



Takiveikata v. State

2008] FJHC 315

Country: Fiji

Region: Oceania

Year: 2008

Court: High Court

Health Topics: Hospitals, Prisons, Violence

Human Rights: Freedom from torture and cruel, inhuman or degrading treatment, Right to due process/fair trial, Right to family life, Right to liberty and security of person

Facts

An application to the High Court for a stay of proceedings was made on behalf of ten defendants, facing a charge of conspiracy to murder. The prosecution alleged that the defendants had agreed to murder the Prime Minister, Minister of Finance and the Attorney General. The case for the prosecution relied on the testimony of two military officers who had infiltrated the group.

The defense applied for a permanent stay of proceedings on the following grounds; a) treatment of the accused prior to interception; b) treatment of the accused on interception; c) treatment of the accused post interception; d) unfair and prejudicial publicity; e) the absence of bona fides in the carrying out of the investigation by, in particular, the military; f) inadequate disclosure by the State; g) destruction of material ordinarily disclosable which seriously prejudices a fair trial; and h) the conduct of the military, taken as a whole, is such that would be improper to hold a trial.

[Adapted from INTERIGHTS summary, with permission]

Decision and Reasoning

The Court considered some fundamental principles of law as a basic starting point in this case: 1. The defense bore the burden of proof to the civil standard for the application. 2. The High Court of Fiji has inherent jurisdiction to stay proceedings where there is a risk of abuse of process, such that a fair trial cannot be had, or where conduct established on the part of the executive is so wrong that it would be an affront to the conscience of the court to allow proceedings to proceed. 3. The Court considered the circumstances in which it was appropriate to stay proceedings, recognizing the power to be discretionary and "only be employed in exceptional circumstances."^[1] Before the courts may consider imposing a stay, the law required that Courts consider other remedies^[2] Where the fairness of a trial was in jeopardy, were are circumstances in which a stay of proceedings might be granted to protect the right to a fair trial, which was fundamental according to the constitution.^[3]

In dismissing the appeal for all applicants except K, the Court held that:

(1)Â The defense failed to satisfy the burden of proof with regard to their claim of harassment by the military, in which they alleged they were subject to repeated detention at military barracks. There was insufficient nexus between the alleged wrongs and the proceedings to grant a stay on these grounds.

(2)Â As there was insufficient evidence to prove harassment by the military, it cannot be held that the military failed to disclose records of detention.

(3)Â The military did provide one record of detention, which offered no justification for the detention, and which was probably unlawful. This does not justify a stay of proceedings as civil remedies were available.

(4)Â The accused were not incited to commit the crime by the presence of the military officers, or by the list produced suggesting methods to carry out the crime.Â The accused state that they had no intention of carrying out the crime, as such, the list and infiltration by the military officers cannot be said to have incited them.

(5)Â The nature and time of the interception was insufficient to prove that the accused had been under the

surveillance of the military and that the military had been acting in bad faith.

(6)Â Whilst it was likely that an excessive degree of force was used against K upon interception, it had not been proven thus the court was unable to grant a stay on these grounds.

(7)Â K alleged unlawful detention, and that he was under detention whilst hospitalized. His personal liberty had been restricted in that he was unable to go as he pleased.

(8)Â An arrest was lawful under s 21 of the Criminal Procedure Code if executed by police, and lawful under s 24 if executed by the military. However, both s 23 and the position at common law require the accused to be taken before a Magistrate "without unnecessary delay" (Wright v Court (1825) 107 ER 1182 and John Lewis & Co v Tims [1952] AC 676 applied). The delay of sixty days between the arrest of K and his being brought before a Magistrate in this circumstance was wholly unreasonable. If the defendant was unable to be transported for health reasons, a Magistrate could have been brought to him.Â The fact that the accused was taken for interrogation also negated this argument.

(9)Â In light of the requirement under s 27(1)(c) of the Constitution that every person who was arrested or detained had the right to consult with a legal practitioner of his or her choice in private in the place where he or she was detained, the conduct on the part of those who insisted that there be an officer present and, possibly those who insisted on the conversations between solicitor and client be very brief was utterly unacceptable.

(10)Â The right of opportunity to communicate with and be visited by a spouse or partner under s 27 of the Constitution had also been ignored, as had the requirement to inform the partner of the detention.Â The restriction of this right was not in itself however sufficient to grant a stay of proceedings. Conduct visited on the partner of the applicant was not relevant, as only conduct visited directly on the applicant was relevant, and was therefore not basis for a stay.

(11)Â The applicants, who relied on the argument that the investigation was not carried out bona fide, had not established to the requisite standard of proof that the investigation was conducted in bad faith. Further, the retention by the military of the conduct of this investigation until very shortly before arrest action was taken did not sufficiently threaten the fairness of the trial to justify the imposition of a stay of proceedings.

(12)Â In respect of the alleged release of highly personal recordings of the accused to the public domain by the police, it was rejected that such information meant jurors could not bring a fair, open-minded and balanced judgment to the issues which would be presented to them so as to impose a stay.

(13)Â The behavior by the executive could not be shown to have substantially threatened either basic human rights or the rule of law.

(14)Â The clear imperative was that those facing criminal charges should be tried. Every authority taken into account in considering these issues makes it plain that a stay of proceedings was to be an exceptional remedy.

(15)Â The prosecution's duty to disclose to the defense relevant information was not limited to the disclosure of admissible evidence as information not itself admissible may lead by a train of inquiry to evidence which was admissible.

(16)Â The impact of the likely testimony of the missing witness must be considered and a stay may only be granted if the absence of the evidence was so prejudicial to the position of the accused that no fair trial could be held.Â Only if no remedial measures could be taken to ensure the fairness of the trial should a stay be imposed.

(17)Â In this instance the right to fair trial was not jeopardized by the destruction of evidence. Nor was the destruction impossible to remedy as cross examination was still available, and the jury could be directed accordingly.

(18)Â A permanent stay of proceedings was granted to K due to the restriction of his liberty, and his being effectively denied legal representation.

(19)Â The stay was refused in respect of the remaining defendants.

[1] R v Humphrys [1977] 1 AC 1; Barton v R (1980) 147 CLR 75; Moevao v Department of Labour [1980] 1 NZLR 464; R v Derby Crown Court, ex parte Brooks (1985) 80 Cr App R 164; Attorney-General's Reference (No 1) of 1990 [1992] QB 630; Jago v District Court (NSW) (1989) 168 CLR 23; Tan Soon Gin v Judge Cameron & Anor [1992] 2 AC 205 applied.

[2] R v Heston-Francois (1984) Cr App R 209; Attorney-General's Reference (No 1) of 1990 [1992] QB 630; R v O'Connor [1995] 4 SCR 411, (1996) 130 DLR (4th) 235; R v Taillefer & R v Duguay [2003] 3 SCR 307 applied.

[3] Section 29(1)

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Decision Excerpts

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