

CRIMEWATCH

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LAW MINISTERS TACKLE PROBLEMS OF CORRUPTION AND INTEGRITY

Commonwealth Law Ministers, at their meeting in Kuala Lumpur, expressed their collective commitment to work on both the domestic and international fronts to combat corruption. In particular they undertook to implement strategies to prevent and combat corruption, to the extent that they have not already done so. In their special statement on the subject, Ministers recognised the threat posed by corruption to democratic institutions and good governance, and the need to combat corruption effectively in order to achieve the goals set out in the Harare Declaration, as elaborated upon by the Millbrook Commonwealth Action Programme.

In terms of the economic effects of corruption, they noted that corruption in international business transactions and foreign aid projects can contribute to the initiation of unnecessary projects and to the diversion of funds and resources from projects which are vital. They expressed approval of the work of the OECD in addressing the fact that bribes paid by foreign businesses, particularly from industrialised countries and which are often tax deductible in their home countries, are conducive to the creation of corrupt cultures.

Recognising that there is a growing need for the network of mechanisms for combating corruption to cover the provision of services in the public interest by the private sector, given the trends towards contracting out and the privatisation of services previously provided by government entities and the shift in the nature of governance which this entails, they recommended the establishment of an advisory group which is to assist the Commonwealth Secretariat to examine all aspects of the problem, to advise Ministers on developments and initiatives in the field and to propose courses of action which may assist member jurisdictions to address and to resolve the problems of corruption more effectively.

The Commonwealth project is to concentrate on the collection and dissemination of examples of national laws and experiences in combating corruption; identification of strategies which have been effective in changing national and international standards, especially those strategies which have helped to promote an "anti-corruption" culture; and the development of model legal strategies for combating corruption, including an appropriate legal framework which takes into account the increasing role of the private sector in the system of government. It will also include the development of minimum standards for Commonwealth members in the form of a Model Integrity Code.

CASE NOTES

Summary proceedings - Preliminary hearing - Prosecutor's authority - Judicial review - Abuse of Process - Serious Fraud Office.

P sought to obtain a judicial review of the actions of a senior investigator in the New Zealand Serious Fraud Office, who had charged him with fraud, on the grounds that the prosecution was acting unlawfully in proceeding with a preliminary hearing under the Summary Proceedings Act 1957, S.160A, where it wished to have some witnesses examined on oath. (P wanted to be committed for trial on charges already laid against him on the papers and without an extensive preliminary hearing with the risk that further charges against him might result.) (Under the Serious Fraud Office Act 1990, the powers of the SFO are not brought to an end when a person is charged.)

Held:

There is ample authority that a decision of the prosecution not to call witnesses at committal proceedings is not reviewable. Policy considerations support this stance and there are the gravest dangers in the Court taking an interest in how the prosecution or defence chooses to run its case. The criminal justice system of this country is now, and will continue to be for the foreseeable future, under the gravest kind of pressure. There is a need for prosecuting counsel to be independent and it would provide an unfair advantage to the defence if it could dictate the mode by which prosecution witnesses gave evidence at preliminary hearings.

Phillips v. Drain, High Court of New Zealand, 29 November 1995, confirmed on appeal by the Court of Appeal on 9 February 1995. (From (1995) 18 The Capital Letter No. 4, p. 10)

Serious Fraud Office - power to compel answers - whether reasonable excuse - whether power continued after person charged.

The UK Serious Fraud Office applied for judicial review of the decision of the Metropolitan Stipendiary Magistrate to dismiss a charge under the Criminal Justice Act 1987 (the Act), of failing to answer questions posed by the SFO pursuant to its powers under the Act. The accused based his refusal to answer questions on the ground that he had a reasonable excuse for so doing. The issue for decision was whether the accused could be compelled to answer questions after being charged.

Held (in granting the application):

1. the Stipendiary Magistrate was incorrect in his decision. In the light of the House of Lords decision in *R. v. Serious Fraud Office ex parte Smith* [1993] 1 AC 1 and the Court of Appeal's judgment in *Arrows Ltd. (No.4), Re* [1994] C.L.Y.678, the powers of the Director of the SFO to compel answers must continue after the person under investigation has been charged, so that the defence of "reasonable excuse" in s.2(13) of the Act could not arise.

R v. Metropolitan Stipendiary Magistrate ex parte Serious Fraud Office [1994] C.O.D. 509, Butler Sloss, L.J.

Evidence - admissibility of witness statement - illness of witness

The applicant had been convicted on a single count of burglary, for which he was sentenced to 3 years imprisonment. He had been tried jointly with Alan Barry Walker, who pleaded guilty and was put on probation for two years with a condition that he has psychiatric treatment. He appealed his conviction on the ground that evidence had been incorrectly admitted at trial.

The issue was whether written statements made by a witness to a burglary, who was the sole identification witness and who later was medically unfit to give evidence, was admissible. It was argued that it was not in the interests of justice for evidence to be admitted, particularly since that witness could not be cross-examined and this would result in unfairness to the accused.

The relevant provisions of the UK Criminal Justice Act 1988 provide for the admission of statements of witnesses who are, by reason of bodily condition, unfit to attend but require the leave of the court before such statements can be admitted. The Court is required to determine whether, on specified grounds, it would be in the interests of justice to admit the statement.

Held:

No statutory provision or legal precedent justified a submission that a trial judge was wrong to have admitted in evidence several statements made by a witness to a burglary who later became so ill that he was and would remain unfit for an indefinite time to give evidence at the trial of a man he had identified as being involved in the burglary. The trial judge, having weighed the relevant considerations, was correct in his decision to admit the statements.

Regina v. Dragic (Court of Appeal), *The Times*, March 7 1996.

Evidence - admission of evidence obtained as a result of a search of third party premises - Charter of Rights - right to privacy

The accused appealed from conviction on a charge of possession of drugs for the purposes of trafficking. The drugs had been found in the apartment of his girlfriend following the making by police of false statements to gain access to the apartment. At trial the accused argued that the drugs had been obtained as a result of an unreasonable search in terms of s. 8 of the Canadian Charter of Rights and Freedoms which provides that everyone has the right to be secure against unreasonable search and seizure.

Held - dismissing the appeal

The right guaranteed by the Charter must, as a general rule, be that of the accused person making the challenge. In determining whether or not a reasonable expectation of privacy exists, regard must be had to the totality of the circumstances. Here the appellant had not reasonable expectation of privacy. Since he had no personal privacy right under s. 8 he could not challenge the police's behaviour.

R. v. Edwards [1996] SCR (Canada) (drawn from a summary of the case provided by the Human Rights Law Section of the Canadian Department of Justice)

Evidence - Expert evidence - Drug Trafficking

The accused was charged with the offence of trafficking dangerous drugs under S.39(1)(c) of the Dangerous Drugs Act 1952 ("the Act"). Counsel for the accused raised issues relating to contradictions and uncertainties of the government chemist with regard to the subject matter of the charge, and the identity of exhibits. The government chemist stated that the matter found with the accused was "cannabis as defined in the Act" in the chemist report, but in his oral testimony in court, he stated that it was "cannabis or cannabis (Indian hemp) as defined in S.2 of the Act."

The substantive issue before the court was, whether, in light of statutory provisions governing the admission of material required by law to be reduced to writing (in this case the chemist's report) and the right to give evidence to supplement such written material, the chemist could give oral evidence to improve the chemist report. (Another issue on the integrity of the evidence (packets of seized drugs) was also relevant to the outcome.)

Held: (amending the charge to one of possession of cannabis (Indian hemp), acquitting and discharging the accused), that an expert like a government chemist must be very selective in the use of the words when testifying in court. A wrong choice of words would be fatal especially when it involves a penal statute that carries with it the mandatory death penalty;

Public Prosecutor v. Sulaiman bin Mohamed Noor [1996] 1 MLJ 196 High Court, Malaysia.

Evidence - taped conversations - admissibility - test of relevance. Bill of Rights - unlawful interference with privacy - whether wire taps constitute unlawful interference.

The Applicant was convicted of conspiracy to traffic in dangerous drugs. Evidence against him had been provided, inter alia, by taped conversations between various parties, which greatly implicated him. In a related trial in Canada, the court had ruled the wire tap evidence inadmissible on the ground that the RCMP application for the warrant to intercept failed to disclose reasonable and probable grounds that the target was involved in any drug transaction.

The applicant sought to challenge the conviction on the ground that the wire tap evidence should have been excluded and also on the ground that the interception of telephone calls constituted an unlawful interference with his privacy contrary to Article 14 of the Hong Kong Bill of Rights.

Held, dismissing the appeal, that it was a generally accepted principle that the test of the admissibility of evidence is "relevance." Since the taped conversations constituted relevant and cogent evidence the judge was right to rule them admissible in evidence. The finding of the Canadian Court concerning the same tapes was irrelevant - as was any UK law on the subject. In Hong Kong the question of admissibility was governed by common and not by statute law.

The Bill of Rights is part of the law of Hong Kong and is not a self-contained code which can operate to change the result of applying ordinary rules of evidence and procedure on the admissibility of a piece of evidence. The Bill of Rights does not operate to provide a dual system of justice.

R v. Cheung Ka Fai. [1995] 3 HKC 214 (Hong Kong Court of Appeal)

Privy Council - death sentence - mercy plea - power to hear appeal.

The convicted person sought special leave of Judicial Committee of the Privy Council to appeal against the dismissal of an appeal against conviction. Leave was sought after the Belize Advisory Council had rejected a plea of mercy by the convicted person.

The issue before the Board was whether, in an independent state, the decision as to the exercise of the prerogative of mercy was necessarily the last stage in the process and a subsequent appeal was therefore constitutionally irregular.

Held:

1. If the trial leading up to the conviction was legally unsatisfactory, the conviction could not stand. It was for the court to rule on the legality of a conviction.
2. It was for the Advisory Council to decide whether to exercise the prerogative of mercy in relation to a person lawfully convicted.
3. If, for good reason no appeal against conviction had been brought before the refusal to exercise the prerogative of mercy and it was shown that there might have been wrongful conviction, it had to be possible to set such conviction aside on legal grounds. The Judicial Committee of the Privy Council had jurisdiction to grant special leave to appeal to persons under sentence of death in Belize after a plea of mercy had been rejected by the Belize Advisory Council and Logan's conviction and sentence of death were quashed and substituted by a conviction of manslaughter.

Logan v. The Queen. The Times, March 8 1996. Privy Council.

Human rights - Detention - Right to review of lawfulness continued detention - European Convention on Human Rights - whether available remedies satisfied requirements of Art.5.4 of the Convention.

Both applicants had been convicted of murder and sentenced to be detained during Her Majesty's pleasure. At various times the Parole Board had reviewed each case without making reports on which the Board based its decisions available and without affording the applicants an opportunity for an oral hearing. Each of the sentences was imposed pursuant to S.53 of the Children and Young Persons Act 1993, which provides:

"A person convicted of an offence who appears to the court to have been under the age of eighteen years at the time the offence was committed shall not, if he is convicted of murder, be sentenced to imprisonment for life nor shall sentence of death be pronounced on or recorded against any such person; but in lieu thereof the court shall.....sentence him to be detained during her Majesty's pleasure....."

The sentences each involved a fixed punitive period and an indeterminate term of detention thus making the sentences akin to discretionary life sentences (which under UK law require the setting of a period which must be served before release).

Art. 5.4 of the European Convention on Human Rights provides that "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered

if the detention is not lawful."

Held:

1. In discretionary life sentences new issues of lawfulness might arise in the course of detention or re-detention, and the applicants were entitled under Art.5.4 to take proceedings to have those issues decided by a court at reasonable intervals.
2. Art.5.4 required an oral hearing in the context of an adversarial procedure involving legal representation and the possibility of calling and questioning witnesses. The applicants' possibility of obtaining an oral hearing by way of proceedings for judicial review did not adequately satisfy the requirements of Art.5.4.

The Court unanimously held that there had been a violation of Art.5.4 in that the applicants were unable to have the lawfulness of their continued detention reviewed by a court.

Hussain v. United Kingdom (case no.55/1994/502/584); *Singh v. United Kingdom* (case no.56/1994/503/585) European Court of Human Rights, The Times, February 26 1996.

Media Coverage of Arrest and Trial - Media Payments to Potential Witnesses - Right to a Fair Trial

An application for leave to appeal convictions on 10 counts of murder was brought by the convicted person. The issue raised by the defence was whether a fair trial could be held after intensive publicity adverse to the accused. Five witnesses had been paid sums by the media. The defence argued that money received or contracts made by witnesses who were important Crown witnesses rendered their evidence tainted and suspect to the point of making the jury's verdict unsafe.

Held:

Provided that the judge effectively warned the jury to act only on the evidence given in court there was no reason to suppose that they would do otherwise. To hold that a fair trial could not be had after intense adverse publicity would mean that if allegations of murder were sufficiently horrendous so as inevitably to shock the nation, the accused could not be tried. Such a result would be absurd.

Save in respect of a contract with a witness of which the prosecution had been unaware until disclosure by a newspaper group, all contracts had been disclosed to the defence before trial so that witnesses could be cross-examined about them. The effect of this would only be to weaken the Crown case. The Judge had also gone through the contracts in detail in his summing up and had warned the jury to have regard to commercial motives which the defence attributed to the witnesses. The effect of the contracts with the media did not, in the circumstances, render the verdict unsafe.

The whole issue of media payments to witnesses required to be reviewed, including the issue of whether payments should be prohibited, and if not, at what stage of criminal proceedings might they be permitted. It was not, however, for the Court to answer these questions which were being considered by the Attorney-General.

Regina v. West, Court of Appeal, United Kingdom, The Times, 4 April 1996.