

IN THE CONSTITUTIONAL COURT OF SEYCHELLES

(Before Egonda-Ntende CJ., Burhan J. and Robinson J.)

ALCIDE BOUCHEREAU

1ST PETITIONER

KEVIN BARBE

2ND PETITIONER

v

THE SUPERINTENDENT OF PRISONS

1ST RESPONDENT

THE ATTORNEY GENERAL

2ND RESPONDENT

Constitutional Case No: 01 of 2013

Constitutional Case No: 02 of 2013

Mrs. A. Amesbury Attorney at Law for the Petitioners

Mr. D. Esparon Principal State Counsel with Mr. Chinnasamy

Assistant Principal State Counsel for the Respondents

JUDGMENT OF THE COURT

[1] The 1st and 2nd Petitioners filed two separate petitions alleging that their constitutional rights under Articles 19 (4), 27(1) and 27(2) of the Constitution of the Republic of Seychelles had been contravened by the enactment of section 2 of the Prisons (Amendment) Act 2008, (Act 16 of 2008). Both petitions were amalgamated as the issues and reliefs claimed were similar in nature.

[2] The Petitioners seek the following reliefs;

- a) a declaration that the Petitioners' rights entitling them to remission have been contravened;
- b) declare that the Petitioners are entitled to remission on one third of their sentence having committed no disciplinary offence whilst incarcerated which would deprive them of such remission;
- c) declare that the Prisons (Amendment) Act 2008 is discriminatory, is inconsistent with Article 5 of the Constitution and is therefore void to the extent of the inconsistency;
- d) issue a writ of mandamus ordering the 1st Respondent to re-instate the Petitioners' remission;
- e) award compensation in a sum of SCR 100,000/= to the Petitioners' for being denied their rights;
- f) make such additional and further orders or declarations, issue such writ or give such directions as it may consider appropriate for the purpose of enforcement of the Constitution and disposing of all the issues relating to this application.

[3] The material background facts as set out in the petitions are that both Petitioners were convicted of offences under the Misuse of Drugs Act and were sentenced to terms of imprisonment. The 1st Petitioner Alcide Bouchereau was convicted on the 22nd of September 2008 for the offence of trafficking in a controlled drug which offence was committed on the 22nd of October 2007 and sentenced to a term of 8 years imprisonment. The 2nd Petitioner Kevin Barbe was convicted on the 15th day of May 2009 for the offence of importation of a controlled drug which offence was committed

on the 7th April 2008 and was sentenced to a term of 11 years imprisonment. On the 25th of August 2008 an amendment to the Prisons Act namely the Prisons (Amendment) Act 2008, (Act 16 of 2008) came into force (hereinafter sometimes referred to as the “said amending Act”).

- [4] The impugned amendment section 2 of the said amending Act reads as follows;

“The Prisons Act is amended in section 30 by repealing subsection (2) and substituting thereof the following subsection-

“(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.”

- [5] For purposes of clarity section 30 of the Prisons Act as amended is set out herein.

(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 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) where a remission granted under subsection (1) to a prisoner results in the reduction of his period of imprisonment to a period less than 30 days, the prisoner shall not be released from prison until he has served a period of 31 days imprisonment.

(4) 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.

(5) The preceding provisions of this section shall be without prejudice to the prerogative of mercy vested in the President under the Constitution.”

[6] Therefore in effect what the said amending section did was to prohibit remission for persons serving a sentence of imprisonment under the Misuse of Drugs Act. It is to be noted that prior to the said amendment the section already prohibited remission for persons sentenced to terms of imprisonment for life and those persons detained in custody during the President's pleasure.

- [7] Learned counsel for the Respondents took up a preliminary objection in that the petition was time barred since it had not been filed within 90 days of the alleged contravention as required by the Constitutional Court (Application, Contravention, Enforcement or Interpretation of the Constitution) Rules 1994. We are of the view that as both petitioners are still incarcerated and serving their sentences, the alleged denial of remission if unconstitutional, would amount to a continuing breach and therefore not be subject to any time limitations prescribed by the rules. Further it is the intention of this court, to deal with the substantive issues in cases of this nature dealing with unlawful or illegal incarceration of persons and not to dismiss applications on technical or procedural irregularities,
- [8] Learned counsel for the Petitioners contended that both Petitioners were deprived of their legitimate expectation of remission by section 2 of the said amending Act and therefore this would amount to a constitutional violation. Learned counsel for the Respondent countered that legitimate expectation is a ground for relief in Judicial Review cases and not an applicable remedy in constitutional violations.
- [9] Legitimate expectation would arise in instances where a public authority in its dealings with the public, leads the public to believe and expect certain legitimate undertakings or statements of intent on its part. Failure thereafter to comply would be a ground for Judicial Review based on inconsistency of policy and unfairness also discussed in *Wade on Administrative Law ninth edition at pg 372*.

- [10] Further Article 125(1)(c) of the Constitution of the Republic of Seychelles specifically grants jurisdiction to the Supreme Court and not the Constitutional Court in such matters. The fact that the Constitutional Court is vested with powers to issue writs in terms of Article 46(4) and 46(6) is only to ensure that the Constitutional Court is empowered to effectively remedy any constitutional violations and this Article does not bestow in any way supervisory jurisdiction on the Constitutional Court.
- [11] Be that as it may learned counsel's argument that at the time the offence was committed, the Petitioners had the legitimate expectation that they would be entitled to remission bears no merit as had they been acquitted, the said expectation would have never arisen. To assume that they had the legitimate expectation at the time the offence was committed of being convicted and sentenced (as remission arises only thereafter) is unacceptable and unconstitutional. At the time of 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 nullified and not in existence.
- [12] Learned counsel for the Petitioners further contended that as the Respondent had admitted in their reply that they applied the provisions of the said amending Act only in July 2010, eventhough the Act came into force on the 25th of August 2008, the relevant date to be taken into consideration should be July 2010.
- [13] This argument is devoid of any merit as the basic principle of interpretation is that the law comes into force from the day the Act comes into operation as set out in the Act itself, in this instance the 25th of August 2008 and not only

on each and every date it is being implemented. Section 25 (4) of the Interpretation and General Provisions Act Cap 103 (hereinafter referred to as the Interpretation Act) reads as follows.

“An Act or a provision of an Act is in operation as from the beginning of the day on which it comes into operation.”

[14] Learned counsel next contended that the said amending Act was unconstitutional as it was in violation of Article 27 (1) and 27 (2) of the Constitution. Her argument was based on the fact that the said amending Act discriminated between one class of prisoners and another and that the said amending Act further discriminated between prisoners who were convicted and sentenced prior to the coming into force of the Act and those convicted and sentenced after.

[15] Article 27(1) of the Constitution reads as follows;

“Every person has a right to equal protection of the law including the enjoyment of the rights and freedoms set out in this charter without discrimination on any ground except as is necessary in a democratic society.”

[16] Article 27(2) of Constitution reads as follows;

“Clause (1) shall not preclude any law, programmes or activity which has as its objects the amelioration of the conditions of disadvantaged persons or groups.”

- [17] On this question of right to equal protection of the law, in the case of ***Ram Krishna Dalmia v Justice Tendolkar AIR 1958 SC 538*** Das Chief Justice held that, a statute may itself indicate the persons or things to whom its provisions are intended to apply and the basis of the classification of such persons or things may appear on the face of the statute or may be gathered from the surrounding circumstances. In determining the validity or constitutionality of such a statute a court has to examine whether such classification is or can be reasonably regarded as based upon some differential which distinguishes such persons or things grouped together from those left out of the group and whether such differential has a reasonable relation to the object sought to be achieved by the statute, no matter whether the provisions of the statute are intended to apply only to a particular person or thing or only to a certain class of persons or things. Where the court finds that the classification satisfies the test the court will uphold the validity of the law.
- [18] In this case the impugned section of the law, specifically states that the said amending law applies to persons in addition to those sentenced to imprisonment for life and those detained in custody at the President's pleasure to persons sentenced to imprisonment under the Misuse of Drugs Act. It is apparent that the basis of the classification is on the serious nature of the offence committed. The object ought to be achieved by this particular statute as set out in the Prisons (Amendment) Bill 2008 is to serve as a deterrent to persons dealing in drugs.
- [19] In the view of this court, the classification of such persons based on the serious nature of the offence including offences under the Misuse of Drugs

Act and differentiating between them and those other persons committing less serious offences is reasonable in the circumstances and would in the view of this court achieve the objective of the amendment which is to serve as a deterrent to persons dealing in drugs. Therefore this court is satisfied that the classification of persons set out in the law that is section 2 of the said amending Act is acceptable and not discriminatory in nature as contended by learned counsel for the petitioner and therefore the law should be upheld by this court.

[20] 1988 Mauritius Laws Review 177, 207 at paragraph 13 stated,

“The right to equality before the law and to equal protection of the law without any discrimination does not make all the differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26.”

[21] Learned counsel for the Petitioners next contended that as the said amending Act had removed remission the degree of the penalty imposed had been affected as the petitioners now had to face a “heavier” penalty and therefore the said amending Act was in contravention of Article 19 (4) of the Constitution.

[22] Article 19 (4) of the Constitution reads as follows;

“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.”

- [23] On a careful scrutiny of this Article it is observed that the Article sets out that a *penalty shall not be imposed* (emphasis added) for any offence that is more severe in degree or description than the *maximum penalty* (emphasis added) that might have been imposed for the offence at the time it was committed. The maximum penalty of imprisonment that might have been imposed for the offences of trafficking in a controlled drug and for importation of a controlled drug as set out in the Schedule 2 of the Misuse of Drugs Act was 30 years at the time petitioners committed the said offences.
- [24] We observe that in the cases of both petitioners, the sentence imposed as a penalty on each petitioner has not been more severe in degree or description than the maximum penalty of 30 years that might have been imposed for the offence at the time it was committed. The penalty imposed on petitioner Alcide Boucheareau has been 8 years and that of Kevin Barbe 11 years both penalties being less than the 30 years imprisonment. Therefore learned counsel for the Petitioner’s contention that as the said amending Act had removed remission the degree of the penalty imposed had been affected as the petitioners now had to face a “heavier” penalty contrary to Article 19 (4) of the Constitution is not supported by the wording of Article 19 (4) as it refers to the maximum penalty imposed for an offence by law and not the penalty imposed by the sentencer.

- [25] The Legislature is not precluded from increasing penalties and decreasing penalties depending on the prevailing circumstances and factors subject to Article 19 (4) of the Constitution. It was decided in the case of ***Roy Bradburn & Anor v The Superintendent of Prison & Anor CC No 9 of 2010*** that remission was not a penalty. Penalty is a punishment as envisaged under Chapter VI of the Penal Code, whilst remission is a concession as an incentive for good behaviour. Further remission is not an absolute right.
- [26] Learned counsel for the Petitioners further submitted that as the words “time spent in remand to count towards sentence” had been entered in the committal of commitment, the sentence did not commence on the date of sentence but from the date the offence was committed. With due respect to learned counsel to accept such a contention would result in the sections of the Criminal Procedure Code dealing with the procedure at a summary trial and the Articles in the Constitution relating to the presumption of innocence and fair trial being turned upside down if a sentence was to commence from the date the offence was committed. We prefer to let the provisions remain as they are and simply hold that the said submission bears no merit. Article 18(14) of the Constitution ensures that the incarceration of an individual prior to conviction is credited to the benefit of an individual if convicted and while serving his sentence on conviction and not to be used as a means to backdate the sentence.
- [27] It would be pertinent at this stage to consider section 31(1) of the Interpretation and General Provisions Act;

“The repeal of an Act does not-

- (a) *affect the previous operation of the Act or anything duly done or suffered under it;*
- (b) *affect any right, privilege, obligation or liability acquired, accrued or incurred under the Act;*
- (c) *affect any penalty, forfeiture or punishment incurred in respect of any offence against the Act; or*
- (d) *affect any investigation, legal proceedings or remedy in respect of any right, privilege, obligation or liability referred to in paragraph (b), or any penalty, forfeiture or punishment referred to in paragraph (c).*

and the investigation, legal proceedings or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the Act had not been repealed.”

[28] In view of these provisions contained within the Interpretation Act and to clarify matters and make litigation on this issue come to a rest, this court holds that the provisions of remission as contained in section 30 of the Prisons Act prior to it being amended by Act 16 of 2008, will apply to persons sentenced under the Misuse of Drugs Act who commenced serving their sentences prior to the coming into force of the said amending Act, i.e prior to the 25th of August 2008.

[29] However the two Petitioners in this instant case have commenced serving their terms of imprisonment after the 25th of August 2008 and therefore they are not entitled to any relief.

[30] For the aforementioned reasons we are satisfied that the said amending provision of the Prisons Act namely Prisons (Amendment) Act 2008 (Act 16 of 2008) is not inconsistent with the Constitution and therefore Article 5 of the Constitution is not applicable. The petitions stand dismissed. We make no order in respect of costs.

Signed, dated and delivered this 30th day of July 2013

FMS Egonda Ntende
Chief Justice

Mohan Burhan
Judge

Fiona S Robinson
Judge