

# BRADBURN v SUPERINTENDENT OF PRISONS

(2012) SLR 182

K Domingue for the petitioners  
C Jayaraj for the respondents

**Judgment delivered on 12 June 2012**

**Before Karunakaran, Renaud, Burhan JJ**

The first and the second petitioners are convicts. They are currently serving a term of imprisonment in respect of offences under the Misuse of Drugs Act. They were convicted and sentenced by the Supreme Court on 24 July 2009 and 28 January 2009 respectively for the offences of trafficking and being in possession of a controlled drug.

The Prisons Act as it existed prior to the conviction and sentence of the petitioners had then contained a provision, which had granted the benefit of remission from prison terms to certain categories of prisoners including those who were serving a prison term for offences under the Misuse of Drugs Act.

In fact, on 25 August 2008, almost a year prior to the said conviction and sentence of the petitioners, the law under section 30(2) of the Prisons Act, which contained the provision for remission, had been amended. This amendment in effect had taken away the benefit of remission, which had otherwise been granted in the past to the drug offenders. This amendment had been made by repealing subsection (2) and substituting the following:

- Sub Section (1) shall not apply to a prisoner —
- (a) serving sentence of imprisonment for life; or
  - (b) serving a sentence of imprisonment under the Misuse of Drugs Act; or
  - (c) detained under custody during President's pleasure.

Following the said amendment, section 30 of the Prisons Act now reads thus:

Remission

- (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) Sub Section (1) shall not apply to a prisoner —
  - (a) serving sentence of imprisonment for life; or
  - (b) serving a sentence of imprisonment under the Misuse of Drugs Act; or
  - (c) detained under custody during President's pleasure.
- (2) ...

- (3) For the purpose of giving effect to subsection (1), each prisoner on the commencement of his sentence shall be credited with the full period of remission which he would be entitled to under that subsection and shall only lose such remission as a punishment for idleness, lack of industry or other offence against prison discipline.
- (4) The preceding provisions of this section shall be without prejudice to the prerogative of mercy vested in the President under the Constitution.

The petitioners herein seek a constitutional remedy, alleging that the said amendment made in 2008 to the Prisons Act contravenes their constitutional rights, although the amendment had been made almost a year prior to their conviction and sentence. As per the pleadings in the petition, it is the case of the petitioners:

1. That the above amendment is discriminatory amongst those who are convicted under the Misuse of Drugs Act;
2. The Amendment Act cannot apply retrospectively to persons who committed the offence prior to 25 August 2008, the date on which the amendment came into force;
3. Amendment violates the underlying constitutional principle of the "equal protection of laws"; and
4. The petitioners' constitutional right to a fair hearing had been contravened by the said amendment.

According to Ms Domingue, counsel for the petitioners, the amendment in question and the subsequent act of refusal by the prison authority to grant remission of sentence to the petitioners are unconstitutional as it contravenes the constitutional rights of the petitioners.

In the circumstances, the petitioners pray this Court for a judgment:

1. Declaring that the petitioners are entitled to remission on their sentence;
2. Declaring that the petitioners are entitled to remission on the ground that they committed the offences before the Amendment Act 2008 came into force;
3. Declaring that the Prisons Amendment Act, 2008 is discriminatory and therefore null and void;
4. Directing the respondents to re-instate the practice of remission of sentences; and
5. Awarding the petitioners moral damages in the sum of R50,000 each.

On the other hand, the respondents have raised a preliminary objection contending that this petition is time barred since it has not been filed within 90 days of the alleged contravention as required by the Constitutional Court Rules. The Amendment Act came into force on 25 August 2008, and the petition was filed on 25th October 2010. Hence, the respondents contended that the instant petition is not maintainable in law and liable to be dismissed *in limine*.

On the merits of the case, the respondents contended that the above amendment is not discriminatory amongst those who are convicted under the Misuse of Drugs Act, as it

equally and universally applies to all prisoners who served imprisonment under the Misuse of Drugs Act on the day the amendment came into force. Further, the amendment according to the respondents, should apply retrospectively to all persons who committed the offence prior to 25 August 2008 on which date the amendment came into force. The respondents contended that the impugned Amendment Act first of all, does not create any offence retrospectively and that it is not *an ex post facto law*. Denial of remission to the petitioners by virtue of the provisions under the Prisons Act is neither a new conviction nor a new or enhanced penalty in law. Denial of remission in accordance with the amendment has no relevance either to the presumption of innocence on the part of the petitioners or to fair trial. Obviously, the issue of remission arises only after a fair trial and proper conviction and sentence. Therefore, the amendment to the Prisons Act is neither an amendment to any penal provision of law nor does it fall under “ex post facto laws”. Hence, counsel for the respondents submitted that the instant petition is devoid of merit and therefore moved for its dismissal.

At the very outset we would like to observe that the pleadings in the petition appear to be somewhat vague and indecisive. In fact, the pleadings do not state the material facts concisely nor does it refer to the specific provision of the Constitution that has been contravened as required by rule 5 of the Constitutional Court Rules. If the petitioners’ clear intention had been to challenge the constitutionality of the legislation that brought in the amendment to the Prisons Act, it should have been explicitly, clearly and specifically pleaded in unequivocal terms in the petition. Accordingly, the petitioner should have simply prayed for a declaration on the alleged unconstitutionality of the legislation and sought an annulment of the said amendments.

On the other hand, if the petitioners’ clear intention had been to challenge the constitutionality of the acts of the Prison Authority in denying the petitioners the remission of sentence otherwise given to prisoners serving the prison terms under the Misuse of Drugs Act, such constitutional contravention should have been explicitly, clearly and specifically pleaded in the petition without any ambiguity. Pleadings obviously need clarity as to the nexus between their constitutional grievance and the loss of remission since the petitioners have no explicit constitutional right as such to claim any remission of sentence after conviction.

On a careful perusal of the petition, we observe under paragraph 6(b) it is averred that the petitioners were discriminated against, implying that the impugned amendment is tantamount to a “**discriminatory or colourable legislation**”, whereas under paragraph 6(c) it is averred that the said amendment cannot apply retrospectively, implying that the impugned amendment is tantamount to an “**ex post facto law**”. At the same instance, it is averred under paragraph 7 that the said amendment or refusal to grant remission contravenes the petitioners’ “**right to equal protection of laws**” and also their rights to a “**fair trial**”. Obviously, the pleadings of this hybrid without specific reference to the exact provision/s of the Constitution that has/have been allegedly contravened or is/are likely to be contravened are in our view defective in form. They do not comply with the requirement under rule 5 of the Constitutional Court Rules 1994, which reads –

- (1) *A petition under rule 3 shall contain a concise statement of the material facts and refer to the provision of the Constitution that has been allegedly contravened or is likely to be contravened or in respect of which the application, enforcement or interpretation is sought.*
- (2) *Where the petitioner alleges a contravention or likely contravention of any provision of the Constitution, the petition shall contain the name and particulars of the person alleged to have contravened that provision or likely to contravene that provision and in the case of an alleged contravention also state the date and place of the alleged contravention.*

It is pertinent to note herein that the constitutional principles of “**equality before law**” and “**equal protection of laws**” emanate from two different concepts. The first is a negative concept which ensures that there is no special privilege in favour of anyone; that all are equally subject to the ordinary law of the land. All are equal before law and that no person, whatever be his rank or condition, is above the law. This is equivalent to the second corollary of the Dicean concept of the rule of law in Britain.

The second concept “**equal protection of laws**” is positive in content. It does not mean that identically the same law should apply to all persons, or that every law must have universal application within the country irrespective of difference in circumstances. Equal protection of law does not mean or postulate equal treatment of all persons without distinction. What it postulates is the application of same laws alike and without discrimination to all persons similarly situated. It denotes equality of treatment in equal circumstances. It implies that among equals the law should be equal and equally administered, that like should be treated alike without discrimination. In other words the equals should be treated equally. **Vide, M P Jain *Indian Constitutional Law* (5th ed, 2003) at 1000.** However, the pleading in the instant petition does not seem to comprehend and distinguish the difference between the two concepts. **Equal protection of law** as has been pleaded in the petition is not a substitute for “**equality before law**”.

We meticulously perused the pleadings and written submissions filed by counsel on both sides. We carefully examined the relevant provisions of the Constitution and the authorities cited by counsel.

On the preliminary issue, we agree with the contention of Ms Domingue that the alleged contravention is in the nature of a continuous cause of action as the petitioners shall carry on losing the benefit of remission unless and until such time the situation is redressed by the Court. Hence, the cause of action namely, the alleged contravention arose on 25 August 2008, it continues beyond the 90 days time-limit. Indeed, the position of case law in this respect has already been set by the precedents of the Constitutional Court in *Georgie Larue v Court Martial [Constitutional Case No 1 of 1996]*, *Alwyne Talma and Another v James Alex Michel and Others* (2010) SLR 477, and *Paul Chow v James Alex Michel and Others* (2011) SLR 1.

In the circumstances, and on the strength of the said precedents, we find that the instant petition is not time-barred as the alleged contravention or breach is continuous in nature. Therefore, we dismiss the preliminary objection raised by the respondents on the issue of limitation in this matter.

We will now proceed to examine the case on its merits. It is true as submitted by counsel Mr Jayaraj that the first respondent (Superintendent of Prisons) is statutorily obliged to carry out the mandate of the Prisons Amendment Act 2008, as it was the law in force on the day the petitioners were convicted, sentenced and remitted to prison. In fact, the amended law, which had done away with remission for drug offenders, had been in force ever since 25 August 2008, whereas the petitioners were sentenced in or after January 2009. Hence, the first respondent did not apply remission to the petitioners in accordance with the law that was in force that time. Had he acted otherwise, obviously he would be faulted for disobeying the law in force. In the circumstances, it is wrong to assume and allege that the Superintendent of Prisons committed an act in violation of the petitioners' constitutional rights in this matter.

The Prisons (Amendment) Act 2008 applied to all convicted prisoners serving a sentence of imprisonment under the Misuse of Drugs Act 1990 on the date the amendment came into force, irrespective of whether they committed the offence before or after the amendment to the Prisons Act. The date of the commission of the offence is obviously irrelevant to the amendment made to the Prisons Act. The Amendment Act clearly applies to all prisoners serving a sentence under the Misuse of Drugs Act at the time that it came into force. The amendment did not create any new offence nor did it affect or enhance any penal provision under the Penal Act, namely Misuse of Drugs Act. Indeed, at the time the Amendment Act came into force in 2008, both the petitioners were not even convicted or sentenced and were not serving any sentence of imprisonment under the Misuse of Drugs Act as envisaged under section 30(2)(b) of the said Act. Therefore, in our view there is no contravention of the petitioners' constitutional rights at the time the amended Act came into force.

As rightly submitted by Mr Jayaraj, we also find that denial of remission to a prisoner who had been charged, convicted and sentenced before the amendment came into force does not amount to imposition of a penalty for the commission of any offence. In other words, those prisoners convicted and sentenced under the Misuse of Drugs Act 1990 are not given any retrospective punishment for the offence they committed because of the amendment, or as and when it came into force, as the petitioners mistakenly claim.

In fact, the Amendment Act does not create any offence retrospectively nor enhance the sentence imposed by the Court. The denial of remission by the Prison Authority does not amount to or can no way be equated to any new conviction or new penalty. Denial of remission in accordance with the amendment has no relevance to the presumption of innocence on the part of the petitioners or the fair trial. The issue of remission arises only after a fair trial and proper conviction and sentence. Hence, the contention of the petitioner that their rights to **equal protection of law** and to a **fair trial** are contravened

is obviously misconceived. As we see it, there is no causal link between the benefit of remission and the alleged contravention of the petitioners' constitutional rights. In any event, grant of remission to a prisoner is nothing but a conditional privilege, which may be granted if and only if the prisoner concerned had been industrious and of good behaviour while in prison. Those who are given that privilege will lose it as a punishment for idleness, lack of industry or other offence against prison discipline. Therefore, no prisoner can claim remission as of right constitutional or otherwise and so we find.

We also find that the intention of the legislature in amending section 30(2) was simply not to extend the benefit of remission on sentences to all prisoners convicted and sentenced under the Misuse of Drugs Act 1990. Undoubtedly, the amendment has universal application and stipulates no discrimination or classification among persons who are convicted and sentenced under the Misuse of Drugs Act 1990 as they all fall within a class by themselves as compared to other prisoners.

Further, the Amendment Act does not discriminate between any two classes of prisoners who were convicted for the same offence under the Misuse of Drugs Act. In other words, as rightly submitted by Mr Jayaraj, only if the respondents apply the Amendment Act to one prisoner and do not apply it to another prisoner who has committed the same offence would it amount to discrimination and would violate the concept of "*equality before law*". The petitioners in the instant case have not shown that the impugned amendment has made any such discrimination among the same class of prisoners, in that one prisoner is denied remission whereas another is given remission for having committed the same offence under the Misuse of Drugs Act. As we discussed supra, what this amendment postulates is the application of same laws alike and without discrimination to all persons similarly situated. It denotes the "**equal protection of laws**" and equality of treatment in equal circumstances. It implies that among equals the law is equal and equally administered and that like is treated alike without discrimination.

We also note that the Amendment Act demonstrates a nexus between the object and classification of prisoners serving a sentence under the Misuse of Drugs Act from the rest of the prison population. The Legislature has clearly expressed its legislative policy on its choice not to extend the benefit of remission to the prisoners sentenced for drug offences. Such classification is in our view a reasonable classification based on "*intelligible differentia*". This amendment simply relates to the administrative policy and regulations of prisons, which is very much within the competence and powers of the Legislature. It has unfettered discretion to legislate on prison security and policy issues, taking into account the public revulsion felt against certain types of crime such as drug offences, robbery with violence, murder etc.

We agree with the contention of the respondents that the Constitution does not place any bar or limitation on the competence of the Legislature to formulate a prison policy and make laws for its administration in the larger interests of the community.

In the final analysis, we find that the impugned amendment to the Prisons Act is not a “**discriminatory or colourable legislation**”. It is not an “**ex post facto law**”. This amendment did not create any new offence nor did impose any penalty *for any drug offence that is more severe in degree or description than the maximum penalty that has already been prescribed for the offences under the Misuse of Drugs Act. This Amendment Act does not* contravene any provision of the Constitution, and particularly does not contravene article 19(4) of the Constitution, which reads:

*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.*

Besides, we find that the said amendment or refusal by the Prison Authority to grant remission to the petitioners does not contravene any of the provisions of the Constitution or any constitutional right of the petitioners.

For these reasons, we conclude that the instant petition is devoid of merit and hence, is dismissed.