (a) the prohibition against arbitrary detention or imprisonment of any person.
- (iv) Section 5 (2) (h), the prohibition against depriving a person of such procedural provisions are necessary for giving effect to his fundamental rights and freedoms.

In keeping with these orders, the Claimant's case should be reviewed along the guidelines suggested by the Court of Appeal in the Chuck Attin case (see pages 18 – 24 of Cv. App. 29 of 2004).

13. Another matter that arises here concerns the provisions of section 4A(7) of the Act. Section 4A(7) provides that after an order for the detention of the accused pursuant to section 4A(6), "The court shall as soon as practicable, report the finding of the jury and the detention of the person to the President who shall order the person to be dealt with as a mentally ill person in accordance with the laws governing the care and treatment of such persons or in any other manner he may think necessary."

This section purports to provide for the manner and also, the length of the Claimant's detention. These are Judicial functions which are being granted to the Executive (the President). In keeping with the constitutional law the principle of the separation of powers, this attempt to provide for the manner and length of the Claimant's detention is unconstitutional (and see paragraphs 4-6 above).

Unlike the case with section 4A(6), the whole of section 4A(7) is invalid (and see paragraph 10 above). The *raison d'être* of section 4A(7) is to provide for the manner and length of the detention of persons like the Claimant. An amendment would not cure this defective provision. I therefore declare section 4A(7) to be invalid.

C. Damages:

The Claimant is not entitled to damages

14. The continued detention of the Claimant without review has been arbitrary and unconstitutional. The Claimant contends that:

- (i) It is for the state to justify such an arbitrary and unconstitutional detention. The state has failed to lead any evidence justifying this detention.
- (ii) Further, the state must also justify that the Claimant poses a risk to the public or that he needs further treatment for the mental condition from which he suffered at the time of the offence. This is in keeping with the finding of diminished responsibility. The state has failed to lead any evidence to this effect.

That being the case, there is nothing to contradict an alleged presumption that the Claimant would have been released some time. The Claimant suggests that after one year of detention without review, his detention became arbitrary and unconstitutional and he should be awarded damages for unlawful detention from 1997 or 1998, to date.

This argument is without merit. I say so for the following two reasons:

15. Firstly, by section 4A(6) of the Act the accused must first be convicted of manslaughter. There being a conviction, a court must first decide what is the tariff period of a sentence as a punishment for his crime (see Chuck Attin op cit). Until such a tariff is established, any claim for damages is premature.

16. Secondly, under section 4A(6) of the act the jury must declare “whether the accused was so convicted by them on the ground of such abnormality of mind”.

By section 4A(1) the abnormality of mind that is relevant is “abnormality (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts...”.

There is therefore a presumption that the Claimant suffered some mental condition at the time of the offence. It is for the Claimant or his doctors to reverse this presumption upon further reviews of his case. Until a finding is made that the Claimant no longer suffers from an abnormality of mind, there can be no finding that he ought to be released. His claim for damages at this time is premature.

DISPOSITION:

17. In summary, I make the following orders to correct (a) the unconstitutionality of the sentence of the Claimant and (b) the manner it was carried out.

THIS COURT DECLARES that:

1. The sentencing order in relation to the Claimant passed on the 26th day of June 1996, that the Claimant be detained “until the President’s pleasure is known” is illegal as it offends against the principle of separation of powers enshrined in the Constitution.

2. Section 4A(6) of the Offences against the Person Act Chapter 11:08 be modified by deleting the words “until the President’s pleasure is known” and substituting therefor the words” until the Court’s pleasure is known”.
3. Section 4A(7) of the Offences against the Person Act Chapter 11:08 is unconstitutional as it offends against the principle of the separation of powers enshrined in the constitution.

IT IS ORDERED that there be an Order varying the sentence of the Honourable Mr. Justice Mc Millan so that it will read and have the effect that the Claimant be detained “until the Court’s pleasure is known”.

THIS COURT FURTHER DECLARES that:

1. The Claimant is entitled to have his sentence reviewed by the High Court periodically and accordingly that the Claimant be brought before the High Court sitting in its Criminal jurisdiction as soon as practicable for a review of his detention on a date to be fixed by the Registrar of the Supreme Court.
2. The failure to review the continued detention of the Claimant while incarcerated is unconstitutional as it offends Section 4(a) and (b) and Sections 5(2) (a) and (h) of the Constitution.

IT IS ALSO ORDERED that the Defendant do pay to the Claimant’s costs of this matter to be assessed by a Registrar and certified fit for Advocate Attorney-at-Law.

Dated the 6th July, 2009

Mr. Justice G. Smith
JUDGE