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RE ROSEMARY GILLESPIE

[SUPREME COURT—Rooney, J.—22 September 1987]

Civil Jurisdiction

(Habeas Corpus—Arrest on suspicion—suspected person detained—refusal to answer question—no charge but refusal to answer questions delayed arrested's release—unacceptable proposition—Public Emergency Regulations and Common Law provide arrest may not be made unless there is present a resonable suspicion—refusal of co-operation did not justify continued detention). B

V. Maharaj for the Plaintiff

Application for a writ of Habeas Corpus wherein Vijay Maharaj (the plaintiff) sought the production of Rosemary Gillespie an Australian citizen visiting Fiji was arrested on 15 August 1987, taken to the Central Police Station Suva and there detained until 17 August 1987. C

The plaintiff applied for the writ returnable at 10.00 a.m. on 18 August 1987. Miss Gillespie not having been charged with any offence was released on 17 August 1987 pursuant. D

The learned Supreme Court Judge made an order for Costs in favour of the plaintiff apparently on the return of the writ because the defendant failed to satisfy him that the arrest and detention had been justified either at Common Law or under The Public Emergency Regulations 1987. (L.N. 1186 of 1987).

Cases referred to: E

Lister v. Perryman (1870) 4 L.R.H.L. 521
Dumbell v. Roberts (1944) 1 All E.R. 326
Elder v. Evans (1951) N.Z.L.R. 801
Blundell v. Attorney-General (1965) N.Z.L.R. 341

ROONEY, Mr Justice F

Reasons for Order as to Costs

This was an application for a writ of habeas corpus. On the 18 August 1987 I made an order that the defendant pay the plaintiff's costs on a common fund basis under Order 62 Rule 28(3) & (4) of the Rules of the Supreme Court, that is to say, taxed as between solicitor and client. I indicated at the time that I would give reasons for my order at a later date. G

It is not necessary to review all the facts. It is sufficient to say that on the evening of the 15 August 1987, Rosemary Gillespie, an Australian citizen visiting Fiji, was arrested and taken to the Central Police Station, Suva. She was there detained until her release at about 7 p.m. on Monday the 17 August. She was not charged with any offence.

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On the 17 August the plaintiff, who is Gillespie's solicitor, applied for a writ of habeas corpus. This was issued and made returnable at 10 a.m. on Tuesday 18 August. As by that time Gillespie has been released the hearing was concerned only

with tue question of costs. I made the order because the defendant failed to satisfy the Court that the arrest and detention of Gillspie was justified either at commom law or under the Public Emergency Regulations 1987 which are said to be in force at the present time (L.N. 1186/87).

Superintendent Beni Naiveli of the Fiji Police was called as a witness for the defendant in opposition to the application for costs. I shall not allude to the full measure of his testimony, but, I must say that this officer's understanding of the rights and duties of the police in the present situation is not only erroneous, but, devoid of reality and tinged with fantasy. I was obliged to disregard most of his evidence as baseless speculation.

Referring to the Public Emergency Regulations. Superintendent Naiveli said:

> "I appreciate the provision which deals with the detention of suspected persons. A suspected person is one who we have reasonable grounds to suspect that he had committed an offence, however being insufficient to charge. It is a question of evidence and the degree of evidence. It is a subjective test upon the enforcing officer in any court of law."

Later in cross-examination by Dr Cameron for the plaintiff, the witness said:

> "I have no evidence that (Gillespie) was in Fiji last July after making necessary investigations. It is a subjective test under Regulation 17."

This evidence seems to imply that if a person is arrested or detained under Public Emergency Regulation 17(1) or (4) by a police officer or a member of Her Majesty's Armed Forces, the existence of the reasonable suspicion that must first be in the mind of the officer concerned before that arrest can be deemed lawful, is to be determined otherwise than by a consideration of the information in that officer's possession. This would mean that a person could be deprived of his liberty by an authorised officer with impunity on a suspicion that was afterward proved to be groundless or erroneous. If that were the case the liberty of the subject might depend upon ingorance, stupidity, intoxication, delusion or even insanity.

In *Lister v. Perryman* (1870) 4 L.R.H.L. 521 it was laid down that it is for the trial Judge to determine whether the facts found do constitute reasonable and probable cause for an arrest. Hatherly L.C. put it at 531 as follows:

> "But what is now to be decided is this, how far this gentleman, having this information conveyed to him, may be said to have reasonably and discreetly trusted his informant. Because I apprehened that you are to have regard to every shade of difference between the amount of credit to be given to one person and to another, according to the character of the informant. Information given by one person of whom the party knows nothing, would be regarded very differently from information given by one whom he knows to be a sensible and trustworthy person. And the question whether or not a reasonable man would or would not act upon the information must depend in a great degree upon the opinion to be formed of the position and circumstances of the informant, and of the amount of credit which may be due under those circumstances to the person who thus conveyed the information."

The test is obviously not subjective on this principle.

The proper approach is set out by Scott L.J. in *Dumbell v. Roberts* (1944) 1 All E.R. 326 at 329:

"The duty of the police when they arrest without warrant is, no doubt, to be quick to see the possibility of crime, but equally they ought to be anxious to avoid mistaking the innocent for the guilty. The British principle of personal freedom, that every man should be presumed innocent until he is proved guilty, applies also to the police function of arrest—in a very modified degree, it is true, but at least to the extent of requiring them to be observant, receptive and open-minded and to notice any relevant circumstance which points either way, either to innocence or to guilt. They may have to act on the spur of the moment and have no time to reflect and be bound, therefore, to arrest to prevent escape: but where there is no danger of the person who has *ex hypothesi* aroused their suspicion, that he probably is an 'offender' attempting to escape, they should make all presently practicable enquiries from persons present or immediately accessible who are likely to be able to answer their enquiries forthwith. I am not suggesting a duty on the police to try to prove innocence: that is not their function; but they should act on the assumption that their *prima facie* suspicion may be ill-founded. That duty attaches particularly where slight delay does not matter because there is no probability, in the circumstances of the arrest or intended arrest, of the suspected person running away. The duty attaches, I think, simply because of the double-sided interest of the public in the liberty of the individual as well as in the detection of crime. For that reason, just as it is of importance that no one should be arrested by the police except on grounds which in the particular circumstances of the arrest really justify the entertainment of a reasonable suspicion, so also it is in the public interest that sufficient damages should follow in such a case in order to give reality to the protection afforded by the law. Personal freedom depends upon the enforcement of personal rights: and the primary personal right, apart from *haveas corpus*, is the common law right of action for damages for trespass to the person, which is called 'false imprionment' just because it is for a trespass which has involved interference with personal freedom."

The Public Emergency Regulations 1987 do not depart from the essential requirement that an arrest can only be made where there is present a reasonable suspicion. That remains the law in Fiji. The Public Emergency Regulations do not provide for any different interpretation. The rights of a person arrested under the Regulations are no different than those of a person arrested under the common law.

In the founding affidavit the plaintiff stated at paragraphs 8 and 9:

"8. *IN* my presence Sergeant Naipote asked Miss Gillespie her name, purpose of her visit to Fiji and requested her passport. She told Sergeant Naipote that she was her on a holiday and also handed over her Australian Passport to him.

9. *MISS GILLESPIE* then exercised her right to maintain silence and refused to answer any further questions. She was then informed by Sergeant Naipote that she would be detained in the cell until the next morning pending further investigations."

In the course of his evidence Superindent Naiveli said:

"(Gillespie) was questioned and she did not answer questions, thus delaying her release. We detain people for investigation."

A The implication is that the police may arrest, detain and question people if they feel so inclined. This is an unacceptable proposition.

"It is a fundamental principle in English law that an accused person cannot be interrogated, or at least cannot be forced to answer questions under a legal penalty if he refuses. That principle . . . is absolute, and does not admit of exception even for a demand of name and address, unless a statute has expressly created an exception." *Elder v. Evans* (1951) N.Z.L.R. 801 per Hay J. at 807.

B [See also *Blundell v. Attorney-General* (1965) N.Z.L.R. 341 and 358].

This principle must apply a fortiori where the person arrested is not accused of any crime. The law cannot admit of any distinction between an arrest and any other form of detention. A person may go to the police and voluntarily made a statement. The police have no right to take a person to a Police Station for questioning against his will. This would be an arrest. There is nothing in the Public Emergency Regula-C tions which requires a person to give any information to the police other than his name or address. This obligation only arises in the circumstances provided for in Regulations 17(1).

Gillespie had every right to remain silent and refuse to answer questions. There was no justification for her continued detention because it appeared to the police that she was, to that extent, unco-operative.

D Another matter of concern arises from the evidence given by Superintendent Naiveli which I have noted as follow:

"... I was given documents seized from the plaintiff (sic) (Gillespie). After seizing these documents, I directed that Sgt. Naipote come with me to see Qetaki. I met Qetaki 15 minutes later. He told me he had directed the arrest of the plaintiff E (Gillespie) on the grounds similar to that I had mentioned relating to her entry into Fiji in July.

"... I am certain I was not misinformed about her, her presence, but it was not my informer, but, Mr Qetaki's informer. Qetaki's status lends credibility as far as I am concerned. He told me that his informant saw plaintiff (Gillespie) in the Western Division and I acted on that information from such a well known per-F son. I could not ask Qetaki to reveal his source of information, this would be unethical. . ."

"... It was a sufficient ground that someone has seen her. I do not have to see the witness myself. I did not wish to be discourteous to Mr Qetaki. I do not say that Qetaki has power to arrest. . ."

". . . Qetaki is the Adviser on Justice. I believe what he said."

G Mr Alipate Qetaki is the Adviser on Justice to the Governor-General. On the 26 May 1987 His Excellency directed that he discharge the functions, powers and duties conferred upon the Attorney-General under any written law. (Fiji Republic Gazette Vol. 114 No. 41 dated 29 May 1987 at 637). He must be regarded as a "person employed in the public service" as defined in Section 4 of the Penal Code.

H Section 111 of the Penal Code creates the offence of abuse of office. It reads in part:

"Any person who, being employed in the public service, does or directs to be done, in abuse of the authority of his office, any arbitrary act prejudicial to the rights of another, is guilty of a misdemeanour. . ."

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Such an offence is punishable with imprisonment for a term not exceeding two years or with a fine or both. (Section 47 Penal Code).

Mr Qetaki did not give evidence at the hearing. It may be that the evidence given by Superintendent Naiveli is the product of another of his fantasies. But, I cannot ignore the fact that a senior police officer has given sworn evidence in open court to the effect that a person who has been invested with the duties of the principal legal adviser to the Government has directed the unlawful arrest and detention of a visitor to this country who is entitled to the same right to personal liberty as is enjoyed by any citizen. In my view this is a serious matter which requires to be further investigated.

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C

Section 111 of the Penal Code provides that a prosecution for any offence under the section shall not be instituted except by or with the sanction of the Director of Public Prosecutions.

I now direct the Chief Registrar to transmit the Supreme Court file or a certified copy of its contents to the Director. It is for that officer to decide in the exercise of the authority vested in him by Section 85 of the Constitution of Fiji what action (if any) should be taken arising out of the matters related above.

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