ABHAY KUMAR SINGH v DIRECTOR OF PUBLIC PROSECUTIONS and Anor

HIGH COURT — MISCELLANEOUS JURISDICTION

SHAMEEM J

13, 18 November 2003

[2003] FJHC 221

Courts and judicial system — jurisdiction — application for constitutional redress — admissibility of disputed evidence in criminal trial — application improper — applicant had adequate alternative remedy — Constitution of the Republic of Fiji ss 41, 41(1), 41(3), 41(4), 41(10) — High Court (Constitutional Redress) Rules 1998 r 6(5).

Applicant barrister and solicitor of the Fiji High Court sought declarations that his constitutional rights were violated through a recorded conversation with a client. He also questioned its admissibility as evidence. Respondents alleged that the application for constitutional redress was defective in form and substance and that Applicant has an alternative remedy.

Held — (1) The application was not proper since any order in the matter would usurp the role of the judge conducting the trial in the matter, would fragment the criminal process and would be inappropriate considering the Applicant's rights to canvass the same objections during the trial.

(2) The Applicant had an adequate alternative remedy and was not deprived of an interlocutory appeal. There was public interest in ensuring that criminal trials were not fragmented, nor prejudiced by interlocutory and premature applications which in any event would not be binding on the trial judge. The same principles applied to the Magistrates' Courts. Questions of admissibility of disputed evidence cannot and should not be entertained when the trial was to be conducted in the High Court.

Application dismissed.

Cases referred to

Amand v Home Secretary [1943] AC 147; *Josefa Nata v State* AAU 15 of 2002S, cited.

Imperial Tobacco Ltd v Attorney-General [1980] 1 All ER 866; *Josefa Nata v State* HAM 40 of 2003S; *Richard Hinds v Attorney-General of Barbados* [2001] UKPC 56; Privy Council Appeal No 28 of 2000, considered.

D. Sharma for the Applicant.

G. Allen for the 1st Respondent.

S. Sharma for the 2nd Respondent.

Shameem J. This is an application for constitutional redress, made under s 41 of the Constitution. It is made by motion, dated 6 October 2003, and was filed in the High Court Criminal Registry on the 6th of November 2003 by Messrs A K Singh Law. It is supported by the affidavit of Abhay Kumar Singh.

The Respondents object to the filing of the application, saying that it is defective in form and substance, and that in any event it ought to be dismissed because the Applicant has an alternative remedy. In the circumstances I have decided to rule on these preliminary objections first.

The affidavit of Abhay Kumar Singh states that he is a barrister and solicitor of the High Court of Fiji and that Rajendra Kumar has been a client of his since 1996. On an unspecified date he was arrested and charged for a number of criminal offences. The warrant of arrest annexed to the affidavit is dated the 24th of July 2003. The charges (Annex G) are dated the 25th of July 2003. They state that in the first week of June, third week of July and on the 23rd day of July 2003, the Applicant "attempted to pervert or defeat the course of justice by attempting to cause or induce a witness to give false testimony in a pending criminal cause".

The statement of Rajendra Narayan is also annexed. It states that he is a witness in a case of corruption against one Athai Khan of the Land Transport Authority. His lawyer the Applicant was and is defending the accused. The statement goes on to say that in June 2003 the Applicant approached him and asked him to change one part of his evidence, that is, to say that he, Rajendra Narayan had left "the money under the book and Atai was not aware of it". He asked Mr Narayan to come to see him in his office. Mr Narayan did not go.

The statement states that in July he met the Applicant by chance at the Land Transport Authority Office, and he said that the Applicant again told him to change his evidence, or to run away overseas until the case was over.

On the 23rd of July, Mr Narayan reported the matter to the police. One Sergeant Puran discussed the matter with the DPP's office. The police then told him to speak with the Applicant and record the conversation in a small recorder given to him by the police. Later that day, Mr Narayan picked up the Applicant in his car. The tape recorder was switched on. During this conversation the Applicant said to Mr Narayan that he should say in evidence that he had left the money with Atai Khan but without his knowledge. He further said that because a court summons had been served on Mr Narayan, the option of leaving the country was no longer available. He further said that he would claim damages from the police and that if Mr Narayan was charged with making a false statement, the Applicant would "save him". Mr Narayan then picked up the two police officers, Sergeant Puran Lal and ASP Josese and they went to the DPP's office where the conversation was recorded on computer.

Annexed also to the affidavit are the statements of Detective Sergeant Puran Lal, Josese Lako, and Peter Ridgway. The statements explain how Mr Narayan reported the matter to the police, how the conversation was taped and how Peter Ridgway downloaded the recording on to his computer. A CD ROM copy was obtained by this process.

These statements were disclosed to the Applicant in the Magistrates' Court.

The declarations sought by the Applicant are as follows:

(a) For a declaration that the use of the secret recording device against the Applicant by the 1st Respondent or his agents or servants was in breach of the Applicant's fundamental right under 1997 Constitution of the Republic of Fiji and as such should be excluded from using the said secret recording in the pending criminal trial against the Applicant;

Alternatively

(b) For a declaration that the unlawful recording of Applicant's private conversation with his client or unlawfully recording of the Applicant's voice constituted an unlawful search and seizure within s 26 of the

Constitution of the Republic of Fiji and as such should not be used against the Applicant in pending criminal trial.

Alternatively

(c) For a declaration that the unlawful recording of Applicant's private conversation with his client were in breach of the applicant's rights to personal privacy, including the right to privacy of personal communication within s 37 of the Constitution of the Republic of Fiji and as such should not be used against the Applicant in pending criminal trial.

(c) For a declaration that the first respondent through his servants or agents abused their powers and authority in arranging or setting up the entrapment against the Applicant with a view to unlawfully prosecute the Applicant.

Counsel for the Attorney-General submitted that this application should not be entertained because the Applicant had an adequate alternative remedy in the criminal trial itself. He further said that no court should interfere with the conduct of a criminal trial, and that even the Court of Appeal in *Josefa Nata v State* AAU0015/02 refused to fragment a criminal trial by hearing an interlocutory appeal. He further said that declarations in relation to a criminal trial were not available when the trial was pending and said that the application was an abuse of the process insofar as it intended to have the effect of interfering with a criminal trial.

Counsel for the Director of Public Prosecutions objected to the form of the application, the relief sought and the jurisdiction of the court to consider a civil application. He agreed that the Applicant had an adequate alternative remedy and asked that the motion be dismissed.

Counsel for the Applicant said that the bringing of an application for constitutional redress was a right under s 41 of the Constitution, and that the holding of a voir dire during the trial proper was not an adequate remedy because, if the evidence was ruled admissible, the Applicant would have to wait until the end of the trial to file an appeal. He further said that the Magistrates' Court could have considered the same question, had the Applicant raised it there. In response to my question as to whether, in effect, a voir dire could be held in the Magistrates' Court in respect of a disputed confession in a case of murder, before transfer to the High Court for trial, counsel said that he was of the view that such a voir dire could be held under s 41 of the Constitution.

Section 41(1) of the Constitution provides:

> If a person considers that any of the provisions of this Chapter has been or is likely to be contravened in relation to him or her (or, in the case of a person who is detained, if another person considers that there has been, or is likely to be, a contravention in relation to the detained person), then that person (or the other person) may apply to the High Court for redress.

Section 41(3) provides that the High Court has original jurisdiction to hear such applications and that it "may make such orders and give such directions as it considers appropriate".

Section 41(4) provides:

> The High Court may exercise its discretion not to grant relief in relation to an application or referral made to it under this section if it considers that an adequate alternative remedy is available to the person concerned.

Section 41(10) gives the Chief Justice powers to make rules. The High Court (Constitutional Redress) Rules 1998 were gazetted in accordance with these powers. They require applications to be made within 30 days from the date when the matter first arose, and by motion and affidavit claiming a declaration, injunction or any other order.

Rule 6(5) states that in the case of a criminal matter the Director of Public Prosecutions and the Attorney-General are entitled to appear and be heard.

In relation to the submission made by counsel for the DPP, that an application for constitutional redress should be made in the civil jurisdiction of the High Court, neither the Constitution nor the Rules make specific reference to the proper repository of the papers. However in a criminal cause or matter (defined by Lord Wright in *Amand v Home Secretary* [1943] AC 147 at 159, as one which if carried to its conclusion may result in the conviction of a person charged and a sentence) the logical place for the filing of such papers is the criminal High Court. This is not the first application for constitutional redress filed in the criminal jurisdiction of the High Court. *Rosa v State* HAM0006.2003 is one such example. That involved a complaint about the computation of a prisoner's sentence. *Nata v State* HAM0040.2003 which is pending and awaiting the grant of legal aid, is another. There are always cases which might appear to have a hybrid quality. Habeas corpus applications for instance might not appear to be either civil or criminal. However for such cases the good sense of the civil and criminal registries will no doubt prevail in the choice of the appropriate court in which to place such applications.

In this case, the Applicant seeks declarations in relation to the admissibility of evidence destined for a criminal trial. The criminal High Court was and is the right place to file such an application. Further the remedies available to the High Court under the Constitution and under r 3 of the Redress Rules are available to a criminal judge of the High Court, provided the application is one for constitutional redress. The limited powers given to the court under the Criminal Procedure Code, does not preclude the court from acting under the powers of other legislation, for instance the Extradition Act, or the Marine Spaces Act, or the Human Rights Commission Act. I find therefore that this court does have jurisdiction to entertain this application. However the remedies sought are not provided for in the Constitutional Redress Rules. They are provided for in the Human Rights Commission Act, but this application is not brought under that Act. Nor are the Redress Rules specified in the motion. Although generally speaking, the High Court might overlook technical defects in the pleadings where the Applicant applies in person, in this case the Applicant is a barrister and solicitor and is assumed to know the rules in relation to pleadings and remedies. If this application were to be allowed to proceed further, I would have ordered amendment of the motion.

However, I do not consider that the application should be entertained because I believe that any order in the matter would usurp the role of the judge conducting the trial in the matter, would fragment the criminal process and would be inappropriate considering the Applicant's rights to canvass the same objections during the trial.

The Applicant seeks to exclude disputed evidence before the information is filed, while his own appeal against the transfer order is still pending in this court and before any assessors have been sworn in (assuming there is a trial). His application is premature and inappropriate. It is entirely inappropriate for a judge to consider the question of the admissibility of criminal evidence before the

accused has been arraigned and before the assessors have been sworn in. It is entirely inappropriate for a judge to rule on the admissibility of criminal evidence when the trial proper may well be heard by another judge. Lastly it is entirely inappropriate to rule on the admissibility of criminal evidence without giving both parties (the state and the accused) an opportunity to call and lead evidence, in a voir dire, on the circumstances in which the evidence was taken.

Counsel for the Attorney-General referred me to two authorities in this regard; *Hinds v Attorney-General* Privy Council Appeal No 28 of 2000, and *Imperial Tobacco Ltd v Attorney-General* (1980) 1 ALL ER 866. In Hinds the Appellant was convicted and sentenced for setting fire to a house in Barbados. In the course of the trial, he had requested legal aid but the presiding judge had refused. On appeal from the conviction he raised the question of his lack of representation in the Court of Appeal but that ground had been rejected. After the appeal, the Appellant applied by motion for several declarations in relation to his lack of legal representation during the trial. His application was rejected on the ground that this issue had already been considered by the Court of Appeal. The Court of Appeal agreed. On appeal to the Privy Council, the Privy Council held that the ordinary processes of appeal provided the Appellant with "an adequate opportunity to indicate his constitutional right, that he could not launch a collateral action upon a judgment when there were adequate rights of redress in the appellate process and that constitutional relief should only be considered where an appeal process is not readily available". Citing Lord Diplock in *Chokolingo v Attorney-General of Trinidad and Tobago* (1981) 1 WLR 106, with approval, the Privy Council held that:

> As it is a living, so must the constitution be an effective, instrument. But Lord Diplock's salutary warning remains pertinent: a claim for constitutional relief does not ordinarily offer an alternative means of challenging a conviction or a judicial decision, nor an additional means where such a challenge, based on constitutional grounds, has been made and rejected.

In Imperial Tobacco, charges were laid under the Lotteries and Amusements Act 1976. While the charges were still pending, the defendants issued an originating summons in the Commercial Court seeking a declaration that their conduct had been lawful. The Commercial Court considered the summons, despite an objection from the Crown that because the case was already before a criminal court, the application ought to be declined. On appeal, the Court of Appeal held that the Commercial Court had jurisdiction and that the defendants' conduct was lawful. The Crown appealed to the House of Lords. The House of Lords reversed the decision of the Court of Appeal, holding, inter alia that where criminal proceedings were properly instituted, it was not a proper exercise of judicial discretion for a judge in a civil court to consider the lawfulness of the acts of the defendants, because to do so was a usurpation of the functions of the criminal court without binding it and would therefore inevitably prejudice the criminal trial. The court held that the declaration ought not to have been granted. These principles are highly relevant in this case.

The Applicant has an adequate alternative remedy. His argument that he will be deprived of an interlocutory appeal does not persuade me to ignore the public interest in ensuring that criminal trials are not fragmented, or prejudiced by interlocutory and premature applications which in any event would not be binding on the trial judge. The same principles apply to the Magistrates' Courts.

Questions of admissibility of disputed evidence cannot and should not be entertained when the trial is to be conducted in the High Court.

For these reasons this application is dismissed.

Application dismissed.