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LEGISLATION

Samoa passed on 25th April 2002, “The Prevention and Suppression of Terrorism” Act No. 6 of 2002.

The Act creates an offence of terrorist bombing which it defines as intentionally delivering, placing, discharging or detonating of an explosive or other lethal device in, into or against a place of public use, a State or government facility, any vehicle or an infrastructure facility,

- “(a) With the intent to cause death or bodily injury; or
- (b) With the intent to cause extensive damage to such a place, facility or system where such damage results in or is likely to result in significant economic loss; or
- (c) With the intent to cause public alarm, fear or panic.”

Terrorist bombing is punishable by imprisonment for life.

Other offences created are:

1. hostage taking and attempts thereof,
2. attacks against internationally protected persons and their premises and threats to such persons,
3. offences against civil aviation including seizure of aircraft and violence at airports,
4. offences against the safety of maritime navigation such as seizure of ships, and threat to a ships safety, and
5. the financing of terrorist activities and assisting in such financing.

In respect of the offence of financing of terrorist acts, the Act provides for the forfeiture of such funds or proceeds to the State. the Court has power to order the freezing of such funds upon the application of the Attorney general, and to punish with imprisonment any person who fails to comply with its orders. Managers, company directors or persons with authority over the relevant funds are held personally liable for any act or failure to act by the company or other juridical person.

Part VIII of the Act provides for a fast track extradition of foreign nationals wanted overseas on terrorist charges or who have escaped custody after conviction for terrorist acts. The provisions apply notwithstanding the provisions of the Extradition Act 1974 or any other law. The procedure allows a police officer upon reasonable suspicion to arrest and bring to the Supreme Court the foreign national wanted by a foreign country. Under section 6, the Supreme Court can order that the person remain in custody and be returned to the foreign country, upon being satisfied that:

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For further information or copies, please
contact: The Editor, Criminal Law Section,
Legal & Constitutional Affairs Division (LCAD),
Commonwealth Secretariat,
Marlborough House, Pall Mall,
London SW1Y 5HX, United Kingdom.
Tel: +44 (0)20 7747 6417/6420/6423
Fax: +44 (0)20 7839 3302
E-mail: k.prost@commonwealth.int
v.wright@commonwealth.int

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- "(a) the provisions of section 6 of the Extradition Act do not apply, and
- (b) there is reasonable evidence available to the Court that the person should face trial for committing a terrorist act".

The jurisdiction of the Supreme Court over the

application of the Act applies irrespective of whether the act occurs within Samoa or outside.

In introducing the Act, the Prime Minister said that the Act was "a further example of Samoa's commitment to the international campaign against terrorism. It closes Samoa's doors as a potential safe haven or transit for terrorists".

C A S E N O T E S

Constitutional law - Charter of Rights - Unreasonable search and seizure - Stolen safe recovered by police and searched - suspicion of tax evasion - Whether photocopying of documents constituted unreasonable search or seizure - Whether photocopied documents admissible as evidence of Excise Tax Act violations - Canadian Charter of Rights and Freedoms, ss. 8, 24(2).

L reported to police the loss of his safe. It was later recovered by police open in a field. The police conducted an investigation of the theft. Before the safe was returned to the accused, an officer, not involved in the investigation of the theft but who suspected the accused of tax violations, photocopied some financial documents found in the safe and eventually forwarded the photocopies to Revenue Canada. L was charged under the *Excise Tax Act* for contraventions of the reporting requirements and of the obligation to remit taxes. The prosecution requested that the photocopied documents be admitted into evidence. The trial judge ruled that the photocopying of the documents was an unreasonable search under section 8 of the Canadian Charter of Rights and Freedoms, and excluded the photocopies under s. 24(2) of the Charter. Since there was no further evidence, the trial judge acquitted L of all charges. On appeal, the trial judge's decision to exclude the evidence was upheld. The prosecution appealed further to the Court of Appeal, the majority of which allowed the appeal. L then appealed to the Supreme Court of Canada. At issue was whether the photocopied evidence, which revealed alleged tax violations on the part of L, ought to be excluded.

➔ Held: allowing the appeal;

1. Police conduct interfering with a reasonable expectation of privacy is said to

constitute a search within the meaning of s. 8 of the *Charter*. Where an individual abandons his property, he effectively abandons his privacy interest in it. However, the mere fact that police recover lost or stolen property is insufficient to support an inference that the owner voluntarily relinquished his expectation of privacy in the item. In this case, the accused retained a residual, but limited, reasonable expectation of privacy in the contents of the stolen safe. One would have expected the stolen property to remain private following its recovery, as it was before its theft. The existence of a residual privacy interest does not undermine the police's obligation to investigate the theft of a stolen item, or to carry out whatever law enforcement responsibility is reasonably associated with its taking. However, where the police cannot reasonably conclude that the property has been abandoned by its owner, they are limited in their investigation by the privacy interest of the owner as protected by s. 8 of the *Charter*. The police's seizure of the accused's safe was restricted to the purpose of the seizure, namely, the investigation of the theft, and did not extend to the pursuit of totally unrelated hunches. Further, to the extent the officer was driven by another law enforcement objective, namely, investigation of GST violations, he lacked reasonable and probable grounds to suspect the accused. The search was unreasonable as none of the recognized exceptions to the warrant requirement was satisfied. Further, the search was not conducted by an "authorized person" under the *Excise Tax Act*, rendering the statutory defence under that Act unavailable.

2. The evidence should be excluded. Although admitting the evidence would not affect the fairness of the trial (it being real, discoverable, non-conscripted evidence), and excluding the evidence would compromise the

Crown's case, the resolution of the inquiry under s. 24(2) turns on whether the violation of s. 8 is so serious that it outweighs the State's interest in admitting the evidence. The officer's approach, behaviour and disrespect for regular police procedures combined with his failure to leave responsibility for the investigation to taxation authorities when that option was available rendered his conduct sufficiently serious to exclude the photocopied documents. The administration of justice would suffer greater disrepute from the admission of the evidence than from its exclusion.

R. v. Law, [2002] SCC 10

Criminal Law – Corruption – whether government department a public body – whether Crown a public body – Public Bodies Corrupt Practices Act 1889, s. 1(2) – Prevention of Corruption Act 1916, s. 4(2) – (United Kingdom)

N was tried in the Crown Court on corruption charges contrary to section 1(2) of the Public Bodies Corrupt Practices Act 1889, for offering money to an officer of the Home Office, Immigration and Nationality Department in return for passing files relating to two people to N.

N was a retired officer of the Immigration and Nationality Department in which M also worked as an executive officer. Following his retirement, N set up Premier Immigration Consultants. He and M set up a corrupt arrangement whereby M would pass to N the home files relating to N's clients. N would then destroy the file, thereby gaining considerable delay in immigration procedures, possibly of up to 2 years, for his clients. The clients would each pay £500 which would be split equally between them.

Counsel for N submitted at the trial that N had no case to answer, because M was an officer of the Crown and hence an agent of the Crown. Accordingly, the facts gave rise to an offence under section 1 of the Prevention of Corruption Act 1906 and not the Public Bodies Corrupt Practices Act 1889 Act, under which N was charged. The 1889 Act did not apply to officers of the Crown because the Crown was not a public authority within section 7 of that Act. Since the Attorney General had not given his consent for the prosecution, it was not possible to amend the indictment.

The prosecution, argued in contrast that section 4(2) of the Prevention of Corruption Act 1916 which amended the expression "public body" in the 1889 Act was sufficiently wide to include the Immigration and Nationality Department of the Home Office and thus the 1889 Act was applicable. The trial judge decided that the 1889 Act was applicable. N then pleaded guilty and was sentenced to a term of imprisonment of 9 months on each count, suspended for 2 years, to run concurrent.

N then appealed to the Court of Appeal.

Section 1(2) of the 1889 Act provides:

"Every person who shall by himself or by or in conjunction with any other person corruptly give, promise, or offer any gift, loan, fee, reward, or advantage whatsoever to any person, whether for the benefit of that person or another person, as an inducement to or reward for or otherwise on account of any member, officer, or servant of any public as in this Act defined, doing or forbearing to do anything in respect of any matter or transaction whatsoever, actual or proposed, in which such public body as aforesaid is concerned, shall be guilty of a misdemeanour."

Section 7 of the 1889 Act provides:

"In this Act –

The expression "public body" means any council of a county or county [sic] of a city or town, any council of a municipal borough, also any board, commissioners, select vestry, or other body which has power to act under and for the purposes of any Act relating to local government, or the public health, or to poor law or otherwise to administer money raised by rates in pursuance of any public general Act, but does not include any public body as defined existing elsewhere than in the United Kingdom."

The relevant provision of section 1(1) of the Prevention of Corruption Act 1906 provides:

"If any person corruptly gives or agrees to give or offers any gift or consideration to any agent as an inducement or reward for doing or forbearing to do, or for having after the passing of this Act done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour

to any person in relation to his principal's affairs or business"...

he shall be guilty of a misdemeanour and liable, so far as this case is concerned, on conviction on indictment to a term of imprisonment not exceeding 2 years or to a fine not exceeding £500 or both.

Section 1(3) of the 1906 Act provides:

"A person serving under the Crown or under any corporation or any borough, county, or district council, or any board of guardians, is an agent within the meaning of this Act."

Section 4 of the Prevention of Corruption Act 1916 provides:

"(1) This Act may be cited as the Prevention of Corruption Act 1916, and the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906, and this Act may be cited together as the Prevention of Corruption Act 1889 – 1916.

(2) In this Act and in the Public Bodies Corrupt Practices Act 1889, the expression "public body" includes in addition to the bodies mentioned in the last mentioned Act, local and public authorities of all descriptions [and companies which in accordance with Part V of the Local Government and Housing Act 1989 are under the control of one or more local authorities]."

Both sides agreed that the expression "public body" in section 7 of the 1889 Act did not include the Crown. The point at issue before the Court was whether the words "... and public authorities of all descriptions" in section 4(2) of the 1916 Act include the Crown.

➔ **Held:** allowing the appeal:

1. The question for the court's consideration was what the words "public authority of all descriptions" meant in 1916. Section 7 of the 1889 Act did not bring the Crown within the expression "public body". Furthermore, unless the Crown can be brought within the words "public authorities of all descriptions" within section 4(2) of the 1916 Act, the 1889 Act did not apply to the case.

2. Section 1 of the 1906 Act as it related to the Crown was not an amendment or extension of the 1889 Act but was a free standing measure. M was an agent of the Crown within

the meaning of the 1906 Act and could have been prosecuted under that Act. Thus if, section 1 of the 1906 Act applies to civil servants because they are agents of the Crown, it was difficult to see why the draughtsman of section 4(2) of the 1916 Act should have intended to have included the Crown within the expression "public authorities of all descriptions". There was no need to do so because the position of civil servants was already taken care of by section 1 of the 1906 Act. Moreover, there was no mention whatsoever in section 4, of the Crown at all. Furthermore the Court did not consider that the words "public authorities of all descriptions" by necessary implication includes the Crown.

3. A consideration of section 2 of the 1916 Act indicated that there was a distinction between the Crown and any government department and "a public body". If the words in section 4(2) of the 1916 Act "public authorities of all descriptions" included the Crown or a government department then the wording of section 2 in so far as the Crown and any government department were referred to was unnecessary.

4. Accordingly, the definition of "public body" in section 7 of the 1889 Act, as amended by section 4(2) of the 1916 Act, does not include a government department and/or the Crown. M was an agent of the Crown. N, with leave from the Attorney-General, ought to have been prosecuted under section 1(1) of the 1906 Act. Accordingly N's conviction was quashed.

R. v. Natji [2002] EWCA Crim 271. Also reported in [2002] 1 WLR 2337

Law of War and Victims – Rape, Outrages upon personal dignity, Torture and Enslavement – ICTY

Three Serbian men accused before the International Tribunal for the Former Yugoslavia (ICTY), were convicted for crimes against humanity. *Dragoljib Kunarac, Radomir Kovac and Zoran Vukovic* were accused of being involved in the Serbian campaign to cleanse the municipality of Foca and its surrounding villages of Muslims. Muslims were rounded up and the men separated from the women and children. While the men were detained and/or killed, the women and children were kept in collection points and in private residences. The women were then raped and caused to commit other

indecent acts for the sexual gratification of the soldiers, including the three accused men. The tribunal found that the rape was used by members of the Bosnian forces as an instrument of terror, which they could use whenever and against whomever they wished. This was in part facilitated by the local police who turned a blind eye to these actions.

The Tribunal held the following in respect of the offences for which the accused were convicted:

1. Crimes against Humanity, Article 5 of the Statute of the Tribunal: for this article to apply, the following elements must be present: (1) there must be an attack; (2) the perpetrator's act must be part of that attack; (3) the attack must be directed against the civilian population; (4) the attack must be widespread and systematic; and (5) the perpetrator must know of the wider context in which his acts occur and that they are part of the attack (the *mens rea* of the offence).

2. Rape under International Law: The Tribunal adopted the definition of rape in its judgement in the case of *Furundzija*, that penetration no matter how slight of the vagina or anus by the penis or other object, or of the mouth by the penis, by coercion or force or threat of force against the victim or other person constituted rape. It went on to state that in the light of the general principles of law common to the major national systems of the world, the requirement of coercion, force or threat of force against a victim or third person must be extended to include other factors which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim. This included specific circumstances that go to the vulnerability or deception of the victim such as diminished mental or physical capacity, misrepresentation, or surprise, and the absence of consent or voluntary participation.

3. Torture: The Tribunal held that the three elements of the crime of torture required by the statute reflect customary international law: (1) torture is the infliction, by act or omission, of severe pain or suffering, whether physical or mental; (2) this act or omission must be intentional; (3) the act or omission must be instrumental to another purpose. Considering that torture was both a violation of human rights and international humanitarian law, the Tribunal held that "the presence of a state official or any other authority-wielding person in the torture process was not necessary for the

offence to be regarded as torture under international humanitarian law.

4. Outrages of personal Dignity: this offence is provided for under article 3 of the statute. The Tribunal defined the offence to be an act or omission, which would generally be considered to cause serious humiliation, degradation or otherwise to be a serious attack on human dignity. The humiliation or degradation need not have caused a lasting suffering of the victim. The *mens rea* of the offence required that the accused person must have known that his act or omission caused serious humiliation or degradation, without the need to show that he knew the actual consequences of his act. In effect there need not be shown that the accused committed the offence with any specific intent to humiliate, ridicule or degrade his victims.

5. Enslavement: the tribunal held that enslavement consisted of the *actus reus* of the exercise powers attaching to the right of ownership over a person, and the *mens rea* of intentional exercise of those powers. It said that the indications of enslavement included:

"elements of control and ownership; the restriction or control of an individual's autonomy, freedom of choice or freedom of movement; and often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent. it is often rendered impossible or irrelevant by, for example, the threat or use of force or other forms or coercion; the fear of violence, deception or false promises; the abuse of power; the victim's position of vulnerability; detention or captivity, psychological oppression or socio-economic conditions. Further indication of enslavement include exploitation; the exaction of forced or compulsory; labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking. With respect to forced or compulsory labour or service, international law, including some of the provisions of the Geneva Convention IV and the Additional protocols, make clear that not all labour or service by protected person, including civilians, in armed conflicts, is prohibited – strict conditions are, however set for such labour or service. The 'acquisition' or 'disposal' of someone for monetary or other compensation is not a requirement for enslavement. Doing so however, is a prime example of the exercise of the right of ownership over someone. The duration of the suspected exercise of powers attaching to the

right of ownership is another factor that may be considered when determining whether someone was enslaved; however, its importance in any given case will depend on the exercise of other indications of enslavement. Detaining or keeping someone in captivity, without more, would depending on the circumstances of a case, usually not constitute enslavement”

“The ICTY Convicts three for Rape and Enslavement as Crimes Against Humanity” by Tom L.W. Scheirs International Enforcement Law Reporter, vol. 17, Issue 6, June 2001

Criminal Law – Taking of indecent photographs of children – meaning of “indecent” – Intention in making the photographs – Section 1 of the Protection of Children Act 1978- (United Kingdom)

Police seized pictures of naked girls from S. These pictures had been down-loaded from the Internet. When he was arrested, S denied that the pictures were of girls appearing to be below the age of 16 years and explained that he had not downloaded them for sexual gratification but in pursuit of his keen interest as a photographer, in the female form. He was then charged with the offence of making indecent photographs of children contrary to section 1(1)(a) of the Protection of Children Act 1978. He was convicted on the basis that the circumstances under which the photographs were made and the motivation for making them were irrelevant considerations to the determination of whether the photographs were indecent for the purposes of the offence charged, the only relevant issue being whether a jury considered the girls to be under the age of 16 and whether the photographs were indecent.

S appealed, contending that the judge’s directions regarding the interpretation of the provision were in breach of section 7 of the Human Rights Act 1998. He also argued that it breached his right to privacy and respect for family life and freedom of expression under the European Convention on Human Rights.

➔ **Held:** dismissing the appeal;

The purpose of section 1(1)(a) of the Protection of Children Act to protect children from exploitation, and the intention of Parliament would be defeated if the circumstances under which indecent photographs of children are made and the motivation for making them were

allowed to be relevant considerations in determining whether or not they were indecent.

Section 1(1)(a) of the Act did not breach the convention rights complained of since those rights were not absolute, but were stated to be subject to limitations as prescribed by law in a democratic society in the interest of the protection of health, morals and the rights of others. The protection of children from exploitation as envisaged by the Act was a justifiable limitation to the convention rights necessary in a democratic society.

R. v. Smethurst [2001] 1 All ER (D) 231

Criminal law - sex-related offences - Police identifying accused as suspect before charges laid - “judge shopping” and pre-charge interviews of complainants — whether charges can be stayed for abuse of process - Whether conduct of Prosecution and police amounted to abuse of process - Whether partial stay of proceedings warranted (Canada)

R was being investigated on allegations that he had committed numerous sexual offences against a variety of young women who had worked for or with him, while he was premier of Nova Scotia. At the conclusion of the investigation, a report was submitted to the Director of Public Prosecutions (“DPP”) who recommended that charges should be laid involving four complainants who were willing to testify. He chose the incidents which involved the most serious physical violations. He also recommended that the police re-contact the six women who had been victims of apparent criminal conduct, but were unwilling to testify. The police did not agree with the DPP’s charging recommendation, and his office and the police re-interviewed most of the original complainants. 19 counts for sex-related offences were laid against the accused. Ultimately, R was charged, one year after the preliminary inquiry, with 18 counts of sex-related offences.

After the DPP’s written recommendation, one of the Crown Attorneys met with police. At that recorded meeting, she suggested that it would not be “advisable” for charges to be brought before a particular judge, because she thought he might be a political appointee of the same party that R belonged to. She proposed to “keep monitoring the court docket to see who was

sitting when and what would be in our best interest". Police and Crown also agreed to re-interview a number of the complainants. Citing the cumulative effect of this Crown behaviour combined with the police premature identification of him as a suspect, the accused sought a stay of all of the charges. At trial, the judge stayed nine of the 18 counts. The prosecution appealed to the Court of Appeal, which, in a majority decision, set aside the stays of the nine counts. R appealed to the Supreme Court of Canada.

➔ **Held** dismissing the appeal by majority decision;

1. A stay of proceedings will only be granted as a remedy for an abuse of process in the "clearest of cases". Regardless of whether the abuse causes prejudice to the accused, because of an unfair trial, or to the integrity of the justice system, a stay of proceedings will only be appropriate when two criteria are met: (1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and (2) no other remedy is reasonably capable of removing that prejudice. The first criterion reflects the fact that a stay of proceedings is a prospective rather than a retroactive remedy. While most cases of abuse of process will cause prejudice by rendering the trial unfair, a small residual category of abusive action exists under section 7 of the Charter, which does not affect trial fairness, but still undermines the fundamental justice of the system. When dealing with an abuse which falls into the residual category, a stay of proceedings is generally speaking only appropriate when the abuse is likely to continue or be carried forward. Only in exceptional, relatively very rare cases will the past misconduct be so egregious that the mere fact of going forward in the light of it will be offensive. Where uncertainty persists about whether the abuse is sufficient to warrant the drastic remedy of a stay, a third criterion is considered: the interests that would be served by the granting of a stay of proceedings are balanced against the interest that society has in having a final decision on the merits.

2. The judge shopping in this case was offensive. Judge shopping is unacceptable both because of its unfairness to the accused, and because it tarnishes the reputation of the justice system. Furthermore, it should not infect the investigative process by involving police in a conspiracy to manipulate the process, and the

trial judge was properly troubled by this evidence. But this single comment was not acted upon, and it was not determinative of the ultimate conclusion that the process against R had been abusive to the point of necessitating a stay of proceedings.

3. Wide-ranging pre-charge Crown interviews are not, *per se*, an abuse of process. While the separation of police and Crown roles is a well-established principle of the Canadian criminal justice system, different provinces have implemented this principle in various ways. The pre-charge interviews in this case were done in accordance with the common practice of the provinces, a practice more wide-ranging than the narrow, exceptional to rare practice described by the trial judge. Furthermore, the Crown conducted an understandable review of the potential witnesses, in the wake of an early recommendation by the DPP that was not determinative. Given the uncertainty of the charges at that point, it could not be known whether the re-interviews led to more charges than would otherwise have been laid.

4. Although a breach of police policy of not releasing the identity of a suspect should not be condoned, the serious remedy of a stay of proceedings was not an appropriate method to denounce or punish past police conduct of this nature.

5. There was no abuse of process in this case. The cumulative effect of the judge shopping, pre-charge Crown interviews, the improper police announcement, and the addition of an extra count in the direct indictment, while troubling in some respects, did not rise to the level of abuse of process which is egregious, vexatious, oppressive or which would offend the community's sense of decency and fair play. Moreover, this conduct, even if it did amount to an abuse, did not have an ongoing effect on the accused which would jeopardize the fairness of his trial.

6. The trial judge fell into error when he ordered the ultimate remedy of a partial stay of a number of charges. The trial judge misconceived the governing test for a stay of proceedings. Instead of inquiring into whether the abuse would be manifested, perpetuated or aggravated by ongoing proceedings, and then inquiring into whether any remedy other than a stay could cure this ongoing taint, the trial judge focused his attention only on the final balancing exercise. The abuse he found should

be and was addressed by remedies other than a stay. Moreover, even if the trial judge had found an ongoing abuse which could only be remedied by a stay, the cumulative effect of the abuse still left some question about whether this was one of those clearest of cases warranting a stay. In his balancing analysis, the trial judge omitted some significant issues relevant to the public interest. Victims of sexual assault must be encouraged to trust the system and bring allegations to light. As the police saw it, there was evidence of a pattern of an assailant sexually attacking young girls and women who were in a subordinate power relationship with the accused, in some cases bordering on a relationship of trust. When viewed in this light, the charges are very serious and society has a strong interest in having the matter adjudicated, in order to convey the message that if such assaults are committed they will not be tolerated, and that young women must be protected from such abuse. In omitting to consider any of these issues which favour proceeding with charges, the trial judge's

discretion was not fully exercised and therefore cannot stand.

7. The decision to grant a stay is a discretionary one, which should not be lightly interfered with. However, where the trial judge made some palpable and overriding error which affected his assessment of the facts, the decision based on these facts may be reversed. Here, the trial judge was in error when he ruled that "pre-charge Crown interviewing in this country is . . . non-existent to rare". As well, the trial judge implied that the loss of Crown objectivity was abusive because it meant that the accused ultimately faced more charges, but there was no evidence to support this deduction. The trial judge also misdirected himself regarding the law for granting a stay by overlooking key elements of the analysis, thereby committing an error which was properly reversed by the Court of Appeal.

R. v. Regan [2002] SCC 12



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