

# IN THE SEYCHELLES COURT OF APPEAL

**[Coram:** F. MacGregor (PCA), S. Domah (J.A.), M. Twomey (J.A.)

## **Constitutional Appeal SCA CP32/2013 (Appeal from Constitutional Court Decision 01/2013)**

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Alcide Bouchereau	1st Appellant
Kevin Barbé	2nd Appellant

Versus

The Superintendent of Prisons	1st Respondent
The Attorney General	2nd Respondent

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Heard: 06 April 2015  
Counsel: Alexia Amesbury for Appellants  
David Esparon for Respondents  
Delivered: 17 April 2015

### **JUDGMENT**

M. Twomey (J.A.)

- [1] The 1<sup>st</sup> Appellant was arrested on 25<sup>th</sup> October 2007 on suspicion of trafficking in a controlled drug and was convicted and sentenced to the minimum mandatory sentence of 8 years on 22<sup>nd</sup> September 2008. The 2<sup>nd</sup> Appellant was arrested on 7<sup>th</sup> April 2008 and convicted on the 15<sup>th</sup> day of May 2009 for the offence of importing a controlled drug and sentenced to a term of 11 years imprisonment. Whilst the Appellants' trial was ongoing but before they were convicted and sentenced, the Prisons (Amendment) Act 2008 came into force.
- [2] Section 2 of the Prisons (Amendment Act) 2008 amended section 30 of the Prisons Act 1991 to provide that:

“30. (1) Subject to subsections (2) and (3), a person sentenced, whether by one sentence or by consecutive sentences, to imprisonment for a period exceeding 30 days, including a person sentenced to imprisonment in default of payment of a fine or other sum of money, may, on the ground of his industry and good conduct while in prison be granted a remission of one third of the period of his imprisonment.

(2) Subsection (1) shall not apply to a prisoner –

(a) serving a sentence of imprisonment for life; or

(b) serving a sentence of imprisonment under the Misuse of Drugs Act, 1990; or

(c) detained in custody during the President's pleasure.”

[3] Insofar as the Appellants are concerned the amendment effectively removed the granting of remission for any persons serving a sentence under the Misuse of Drugs Act. They petitioned the Constitutional Court for a declaration that their constitutional rights had been contravened by the amendment in that they had a lawful expectation of the remission of their sentences. They further petitioned for a declaration that the Prisons (Amendment Act) was unconstitutional as it discriminated between persons convicted under the Misuse of Drugs Act and other prisoners. The 1<sup>st</sup> and 2<sup>nd</sup> Appellants further submitted that they had been remanded in custody since 25<sup>th</sup> October 2007 and 7<sup>th</sup> April 2008 respectively and that as their sentences were to take into account the time they had spent on remand, their sentences had effectively started in 2007 and 2008 respectively, well before the Prisons (Amendment Act) came into force, which provisions therefore did not apply to them.

[4] The Constitutional Court rejected the Appellants’ petition finding that none of his constitutional rights had been breached and that the amending provisions of the Prison’s Amendment Act 2008 was not inconsistent with the Constitution. He has now appealed the decision on the following grounds:

1. The Constitutional Court erred when it held that at the time of the conviction and sentence in respect of both Petitioners, the said amending Act had come into force and therefore the expectation of being entitled to remission was nullified and not in existence.

2. The Constitutional Court erred when it interpreted a right or freedom contained in

Chapter III if the constitution in such a way so as to suppress the said right in violation of Article 45 of the Constitution.

3. In rendering the judgement it did, the Court failed to obey the command of the Constitution contained in Article 48(a) to (d) despite pleading this specific point in the Court below.

4. The Court erred in holding that the Appellants “in this instant case have commenced serving their term of imprisonment after the 25th August 2008 and therefore they are not entitled to any relief” and this, despite the fact that documentary evidence was provided to the Court that the 1st Appellant was in custody from 25th October 2007 and as per the comment “time spent on remand i.e. 25th October 2007 to September 2008 to be counted towards the sentence.”

5. The Court erred in holding the Prison’s (Amendment) Act was not discriminatory and inconsistent with Article 5 of the Constitution and should be declared void to the extent of the inconsistency.

[5] The first ground of appeal relates to the principle of legitimate expectation. The Appellants have relied on the authorities of *Schmidt v Secretary of State for Home Affairs* [1969]2 Ch 149 (CA), *Salemi v Mackellar* (No. 2 [1977] 137 C.L.R 396 and *O’Reilly v Mackman* [1982] 3 WLR for their submission that the Respondents have derogated from the duty of applying remission to their sentences under the Prisons Act 1991 notwithstanding the Prisons (Amendment) Act 2008. We have difficulty in following this argument. As has been rightly pointed out by Mr. Esparon, Counsel for the Respondents, the doctrine of legitimate expectation obtains in administrative law. It is more often a procedural expectation that may ordinarily flow from a set of established circumstances. It is almost exclusively used in proceedings for judicial review where the principles of fairness and reasonableness dictate that a public body retain a long-standing practice or keep a promise in situations where a person has an expectation that it will do so. It ensures the predictability or certainty of procedure to ensure fairness in administrative actions. These are principles of good

administration.

- [6] The term legitimate expectation may be traced back to an *obiter dictum* of Lord Denning in *Schmidt* (supra):

“The speeches in *Ridge v Baldwin* show that an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest or I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say ....” (P. 170, our emphasis)

In *O'Reilly v Mackman* [1983] 2 AC 237 Lord Fraser clarified that:

“Legitimate or reasonable expectation may arise either from an express promise given on behalf of a public authority or the existence of a regular practice which the claimant can reasonably expect to continue.”

- [7] In this regard, a distinction can be drawn, on the one hand, between a legitimate expectation that certain procedures would be followed as a result of some promise or policy, and, on the other hand, that a substantive benefit or right would be conferred or obtained when some statutory discretion came to be exercised. In limited circumstances, the court might find in favour of particular claimant when representations are made to him by the administrative body in the exercise of such discretion, see for example *R. v. Inland Revenue Commissioners, ex p. Unilever Pic* [1996] S.T.C. 681 or where assurances are given by an authority that its policy will remain unchanged, see for example *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213. In such cases the Court has held that a departure from policy change would depend on whether the court was satisfied that there was an overriding interest or reason to do so.
- [8] It is however, inconceivable that a benefit or concession under a law could not be withdrawn by a future law as this would result in fettering the legislative process. It is clear to us

therefore, that the term legitimate expectation refers to a practice and therefore protects procedural interests and in very limited circumstances, substantive rights in administrative settings. We are therefore not persuaded that the principle of legitimate expectation has been elevated to a constitutional or legal right. That ground of appeal cannot therefore succeed.

- [9] Ground 2 of the appeal relates to the interpretation of the Prisons (Amendment) Act and Article 45 of the Constitution which provides:

“This Chapter shall not be interpreted so as to confer on any person or group the right to engage in any activity aimed at the suppression of a right or freedom contained in the Charter.”

It is the Appellants’ contention that in interpreting the amending provisions of the Act their rights to equal protection of the law has been breached. Firstly, we would like to point out that the remission of sentences is not a right. Secondly, the Prisons (Amendment) Act is neither conferring nor suppressing a right. Remission is a privilege accorded to prisoners in certain circumstances. We have tried to follow the Appellants’ argument which seems to suggest that all prisoners should have the right to remission in order for them to be equal before the law.

- [10] In this regard we endorse the findings of the Constitutional Court that the right to equal protection translates into the State treating an individual in the same manner as others in similar conditions and circumstances. A distinction or classification is constitutional if it has a rational basis or a legitimate state objective. Discrimination or classification based on race, colour, gender or status is generally suspect and will be strictly scrutinised by the court as will classification that interferes with rights protected under the Charter. However, where the discrimination or classification has a rational basis or where the state has a rational interest in making the distinction then the qualification will pass the Court’s scrutiny.

- [11] In applying this test to the instant case, it is rational that the State provides a deterrent for serious offences and the removal of remission in sentences can be legitimately construed as meeting that objective. The second ground of appeal is therefore also rejected.

[12] The appellants in their third and fifth grounds of appeal submit that the Court has an obligation when interpreting a provision of the Constitution to do so in accordance with Seychelles' international obligations, more specifically in terms of Article 15(1) of the UN International Covenant on Civil and Political Rights 1966 which it has ratified. That provision provides that a heavier penalty cannot be imposed other than the one applicable at the time the criminal offence was committed.

[13] First of all, we would like to point out that there was no need for the Appellants to resort to Article 15(1) of the Covenant as that right is protected in the second limb of Article 19 (4) of the Constitution which provides:

“Except for the offence of genocide or an offence against humanity, a person shall not be held to be guilty of an offence on account of any act or omission that did not, at the time it took place, constitute an offence, and a penalty shall not be imposed for any offence that is more severe in degree or description than the maximum penalty that might have been imposed for the offence at the time when it was committed. (our emphasis).

[14] Second, we are of the view that the Appellants are confusing a benefit with a penalty. Penalty refers to sentence. The sentence in relation to the offence of trafficking was not increased and then retroactively applied to the Appellant. No harsher penalty imposed by the operation of the amendment. Remission, a privilege, was not granted because it had been withdrawn by legislation in some limited circumstances, one of which included sentences for drug trafficking. This did not mean the penalty imposed (that is the sentence of 8 years) was increased *ex post facto* or retroactively. It just means the privilege of applying a remission of one third of the period of their imprisonment was not applied in the case of the Appellants as was the case for all other drug offenders after the coming into effect of the amendment to the Prisons Act.

[15] In *Ars v Canada* UN Doc CCPR/C/14/D/91/1981, the claimant argued that the reintroduction of parole with mandatory supervision under the Canadian Parole Act constituted a heavier penalty in breach of article 15 (1) of the Covenant. The Human Rights Commission (HRC)

disagreed, finding that mandatory supervision cannot be equated with penalty as it was a measure of social protection in the prisoner's own interest. Similarly and on a parallel to *Ars*, the removal of remission for serious drug offences is a measure of social protection providing a deterrent against the appellant reoffending and also for the protection of society against the scourge of those trafficking in drugs.

- [16] In *Van der Plaat v New Zealand* UN Doc CCPR/C/93/D/1492/2006, the HRC refused to find that the inapplicability of a new scheme to the applicant introducing a less strict parole regime which resulted in his release later than the previous scheme was a breach of article 15 as parole was "neither an entitlement nor automatic, and is in part dependent on the author's own behaviour." [6.4]. Equally, the HRC has refused to find a breach of article 15 when the sentence imposed is within the margin provided by legislation (*Filipovitch v Lithuania* 75/99).
- [17] The authorities cited are clear indications that the Appellants' submissions on these grounds cannot be sustained. The penalties in this case were the sentences meted out to the Appellants. Remission or non-remission of sentence are not penalties but a privilege to a prisoner or a discretionary measure allowed in certain circumstances by the prison authorities. These grounds of appeal are also therefore rejected.
- [18] We now turn to the final ground of appeal. The Appellants contend that since they had been remanded into custody prior to Prisons (Amendment) Act coming into force they had started serving their sentences and that therefore the provisions of the Act could not apply retrospectively to them. We do not wish to unduly dwell on this issue as it is an extremely fallacious argument with which we cannot agree. To follow the Appellant's argument to its logical conclusion would mean that sentence was imposed before conviction. This is certainly not the case.
- [19] A trial court when imposing sentence and in stating that time spent on remand be taken into consideration is satisfying a procedural requirement to ensure fairness for the individual. Any other inference, including the one that sentence is deemed to start on the date of one's arrest or remand in custody whilst awaiting trial, would mean that one would be sentenced before

conviction. This would certainly be a breach of article 19 (2) of the Constitution which states that everyone is innocent until proven guilty. For these reason the Appellants arguments cannot be sustained and the ground of appeal rejected.

**[20]** For these reasons we dismiss the appeal.

M. Twomey (J.A.)

**I concur:.** .....

F. MacGregor (PCA)

**I concur:.** .....

S. Domah (J.A.)

Choose a building block.

Signed, dated and delivered at Ile du Port on 17 April 2015