Solomon Islands

R. v. Rose

High Court
Ward C.J.
21 September 1987

Constitutional law – section 7 of the Constitution – no person shall be subjected to torture or to inhuman or degrading punishment or other treatment – whether caning by schoolmaster unconstitutional per se – whether caning in presence of other pupils degrading – whether reasonable punishment a defence – section 226(4) of Penal Code – Article 3 of European Convention for the Protection of Human Rights and Fundamental Freedoms.

Two ten-year-old boys misbehaved in a school assembly at the Chung Wah School, despite previous warnings about disturbances in assembly. The acting headmaster, the respondent, caned each boy, in the presence of the other pupils, with four strokes of a cane, on the buttocks over their trousers. The skin was not broken, although a welt was raised, and a doctor recommended no treatment. The respondent was charged with minor assault-related crimes and was acquitted in the lower court on all charges.

The Crown appealed on the ground that section 7 of the Constitution had rendered all corporal punishment unlawful *per se*, and on the ground, alternatively, that the punishment in this case was unreasonable and unlawful for that reason.

HELD: The appeal by the Crown succeeded but the respondent was absolutely discharged.

(1) Corporal punishment is not *per se* unlawful. Corporal punishment administered reasonably in a school is neither torturous, inhuman nor degrading under the Constitution: *l.* 190.

(2) The administration of a caning in public inflicts an extra and unnecessary element of humiliation, which renders the punishment degrading and therefore unreasonable: *l.* 310.

DISCUSSION: The decision to prosecute in this case was unfortunate. Given the marginal nature of the transgression, the matter would have been dealt with more appropriately by the school authorities.

OBSERVATION: A useful treatment of the *Tyrer* case and international conventions in the European Court of Human Rights is G. Zellick, "Corporal Punishment in the Isle of Man" (1978) 27 I.C.L.Q. 665.

Cases referred to in judgment:
Cleary v. *Booth* [1893] 1 Q.B. 465
Constitutional Reference No. 1 of 1984: Re Minimum Penalties Legislation [1984] P.N.G.L.R. 314; [1985] L.R.C. (Const.) 642

The State v. *Petrus & Anor* [1985] L.R.C. (Const.) 699 (Bots.)
Tyrer v. *U.K.* (1978) 2 E.H.R.R. 1

Legislation referred to in judgment:
Constitution 1978, sections 2 and 7, and Schedule 3, paragraph 3
Constitution of Botswana 1966, section 7
Criminal Procedure Code (Ch. 4), section 282
Penal Code (Ch. 5) section 225 (4)

Other sources referred to in judgment:
European Convention on Human Rights section 3
Teachers Handbook (issued by the Solomon Islands Ministry of Education, 1978)

F. Mwanesalua for the Crown
A. Radclyffe for the respondent

WARD C.J.

Judgment:

This is an appeal by the Director of Public Prosecutions under section 282 of the Criminal Procedure Code against an acquittal by the Principal Magistrate (Central) of charges of (i) common assault, (ii) assault causing actual bodily harm, (iii) assaulting a person under fifteen years of age in a manner likely to cause unnecessary suffering or injury and (iv) ill-treating a person under fifteen years. All charges related to the same incident.

There were four original grounds of appeal:

(1) that the learned magistrate erred in finding that the punishment administered to Nestor Devesi was reasonable and inexcessive;
(2) that the learned magistrate has omitted to consider relevant evidence whilst determining the question of both reasonableness and excessiveness of the punishment administered to Nestor Devesi.
(3) that the learned magistrate erred in finding that the defence of lawful correction was open to the respondent;
(4) that there was evidence to convict the respondent on the charges upon which he was acquitted.

The Court later gave leave to file two further grounds:

(5) that the learned magistrate erred in his finding that there is no law in the Solomon Islands which renders corporal punishment administered to a pupil by a person in the respondent's position unlawful *per se* as section 7 of the Constitution does;
(6) that as caning is unlawful *per se* under section 7 of the Constitution, section 226(4) of the Penal Code, and the principle of lawful correction under common law, were not open to the respondent as defences for the offences upon which he was acquitted.

However, at the hearing of the appeal the Director of Public Prosecutions confined his arguments to two major grounds:

(1) That if the common law defence of reasonable punishment exists, the

punishment in this case was unreasonable (i.e. grounds 1 and 3) and

(2) The Constitution, as the supreme law since 1978, abrogates the right of parents, teachers or other people to administer corporal punishment as section 7 renders corporal punishment unlawfully *per se* (i.e. grounds 5 and 6).

and I shall deal with the appeal on that basis.

The charges relate to an incident at Chung Wah School on 3 August 1987. On that day two boys, both aged ten years old, were involved in a disturbance in assembly. There had been repeated warnings about the behaviour in assembly and it was agreed by both boys that they had heard such warnings.

The respondent, who was the acting headmaster at the time, told them to go to the classroom and, when they failed to do so, took them by the scruff of their necks and removed them from the line. He then collected a cane and caned each boy on the buttocks over his trousers. It is not clear whether this occurred in a classroom or outside but it is agreed it was in sight of the assembled children. Although there was a dispute about the number of blows, the learned magistrate found that each boy was struck four times. The victim in the charges was seen a short time later by a doctor who described a raised area about 1½-2 inches wide and about 6 inches long. He regarded it as not very serious and recommended no treatment.

I find it convenient to deal with the second ground, i.e. that relating to section 7 of the Constitution, first. Section 7 reads:

> 7. No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.

Unlike most of the sections which protect fundamental rights and freedom, there are no saving provisions. The section was not referred to by counsel at the trial before the magistrate. Indeed, the learned magistrate specifically asked whether the prosecution was asserting corporal punishment was unlawful *per se* or because it was excessive and the Director of Public Prosecutions stated he was alleging it was excessive and therefore unlawful. At that time, he clearly accepted it was permissible in certain circumstances for a teacher to inflict corporal punishment on a pupil and produced the Solomon Islands Teachers Handbook as part of his case urging that, if the Court found the punishment was in breach of the guidelines, that could be taken as evidence of excessive force.

Section 2 of the Constitution declares that the Constitution is the supreme law and, if any other law is inconsistent with it, that other law shall be void to the extent of the inconsistency. Similarly, Schedule 3, paragraph 2 states that the principles and rules of the common law do not have effect if they are inconsistent with the Constitution.

Although at the magistrates' court he accepted the lawfulness of corporal punishment in itself, Mr Mwanesalua now urges that section 7 of the Constitution is in terms that render such punishment unlawful *per se*. If that is so, section 226(4) of the Penal Code and the common law rule of lawful correction no longer provide a defence to charges arising out of the infliction of corporal punishment. Equally, it must follow that the Solomon Islands Teachers Handbook mis-states the law on this matter.

This point has been raised in a number of foreign jurisdictions but very few are directly on the point. I was greatly assisted by the opinions of the learned judges in

the Papua New Guinea *Special Constitutional Reference No. 1 of 1984: Re Minimum Penalties Legislation* [1984] P.N.G.L.R. 314; [1985] L.R.C. (Const.) 642 for general considerations. However, as I shall later show, the word that has the most relevance in this appeal is "degrading" and that word does not appear in the equivalent section of the Constitution of Papua New Guinea.

Identical wording to our section 7 is found in section 7 of the Constitution of Botswana and almost identical words in Article 3 of the European Convention on Human Rights and Mr Mwanesalua referred to cases from both jurisdictions: *The State* v. *Petrus & Anor* [1985] L.R.C. (Const.) 699 and *Tyrer* v. *United Kingdom* (1978) 2 E.H.R.R. 1.

The former case was dealing with a provision in the law of Botswana that allowed a sentence of corporal punishment, an order in addition to imprisonment, to be administered at quarterly intervals in the first and last years of the sentence. Such punishment by instalments was found to be an inhuman or degrading punishment. At p. 725 Aguda J.A. says:

> I take it that whilst "torture" stands by itself, the word "punishment" is the noun which is qualified by the words "inhuman" and "degrading". "Other treatment" must be held also to be qualified by both adjectives.

I must agree with that but, having said it, the learned judge fails effectively to distinguish between "inhuman" and "degrading" although he did quote with approval statements by a number of authors that corporal punishment was degrading because of the infliction of acute pain. He also suggested that even if it was not inherently inhuman or degrading it may become so by the nature or mode of execution.

I am sure the legislature intended the words inhuman and degrading to convey different meanings or, at least, a difference in degree. "Inhuman" suggests a total lack of the human qualities of pity or kindness. It suggests an act that is cruel or barbaric. "Degrading" is a lesser state that relates as much to the feelings of the victim as to the punishment itself. All torture and inhuman punishment, I would suggest, are inherently degrading but a punishment may be degrading notwithstanding that it does not reach the level of inhumanity.

Corporal punishment by a teacher on a pupil is not inherently inhuman but could become so by the manner of its execution. However, where it is administered in accordance with the guidelines in the Teachers Handbook, I cannot accept it would ever fall into the category of inhuman punishment. I am supported in that view by *Tyrer's* case, which related to a judicial order of three strokes of the birch on a juvenile offender in the Isle of Man.

The European Court of Human Rights found that such a punishment did not constitute either torture or inhuman punishment since the victim did not undergo suffering of the level inherent in those notions. However, in determining whether a punishment was degrading, the Court must assess the level of humiliation. A person may be humiliated by the mere fact of conviction but this would not amount to a breach of the Convention. A punishment would be in breach of Article 3 where a person was humiliated, not simply by his conviction but by the execution of the punishment where the humiliation or debasement attained a particular level which exceeded the usual element of humiliation inherent in punishment generally.

With respect, I agree that is the proper test to be applied. Whether corporal punishment is degrading such that it offends section 7 of the Constitution is a matter

of degree. It is not of itself unlawful and, whenever it is administered in accordance with the spirit and controls of the Code of Discipline in the Teachers Handbook, will not breach section 7. Therefore the ground of appeal that corporal punishment is unlawful *per se* fails.

It would follow from this that the defences under section 226(4) of the Penal Code and the common law are available to such a charge and I move on to consider the alternative ground that the learned magistrate erred in finding on the facts of this case that the punishment was reasonable.

Section 226(4) of the Penal Code provides that:

> Nothing in this section shall be construed as affecting the right of any parent, teacher, or other person, having the lawful control of a child or young person to administer reasonable punishment to him.

Section 226 relates to the charges of cruelty to a person under fifteen years (charges 3 and 4) but the right referred to derives from the common law. The law has long accepted the right of a parent to chastise a child, while under age, in a reasonable manner and as long ago as 1893 the court regarded the right of a headmaster to punish a pupil by corporal punishment as a delegation of the parents' right: *Cleary* v. *Booth* [1893] 1 Q.B. 465. This has been the law of this country for many years as shown by section 226(4) of the Penal Code and it is tacitly acknowledged by the Code of Discipline in the Teachers Handbook issued by the Ministry of Education in 1978. As such it provides a possible defence to all the charges in this case.

Thus, when this defence is raised, the court must consider, on the facts, whether the punishment is reasonable and the question of whether it offends section 7 of the Constitution should be borne in mind as part of that assessment. Any infliction of corporal punishment on a child that was inhuman or degrading must, in the light of that provision, be unreasonable punishment.

Whilst he took some trouble to consider the question of reasonableness, it is hardly surprising, in view of the way the case was presented in the lower court, that the learned magistrate did not specifically address his mind to the question of whether the punishment itself or the manner in which it was inflicted was degrading. In a carefully reasoned judgment he referred to the common law and section 226(4) then went on to remind himself of the provision of section 228 and the relevance of improper motive. The learned magistrate then specifically considered the "Code of Punishment" and found that there was no breach. He continued:

> I have considered the general point made by the prosecution that the punishment was excessive in relation to the crime. Courts should be slow to substitute their views for those of teachers present and dealing with indiscipline. I can find nothing that indicates to me that the decision to cane this boy was unreasonable.
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> I also find nothing that indicates that the blows inflicted were themselves excessive. A total of eight blows were delivered, four to each of two boys. The alleged victim was left with a mark on his buttocks, the other boy was not. The mark was evidence of slight injury. I received medical evidence on this. I do not find it to have been an injury of any great significance. I do not find that the fact that one or more blows out of a total of eight inflicted, four on this boy, left an injury of this sort leads me to the conclusion that the force used was

excessive.

I turn finally to the element of anger. Case law does indicate that improper motive, e.g. anger can render punishment unlawful. I have heard and assessed the accused. He was angry – he preferred the word annoyed – but this did not influence the administration of this punishment. It flowed inevitably from the warning given to the school the previous week.

Those conclusions were based on the learned magistrate's findings of fact and as such were conclusions he was entitled to make. This Court is always reluctant to interfere with such findings based as they are on his assessment of the evidence and witnesses and, as they stand, I see no reason to criticize them.

However, for reasons I have already described, the learned magistrate did not consider, as part of the test of what constitutes reasonable punishment, the question of whether the punishment was degrading in this case. I must consider that aspect on the evidence that was presented to the lower court.

In determining whether the conduct was degrading, the section should be interpreted in the light of present day conditions and the commonly accepted standards in this country at this time. Whilst the very old cases established the defence of reasonable correction, the generally accepted standard of what is reasonable has changed radically since then. If the manner of inflicting corporal punishment is outside the standards normally accepted and expected today, the possibility that the victim will feel humiliated is increased.

The Code of Discipline in the Teachers Handbook is of some assistance in this because it aims to set out the principles that should govern a teacher's conduct. Clause 8 states that, whilst corporal punishment is definitely not encouraged, it may be administered but only very rarely and subject to strict conditions which the magistrate found in this case were observed. It would appear, therefore, that the evidence showed caning is within the normally accepted standards of discipline in schools in this country.

Was there evidence, then, that the punishment or the manner in which it was administered in this case exceeded the "usual element of humiliation inherent in punishment generally?" I would be reluctant to find that a caning administered in conformity with the strict conditions in the Code of Discipline would exceed the inherent element of humiliation. However, in this case, whilst the magistrate found those conditions were observed, there were additional features. Each boy claimed to have been put in the wrong by the other and no attempt was made by the headmaster to ascertain the cause of disturbance. As it was a public punishment, it was carried out in the sight of the assembled pupils so that any sign of reaction such as crying would be witnessed by them.

There was no evidence before the Court as to the incidence of corporal punishment in schools generally but both the pupils who were caned knew of previous occasions when canings had been administered at Chung Wah School. The respondent himself had been at the school since January 1986 and had caned about twenty pupils. It is clearly not a rare occurrence at this school. As such I accept it is less likely to be humiliating than when it is very unusual. On the other hand, the respondent made a deliberate decision to make this punishment public. He told the lower court: "I'd made a decision before, and had told the school, that caning would be the outcome. I was committed to it." He then described giving each boy four

quick blows and continued, "Force used was reasonable. I am sure of the number of strokes. Four moderate strokes would have more visual effect but one hard one would have been worse. I did it deliberately in front of the school. Other teachers would definitely have seen it." The fact that such a punishment may have had a greater deterrent effect on the school does not reduce the degrading effect on the child caned. On the contrary, the deliberate decision to punish in public increased the child's humiliation. I would suggest that even if the caning had been in private, the knowledge that it occurred would have made it an effective deterrent.

It seems to me that this was an ill-judged and unwise act. Whilst I have already stated I will not interfere with the magistrate's findings on the evidence that there was no actual breach of the Code of Discipline and that the respondent's anger did not influence the administration of the punishment, I cannot escape the conclusion that it was against the spirit of the Code.

I do not set them out here, but the earlier sections of the Code of Discipline clearly set the background against which clause 8, "Corporate Punishment", should be read and I commend them to any teacher who wishes to consider the principles of fair punishment.

Caning of ten-year-old children in public is not in the spirit of a code that limits the use of corporal punishment to very rare circumstances under a procedure that militates against the punishment being administered in hot blood. Equally, the requirement that another teacher should be present suggests that the Code envisages the punishment being carried out in private.

In *Tyrer's* case the victim had to wait a long time in the police station for the punishment to be administered. He had to remove his trousers and pants and was beaten in front of a police officer, a doctor and his father. The court found that did attain the level of humiliation inherent in the notion of degrading punishment.

In this case, the element of humiliation was less but the deliberate decision to inflict the caning in public and the consequence that any emotion would be seen by the assembled pupils added an extra and unnecessary element of humiliation. In those circumstances, I feel this did take the matter beyond the degree of humiliation inherent in the punishment itself, rendered it degrading and thereby unreasonable and the defence under section 226(4) and the common law cannot help the accused.

The appeal is allowed and the findings of acquittal are quashed.

Before I leave this case, I should comment on the inappropriateness of this prosecution. No court should seek to deprive anyone of his right to claim the protection of the criminal law. Any parent may feel distressed when his child is punished by a teacher but he would be wise to examine his own conscience carefully before condemning the teacher for the fact of the punishment and weight carefully the true effect of a prosecution before advocating such a course. Although I have concluded this punishment was unreasonable, it was certainly a borderline case and would have been dealt with far more effectively by an approach to the school authorities. The result of the decision to prosecute is that this child has had to describe his humiliation in a public court crowded with strangers. The case will inevitably be the subject of comment, much of it ill-informed, amongst the public and especially his school fellows. The degree of humiliation suffered by the child may well have been increased by this both in degree and in the time it continues to be felt. The school itself, without having been given an opportunity to solve the matter, may suffer disciplinary problems which will be to the detriment of all the

pupils. The teacher, who I am quite satisfied believed he was entitled to do as he did, will have had his authority in the school undermined.

All this would have been avoided and the system of punishment at the school reconsidered by a direct and sensible approach to the school authorities. Why the prosecuting authorities decided to take this case to court is a matter about which I do not need to speculate but I would urge them to consider very carefully any such future prosecution. Like the learned trial magistrate, I feel it is a pity this prosecution was brought at all. The decision to do so was as ill-advised as the subsequent trial was unnecessary. However, having brought the case in the magistrates' court, the Director of Public Prosecutions was right to draw this court's attention to section 7 of the Constitution and I can only hope that this judgment will help to define the position for other teachers.

I have already stated that I accept the respondent believed he was entitled to act as he did. Corporal punishment is clearly permissible and the excess of which he is guilty in this case is slight. The magistrate accepted the medical evidence that the force actually used was not excessive. Both children agreed that the assembly had been disrupted by their actions. The only matter that was wrong was the decision to inflict the caning in public.

I am informed by the Director of Public Prosecutions that the respondent has no previous convictions.

In all the circumstances a conviction is not appropriate. I am satisfied the proper order is an absolute discharge without conviction under section 35 of the Penal Code.

Reported by: P.T.R.