COMMONWEALTH

CRIME WATCH

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COMMONWEALTH

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EXPLORING THE BOUNDARIES: THE IMPACT OF THE CHILD SEX TOURISM LEGISLATION

by Tim Mackintosh (Australia)

"This article explores the process by which certain obligations incurred by the Federal Executive's ratification of the Convention on the Rights of the Child are translated into domestic law, specifically in the *Crimes (Child Sex Tourism) Amendment Act* 1994 (Cth.)."

According to the writer, the development of various international conventions aimed at the problem of international sexual exploitation of children and the increase in such exploitation, as part of the growth of tourism in Asia, formed the backdrop to the enactment of the Crimes (Child Sex Tourism) Amendment Act. In the view of the author, this Act was drafted in accordance with the terms of the Draft Optional Protocol to the Convention on the Rights of the Child. He describes the Act as radical and proactive, when compared with other enactments put in place by other countries. He notes the following key points of the legislation, in that regard:

- It imposes heavy penalties of up to 17 years imprisonment for violations;
- It creates, *inter alia*, the specific offence of benefiting from or encouraging sexual exploitation of children;
- Individuals who commit proscribed acts outside Australia are also caught by the Act, where they are citizens or residents of Australia. Where the offender is a legal entity it will be caught if it is registered in Australia or conducts its business in Australia.
- It does not have a double criminality requirement, thus removing the need to show that the act complained of was both an offence in the country where it was committed and in Australia.

The writer's view is that the extra-territorial application of the Act has "revealed an important feature of national sovereignty. In embracing and responding to obligations incurred by the Executive, the legislature has arguably, and in one important area, redefined the nature of the rights and obligations of its citizens and residents".

Tim Macintosh, New South Wales Office of the D. P. P., Published in the Australia Law Journal, Vol. 72, p. 613.

THE ECONOMIC CRIME AND ANTI-MONEY LAUNDERING ACT, 2000, MAURITIUS.

In June this year, Mauritius passed the Economic Crime and Anti-Money Laundering Act 2000, for the purpose of establishing an Economic Crime Office and for the prevention and punishment of money laundering offences. An Economic Crime Office headed by a Director, is established, inter alia, for the purposes of investigating economic offences and any matter relating to suspicious transaction reporting; collecting and evaluating suspicious transaction reports and disseminating the same to other law enforcement authorities and co-operating with foreign authorities in the fight against money laundering. The Act imposes on the Director and every member of the Office the obligation to make a declaration of their assets and liabilities within 30 days of taking up their appointment.

The duties of the Director include investigation into suspected cases of money laundering or other economic crimes and ensuring compliance with the provisions of the Act by banks, financial institutions and other professions. In the exercise of his or her functions, the Director has powers of search and entry into the premises of banks, financial institutions and cash dealers, upon application for an order from the court. He or she can also seek and obtain tracking and monitoring orders where there is a reasonable suspicion that a person has committed a money laundering offence, which the Director has power to investigate.

An offence of money laundering is created, which is defined in section 17 as follows:

(1) Any person who—
- (*a*) engages in a transaction that involves property which is, or in whole or in part directly or indirectly represents, the proceeds of any crime; or
- (*b*) receives, possesses, conceals, disguises, transfers, converts, disposes of, removes from or brings into Mauritius any property which is, or in whole or in part directly or indirectly represents, the proceeds of any crime,

where he suspects or has reasonable grounds for suspecting that the property is derived or realised, in whole or in part, directly or indirectly from any crime, shall commit an offence.

(2) Any bank, financial institution, cash dealer or member of a relevant profession who—
- (*a*) engages in a transaction that involves property which is, or in whole or in part directly or indirectly represents, the proceeds of any crime; or
- (*b*) receives, possesses, conceals, disguises, transfers, converts, disposes of, removes from or brings into Mauritius any property which is, or in whole or in part directly or indirectly represents, the proceeds of any crime,

and who fails to take such measures as are reasonably necessary to ensure that neither it nor any service offered by it, is capable of being used by a person to commit or to facilitate the commission of any act of money laundering shall commit an offence.

(3) Notwithstanding section 109 of the Criminal Code (Supplementary) Act, any person who agrees with one or more other persons to commit any act specified in subsections (1) and (2), shall commit an offence.

(4) For the purposes of subsections (1), (2) and (3), references to a crime shall be deemed to include references to any act or omission which occurred outside Mauritius which, had it taken place in Mauritius, would have constituted a money laundering offence or any other crime.

(5) Any person may be convicted of a money laundering offence under this section notwithstanding the absence of a conviction in respect of a crime which generated the proceeds alleged to have been laundered.

(6) Any person may, upon a single information or upon a separate information, be charged with and convicted of both the offence of money laundering and of the offence which generated the proceeds alleged to have been laundered.

(7) In any proceedings against a person for an offence under this section, it shall be sufficient to aver in the information that the property is, in whole or in part directly or indirectly the proceeds of a crime, without specifying any particular crime, and the

Court, having regard to all the evidence, may reasonably infer that the proceeds were in whole or in part directly or indirectly the proceeds of a crime.

Upon conviction for a money laundering offence, any property belonging to, or under the control of the convicted person is deemed to be the proceeds of crime and unless the contrary is proved, shall be forfeited.

The penalty for a money laundering offence is a fine not exceeding 2 million rupees and penal servitude. Penal servitude is not defined in the Act.

The Act also has provisions aimed at preventing money laundering. Under section 21, banks, financial institutions, cash dealers and relevant professions are obligated to "take such measures as are reasonably necessary to ensure that neither it nor any service offered by it is capable of being used by a person to commit or facilitate the commission of a money laundering offence". This obligation includes verifying the true identity of customers, keeping records and making them available when required to do so by a court order, and reporting suspicious transactions. The relevant professions are listed in the Second Schedule to the Act as:

1. Accountants
2. Attorneys-at-Law
3. Barristers
4. Casinos, Bookmakers and Totalisator under the Gaming Act
5. Chartered Secretaries
6. Notaries

"Whistle blowers" are protected under section 24 (2). Banks and their employees are also immune from liability for making suspicious transaction reports.

Part V of the Act deals with Restraint and Forfeiture of the proceeds of economic crime. Where forfeiture is impossible to achieve because the tainted property cannot be located, has been substantially diminished or co-mingled with other property such that it cannot be divided without difficulty, etc. the Supreme Court may order that the person concerned pay a sum equivalent to the value of the property to be forfeited.

Mutual Assistance in respect of money laundering offences is provided for in Part VI which allows for the provision of assistance in the investigation and prosecution of offences where there is reciprocity between Mauritius and the requesting country. Mauritius may also apply for assistance from foreign states. Section 42 allows for the sharing of assets with, or the return of assets to, the requesting state, pursuant to an international agreement or for purposes of protecting the public interest.

Part VII makes money laundering an extradition offence.

CASE NOTES

Constitutional Law – Trial delay totalling 15 years – whether breach of Constitutional guarantee on fair hearing – Whether appellate delay included in guarantee – Section 10 of the Constitution of Mauritius – (Mauritius)

The appellant was arrested in December 1985 on provisional charges of forgery. He was held in custody for 17 days after which he was released on bail. While in detention, he made statements that amounted to admissions of all the charges subsequently levied against him. For some unknown reason, the police file remained with the police until about the end of 1986 or early 1987. In September 1988, the decision was made to prosecute the appellant on 90 charges. In 1991 the provisional charges were struck out and in January 1992 the prosecution served a 20 count information on the appellant. Between December 1985 and January 1992, there was complete silence from the authorities. In April 1992 the appellant sought a stay of prosecution on the grounds of unreasonable delay. His application was dismissed in June 1992. The trial finally took place in April 1993 and judgement was delivered in May 1993. He was convicted and sentenced to a term of 4 years imprisonment. He was granted bail pending appeal.

He lodged his appeal on 31st May 1993, which was heard on the 28th of March 1994. He argued that the delay in the proceedings were an abuse of process. The two judges who heard the appeal could not agree on a verdict and there was an impasse which caused a further three

year delay. In March 1997 a rehearing was held with a bench consisting of three judges. Arguments were heard again on the question of abuse of process. Six months later, in September 1997, the Court (by a majority of two) dismissed the appeal. They held that time started to run from the time the decision to prosecute was made in September 1988 and further decided that no prejudice was caused to the appellant by the delay. While noting the delay in the appeal process, the Court held that this should not be considered in determining if the appellant had been denied a right to a fair trial as a result of delay.

He appealed further to the Privy Council.

Held: allowing the appeal;

The starting point was the Constitution of Mauritius which states in section 10 (1) the following:

> "where any person is charged with a criminal offence, then unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law"

The section creates three separate guarantees, namely (1) a fair hearing; (2) within a reasonable time; and (3) by an independent and impartial court. The requirements are cumulative, such that if any one of the elements is missing, the constitutional right will have been be infringed.

The Pre-trial Delay

The Intermediate Court held that the relevant period of delay was not from the time that the appellant was arrested but from September 1988 when the Solicitor-General took the decision to prosecute the appellant and had therefore mistakenly assumed that the relevant period was 2 years and 4 months whereas the period was about 3 years and 4 months. From the arrest of the appellant in December 1985 to the ruling of the Intermediate Court in June 1992, there was a delay of 6 years and 9 months. This delay was caused by the inaction of the Police and the D.P.P.'s office. This was an inordinately long delay, taking into account the nature of the charges, the documentary records available, what the prosecution described as comprehensive confessions on all counts, and the duration of the eventual trial. Objectively considered there is a strong argument that the pre-trial delay by itself amounted to a breach of the constitutional guarantee. On balance, however, their Lordships found it unnecessary to rule on this matter as an independent ground of appeal.

The delay in the appellate proceedings

The question was whether the guarantee in section 10(1) of the Constitution is wide enough to cover such post-conviction delay. The guarantee applies where "any person is charged with a criminal offence". Literally it may be said that a convicted person, who seeks to appeal against his conviction, is no longer a person "charged". Accordingly the guarantee could be said to be inapplicable. This is a rather technical interpretation inappropriate to the construction of a Bill of Rights in a Constitution such as that of Mauritius. It would be strange if a defendant was afforded protection in a Bill of Rights against undue delay in his trial but left wholly unprotected in respect of oppressively delayed appellate proceedings. A purposive and generous interpretation, which avoids "the austerity of tabulated legalism", is necessary: *Minister of Home Affairs v. Fisher* [1980] A.C. 319, at 328E-329A, per Lord Wilberforce. The guarantee in section 10(1) extends to appellate proceedings.

The disposal of the appellate proceedings took 5 years and 1 month, including a delay of almost three years between the two hearings. The fact that a delay of almost 7 years had taken place between the time of the arrest of the appellant and his conviction should have heightened a sense of urgency in the Supreme Court to dispose of the appeal with more speed. The greater part of the delay in the appeal proceedings was entirely unexplained. Their Lordships drew the unavoidable inference that there was no satisfactory explanation and held that the delay was entirely the fault of the Supreme Court of Mauritius. In the result the appellant has had the shadow of the proceedings hanging over him for about 15 years. This amounted to a manifestly flagrant breach of section 10(1) of the Constitution.

The remedy

The normal remedy for a failure of the reasonable time guarantee, is a quashing of the conviction. Counsel for the Respondent had argued however that the appropriate remedy in this case was to affirm the conviction and to remit the matter of sentence to the Supreme Court so that it may substitute a non-custodial

sentence in view of the delay. He argued that the guilt of the appellant was obvious and that it would be wrong to allow him to escape conviction. In their Lordships' view, this argument largely overlooked the importance of the constitutional guarantee as already explained. Although there might be circumstances in which it would arguably be appropriate to affirm the conviction but substitute a non-custodial sentence, e.g. in a case where there had been a plea, in the present case, the only disposal which would properly vindicate the constitutional rights of the appellant was the quashing of the convictions.

Sooriamurthy Darmlingum v. The State Privy Council, Appeal Number 42 of 1999, Delivered on 10th July 2000 (web site: http://www.privy-council.org.uk)

Criminal Law - police informer - disclosure of assistance to police endangering safety of informer and family - common law rule against disclosure of informer's identity based on public policy - whether order for non-publication of informer's identity and related evidence warranted - whether publication likely to prejudice administration of justice - Evidence Act 1971 (ACT), s 83(1) - Drugs of Dependence Act 1989 (ACT), s 164(2)(c) - Magistrates Court Act 1930 (ACT), s.90A - Crimes Act 1900 (ACT), s.429A(1)(h) (Australia)

The applicant was charged in the Magistrates Court with possessing a traffickable quantity of a prohibited substance, heroin, for the purpose of sale contrary to section 164(2)(c) of the Drugs of Dependence Act 1989 (ACT). He pleaded guilty and was committed for sentence to the Supreme Court pursuant to section 90A of the Magistrates Court Act 1930 (ACT). Subsequently, he appeared before a sentencing judge, adhered to his plea and sought an adjournment to permit him to provide information to the police prior to sentence. Under section 429A(1)(h) of the Crimes Act 1900 (ACT), a sentencing court must take into account the degree to which an offender has cooperated with law enforcement agencies in their criminal investigations.

The applicant also sought an order forbidding the disclosure of his identity and the fact that he was prepared to assist the Australian Federal Police by providing them with information concerning the identity of another person involved with him in drug trafficking. He relied on section 83 of the Evidence Act which provides:

(1) Where it appears to a court that -
   (a) the publication of evidence, given or intended to be given, in a proceeding before that court, is likely to prejudice the administration of justice; or
   (b) in the interests of the administration of justice, it is desirable that the name of a party to, or a witness, or intended witness, in such a proceeding be not published;
   the court may, at any time during or after the hearing of the proceeding, make an order -
   (i) forbidding the publication of the evidence or a specified part of the evidence, or of a report of the evidence, either absolutely or subject to such conditions as the court specifies or for such period as is specified; or
   (ii) forbidding the publication of the name of such a party or witness.

(2) Where a court makes an order under subsection (1), the court may, if it thinks fit, also direct that persons specified by the court, or all persons except persons so specified, shall remain outside the courtroom for such period as the court specifies.

The applicant gave evidence that he intended to provide the police with information about the involvement of an individual, whom he named, in drug trafficking. The applicant testified that, if the extent of his assistance to the police became public, then his own and, more particularly, his family's safety would be at risk.

A police officer also gave evidence that the police had received information concerning the person whom the applicant had named connecting that named individual with violent conduct. The police officer also stated that, if told that the named individual was the author of a threat to someone who was involved with him in the drug trade, the police would take the threat seriously. After considering the evidence, the sentencing judge declined to make the orders sought.

Although the trial court accepted the applicant's evidence regarding the danger he and his family faced, and that of the police officer that such threats cannot be dismissed and violence is always possible, the judge declined to make the order sought. He held that the state of affairs in the Territory, at the time, was not such that necessitated the suppression of matters which ordinarily ought to be made public. The judge said that the minimisation of drug trafficking, was more likely to be assisted by the glare of publicity, rather than by the suppression of evidence, or the suppression of publicity of evidence.

The applicant appealed.

Held: allowing the appeal;

1. "At common law, the rule is that the identity of a police informer must not be disclosed in legal proceedings except where the disclosure of the identity of an informer is required for the defence of an accused: *Marks v Beyfus* (1890) 25 QBD 494; *Sankey v Whitlam* (1978) 142 CLR 1 at 61; *Signorotto v Nicholson* [1982] VR 413; Cain v Glass (No 2) [1985] 3 NSWLR 230; and *R v Abdullah* [1999] NSWCCA 188. The justification for the rule is that, if the identity of an informer were liable to be disclosed, then the flow of information from police informers would be likely to dry up, and the police would be hindered in their duty of preventing and detecting crime. The public interest served by the rule is well accepted. Indeed, outside the immediate scope of the informer rule, courts have repeatedly held that the identity of a police informer should, as a matter of public interest, be protected against disclosure: see *Signorotto v Nicholson* at 417; *R v Lewes Justices; ex parte Secretary of State for the Home Department* [1973] AC 388 at 401 and 407-8. The authorities have thus come to recognise the principle that the identity of a police informer should, as a matter of public policy, be protected against disclosure save where a countervailing public interest is shown. This aspect of public policy is calculated to protect the administration of justice from the harm that would follow were the police to be hindered in preventing and detecting crimes by the drying up of information from police informers. The importance of the policy was emphasised by Bowen LJ in *Marks v Beyfus* at 500, when he made it clear the privilege does not depend upon the taking of the point by a witness, but should be asserted by immediate intervention by the judge as soon as disclosure is threatened.

2. There was nothing in this case to indicate a countervailing public interest that favoured the disclosure of the applicant's identity. Although the judge's attention had not been drawn to the authorities mentioned above, the evidence before him indicated that the principle which they reflect, was applicable in the circumstances of the case. The authorities indicated that, save where there is a countervailing interest, the identity of a police informer should be protected from disclosure to prevent the harm to the administration of justice that such disclosure would be likely to effect.

3. Section 83(1)(a) of the Evidence Act 1971, seeks to achieve the same goal. It confers a discretion on a court to forbid the publication of a specified part of the evidence where it appears to the court that the publication of the evidence is "likely to prejudice the administration of justice", or "in the interests of the administration of justice", it is desirable that the name of a party or a witness not be published.

4. The learned trial judge made his decision without regard to this consideration which was relevant in the circumstances of this case and, accordingly, the discretion to refuse the application was wrongly exercised.

5. The Court forbad the publication of evidence "(a) identifying or tending to identify the applicant as being prepared to assist the police by providing them with information concerning any person who was involved in drug trafficking with him and (b) the identity of any such person"

XZ *v. The Queen* [2000] FCA 1143

Defamation – Internet Service Provider received sorted and transmitted defamatory material on news server– whether defendant published defamatory material – Defamation Act 1996 –(UK)

The defendants were Internet Service providers. They received an article that contained material defamatory of the plaintiff, from an unknown person, and posted it in their news server. The plaintiff complained to the defendants and requested that the material be removed from their system. The defendant failed to do so, leaving it on line until it expired automatically. The plaintiff sued for libel and the defendant

contended, inter alia, that they were not the publisher of the material complained of and were therefore not liable. They also alleged that they did not know and had no reason to believe that they had contributed to the publication of a defamatory statement.

The plaintiff applied for an order striking out that part of the defence as not disclosing a reasonable or sustainable defence at law.

Held: granting the application;

At common law, the defendants, as service providers who transmitted or facilitated the transmission of postings to any of their subscribers, were publishers of those postings; they were not merely the passive owners of an electronic device through which postings were transmitted. They could have obliterated the postings when the plaintiff lodged his complaint. Although they were not publishers under the meaning of section 1(2) and (3) of the Defamation Act, once they knew of the defamatory contents of the posting and chose not to remove it from their site, they could not genuinely say that they took reasonable care in relation to the publication, or that they did not know or have reason to believe that what they did caused or contributed to the publication.

Godfrey v. Demon Internet Ltd. [2000] 3 W. L. R. 1021

Criminal Law – acquittal on grounds of no case to answer – whether question of law alone from which prosecution can appeal – (Bermuda)

Following the death from stab wounds of a 17-year-old girl, the defendant (S) and one Mundy were arrested. The defendant was charged with premeditated murder and Mundy with being an accessory after the fact. Mundy pleaded guilty and was sentenced to imprisonment. The defendant was subsequently committed for trial. Before the trial of the defendant commenced, the prosecution obtained new forensic evidence that prompted them to charge the defendant and Mundy jointly for the murder. Mundy applied for an order quashing the new charge arguing that he had already been convicted and sentenced as an accessory after the fact. The Court of Appeal allowed the application and prohibited the Attorney General from proceeding with the murder charge against Mundy. The Court held that a conviction of murder was inconsistent with a conviction as accessory after the fact.

The Prosecution proceeded with the charge of murder against the defendant, relying on circumstantial evidence. Although the prosecution had a statement from Mundy implicating the defendant, they did not call him to give evidence. At the close of the prosecution's case, counsel for the defendant submitted as follows:

(1) that the judge should stop the case because it was an abuse of process of the court;

(2) that there was no case for the defendant to answer.

The judge held that the antecedent of the case had produced a situation where the process of the court had been abused. He did not order a stay of the proceedings consequent upon his finding of an abuse of process, but he proceeded to consider the submission of no case to answer. He held that the prosecution evidence was "inconclusive to connect the defendant with the commission of the crime". He directed the jury to return a verdict of not guilty.

The Attorney General appealed to the Court of Appeal under section 17 (2) of the Court of Appeal Act 1964. The Court of Appeal found that the defendant was not prejudiced in the preparation of his defence nor was he treated unfairly, since he had known the prosecution case from the outset. The Court also held that the trial judge ought to have left the case to the jury to decide and not directed that there was no case to answer. A re-trial was ordered.

The defendant appealed to the Privy Council raising the following issues:

"(1) Did the Attorney General have a right of appeal from the judge's decision that the conduct of the prosecution constituted an abuse of process with the remedy of an implied stay?

(2) Did the Attorney General have a right of appeal from the judge's decision to order discharge of the defendant on the ground that he had no case to answer?

(3) If the answer was yes to either (1) or (2) above (or to both) did the Court of Appeal err in reversing the trial judge's ruling..."

Held: allowing the appeal;

An appeal can be brought only in respect of an order made by a court, and not against the views expressed by a judge. Even though the trial judge found an abuse of process, he did not make an order granting a stay of proceedings. Had he made an order, he would have been *functus officio* and unable to deal with the "no case" submission. However, as he did not do so in this case, there was no order against which an appeal could be heard by the Court of Appeal. Even though the Privy Council were in agreement with the Court of Appeal that there was no abuse of process, there was no basis on which it could entertain an appeal on the jurisdictional issue as to whether the Attorney General had a right of appeal in respect of an order that was never made.

On the question of the no case submission and the Attorney General's right of appeal, the issue was one of statutory interpretation of section 17(2) which allows an appeal by the Attorney General on questions of law alone. The issue was whether the grounds of appeal against the decision on the no case submission could be characterised as involving a question of law alone? "In law when someone asks whether some issue involves a point of law, the response must always be: in what precise context and for what purpose. The question whether there is evidence to support a finding is often treated as involving a point of law for the purpose of statutory rights of appeal from tribunals." In this context the courts should guard against any artificial narrowing of the right of appeal. Very often, a decision on the sufficiency of evidence to support a verdict is called a question of law even though it may in the proper sense be a pure question of fact, because it is committed to and answered by the authority that normally answers questions of law only.

However, within this general background, the language and context of section 17(2) must be considered and both these indicate that this section was intended to apply to pure questions of law only.

As issues of no evidence can arise in different circumstances, including in relation to pure questions of law, it was necessary to consider the particular nature of the present case. This case involved an assessment of the strength of the evidence led by the prosecution, which required a certain amount of weighing of evidence in order for the judge to form a view on whether the evidence could potentially produce a conviction beyond reasonable doubt. The decision by the trial judge, that the circumstantial evidence was an insufficient basis for a jury to convict the defendant, was arrived at on matters of fact and degree. "The argument, the decision of the judge and the ground of appeal did not involve a question of law alone."

Crown counsel had also submitted in the alternative that even if section 17(2) was restricted to pure questions of law, the judge's reasoning was vitiated by an unsound legal approach which gave rise to a ground of appeal that was purely a question of law.
Their Lordships were of the opinion that even if the judges finding was perhaps an astonishing one, it does not alter the fact that it was simply his view that the circumstantial evidence was too weak to warrant consideration by the jury. In any event, even if counsel's argument was accepted, the issue would be one of mixed law and fact on which the Attorney General had no right of appeal.

The Attorney General was not entitled to appeal under section 17(2) of the Court of Appeal Act and the Court of Appeal had erred in entertaining the appeal.

Their Lordships found it unnecessary to answer the remaining question raised in the appeal.

Justis Rahman Smith v. The Queen [2000] W.L.R 1644.

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