MARK LAWRENCE MUTCH v ATTORNEY-GENERAL and Anor (HAM0069D of 2005S)

HIGH COURT — CRIMINAL JURISDICTION

GATES J

9, 13, 19 January, 9 February 2006

Prisons — prisoners' rights — Applicant requested for use of own computer and equipment in prison, internet access and telephone for purposes of Supreme Court Appeal — whether High Court should intervene — Constitution of the Republic of Fiji ss 28(1)(a), 28(1)(c), 29(1) — Prisons Act (Cap 86) s 88 — Standard Minimum Rules for the Treatment of Prisoners UN 1957 — Standard Minimum Rules for the Treatment of Prisoners UN 1977.

The Applicant, who was a convicted and serving prisoner, filed a motion with supporting affidavit, requesting for: (1) a copy of all original witness statements and English translations; (2) copies of all cds introduced in both the Magistrates Court and High Court; (3) facilities to analyse cds and prepare and research being: (a) computer and software including cd/dvd reader/writer; (b) printer; (c) scanner; (d) wireless modem and internet access; and (e) telephone to prepare an appeal to the Supreme Court. He also sought orders against the Director of Public Prosecutions, Commissioner of Prisons, Commissioner of Police, his former lawyer and the Prisons Department to allow him to use his own computer and to have access to the internet in order to pursue the appeal. The Applicant sought a similar application by way of originating summons with the High Court. The issue was whether the High Court should intervene.

Held — The judge declined the Applicant's requests for orders to use his computer, equipment and telephone and internet access in prison since he did not have a legitimate claim to have it. The prisoner has no constitutional right to be permitted to the use of computers, internet or telephone while in prison. Moreover, no regulations have been made making specific provision for access to computers, internet or telephone or for the use of such equipment in the prison cells. If basic constitutional rights were infringed, then the courts will disturb the actions of prison administrators. Absent any infringement, prison administrators have a broad discretion in the management of prison facilities.

Application dismissed.

Cases referred to

West Virginia v William K Davis, Commissioner, Division of Corrections (unreported, Supreme Court of Appeals of West Virginia, No 25155, 1998), applied.

ACLU of Maryland Inc v Wicomico County Md (1993) 99 F 2d 780; *Bell v Wolfish* (1979) 441 US 520; *Harris v Forsyth* (1984) 735 F 2d 1235; *Jackson v Arizona* (1989) 885 F 2d 639; *Mathis v Sauser* (1977) 942 P 2d 1117; *Sands v Lewis* (1989) 886 F 2d 1166; *Sasnett v Department of Corrections* (1995) 891 F Supp 1305 ; *State ex rel James v Hun* (1997) 201 W Va 139; 494 SE 2d 503; *State ex rel Kucera v City of Wheeling* (1969) 153 W Va 538; 170 SE 2d 367; *Taylor v Coughlin* 29 F 3d 39 (2nd Cir 1994); *United States ex rel v Lane* 718 F 2d 226 ; *Wolfish v Levi* (1978) 573 F 2d 118; *Wolff v McDonnell* (1974) 418 US 539; 94 S Ct 2963; 41 L Ed 2d 935, cited.

Sasnett v Sullivan (1996) 91 F 3d 1018, considered.

Applicant in person

P. Madanavosa for the Director of Public Prosecutions

Suliman for the Attorney-General

M. Raza in person

[1] Gates J. On 12 October 2005 the Applicant filed a motion with supporting affidavit. He sought orders against the Director of Public Prosecutions, Commissioner of Prisons, Commissioner of Police and his former lawyer, Mr Mehboob Raza. He did so as a convicted and serving prisoner who was unrepresented.

[2] The real purpose of the application was not at first readily ascertainable. But it seemed to boil down to a request for necessary papers and use of computer equipment to prepare an appeal to the Supreme Court. In particular he sought an order that the Prisons Department allow him to use his own computer and to have access to the internet in order to pursue such appeal.

[3] A great quantity of requests was made in the original motion. Happily these were reduced, on Mr Mutch's own working, to the following:

List of Items

1) Copy of all original witness statements and English translations.
2) Copies of all Cds introduced in both Magistrate's Court and High Court
3) Facilities to analyse cds and prepare & research being:
    a) Computer & software including cd/Dvd reader writer
    b) Printer
    c) scanner
    d) wireless modem & internet access — for research
    e) telephone

[4] Broadly his application was based on every person's constitutional right to a fair trial: s 29(1). He needed the court's assistance for an order to obtain necessary cooperation from other arms of state, including the Director of Public Prosecutions and his former lawyer who had been his counsel at the trial. Mr Raza informed the court that he no longer had any other items or papers from the trial which might be of assistance to the Applicant. The Applicant accepted this.

[5] A charged person has a right for him or her to be given adequate time and facilities to prepare a defence, including, if he or she so requests, a right of access to witness statements: s 28(1)(c) of the Constitution. Such rights are to be interpreted widely to extend, as part of the right to a fair trial, to time and facilities to prepare an appeal.

[6] Since this is an application to assist with an appeal, only papers relevant to an appeal could be requested. Papers are not to be supplied by the state for a general inquiry by the Appellant or for a fishing expedition in case something relevant might turn up to create an appeal point.

[7] The purpose of the application must be confined to the obtaining of assistance with the preparation and prosecution of an appeal to the Supreme Court. On one view this application should have been filed with the Court of Appeal for that court to make the necessary interlocutory or discovery orders.

[8] But the matter can be easily disposed of at this stage. Item 1 presents no difficulty. Original witness statements with English translations are not objected to by the state. The DPP's office can supply those which were relevant to the High Court trial without objection; that is of those witnesses called to give evidence or whose statements may have been exhibited or agreed.

[9] As for Item 2, there was only one relevant CD exhibited at the trial. It is proposed by the state that that CD be viewed by the Applicant in court premises in the presence of an independent IT person. This item similarly presents no real dispute or difficulty. The viewing of an exhibit does not raise privacy issues as suggested by the Applicant.

[10] Finally there is the question of permission to use the Applicant's own computer equipment in the prison, that is, a computer, printer and scanner. The Applicant also wants access to the internet for research purposes and to be allowed the use of the telephone, no doubt for internet access as well as for outside contact.

[11] A similar application was brought by the Applicant by way of Originating Summons before a civil judge of the High Court in proceedings HBC405.03S. To the Respondent's summons to strike out, and save as to one paragraph of the remedies sought, the judge acceded.

[12] Before parting with the interlocutory application however Winter J (at 8) had these observations to make:

> It has been drawn to my attention that the plaintiff at my direction prepared and wanted to have filed certain written materials. Despite requests to the Prison Authorities to ensure that these materials were filed they were not. I am also advised that certain basic research materials purchased by the plaintiff to assist him in preparing his claim have not been given to him.
>
> I wish to make it clear that I will not accept obstruction of the Court's process in this way. If a plaintiff prisoner wishes to have documents filed they are to be delivered to the Registry within a reasonable time. If a plaintiff prisoner wishes to research the law and through the proper channels purchases materials for that purpose these should be given to him.

[13] I accept the broad purport of these remarks. But how far can a court order the manner in which the prisons should provide an Appellant with appellate assistance? There seems nothing remarkable in allowing a prisoner in prison the use of his own computer, printer, and scanner for the purposes of mounting an appeal. I was informed that already at least one prisoner has been allowed to use such facilities. Internet access and telephone usage have greater resource implications and are thus in a different category. The more that resources are needed to implement an order, the less readily will a court be minded to make an order or recommendation.

[14] I am grateful to Ms Madanavosa for her researches in this field. She cited the case of *West Virginia v William K Davis, Commissioner, Division of Corrections* (unreported, Supreme Court of Appeals of West Virginia, No 25155, 1998) (*William K Davis*). In that case the court decided that:

> A writ of mandamus will not issue unless three elements coexist — (1) a clear legal right in the petitioner to the relief sought; (2) a legal duty on the part of the respondent to do the thing which the petitioner seeks to compel; and (3) the absence of another adequate remedy. *State ex rel Kucera v City of Wheeling* (1969) 153 W Va 538; 170 SE 2d 367.

[15] Second, the court decided that prison inmates have no constitutional right to possess personal computers in their cells.

[16] Third, the court decided that a property interest included not only the traditional notions of real or personal property but that it extended to those benefits to which an individual may be deemed to have a legitimate claim of entitlement under existing rules or understandings. To have a property interest, an

individual must demonstrate more than an abstract need or desire for it. He must instead have a legitimate claim of entitlement to it under the law.

[17] This was a case where personal computers, the property of inmates, were permitted for use in the inmates cells. However prison officers later confiscated computers from 11 inmates. It had been discovered that these inmates had used their computers to threaten various companies with lawsuits. As a result the commissioner cancelled all arrangements and inmates were then allowed 30 days within which to make arrangements to send their computers out of the facility. The inmates filed *per se habeas* or *mandamus* petitions.

[18] In several States of America there have been cases where inmates have claimed that prohibitions on the possession of typewriters or word processors impeded their constitutional right of access to the courts. Maynard J in *William K Davis* (at 6) said "For the most part, courts have not been sympathetic to such claims. It has been said that while

> due process requires that prisoners have access to paper, pens, notarial services, stamps, and adequate library facilities, … there is … no constitutional right to a typewriter as an incident to the right of access to the courts. *Taylor v Coughlin* (1994) 29 F 3d 39, 40, quoting *Wolfish v Levi* (1978) 573 F 2d 118, *rev'd on other grounds sub nom Bell v Wolfish* (1979) 441 US 520.

[19] Likewise, in *Sasnett v Department of Corrections* (1995) 891 F Supp 1305 at 1313, *aff'd, Sasnett v Sullivan* (1996) 91 F 3d 1018, *vacated on other grounds*, ___ US ___, 117 S Ct 2502, 138 L Ed 2d 1007 (1997), the court held:

> The right of access to the courts incorporates a right to state-supplied pen and paper to draft legal documents, *Bounds*, 430 US at 824, 97 S Ct at 1496, but does not require such sophisticated tools as computers and memory typewriters. See *Sands v Lewis* (1989) 886 F 2d 1166 (no constitutional right to memory typewriters); *cf United States ex rel v Lane* (1983) 718 F 2d 226, 232 (criminal defendant has no right of access to computerized legal research system upon forgoing right to court appointed counsel). The right of access does not mandate even the provision of ordinary typewriters. *Jackson v Arizona* (1989) 885 F 2d 639, 641.

[20] The court cited several cases in the same vein and concluded that:

> We are persuaded by the uniformity of opinion on this issue and therefore hold that prison inmates have no constitutional right to possess personal computers in their cells.

[21] The court found that there were no laws or regulations that granted to the inmates a property interest in the possession of computers. There had been a policy in West Virginia in operation for a decade allowing computers in inmates cells. The court observed:

> These policies, however, reside solely in the discretion of prison administrators. This discretion is pursuant to both statute and administrative regulation.

[22] By virtue of s 88 of the Prisons Act (Cap 86) in Fiji it is the minister who is responsible for the making of regulations dealing inter alia with:

> (a) the regulation and government of prisons;
>
> …
>
> (h) permitting the introduction of any articles into prisons and the possession of any such articles by prisoners;
>
> …
>
> (s) generally for the effective administration of this Act, for the good management and government of prisons.

No regulations have been made making specific provision for access to computers, internet, or telephone, or for use of such equipment in the cells.

Reasonable access to the courts

[23] Effectively the Applicant claims he is allowed inadequate legal assistance, inadequate time in the law library, and no internet, telephone and computer access. In *State ex rel James v Hun* (1997) 201 W Va 139 the court concluded that the right of meaningful access to the courts is not completely unfettered. The court acknowledged the propensity of prisoners to abuse such assistance as was allowed.

[24] In *Harris v Forsyth* (1984) 735 F 2d 1235 it was said "the law is well-established that a state has a compelling interest in maintaining security and order in its prisons".

[25] The court accepted this principle in *William K Davis*. It said (at 9):

> The possession of computers by inmates compromises security and order by providing the capability to store vast amounts of information that is not easily detectable during searches of inmates' cells. Further, almost unlimited quantities of material may be stored in computers. Pornography, gambling information, accounts of inmates' indebtedness to other inmates, guards' schedules, and escape plans are only a few such examples. This list of illegal uses of a computer is limited only by the imaginations of those with technological capability, anti-social propensities, larceny and mischief in their hearts, and a lot of spare time on their hands.

[26] It ended by stating:

> In addition, as noted above, the overwhelming majority of courts that have decided the issue have found that the right of access to the courts does not include the right to possess typewriters and computers. We hold, therefore, that the right of meaningful access to the courts does not include the right of inmates to possess computers in their prison cells.

[27] In *Mathis v Sauser* (1977) 942 P 2d 1117 it was said that "prisoners have been utilizing computers to harrass prison officials at [the prison] with frivolous litigation and large amounts of paperwork". There must of course be no retaliatory conduct aimed at chilling or diminishing the inmates' exercise of their constitutional right of access to the courts: *ACLU of Maryland, Inc v Wicomico County Md* (1993) 999 F 2d 780.

[28] I find there is no constitutional right for a prisoner to be permitted the use of computers, internet or telephone while in prison. Nor must such be supplied in order that the constitutional right to "adequate facilities" be honoured. I find also no breach of the Standard Minimum Rules for the Treatment of Prisoners, UN 1957, 1977.

How far should the judiciary intervene?

[29] This central issue was discussed in *William K Davis*, where Maynard J said (at 5):

> When considering challenges to prison regulations, we are ever mindful of both the natural conditions which accompany incarceration for breaking society's laws and the contrasting roles of prison administrators and judges. Incarceration necessarily involves substantial limitations upon a prisoner's personal liberty. "Lawful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen, a 'retraction justified by the considerations underlying our penal system'." *Wolff v McDonnell* (1974) 418 US 539; 94 S Ct 2963; 41 L Ed 2d 935 (citation omitted). The primary responsibility for ensuring the orderly and effective maintenance of our penal

> system rests with prison administrators. These administrators are the ones responsible for developing and implementing the policies and procedures which are designed to guarantee that the various goals of incarceration are realized. This Court has recognized that prison administrators have broad discretion in the management of correctional facilities.

[30] He continued (at 6):

> On the other hand, "a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime". *Wolff*, 418 US at 555, 94 S Ct at 2974, 41 L Ed 2d at 950. For example, we have stated that "[c]ertain conditions of jail confinement may be so lacking in the area of adequate food, clothing, shelter, sanitation, medical care and personal safety as to constitute cruel and unusual punishment under the Eighth Amendment to the United States Constitution".

I would add "and under Fiji's Constitution also".

[31] If basic constitutional rights are infringed, then the courts will disturb the actions of prison administrators. Violations are properly brought to the court's attention. The court's cynosure and aim must be to achieve in the prison context "a mutual accommodation between institutional needs and objectives and the provisions of the Constitution": *Wolff v McDonnell* (1974) 418 US 539 at 556; 94 S Ct 2963 at 2975; 41 L Ed 2d 935 at 951. Maynard J concluded:

> In seeking the proper balance, we are careful not to usurp the authority of prison administrators, yet we must be vigilant in not relinquishing this Court's role as guardian of fundamental constitutional commitments.

Conclusion

[32] I decline to order that permission be granted to the Applicant for the use of a computer and equipment in the prison. Similarly I decline to make any specific orders in respect to the use of telephone and internet.

[33] No doubt the prison authorities will use their good sense on telephone usage, if it is related to appeal preparation or for any other allowable usage. Bearing in mind the limited resources available in Fiji, in contrast to those in the United States of America, prison administrators have a duty to exercise their authority non-arbitrarily, fairly, yet wisely. If such is done, the courts will not interfere.

[34] In summary, I order:

That the Applicant be supplied by the Director of Public Prosecutions with copies of all original witness statements and English translations, of those witnesses who were called to give evidence at the trial or whose statements were either exhibited or agreed.

(a) Applicant to be allowed to view the CD that was exhibited at trial, in High Court precincts, by arrangement in the presence of an IT person.

(c) No orders in respect of access to computer, internet or telephone.

(d) Requests for copies of court decisions may be made through the High Court Criminal Registry.

(e) And I direct that the visiting Justice for Suva Jail be provided with copies of the Applicant's submissions to monitor the provision of adequate facilities for his appeal.

Application dismissed.