

IN THE SUPREME COURT OF THE UNITED KINGDOM
ON APPEAL FROM THE COURT OF APPEAL (CRIMINAL DIVISION)

B E T W E E N:

R

-v-

GRANT FLICKER

MOOT PROBLEM

1. The Bayshells is an archipelago of 16 islands in the Indian Ocean, off East Africa. It gained independence from the United Kingdom in 1992. The country held its first election that year. It was contested between two lawyers, Dr Rene Allo and Mr Grant Flicker. Both had been called to the Bar of England and Wales and were both, incidentally, Middle Templars.
2. Rene Allo won the election with a tiny majority. She was sworn in as the first President of Bayshells in October 1992. The capital of Bayshells is on the main island of Barhay. Feeling aggrieved at his loss Grant Flicker moved to the country's second largest island, Craslin.
3. Grant Flicker was a popular local figure in Craslin. He became a cult like leader. People all looked up to him, but he had no official title. The local community and all local police followed Flicker's lead more than that of President Allo. Over the next few months Flicker started to coordinate the running of the Craslin. He gave advice on how to run the island's school, local hospital and started to collect taxes from the local community. There were even plans to appoint judges and set up a local court system, but this never came to fruition.
4. President Allo was devastated at developments on Craslin. She implored Flicker on many occasions to surrender authority back to the central Government on Barhay. Flicker refused.
5. In December 1993 President Allo decided to send her most senior army officer, General Edith, to Craslin to meet face to face with Flicker in the hope of negotiating some sort of end to the crisis. Flicker agreed to meet with General Edith on Christmas Day 1993. However, rather than negotiate as planned, Flicker had General Edith arrested and detained in the local school. General Edith claims that on Boxing Day, Flicker came to the school with a group of local men who proceeded to severely beat him. He said Flicker insisted that General Edith tell him the location of all of the armed forces on Barhay as he intended to take control of the island and the country on New Year's Eve. General Edith claims he held out for as long as he could. But eventually he could take no more and disclosed all the necessary details to Flicker. Flicker has always denied this. He said General Edith voluntarily gave him all the information he needed in the hope of currying favour with him when he took power.

6. On New Year's Eve, Flicker, with a group of South African mercenaries, sailed to Barhay and took control of the island in a bloodless coup. The armed forces surrendered to him. President Allo stepped down and fled to Kenya. On 3 January 1994 Flicker was sworn in as the country's second President.
7. Bayshells was ruled by Flicker in a one party system for three years. In 1997, following growing pressure from the international community, Flicker agreed to hold elections. Rene Allo returned to Bayshells to contest the election. Flicker and Allo faced each other again.
8. The election was due to be held in September 1997. In the months leading up to the election it was reported that armed groups of Flicker supporters kidnapped and detained those campaigning for Allo. It was said they were taken to secret locations and tortured until they agreed not to continue campaigning for Allo. There were said to have been at least 968 such incidents, with nearly 1000 Allo campaigners alleging acts of torture by Flicker supporters. The matter was raised publicly on several occasions and Flicker was asked to stop the actions of these armed groups. Flicker claimed he had no control over them and had no idea who they were. He was provided with a list of names but did nothing.
9. The elections were held in September 1997. Allo won with a landslide and was duly sworn in as President on 25 September 1997. There were calls for Flicker to be prosecuted for his numerous crimes against the people of Bayshells, in addition to the various acts of torture, there were also allegations of widespread corruption.
10. In a gesture of reconciliation and to avoid further violence President Allo offered Flicker an amnesty. It was further decided that a new Constitution would be drafted for Bayshells. The U.K. offered technical assistance and sent a team of drafters to help draft the new Constitution. Article 8 of the Constitution provided that no crimes committed prior to the entry into force of the Constitution could be prosecuted in Bayshells. The Constitution was agreed by all and was launched at a ceremony on 3 January 1998. The ceremony was attended by both President Allo and Flicker. In recognition of the assistance the U.K. had provided with drafting the Constitution the U.K. Foreign Secretary was also invited. She gave a short speech in which she said "she hoped that the olive branch of reconciliation offered by President Allo would lead to many years of peace in Bayshells". It is said Master Treasurer of the Middle Temple was also invited, but there is no record of his attendance at the ceremony.
11. In February 1998 Bayshells ratified the UN Convention Against Torture. In July 1998 Bayshells signed the Rome Statute of the International Criminal Court, but did not ever ratify the treaty.
12. In 2003 Grant Flicker moved to London and took a position at University College London, where he lectured in Law and International Development. He was a popular and well liked faculty member.
13. President Allo stepped down in 2007. A series of hurricanes, tsunamis and other natural disasters had decimated the islands of Bayshells. There was 45% unemployment, widespread poverty and continued social disorder. Courts had all but ceased functioning and there was little by way of a credible legal system.

14. Allo was replaced as President by the daughter of General Edith. She was very much in favour of investigating the alleged crimes of Flicker and his regime. She encouraged a UK based NGO called 'Justice Now' to conduct investigations in Bayshells. Over the next 8 years 'Justice Now' put together a dossier of evidence against Flicker. They handed it over to the Metropolitan Police who in turn conducted their own investigations.
15. On 28 November 2018 Flicker was arrested at his home in London. He was interviewed about his involvement in the alleged torture of General Edith on 26 December 1993 and his involvement in the alleged torture of Allo supporters in the lead up to the September 1997 election. He denied all involvement but claimed that even if true he could not be prosecuted because he had been granted an amnesty in 1997.
16. Flicker was charged and appeared before the Central Criminal Court on a two count indictment:

Count 1: That on 26 December 1993, Grant Flicker, being a person acting in an official capacity, tortured General Edith on the island of Craslin, Bayshells, contrary to section 134 of the Criminal Justice Act 1988.

Count 2: That from June to September 1997, Grant Flicker, being President of Bayshells and therefore a superior, failed to prevent or repress widespread acts of torture as a crime against humanity in Bayshells, contrary to sections 51 and 65(3) of the International Criminal Court Act 2001.
17. Flicker argued before the Trial Judge that the indictment against him should be stayed as an abuse of process on the basis that he had been granted an amnesty in 1997 and by virtue of the Bayshells Constitution of 1998, which the UK had contributed to drafting. The Trial Judge refused the application. Flicker appealed to the Court of Appeal.
18. The Court of Appeal stayed Count 1 as an abuse of process. The Court held that as Flicker was charged with only a single act of torture it would be an injustice to proceed with prosecution in circumstances where an amnesty had been given and effectively endorsed by the U.K. The Court applied *R v Croydon Justices ex parte Dean* [1993] Q.B. 769 and *AG of Trinidad and Tobago v Phillip* [1995] 1 AC 396.
19. However, the Court refused to stay Count 2 on the basis that there can be no amnesties for the serious international crimes of genocide, war crimes and crimes against humanity under international law. In holding that it would not be an abuse of process for the prosecution to proceed the Court cited the international cases of: (i) *Prosecutor v Kallon and Kamara* 'Decision on Challenge to Jurisdiction – Lome Accord Amnesty' Appeals Chamber of Special Court for Sierra Leone, 13 March 2004; and (ii) *Prosecutor v Gaddafi* 'Decision on the Admissibility Challenge by Dr Saif Al-Islam Gadafi' [paras. 61 to 77] Pre-Trial Chamber of International Criminal Court, 5 April 2019.¹

¹ It should be noted that after the decision of the Court of Appeal, but before the hearing before the Supreme Court, the Appeals Chamber of the International Criminal Court held on 9 March 2020 that the Pre-Trial Chamber's decision with regards the applicability of amnesties was *obiter dicta*. At para. 96

20. The certified question of general public importance for consideration on appeal before the Supreme Court is:

Can an amnesty granted in the State where the alleged crimes have taken place prevent prosecution in the U.K. for torture under the Criminal Justice Act 1988 (Count 1) or torture as a crime against humanity under the International Criminal Court Act 2001 (Count 2)?

The senior mooters should argue whether Count 1 should be stayed as an abuse of process.

The junior mooters should argue whether Count 2 should be stayed as an abuse of process.