ALBERTINO SHANKAR and Anor v STATE (CAV0008/2005S)

SUPREME COURT — CRIMINAL JURISDICTION

FRENCH, HANDLEY and IPP JJ

11, 19 October 2006

Practice and procedure — applications — leave to appeal — defect in the appointment of assessors — right to counsel — right to be informed of the right to consult with legal practitioners of one's choice — reasonableness — Criminal Procedure Code ss 264, 265 — Constitution of the Republic of Fiji ss 27(1)(c), 28(1)(d).

The two Petitioners, Albertino Shankar (P1) and Francis Narayan (P2) were convicted of murder on 22 May 2003 in the High Court before Gates J and three assessors. Both Petitioners appealed to the Court of Appeal but their appeals were dismissed.

On 11 October 2006, the court dismissed the Petitioners' applications for special leave to appeal.

The grounds of appeal were:

(1) The trial was a nullity as there was a defect in the appointment of the assessors. Counsel for the Petitioners (Mr Singh) contended that the appointment of the assessors was defective because the list of assessors was not published in the gazette as required by s 264 of the Criminal Procedure Code.

(2) P1, wrongly, was not allowed counsel of his choice. At some time prior to 20 May 2003, the P1's family asked Mr Singh who was then in Australia to represent P1 at the trial. They informed Mr Singh that the case was due to start on 20 May 2003. Mr Singh responded that he would accept the instructions but only if the hearing was adjourned after the weekend following said date because it was only then that he would be available. On 20 May 2003, P1 asked to have the trial adjourned so that Mr Singh could represent him on that date. Trial was adjourned until 22 May 2003 but Mr Singh was not available on that date. The trial proceeded with both Petitioners being represented by legal aid counsel who had previously been appointed to act on their behalf. The Petitioners did not complain about or withdraw the instructions they had previously given to legal aid counsel.

(3) Confessional material was wrongly admitted into evidence. Mr Singh submitted that P1 had not been informed, promptly, of his right to consult with a legal practitioner and said that the failure to inform him of his right to counsel immediately upon his arrest constituted a breach of the Constitution.

(4) The trial judge erred in his direction regarding lies.

(5) The trial judge did not put the case of the defence properly and sufficiently.

Held — (1) The Court of Appeal submitted that while the first ground of appeal asserted that there had been a failure to gazette a list, no application had been made to adduce evidence of that fact or to obtain an admission from the Respondent that it was, in fact, the case. The Court of Appeal likewise observed that, even if there had been some defect in the initial appointment of the assessors, once they had assumed the position of assessors and been sworn in properly, they were, in the absence of challenge during their tenure, de facto holders of that position and their subsequent performance of their duties was valid. The Court of Appeal proceeded to hold that this ground failed "because there really is no evidence to support counsel's contention that the proper procedures had not been followed". The Court held that the Court of Appeal's finding that there was no evidence that the proper procedures had not been followed was unassailable and that the same was sufficient to dispose of this ground.

(2) The court said on the second ground that this ground cannot be upheld. In adjourning the trial until 22 May 2003, the trial judge applied the criterion of reasonableness and the Court of Appeal adopted the same approach. Mr Singh rightly

accepted that the right to counsel under s 28(1)(d) of the Constitution of Fiji was subject to that criterion. To construe s 28(1)(d) as conferring an absolute right to counsel of choice would seriously impede the administration of justice. It is implicit in the section that the right to counsel conferred thereby is qualified by considerations of reasonableness. The constitutional right is one which must be exercised at the proper time. It cannot be exercised on the eve of the trial to force an adjournment.

(3) The purpose of s 27(1)(c) of the Constitution is to require persons, who are arrested or detained, to be informed of their right to consult with legal practitioners of their choice before they make any relevant statement concerning the offence for which they have been arrested or detained. The court opined that there would be compliance with s 27(1)(c) were an arrested or detained person to be informed of his or her right to consult with a legal practitioner within a reasonable time provided that the person is so informed before making any such a statement. P1 was informed of his right to consult his legal practitioner within a reasonable time after his arrest and before making any statement concerning the offence for which he was arrested. In the circumstances, there was no breach of s 27(1)(c).

(4) Mr Singh rightly conceded that the ground concerning the trial judge's direction as to lies was not a ground that could justify special leave to appeal.

(5) The remaining ground was that the trial judge failed to put the Petitioner's case properly and sufficiently to the assessors. Despite Mr Singh's detailed written submissions in support of this ground, the court was not persuaded that it was an appropriate ground for leave and that there was any error in respect on the part of the trial judge.

Application dismissed.

Cases referred to

Adams v Adams (1971) P 188; [1970] 3 All ER 572; *Cassell v R* (2000) 201 CLR 189; 169 ALR 439; [2000] HCA 8; *Ellis v Bourke* (1889) 15 VLR 163; *Hemapala v R* [1963] AC 859; *Norton v Shelby County* (1886) 118 US 425; *Ras Behari Lal v King Emperor* (1933) LR 60 IND APP 354; *Re Aldridge* (1893) 15 NZLR 361; *State v Carroll* (1871) 9 Am Rep 409; *R v Cawthorne; Ex parte Public Service Assoc of South Australia Inc* [1977] 17 SASR 321, cited.

GJ Coles & Co Ltd v Retail Trade Industrial Tribunal (1986) 7 NSWLR 503, considered.

A. K. Singh for the Petitioners

R. Gibson for the Respondent

French, Handley and Ipp JJ.

The court: On 11 October 2006 this court dismissed the Petitioners' applications for special leave to appeal and stated that it would deliver reasons for its decision at a later date. These are those reasons.

The two Petitioners were convicted of murder on 22 May 2003 in the High Court before Gates J and three assessors. They were sentenced to life imprisonment with a recommendation that they serve a minimum term of 17 years' imprisonment.

Both Petitioners appealed to the court of appeal (constituted by Ward P, Smellie and Penlington JJA) against their conviction. Their appeals were dismissed.

The petition raised five grounds of appeal, namely:

(a) The trial was a nullity as there was a defect in the appointment of the assessors.

(b) The Petitioner, wrongly, was not allowed counsel of his choice.

(c) Confessional material was wrongly admitted into evidence.

(d) The trial judge erred in his direction regarding lies.
(e) The trial judge did not put the case of the defence properly and sufficiently.

Before the court of appeal, counsel for the Petitioners (Mr A K Singh) contended that the assessors had not been appointed strictly in accordance with s 264 of the Criminal Procedure Code. He submitted that their appointment was defective because the list of assessors was not published in the gazette as required by s 264.

This was the first time this contention had been advanced on the Petitioners' behalf. Mr Singh explained to the court that no challenge was raised at the time of the trial because the parties were ignorant of the alleged defects.

The Court of Appeal commented in regard to this submission:

While the first ground of appeal asserts that there had been a failure to gazette a list, no application has been made to adduce evidence of that fact or to obtain an admission from the respondent that it was, in fact, the case. That should exclude the court from considering the point but we note that the Respondent does not take issue with that assertion and seeks to defend the position on grounds which must proceed on the basis that they were not properly appointed.

The Court of Appeal observed that, even if there had been some defect in the initial appointment of the assessors, once they had assumed the position of assessors and been sworn in properly, they were, in the absence of challenge during their tenure, de facto holders of that position and their subsequent performance of their duties was valid.

The Court of Appeal proceeded to hold that this ground failed "because there really is no evidence to support counsel's contention that the proper procedures had not been followed". The court went on to state: "had it been proved that the appointments were in breach of the statutory procedures under the act, we would have dismissed the appeal on the basis [that the appointment of the assessors was de facto valid]".

The Court of Appeal's finding that there was no evidence that the proper procedures had not been followed is unassailable. This is sufficient to dispose of this ground.

We shall, nevertheless, deal with the argument that, by reason of the defect alleged to exist in the appointment of the assessors, the conviction was invalid.

Section 265 of the Code provides that a "competent knowledge of the English language" is a necessary condition of liability to serve as an assessor. It is to be inferred from s 264 as a whole that a principal purpose of compiling a list of assessors in accordance with that section is to ensure that the s 265 requirement that assessors be competent in English is complied with.

There was no suggestion that the assessors did not have a competent knowledge of English. Had it been established that any person purporting to act as an assessor was not competent in english, the de facto doctrine relating to the validity of a public officer would not operate. the task of the court in this context is "To determine the meaning of the legislation and to ensure that the legislative purpose is fulfilled": *GJ Coles & Co Ltd v Retail Trade Industrial Tribunal* (1986) 7 NSWLR 503 at 549 (*GJ Coles*) per Kirby P and Hope JA. The intention of the legislature as reflected in ss 264 and 265 is plain in this respect. Lack of the requisite knowledge of English would be so fundamental a defect that it could not be cured: *Ras Behari Lal v King Emperor* (1933) LR 60 IND APP 354; *Hemapala v R* [1963] AC 859.

The de facto doctrine relating to the validity of a public officer holds that the "Acts of a de facto public officer done in apparent execution of his office cannot be challenged on the ground that he has no title to the office": M C Hugh JA in *GJ Coles* at 525, adopted by Gleeson C J, Gaudron, MCHugh and Gummow JJ in *Cassell v R* (2000) 201 CLR 189; 169 ALR 439; [2000] HCA 8.

This common law doctrine was described by Bray CJ in *R v Cawthorne* [1977] 17 SASR 321 at 329 (*Cawthorne*) as "venerable". In *Cawthorne*, Bray CJ accepted as correct the statement of the doctrine made by Butler CJ of the Supreme Court of Connecticut in *State v Carroll* (1871) 9 Am Rep 409 at 427–8. Bray CJ pointed out at 332 that Butler CJ's statement had been approved by the Supreme Court of the United States in *Norton v Shelby County* (1886) 118 US 425, by Richmond J in the Court of Appeal of New Zealand in *Re Aldridge* (1893) 15 NZLR 361 at 376–7 (*Re Aldridge*), and by Simon P in *Adams v Adams* (1971) P 188 at 213–14. McHugh JA also cited it with approval in *GJ Coles* at 526.

Butler CJ's statement commenced:

> A definition sufficiently accurate and comprehensive to cover the whole ground must, I think, be substantially as follows: an officer de facto is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interests of the public and third persons, where the duties of the office were exercised.

Butler CJ went on to list a number of sets of circumstances in which the de facto officer doctrine may operate. One of those sets of circumstances is where there is some defect or irregularity in the exercise of the power to appoint an officer (as is alleged in regard to the appointment of the assessors in this case).

Re Aldridge is an example of the operation of the doctrine. In this case, the New Zealand Court of Appeal upheld the validity of a conviction and sentence imposed by a barrister after the privy council held that he had been invalidly appointed as a judge of the supreme court of New Zealand.

In *Ellis v Bourke* (1889) 15 VLR 163 (*Ellis*) the full court of Victoria applied the doctrine where, under the relevant legislation, the constituent members of the licensing court were a County Court judge and two police magistrates. It was argued that two members of the Court had not been reappointed as police magistrates. As M C Hugh JA observed in *GJ Coles* at 526, the decision in *Ellis* "makes it plain that the de facto officer rule applies to the acts of a multi-membered court as well as to the acts of an individual judicial or public officer".

In the circumstances of this case, the Court of Appeal correctly held that, even if the appointment of the assessors was not gazetted as required by s 264 of the code, their appointment was de facto valid.

The second ground of appeal was that the Petitioner was wrongly prevented from appointing his counsel of choice. This ground was based on s 28(1)(d) of the Fiji Constitution which provides:

> 28(1) Every person charged with an offence has the right:
>
> …
>
> (d) to defend himself or herself in person or to be represented, at his or her own expense, by a legal practitioner of his or her choice or, if the interests of justice so require, to be given the services of a legal practitioner under a scheme for legal aid.

At some time prior to 20 May 2003, the first Petitioner's family asked Mr Singh (who was then in Australia) to represent the first Petitioner at the trial. Mr Singh was told that the case was due to start on 20 May 2003. Mr Singh responded that he would accept the instructions but only if the hearing was adjourned to some time after the weekend following 20 May 2003. It was only then that he would be available. On 20 May 2003 the first Petitioner asked to have the trial adjourned so that Mr Singh could represent him. The court, on that date, adjourned the hearing to 22 May 2003. Mr Singh was not available on that date and the trial proceeded with both the Petitioners being represented by legal aid counsel who had previously been appointed to act on their behalf. The Petitioners did not complain about or withdraw the instructions they had previously given to legal aid counsel.

In adjourning the trial until 22 May 2003, the trial judge applied the criterion of reasonableness. the court of appeal adopted the same approach. Mr Singh rightly accepted that the right to counsel under s 28(1)(d) of the Constitution is subject to that criterion. To construe s 28(1)(d) as conferring an absolute right to counsel of choice would seriously impede the administration of justice. Such a construction would, practically, be unworkable. It is implicit in the section that the right to counsel conferred thereby is qualified by considerations of reasonableness. The constitutional right is one which must be exercised at the proper time. It cannot be exercised on the eve of the trial to force an adjournment.

The argument of Mr Singh comes down to the proposition that, reasonably, the trial should not have been adjourned from 20 to 22 May 2003, but should have been adjourned to a later date. This issue is not one that justifies the grant of special leave. the second ground of appeal could not be upheld.

The third ground of appeal was based on s 27(1)(c) of the Constitution which provides that every person who is arrested or detained has the right:

> To consult with a legal practitioner of his or her choice in private in the place where he or she is detained, to be informed of that right promptly and, if he or she does not have sufficient means to engage a legal practitioner and the interests of justice require legal representation to be available, to be given the services of a legal practitioner under a scheme for legal aid.

Mr Singh submitted that the first Petitioner had not been informed, promptly, of his right to consult with a legal practitioner.

The first Petitioner was arrested at some time after 7 am on 31 March 2001. At 9.15 am that day he was informed of his right to consult a solicitor of his choice. At the time the first Petitioner was so informed, he had not yet made a statement and nothing he said before that time was tendered in evidence. Mr Singh submitted, nevertheless, that the failure to inform the first Petitioner of his right to counsel immediately upon his arrest constituted a breach of the constitution. He submitted that that breach resulted in the statement the first Petitioner made after he was informed of that right being inadmissible.

The purpose of s 27(1)(c) is to require persons, who are arrested or detained, to be informed of their right to consult with legal practitioners of their choice before they make any relevant statement concerning the offence for which they have been arrested or detained. in our opinion, there would be compliance with s 27(1)(c) were an arrested or detained person to be informed of his or her right to consult with a legal practitioner within a reasonable time, provided that the person is so informed before making any such a statement. We come to this conclusion by reference to the purpose (as we have described it) and language of the section.

The first Petitioner was informed of his right to consult his legal practitioner within a reasonable time after his arrest and before making any statement concerning the offence for which he was arrested. In the circumstances, there was no breach of s 27(1)(c).

Mr Singh rightly conceded that the ground concerning the trial judge's direction as to lies was not a ground that could justify special leave to appeal.

The remaining ground was that the trial judge failed to put the Petitioner's case properly and sufficiently to the assessors. Despite Mr Singh's detailed written submissions in support of this ground, we are not persuaded that it is an appropriate ground for leave. Indeed, we are not persuaded that there was any error in this respect on the part of the trial judge.

Accordingly, we came to the conclusion that the application for special leave to appeal should be dismissed.

Application dismissed.