Trinity Term
[2016] UKPC 14
Privy Council Appeal No 0041 of 2016

JUDGMENT

Bade (Appellant) *v* The Queen (Respondent) (Solomon Islands)

From the Court of Appeal of the Solomon Islands

before

Lord Mance
Lord Wilson
Lord Hodge

JUDGMENT GIVEN ON

8 June 2016

Pre Trial (Written Submissions)

Appellant
Douglas Hou
(Instructed by Public Solicitor, Government of Solomon Islands)

Respondent
Ronald Bei Talasasa
(Instructed by Director of Public Prosecutions)

LORD MANCE: (with whom Lord Wilson and Lord Hodge agree)

1. The applicant was on 27 May 2013 convicted of murder by the High Court of Solomon Islands and sentenced to a mandatory life sentence under section 2000 of the Penal Code (Solomon Islands) with a "recommendation" by judgment dated 5 July 2013 that he serve 15 years before being eligible for consideration for parole: [2013] SBHC 126. An appeal to the Court of Appeal against this sentence was dismissed on 9 May 2014: [2014] SBCA 13. Through his advocate, Mr Douglas K Hou, Public Solicitor (Public Defender) of Solomon Islands, he now applies to the Board for permission to appeal on the grounds that the imposition of the mandatory life sentence was unconstitutional and/or the making of a "recommendation", as opposed to a determination, of the punitive term to be served before the applicant became eligible to be considered for parole was likewise unconstitutional.

2. The first issue raised by this application is however one of jurisdiction. Does the Privy Council retain jurisdiction to grant special leave under the Judicial Committee Acts of 1833 and 1844 for an appeal in a criminal matter from the Court of Appeal of Solomon Islands. The Board is grateful for the comprehensive submissions received on this issue from the Public Solicitor (Public Defender) of Solomon Islands. The submissions rightly start from the premise that, since Her Majesty is The Queen of Solomon Islands, her jurisdiction in Council under the said Acts continues unless it has been removed expressly or by "necessary intendment" during the process involved in the independence of Solomon Islands on and after 7 July 1978.

3. Prior to independence, The Solomon Islands Courts Order 1975 (1975 No 1511) amended the Constitution of Solomon Islands to include a new Chapter IVA, which provided in section 65M for a High Court of Solomon Islands, for appeals to a Court of Appeal, defined as the Court of Appeal established for Fiji by the Constitution of Fiji, and for appeals to the Privy Council in certain cases as of right and in some other cases with the leave of the Court of Appeal.

4. Section 65M(3) further provided in familiar form that

> "Nothing in this section shall affect any right of Her Majesty to grant special leave to appeal to Her Majesty in Council from the decision of any court in any civil or criminal matter."

It is well established that a provision in this form does not confer, but merely reflects the existence of, the Privy Council's jurisdiction under the 1833 and 1844 Acts to grant special leave.

5. Upon independence matters however changed. First, on 8 May 1978 the Solomon Islands legislature enacted a Court of Appeal Ordinance (later Act), though this was apparently only brought into effect on 1 December 1982. The Act provided for the establishment of a new Solomon Islands Court of Appeal. Section 11(1) provided that "an appeal shall lie" to this Court of Appeal in any civil cause or matter, other than those specified in subsection (2) where "no appeal shall lie".

6. Section 20 provided that a person convicted on a trial before the High Court "may appeal … to the Court of Appeal", while section 21 provided that the Director of Public Prosecutions ("DPP") "may appeal … to the Court of Appeal" where a person was tried before the High Court and acquitted on any ground of appeal which involves a question of law or where "in the opinion of the [DPP] the sentence imposed by the High Court is manifestly inadequate".

7. Then on 25 May 1978 the United Kingdom Parliament enacted the Solomon Islands Act 1978. Section 1(1) provided for the Islands' independence on and after 7 July 1978. By section 1(2) no United Kingdom Act of Parliament passed on or after Independence Day was to extend or be deemed to extend to Solomon Islands as part of its law. Section 1(3) provided in contrast that:

> "Subsection (1) above shall not affect the operation in Solomon Islands of any enactment or any other instrument having the effect of law passed or made before Independence Day, or be taken to extend any such enactment or instrument to Solomon Islands as part of its law."

8. Section 8 provided:

> "Her Majesty may by Order in Council make such provision as She thinks fit for and in connection with the disposal after Independence Day of any appeal to Herself in Council from a court having jurisdiction for the Solomon Islands protectorate, where leave to appeal has been granted before that day."

9. Further on 31 May 1978 Her Majesty by Order in Council made The Solomon Islands Independence Order 1978, to come into operation on 7 July 1978. By section 3(1) it revoked inter alia the Solomon Islands Courts Order 1975 and the Solomon Islands (Appeals to the Privy Council) Order 1975 (SI 1975/1510), though by section 5(1) the revocation of such Orders was to be "without prejudice to the continued operation of any existing laws made, or having effect as if they had been made, under any of those Orders", and such existing laws were to have effect after 7 July 1978 as if they had been made in pursuance of a new Constitution, which was set out in its Schedule and which it provided by sections 2(1) and 4(1) was to come into effect on 7 July 1978.

10. The Board notes in passing that, contrary to the Public Solicitor's submissions on jurisdiction, the 1833 and 1844 Acts cannot be existing laws within section 5(1) of The Solomon Islands Independence Order 1978, since they were not made under, and did not have effect as if they had been made under, any of the Orders revoked by section 3(1) of that Order. The relevant provision in this area is section 76 of the new Constitution read with Schedule 3 to that Constitution, which the Board addresses below.

11. Section 12 of The Solomon Islands Independence Order 1978 provides:

> "Legal proceedings
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> 12(1) All proceedings commenced or pending immediately before the appointed day before the High Court or the Court of Appeal established by the existing Constitution may continue on and after that day before the High Court or the Court of Appeal, as the case may be, established by the Constitution.
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> (2) Any decision given before the appointed day by the High Court or the Court of Appeal established by the existing Constitution shall for the purposes of its enforcement or, in the case of a decision given by the High Court, for the purpose of any appeal therefrom, have effect on and after that day as if it were a decision of the High Court or the Court of Appeal, as the case may be, established by the Constitution.
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> (3) Sections 85 to 89 of the Constitution shall come into operation on such date as the Governor-General may by order prescribe, and any such order may make such transitional provision as to pending proceedings or otherwise as the Governor-General thinks fit.
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> (4) Notwithstanding the provisions of this section, until such time as the Court of Appeal is established under section 85 of the Constitution, appeals from the High Court shall lie to the Court of Appeal of Fiji or such other court as Parliament may prescribe."

Section 12(4) therefore provided for appeals during the period before the Court of Appeal Act 1978 was actually brought into operation in, it appears, 1982.

12. Chapter VII of the new Constitution, entitled The Legal System, provides for the establishment of a High Court (sections 77-84) and of "a Court of Appeal for Solomon Islands which shall have such jurisdiction and powers to hear and determine appeals in

civil and criminal matters as may be conferred on it by this Constitution or by Parliament" (section 85 and see also sections 86-90). The Constitution makes no reference to any form of appeal to the Privy Council.

13. However, sections 75 and 76 provide:

> "Application of laws
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> 75(1) Parliament shall make provision for the application of laws, including customary laws.
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> …
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> Common law and customary law, etc.
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> 76. Until Parliament makes other provision under the preceding section, the provisions of Schedule 3 to this Constitution shall have effect for the purpose of determining the operation in Solomon Islands -
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> > (a) of certain Acts of the Parliament of the United Kingdom mentioned therein;
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> > (b) of the principles and rules of the common law and equity;
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> > (c) of customary law; and
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> > (d) of the legal doctrine of judicial precedent."

14. Schedule 3 provides:

> "1. Subject to this Constitution and to any Act of Parliament, the Acts of the Parliament of the United Kingdom of general application and in force on 1 January 1961 shall have effect as part of the law of Solomon Islands, with such changes to names, titles, offices, persons and institutions, and as to such other formal and non-substantive matters, as may be necessary to facilitate their application to the circumstances of Solomon Islands from time to time.

2(1) Subject to this paragraph, the principles and rules of the common law and equity shall have effect as part of the law of Solomon Islands, save in so far as:-

(a) they are inconsistent with this Constitution or any Act of Parliament;

(b) they are inapplicable to or inappropriate in the circumstances of Solomon Islands from time to time; or

(c) in their application to any particular matter, they are inconsistent with customary law applying in respect of that matter.

(2) The principles and rules of the common law and equity shall so have effect notwithstanding any revision of them by any Act of the Parliament of the United Kingdom which does not have effect as part of the law of Solomon Islands.

3(1) Subject to this paragraph, customary law shall have effect as part of the law of Solomon Islands.

(2) The preceding subparagraph shall not apply in respect of any customary law that is, and to the extent that it is, inconsistent with this Constitution or an Act of Parliament.

(3) An Act of Parliament may:-

(a) provide for the proof and pleading of customary law for any purpose;

(b) regulate the manner in which or the purposes for which customary law may be recognised;

(c) provide for the resolution of conflicts of customary law.

4(1) No court of Solomon Islands shall be bound by any decision of a foreign court given on or after 7 July 1978.

(2) Subject to the preceding provisions of this Schedule or any provision in that regard made by Parliament, the operation in Solomon Islands of the doctrine of judicial precedent shall be regulated by practice directions given by the Chief Justice.

5. The provisions of this Schedule are without prejudice to the provisions of section 5 of the Order to which the Constitution is scheduled."

15. The 1833 and 1844 Acts are on their face acts of general application in force on 1 January 1961, and the prima facie effect of section 76 of the Constitution, read with Schedule 3 paragraph 1, can therefore be said to be to preserve their operation. However, this is "subject to this Constitution and to any Act of Parliament", the latter including no doubt the Solomon Islands Act 1978.

16. The following features of the above course of events are evident:

a) Appeals to the Privy Council as of right and with leave of the Court of Appeal were expressly regulated, and the possibility of an appeal by special leave of the Privy Council was expressly mentioned, by the Constitution in force from 1975 to 7 July 1978.

b) On and from 7 July 1978, the new Constitution and section 12 of the Solomon Islands Independence Order 1978, while dealing explicitly with the establishment of a High Court and with appeals to a Court of Appeal, contains nothing to permit future appeals to the Privy Council as of right or with leave of the Court of Appeal. It also makes no reference to any possibility of an appeal by special leave.

c) On the other hand, section 8 of the Solomon Islands Act 1978 expressly recognised that provision might appropriately be made for appeals to the Privy Council where leave had been granted before 7 July 1978. This is readily explicable as a transitional provision if no new appeals at all were to be possible after independence. It could also be explicable as a transitional provision if all that was in mind was that there would in future be no new appeals as of right or by leave of the Court of Appeal.

d) Paragraph 4(1) of Schedule 3 to the Constitution may simply be addressing the doctrine of precedent, which is also the subject of paragraph 4(2). Further, the Privy Council, when it has jurisdiction in respect of an overseas state, may itself be seen both as a court and as a court of the relevant foreign state. But treating the Privy Council as a Solomon Islands court in this context does not really fit with the provision

in paragraph 4(2) for the Chief Justice to regulate the doctrine of judicial precedent in Solomon Islands. Viewed overall, paragraph 4(1) appears to fit uneasily with any idea that there could in future be appeals of any sort to the Privy Council.

17. In the submissions on jurisdiction made to the Privy Council, considerable emphasis is laid on the Court of Appeal Ordinance (later Act) 1978 and on the difference between the words "shall lie" used in relation to civil appeals and "may appeal" used in relation to criminal appeals. It is submitted that these lead to or support a conclusion that appeals by way of special leave were excluded after independence in civil appeals, but continued to be preserved, since not abolished by "necessary intendment", in criminal cases like the present. The first problem with this submission is that the Act was not in force at the time of independence. But, putting that aside, the Board does not consider that the difference in wording can have the significance suggested. The difference arises in the Board's view from the simple fact that the subject of the words "shall lie" is the (civil) appeal, while the subject of the words "may appeal" is the appellant, viz either the person convicted or the DPP. In each case an appeal to the Court of Appeal is a voluntary exercise, open in circumstances which the Act goes on to identify. The difference does not throw any light on the intended finality or otherwise of the Court of Appeal's, or intended Court of Appeal's, decisions in any sphere.

18. Submissions based on "the protection of the law" guaranteed by section 3(a) of the Constitution do not in the Board's view carry matters further. They beg the essential question which is whether there remains a possibility of seeking special leave from the Privy Council. There is no reason to assume that those framing the Constitution and other relevant independence legislation regarded such leave as an essential protection. It is a matter of construction of the Constitution and such legislation, whether they preserved it or did away with it by necessary intendment.

19. The Board accepts that there has been no express abrogation of the right to petition the Privy Council for special leave under the 1833 and 1844 Acts. But it considers that the clear implication or necessary intendment of the new Constitution and other legislation by which Solomon Islands achieved their independence was to remove all right of appeal to the Privy Council, whether as of right, by leave of the Court of Appeal or by special leave of the Privy Council. The Board adds that it is no doubt possible for a country to preserve a right to petition for special leave, while removing all other possibilities of appeal to the Privy Council, and also to restrict any such right to petition to a particular area, such as criminal law, but it would seem on its face unlikely that a state achieving independence would so determine. However that may be, the Board sees no indication that that was what was intended here. On the contrary, the Board concludes with confidence that the intention must have been that there should be no further appeals whatever, other than in respect of matters for which leave had already been given prior to independence.

20. The Board will therefore humbly advise Her Majesty that no jurisdiction now exists to enable either further consideration or grant of this application for permission to appeal.