IN THE COURT OF APPEAL FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CRIMINAL APPEAL NO. AAU0057 OF 2006S
(High Court Criminal Action No. HAC004 of 2004S)

BETWEEN:

ABHAY KUMAR SINGH

Appellant

AND:

THE STATE

Respondent

Coram: Ward, President
Barker, JA
Ellis, JA

Hearing: Friday, 2nd March 2007, Suva

Counsel: Appellant in Person

Kieran Raftery]
Daniel Goundar] for the Respondent
Aman P Singh]

Date of Judgment: Friday, 9th March 2007, Suva

JUDGMENT OF THE COURT

The Appeal

[1] The appellant Mr Singh is a barrister and solicitor practising in Fiji. He was charged with 3 counts of attempting to pervert the course of justice in June and July 2003. At trial he pleaded guilty to the third charge in the following form:

"Attempting to Pervert the Course of Justice: Contrary to section 131 (d) of the Penal Code Cap.17

Particular of Offence

Abhay Singh s/o Ranjeet Singh on the 23rd day of July 2003 at Dilkusha, Nausori in the Eastern Division, attempted to pervert or defeat the course of justice by attempting to cause or induce a witness namely Rajendra Narayan s/o Suruj Narayan to alter the testimony he intended to give in a pending criminal cause, namely The State v Sahadatt Attai Khan."

[2] On 25 October 2006 he was convicted and sentenced to 12 months imprisonment.

[3] Prior to his plea of guilty, the trial Judge had ruled that recordings of conversations between himself and Rajendra Narayan were admissible in evidence for the prosecution.

[4] He now appeals against his conviction and sentence on 4 grounds:

(i) The ruling on admissibility was incorrect.

(ii) That being so, his conviction should be set aside.

(iii) If not, the sentence was excessive and wrong in principle.

(iv) In any event there should be a permanent stay of proceedings on the grounds of delay and misconduct by the prosecution.

So we are not misunderstood, we record that the appellant formulated 5 grounds, but they are absorbed in the above.

The Facts

[5] The agreed summary of facts is in our view correctly stated by the Judge in his sentencing notes. He said:

> *"On the 24th July 2003 the trial was due to start in the Magistrates Court at Suva of one Sahadat Attai Khan. He was charged with corruptly seeking, as a Land Transport Authority Officer, $200 for the registration of a second-hand vehicle. The owner of the car and the person from whom it was alleged he had sought the money was Rajendra Narayan. The Accused was Mr Khan's defence counsel. Subsequently in February 2005 Mr Khan was acquitted of that charge.*
>
> *Prior to the Khan hearing, on 22nd July 2003, Mr Narayan informed the investigating officer that he had been approached by the Accused. The police took advice from the Director of Public Prosecutions Office. It was then agreed to give Mr Narayan a digital recording device to record any further conversation with the Accused on the topic. Mr Narayan agreed to this course.*
>
> *On the next day, 23rd July 2003, a conversation took place between the Accused and Mr Narayan. It started when they were in a vehicle traveling to the scene of an accident in which the Accused's son had been one of the drivers. In the course of the conversation the Accused mentioned the court case the next day. He advised Mr Narayan to change his evidence to some extent, and the accused told him what to say in its place.*
>
> *The original evidence from Mr Narayan was that Mr Khan had taken the $200 from him and placed it under a book. Mr Khan then pulled out a file pretending to read it in order to hide his actions from a woman who had come to the door of his office.*
>
> *The Accused told Mr Narayan to keep to his original story which he need not lie about. But that when he came to describe handing over the money to Mr Khan he should say that he hid it under a book or register because a woman came into the room. He was to say that he never actually handed the money over to Mr Khan. He should add that Mr Khan did not see him do any of this. The rest he could leave to the Accused.*
>
> *The Accused promised that once his client was acquitted he would sue the police. He would not make Mr Narayan a party to those proceedings. Instead he would pay Mr Narayan an unspecified sum of money out of the lump sum obtained thereby in damages.*

The Accused was interviewed by police under caution on 24th July 2003. He availed himself of his constitutional right to consult a lawyer, and did so before the main questioning commenced. He said he had been practising as a barrister and solicitor since 1994, and was admitted as such in New Zealand, Fiji, Tasmania and Queensland. He was a Commissioner for Oaths and a Notary Public.

When it was suggested that he had met the complainant and asked him to change one part of his story in the corruption case against Attai Khan, the Accused said the allegation was false. More details of the conversation were put to him but he said they were false.

He asserted that he wanted to save Attai Khan in his court case because he believed he was innocent. He denied discussing anything to do with the case with Mr Narayan. At least a part of the digital recording was played to the Accused and he denied that it included his voice. He denied that one of the other voices was Mr Narayan's. He was positive the voice was not his own. He said Mr Narayan was lying in saying that it was his voice. He also alleged Mr Narayan had offered him $45,000 if he could have Attai Khan convicted for corruption.

In these proceedings the Accused has accepted that the translation of the recordings in Hindi is essentially correct save for a few inconsequential inaccuracies. He now accepts that it was indeed his voice on the recording, as well as that of Mr Narayan. He admits the offence, and admits that he had made the approach to Mr Narayan to change his evidence, what Mr Raza called "one stupid act", and "one act of madness."

Besides being a lawyer in private practice, the Accused has no previous convictions."

The Admissibility Ruling

[6] The accused challenged the admissibility of the tape recordings on the grounds that they were an illegal search and seizure contrary to Article 26 of the Constitution, an unlawful invasion of his privacy contrary to Article 37 and that he was entitled to the protection of Article 28(1). These Articles provide:

"26 (1) Every person has the right to be secure against unreasonable search of his or her person or property and against unreasonable seizure of his or her property.

(2) Search or seizure is not permissible otherwise than under the authority of law."

37 (1) Every person has the right to personal privacy, including the right to privacy of personal communications.

(2) The right set out in subsection (1) may be made subject to such limitations prescribed by law as are reasonable and justifiable in a free and democratic society."

"28 (1) Every person charged with an offence has the right:

(e) not to have unlawfully obtained evidence adduced against him or her unless the interests of justice require it to be admitted."

[7] The trial Judge rejected the challenge in a fully-reasoned ruling in which he referred explicitly to the Universal Declaration of Human Rights 1948–98, the International Covenant on Civil and Political Rights 1966 and the Convention on the Rights of the Child 1989. He then reviewed English, American, Canadian, Australian and New Zealand cases. We agree with his conclusions but will only refer to those cases directly in point. In summary, we agree with Mr Raftery's submission that the recording by Mr Narayan of the conversations between himself and the appellant

"(a) was a reasonable search under s.26(1) of the Constitution;

(b) was carried out under the authority of law and therefore did not violate s.26(2) of the Constitution;

(c) was a reasonable and justifiable limitation on the Appellant's right to privacy and therefore it did not violate s.37(1) of the Constitution;

(d) was not unlawfully obtained and the interests of justice required its admission and therefore did not violate s.28(1)(e) of the Constitution."

[8] In referring to these cases, we record that neither the New Zealand Bill of Rights Act 1990, the United States Constitution nor the Canadian Charter of Rights has a specific right to privacy. This is because participant surveillance and the privacy considerations it involves have been dealt by the Courts in each of these

jurisdictions under the "search and seizure" provisions in the constitutional documents.

United States Cases

[9] In ***Lopez v United States*** 373US 427 (1963), a case in which an Inland Revenue agent recorded the defendant offering him a bribe, the United States Supreme Court saw no problem in admitting the recording into evidence because its purpose was to obtain the most reliable evidence possible of a conversation in which the agent was a participant and which the agent was fully entitled to disclose: Harlan J, speaking for the majority said (at p.439):

> ***"Stripped to its essentials, the petitioner's argument amounts to saying that he has a constitutional right to rely on possible flaws in the agent's memory, or to challenge the agent's credibility without being beset by corroborating evidence that is not susceptible of impeachment. For no other argument can justify excluding an accurate version of a conversation that the agent would testify to from memory."***

[10] The Court confirmed this view in ***United States v. White*** 401 US 745 (1971) stating at pp751-752, that as the law gives no protection to wrongdoers whose trusted accomplices are or become police agents, it should not protect those wrongdoers when those agents have recorded or transmitted the conversations which are later offered in evidence to prove the State's case. White J, delivering the leading judgment, said at p.751:

> ***"If the conduct and revelations of an agent operating without electronic equipment did not invade the defendant' constitutionally justifiable expectations of privacy, neither does a simultaneous recording of the same conversations made by the agent, or by others from transmission received from the agent to whom the defendant is talking...***

His Honour concluded, at p 752, that:

> ***"It is thus untenable to consider the activities and reports of the police agent himself, though acting without a warrant, to be a "reasonable" investigative effort and lawful under the Fourth Amendment but to view the same agent with a recorder or transmitter as conducting an "unreasonable" and unconstitutional search and seizure."***

[11] These decisions were confirmed in ***United States v Caceres*** 440 U.S. 741 (1979). See in particular the judgment of Stevens J at pages 4 and 5 (The copy available to us is from the report in the New York Times in "Westlaw".)

Canadian Cases

[12] In Canada , s.178.11(2)(a) of the Criminal Code 1970 provided an exception to the criminal prohibition against interception of private communications in s.178.11(1) (police generally may only conduct electronic surveillance once in possession of an authorization issued by a superior court judge), stating that such interceptions are allowed when one party consents to their being intercepted. Although the Supreme Court of Canada later held in ***R v Duarte*** (1990) 53 CCC (3d) 1 (SCC), that warrantless participant surveillance is unreasonable under s.8 of the Canadian Charter of Rights, the Court still admitted the recording in that case, one of the reasons being that the police could have relied solely on the evidence of the informer. In ***R v Wiggins*** (1990) 1 SCR 62 the same Court followed its decision in ***Duarte***, but also admitted such evidence nonetheless.

[13] From the headnote in ***Wiggins*** we record the following facts and decision:

> ***"The appellant was the owner of a vessel alleged to have been used by him to carry out a scheme to import narcotics into Canada. He contacted a person who, unknown to him, was a police informer, and asked him if he would like to invest in the scheme. The informer had further conversations with the appellant while wearing a 'body pack" which transmitted the conversations to the police who simultaneously recorded them. In one taped conversation, the appellant told the informer how the narcotics were obtained, transported and hidden upon his reaching British Columbia."***

And the Court held:

> ***"The participant electronic surveillance conducted here by the police and their informer infringed the right to be secure against unreasonable search and seizure guaranteed by s.8 of the charter and was not saved by s.1 of the Charter. The appellant did not discharge the onus of establishing that the admission of the recordings of the intercepted communications would bring the administration of justice into disrepute. The evidence, therefore, needed not be excluded."***

The Australian Case

[14] In ***R v Koeleman*** [2000] VSCA 141 Tadgell J.A., delivering the lead judgment of the Court of Appeal of the Supreme Court of Victoria, held that the admission of evidence of a recording obtained by the police in similar circumstances to the present was not illegal and within the trial Judge's discretion to admit.

The New Zealand Cases

[15] There have been a series of cases dealing with the admissibility of recordings both oral and visual involving participant surveillance, without a judicial warrant. They are leading cases each involving a strong Court of Appeal: ***R v A*** [1994] 1 NZLR 429, ***R v Barlow*** (1996) 14 CRNZ 9, and ***R v Smith*** **(Malcolm)** [2000] 3 NZLR 656. The decisions in other jurisdictions were discussed. In each, case, the Court concluded that such surveillance and the recordings there from were not illegal and that admissibility required an assessment of the reasonableness of the search which involved consideration of the invasion of privacy, the seriousness of the offence, the element of entrapment involved and, in short, all the circumstances of the case. In any case such as this, the power to conduct clandestine eavesdropping naturally alerts Courts to the threats to privacy and its high social value. The position was well summarized by Richardson J in ***R v A*** (Supra) at p.437:

> ***"An Orwellian world in which the state has both the desire and facility to record all our private communications would deny fundamental human rights. The right to be left alone is basic to the flourishing of human personality. Fears of electronic snooping may have a chilling effect on free expression. But as in many other areas of living in today's complex society the social answer in less extreme cases turns on an assessment of all the circumstances rather than on an impossible quest for universally agreed moral absolutes. In my judgment it is going too far to say that those underlying privacy values are inevitably imperilled by any recording of any conversation whatever the circumstances. It is, I repeat, a matter of time, place and circumstance."***

[16] We conclude that the 'search' in this case was not unlawful and therefore not in breach of clauses 26 or 37 of the Constitution. Further, whether or not it is lawful, the interests of justice require the evidence of it to be admitted at trial, and so, clause 28(1)(e) does not operate to exclude it. In so deciding we considered, as did the trial Judge, the fact that evidence of what was said would in any event be given by Mr Narayan, that the recordings were the basic evidence of what was said and that the transcripts were accepted (in writing) by the defence as being accurate. Further, the offence in question was serious, involving an officer of the Court seeking the giving of false evidence. There was no significant factor indicating a special need of confidence or privacy that should be protected. The recordings related to a repetition of the offence already committed.

[17] This ground of appeal is therefore rejected.

The delays

[18] The appellant sought before the trial Judge a permanent stay on the grounds of delay both in bringing the case to trial and also in providing a final transcript of the tapes in English. The recorded conversations were in Hindi and were recorded over other conversations.

[19] Mr Raftery provided the Court with a chronology, which although not complete, captured the essence of the delays. This shows the following events:

"Brief Chronology

24th July, 2003	*Arrested and charged*
25-6 July, 2003	*2 Civil Actions commenced by AKS v AG/DPP for False imprisonment/malicious prosecution, etc.*
28th October, 2003	*Further civil action against AG, DPP & Police*
3rd November, 2003	*Transfer to High Court*
5th November, 2003	*Appeal against Transfer lodged*
6th November 2003	*Application for Constitutional Redress [Challenging tape recording] lodged*
18th November 2003	*Constitutional Redress declined (because alternative remedy available). Shameem J.*
14th November 2003	*Defence application to adjourn Transfer Appeal*
23rd February, 2004	*Judgment upholding transfer. Shameem J.*
26th February, 2004	*Appeal to FCA lodged against Ruling on Transfer*
Dates Uncertain	*. Appeal to FCA lodged against Ruling on Constitutional Redress* *. Application to remove Shameem J as Trial Judge*
14th April, 2004	*Further Civil Action filed against DPP's Office for Deprivation of Liberty & Abuse of Office*
24th April, 2004	*Call-Over fixed trial date for 20 September, 2004*
16th July, 2004	*FCA dismissed Appeal against Refusal of Constitutional Redress/Transfer; and refuse an Application for Stay.*

20th September, 2004	*Original trial date vacated (HC business overrunning) new date fixed (in October) for 30 March, 2005*
March/April, 2005	*Due to illness of Defence Counsel of choice and other reasons trial adjourned to 19th July, 2005*
19th July, 2005	*Due to serious overrun of Kaitani [illegal Oath] trial (and need to complete Labasa sittings) trial adjourned to March 2006 [Defence Counsel not present]*
06th March, 2006	*Trial commenced but adjourned for further inquiries to assist indicated Defence challenges.*
26 June, 2006	*Tentative date set for June/July later vacated to September at State's request [my non-availability in June/July]."*
25th September, 2006	*Trial*

[20] An application for permanent stay was heard by the trial Judge on 22 and 29 March 2005. He dealt with each stage of the trial to date and 6 complaints by the accused with emphasis on the failure by the prosecution to produce transcripts of the tapes in final form. The accused complained that he had been prejudiced in his defence by this delay and the overall lapse of time. In essence the matter of the transcript is resolved by the fact that the prosecution gave the defence copies of the tapes (in Hindi) and transcripts in August 2003. In the critical passages, these transcripts did not differ from those finally available at trial and could always have been compared by the appellant with the tapes or discs.

[21] The progress to trial is explained by the chronology above. Both defence and prosecution contributed to delay as did the Court's overload. Overall and taking into account the guilty plea, we are satisfied that, apart from the stress of the delays, the accused was not prejudiced in his defence.

[22] The trial Judge concluded, after an exhaustive discussion of each step, that the accused did not suffer prejudice to the extent that compelled a permanent stay. We have considered as well events since March 2005 and the eventual production of final transcripts. We too consider the accused was not prejudiced in his defence and that a stay should not be granted. It would follow that if we had been considering ordering than a retrial, we should not have been deflected from doing so because of delays on the part of the prosecution.

The Guilty Plea

[23] There was advanced before us argument as to the significance of the plea of guilty on the appeal against conviction. It is plain that appellant pleaded guilty to count 3 on the agreed basis that he would then appeal his conviction on the ground that the recordings were inadmissible at trial. As that and the appeal on that ground and the refusal of stay have been refused, it is unnecessary to unravel the consequences of the plea.

Appeal Against Sentence

[24] The appellant submits a non custodial sentence was appropriate. He submitted he had been trapped, had pleaded guilty, had no previous convictions, and had suffered the loss of his practice: there was no element of threat or violence in what he did. He sought to rely of the case of ***R v Taffs,*** [1991] 1 NZLR 69. There, a solicitor who had threatened the mother of a schoolboy who had been kidnapped and robbed that if the boy persisted in giving evidence, he, the solicitor, would expose the boy as a homosexual. The mother was also a solicitor. The accused went to trial and was convicted. The sentence imposed was a fine of $5,000 and he faced Law Society disciplinary proceedings. In hearing an appeal against conviction only, the Court of Appeal said per Cooke P at p.73:

"There is no appeal against sentence, but we think it right to make some observations about that, as the case is one of a kind that apparently has not come before the New Zealand Courts previously. The Judge fined the accused $5,000 – on its face a sufficient penalty in the particular circumstances for an offender without substantial means. We were told that after his conviction the District Law Society required the accused to undertake not to practice pending the present appeal, indicating that disciplinary proceedings were contemplated. While such proceedings are entirely a matter for the Law Society in the first instance, and while the accused's conduct deserves censure, it may perhaps be of some help to the Society to say that, on such knowledge of the facts as this Court has (which may of course be incomplete), the accused acted in a hasty and ill-considered way, for which he has now been appropriately punished, bearing in mind that for a period he has had to abstain from practice. The prosecution has established an important principle and precedent. The facts of this particular case do not suggest that any further penal action, by way of future deprivation or restriction of his right to practice or monetary penalty, is necessary in the public interest. Now that the law has been clarified, future offences of this kind may of course attract more severe penalties."

[25] Other cases cited to this Court include ***R v Anderson*** (1987) 9 Cr App. R(S) 105: 3 years imprisonment; ***R v Riley*** (1990) 12 Cr App. R (S) 410 15 months; ***R v Postlethwaite*** (1991) 13 Cr App R (5) 260 9 months; ***R v Myatt*** (1996) 1 Cr App R (S) 306, 12 months; ***R v Lomax*** (1996) 2 Cr App R (S) 20 12 months; AG's reference 62-65 of 96 (1998) 1 Cr. App R (S) 0 6 moths; ***R v Saxena*** (1999) 1 Cr App R (S) 70 9 months; and ***R v Pangallo*** (1991) 56 A Crim R 441. This last case involved a solicitor who attempted to bribe a police officer. He was sentenced to 36 months' imprisonment to be served as periodic detention. On appeal, this sentence was replaced by 6 month's imprisonment.

[26] In our view the essence of sentencing in a case like this was captured by the NSW Court of Criminal Appeal in ***Pangallo*** where Lee CJ said at p. 443:

"A solicitor who bribes or attempts to bribe a police officer commits a serious offence whether the bribe is large or small. His Honour recognised this and referred to "the very considerable criminality" involved in the offence. An offence committed by a solicitor is to be distinguished significantly from an offence by, say, Mr Robson himself, who would

naturally be concerned about his position and who might foolishly but of course nonetheless unlawfully make an approach to police to go lightly on him. In my view, the crime of bribery is always to be regarded as one which strikes at the very heart of the justice system and it must be severely punished whenever it is detected."

[27] We agree with the passage just quoted and, in the unexceptional case, a term of imprisonment is to be imposed. In the present case, the guilty plea was late and little remorse was in evidence. We accept that conviction carried dire consequences for this appellant's professional future, that he is a first offender, and there was no threat of violence. The trial Judge imposed a sentence of 12 months imprisonment. That sentence is not out of line with the run of cases we have referred to but we consider some allowance need be made for the long time this case has been hanging over the appellant. Of course, this is in part due to the conduct of the defence. Taking all into account, we consider society's disapproval is as well recognised by a sentence of 6 months' imprisonment as by twelve.

[28] We realize that there will likely be proceedings against the appellant by the Law Society which could well result in his inability to practice in the jurisdictions in which he is admitted. The appellant submitted that a suspended sentence of imprisonment would be appropriate on the basis that before there is jurisdiction to impose a suspended sentence, the Court has to be satisfied that the offending is serious enough to justify a prison sentence. See ***R v Petersen*** [1994] 2 NZLR533. However the New Zealand Court of Appeal in that case did not consider a suspended sentence available where the need to deter others was paramount. The appeal against sentence is therefore allowed and a sentence of six months imprisonment substituted.

Conclusion

[29] The appeal against conviction is refused. The appeal against sentence is allowed by substituting a sentence of 6 months imprisonment for the 12 month's imposed by the trial Judge.

Ward, President

Barker, JA

Ellis, JA

Solicitors:

Appellant in Person
Office of the Director of Public Prosecutions, Suva for the Respondent

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