

Crystal Clear Video Ltd. v. Commissioner of Police and Attorney-General

High Court
Fatiaki J.
22 July 1988

Constitutional law—application of colonial statutes—whether Copyright Act 1956 (U.K.) survived military coups of 1987.

Criminal procedure—police powers of search and seizure—extent of police power to retain seized items.

¹⁰ *Civil procedure—injunctive relief—whether mandatory injunction can be granted against the State.*

Evidence—presumptions—omnia praesumuntur rite esse acta.

After obtaining a search warrant, the police searched the plaintiff's company's shop premises and seized a number of items. Some six weeks later, some of the items were returned to the plaintiff. Three months after the seizure, no charges had yet been laid against the plaintiff although it appeared that charges under the Copyright Act were likely.

²⁰ In this case, the plaintiff sought by way of interlocutory motion an order to compel the police to return the seized items immediately. Additionally, or alternatively, the plaintiff sought an order that the police officers acted *ultra vires* the Copyright Act 1956.

HELD, dismissing the applications:

- (1) The Court has no power to issue a mandatory injunction against the State and an officer of the State. To do so would offend against the provisions of section 15 of the Crown Proceedings Act, cap. 24.
- (2) The Copyright Act 1956 (U.K.) still applies in Fiji; and the Head of State and Executive Authority of Fiji Decree 1988 does not alter the position. *Robert Tweedie McCahill v. R.* unreported, Fiji Court of Appeal, 1982 followed.
- ³⁰ (3) In the absence of rebuttal evidence, the legality of the search warrant is governed by the maxim *omnia praesumuntur rite esse acta donec probetur in contrarium*.
- (4) The police may seize and retain items, when no person has been arrested or charged, if there are reasonable grounds to believe that the items in question are either the fruit of crime, or are the instrument(s) by which the crime was committed or are material evidence to prove the commission of the crime. There must be reasonable grounds to believe that the person in possession of the items has committed the crime, or is implicated in it, or is an accessory to it. The seized items cannot be retained by the police for any longer than is reasonably necessary to complete investigations or preserve the items for
⁴⁰ evidence. *Chief Constable of Kent v. V.* [1982] 3 All E.R. 36; *Ghani v. Jones*

[1969] 3 All E.R. 1700; *Malone v. Metro. Police Commissioner* [1980] 1 Q.B. 49, followed.

- (5) Having regard to the complicated and somewhat technical nature of the evidence that might be necessary to support charges under the Copyright Act, and the rarity and novelty of such charges, it would be unsafe to hold that the items in question are irrelevant as evidence for charges that have yet to be laid, or that their continued retention by the police is unjustified, or that there has been an inordinately long delay in the laying of charges.

Other cases referred to in judgment:

- 50 *Chic Fashions (West Wales) Ltd. v. Jones* [1968] 2 Q.B. 299, [1968] 1 All E.R. 229, [1968] 2 W.L.R. 201
Chief Constable of Kent v. V. [1982] 3 All E.R. 36
Frank Truman Export v. Metropolitan Police Commissioner (1977) 64 Cr. App. R. 248
Ghani v. Jones [1970] 1 Q.B. 693; [1969] 3 All E.R. 1700; [1969] 3 W.L.R. 1158
Malone v. Metro. Police Commissioner [1980] 1 Q.B. 49, [1979] 1 All E.R. 256, [1978] 3 W.L.R. 936
McCahill v. R. unreported, C. A. No. 46, Fiji Court of Appeal, 1982
R. v. Emori Kalou Tolo and Others 21 F.L.R. 105
60 *R. v. Uxbridge Justices ex p. Commissioner of Police of the Metropolis* [1981] Q.B. 829; [1981] 3 All E.R. 129; [1981] 3 W.L.R. 410, C.A.; affg. [1981] 1 All E.R. 940; [1981] 1 W.L.R. 112

Legislation referred to in judgment:

Copyright Act 1956 (U.K.)
Criminal Procedure Code, cap. 21, sections 103, 106, and 164(1)
Crown Proceedings Act, cap. 24, section 15
Head of State and Executive Authority of Fiji Decree 1988, Decree No. 5, section 29(1)

Counsel:

- 70 *H. Patel* for the plaintiff
N. Nand for the defendants

FATIAKI J.

Judgment:

The brief undisputed facts of this case so far as relevant for the present application may be summarized as follows:

1. On 20 April 1988 the police swore an information to obtain a search warrant before a resident magistrate in Suva and obtained a search warrant to search the shop premises of the plaintiff company at Ellery Street.
2. On 21 April 1988 the search warrant was executed at the shop premises of the plaintiff company and one hundred items were seized comprising *inter alia* recorded and blank videotapes; video decks; a television; a tape
80 re-winder; an amplifier; video accessories; together with film posters, correspondence files, record books, and receipt books. A search list was provided to the plaintiff company for the items seized.

3. On 9 June 1988 some of the items seized were returned to the plaintiff company's premises by the police. These comprised video decks, some videotapes, video accessories, record books, posters, a television, a videotape rewinder, and the amplifier.

No charges have as yet been laid, but it seems likely that charges under the Copyright Act will soon be filed against the plaintiff company.

Nevertheless, the plaintiff company now seeks by way of an interlocutory motion dated 17 May 1988:

AN ORDER that the items seized by the Police from the plaintiff's premises on 21 April 1988 be returned immediately *and/or* for an order that the *Police Officers* acted *ultra vires* the Copyrights Act Cap. 224 *and* costs in the cause or as this Honourable Court may think fit.

On the same day it issued a writ of summons naming the Commissioner of Police and the Attorney-General of Fiji as first and second defendants respectively, in which it also claimed the immediate return of all the items seized or alternatively their equivalent value in money together with general damages and costs.

This application may be quickly dealt with in a short and summary manner. I shall deal with the two orders sought in turn.

The first order as framed, if granted, would in effect amount to a mandatory injunction being granted against the State and an officer of the State. This the Court cannot do, for to do so would offend the provisions of section 15 of the Crown Proceedings Act, cap. 24. On that ground alone the application must be refused; however, in deference to the submissions of both counsels and in view of the importance of the legal issues involved, I propose to deal more fully with the matter in relation to the second alternative order sought by the plaintiff company.

The second or alternative order sought is in substance and effect for a declaration that the police officers in seizing the plaintiff's property acted *ultra vires* the provisions of the Copyright Act, cap. 224. As I understand learned counsel for the plaintiff company's submissions on this point, his argument was to dual effect that:

1. the Copyright Act did not apply to Fiji; and
2. the police's actions were unjustified by the terms of the Criminal Procedure Code provisions dealing with their powers of search and seizure.

I. Copyright Act

Dealing with the first argument, the Fiji Court of Appeal after a full and comprehensive review of the relevant statutory context in its judgment in *Robert Tweedie McCahill v. R.* Criminal Appeal No. 46 of 1982, at pages 6 to 10, concluded that:

the (Copyright Act) 1956 Act is, with modifications, "a Fiji Act" and has been from 1 February 1961 down to the present day.

That decision, however, as counsel for the plaintiff company boldly but vainly sought to argue, was delivered on 19 November 1982 and represented the law as it existed then and not in the hearing of the application because of the various events that occurred last year.

Such a submission blithely ignores the clear words of section 29(1) of Decree No.

130 5 entitled the Head of State and Executive Authority of Fiji Decree 1988 which providing *inter alia* under the subheading "Existing Law" that:

... the laws in force immediately before the 25th day of September 1987 shall continue in force ...

I am satisfied that the Fiji Court of Appeal decision in the *McCahill* case still represents the law in this country and the Copyright Act 1956 (U.K.) still applies, and am therefore constrained to refuse the plaintiff company's application for an order to the contrary.

II. Seizure and Search

140 Dealing then with the second argument, it is undisputed that, in the search and seizure of the items from the plaintiff company's premises, the police were acting under the authority of a search warrant issued under the seal of the Magistrate's Court, Suva, and signed by a resident magistrate.

Both the warrant and the information in support of it are in the nature of forms prescribed under the Criminal Procedure Code, cap. 21, and are annexed to an affidavit sworn by the police superintendent responsible for the conduct of the police investigation, in this instance on 16 June 1988.

In both annexures the premises of the plaintiff company at Ellery Street are identified as the premises authorized to be searched and in all other respects the annexures complement and confirm each other, save that the information discloses that the:

150 ... grounds for suspicion and belief are that the above-mentioned items will assist the police in their investigations in regard to infringement of Copyright Act.

The plaintiff company did not seek to reply to the said affidavit, but its counsel sought at the hearing to justify the plaintiff company's bald assertion that the seizure of the items was "without colour of right", by an examination of the relevant provisions of the Criminal Procedure Code, cap. 21, in particular sections 103 to 106 and section 164(1) dealing with search warrants and the disposal of property, respectively. In effect, counsel sought to go behind the warrant and information based upon an admitted return by the police of some of the items seized under the warrant.

160 The plaintiff's counsel's argument proceeded along the lines that the return of the items by the police on 9 June 1988 showed at the very least that they themselves had no reasonable grounds or suspicion for seizing those items in the first place—how then could they have satisfied the magistrate to issue the warrant?

With respect, the list of sixteen items returned is small when compared with the number retained of the one hundred items originally seized. Furthermore, this is neither the appropriate time or procedure to question the legality of a search warrant nor have sufficient facts been adduced so as to rebut or displace the applicable legal presumption of regularity conveniently encapsulated in the Latin phrase: *omnia praesumuntur rite esse acta donec probetur in contrarium*.

170 It is to be noted that the warrant expressly empowered the police to search not only for property in respect of which an offence has been committed, but also for property which is necessary to the conduct of an investigation into an offence. A

magistrate is similarly empowered by section 103 of the Criminal Procedure Code, cap. 21, to issue such a search warrant.

That the making, selling, or letting for hire of copyright infringing material are offences in Fiji cannot now be doubted in the light of the Fijian Court of Appeal judgment in the *McCahill* case (op. cit.) and the charges laid by the prosecution in that case and the provisions of section 21 of the Copyright Act 1956.

180 The common law principles relating to the powers of police officers to seize goods in respect of which there is a reasonable suspicion that an offence has been committed has been recently restated by Lord Denning M.R. in *Chief Constable of Kent v. V.* (1982) 3 All E.R. 37 where he said at page 39:

I need say nothing today of the power of the police to arrest a person. I speak first of their power to seize or detain goods. This was considered by this court in *Chic Fashions (West Wales) Ltd. v. Jones* [1968] 1 All E.R. 229, [1968] 2 QB 299. That case showed that on entering a house with a search warrant or by the occupier's consent the police have power to seize goods which they reasonably believe to have been stolen or obtained fraudulently by deception. *They can thereafter*
190 *detain the goods for such time as is reasonably necessary to complete their investigations* into the theft or fraudulent obtaining. If their investigations indicate that the goods have been stolen or fraudulently obtained by deception, the police can detain them further so that they can in due course be restored to their rightful owner and, where necessary, be produced as material evidence at the trial of an accused person. But, once it appears that the goods were not stolen or fraudulently obtained and are not needed as evidence, then the police should restore them to the person from whom they were taken: see *Ghani v. Jones* [1969] 3 All E.R. 1700, [1970] 1 QB 693; *Malone v. Commissioner of Police of the Metropolis* [1979] 1 All E.R. 256, [1980] 1 QB 49; and *R. v. Uxbridge Justices, ex p. Commissioner of Police of the Metropolis* [1981] 1 All E.R. 940, [1981] QB 829,
200 unless in special circumstances the court directs them to be held until after the trial. (My emphasis)

Counsel for plaintiff company also specifically drew the Court's attention to the case of *Ghani v. Jones* (referred to in the above-quoted passage). That was a case in which the police had seized the defendant's passport and letters without a search warrant and had retained them in order to prevent the defendant from leaving the country pending police enquiries.

In that case Lord Denning M.R. stated *obiter* at page 1705:

... I should have thought that, in order to justify the taking of an article, when no man has been arrested or charged, these requisites must be satisfied (which I have summarised as follows).
210

First: The police officers must have reasonable grounds for believing that an offence has been committed.

Secondly: The police officers must have reasonable grounds for believing that the article in question is either the fruit of the crime *or* is the instrument by which the crime was committed *or* is material evidence to prove the commission of the crime.

Thirdly: The police officers must have reasonable grounds to believe that the

person in possession of it has himself committed the crime, *or* is implicated in it, *or* is accessory to it.

220 *Fourthly*: The police must not keep the article for any longer than is reasonably necessary to complete their investigations or preserve it for evidence. As soon as it is decided not to go on with it, the article should be returned.

Finally: The lawfulness of the conduct of the police must be judged at the time, and not by what happens afterwards.

The above passage was cited in the ruling of Tuivaga, J. (as he then was) in the case of *R. v. Emori Kalou Tolo and Others* 21 F.L.R. 105 at page 108.

230 Adopting for our present purposes the above requisites, I am satisfied on the affidavits and annexures before the Court that all four criteria have been met by the police in this instance, and would hold that the seizure of the items from the plaintiff company's shop premises at Ellery Street on 21 April 1988 was lawful.

Even if I were not satisfied that all four criteria had been met, nevertheless I would respectfully adopt the words of Swanwick, J. in *Frank Truman Export Ltd. v. Metropolitan Police Commissioner* (1977) 64 Criminal Appeal R. 248 where he said at page 257 regarding the four criteria:

However, Lord Denning M.R. was not drafting a statute or regulation, but giving guidelines, and I do not suppose that he was considering the application of the law of agency or bailment or envisaging every possible situation. Also, his reference to an unreasonable refusal shows that he was not considering a case where there was no refusal but a consent at the time of taking.

240 More recently in *Malone v. Metro Police Commissioner* (1980) 1 Q.B. 49, the Court of Appeal (U.K.), in distinguishing the case of *Ghani v. Jones* (op. cit.) and discharging a mandatory injunction directed at the police for the return of specified currency notes seized by the police under a search warrant and not produced in the committal proceedings, criticized the procedure there used by the appellant to obtain possession, namely by writ and order 14 summons, and then order 29 summons for a mandatory injunction whilst the order 14 decision of the master was under appeal and when the trial of the appellant for conspiracy and handling stolen property was still pending. No charges were anticipated or laid in respect of the seized currency notes.

250 In that case it was held:

. . . that although there was no general power in the police to retain property lawfully seized which was not the subject of any charge and the police must justify such retention upon some ascertainable ground and although the money had not been exhibited in the committal proceedings, *circumstances could arise under which it would form material evidence at the trial so that it would become necessary for it to be produced and it would gravely hamper the administration of justice if it had been handed back and spent*; and that accordingly the Commissioner was entitled to retain the money until the conclusion of the criminal trial. (Emphasis added)

260 In that case charges had already been laid, and none related directly to the currency

unsuccessfully sought to be returned. The situation in this case is even more uncertain in some respects, and the police ought not to be hampered in their investigations or in the charges they may decide to lay by an order for the return of the items now.

I accept that two months had passed since the items were seized by the police and still no charges have been laid against anyone in respect of the items seized and retained. However, it is clear that some sorting out of the items was necessary and that was not complete until the 19 June 1988 when sixteen presumably "innocent" items were returned to the plaintiff company by the police.

270 Counsel for the State, at the hearing of this application on the 22 June 1988, assured the Court that the police were in the process of laying charges in this case with the assistance of the office of the Director of Public Prosecutions.

Having regard to the complicated and somewhat technical nature of the evidence that might be necessary to support charges under the Copyright Act and the rarity and novelty of such charges, I would be most reluctant to hold that the items presently retained by the police were irrelevant as evidence for charges that have yet to be laid *or* that their continued retention by the police was unjustified *or* that there has been an inordinately long delay in the laying of charges.

280 Needless to say, evidence of copyright owners would have to be obtained and these are most likely to involve persons outside Fiji.

I am supported in my view not only by legal authority but by the express terms of section 106 of the Criminal Procedure Code, cap. 21, which reads:

106 — (1) When any such thing is seized and brought before a court, it may be detained until the conclusion of the case or the investigation, reasonable care being taken for its preservation.

(2) If any appeal is made, or if any person is committed for trial, the court may order it to be further detained for the purpose of the appeal or the trial.

(3) If no appeal is made, or if no person is committed for trial, the court shall
290 direct such thing to be restored to the person from whom it was taken, unless the court sees fit or is authorized or required by law to dispose of it otherwise.

In the circumstances, the plaintiff company's application is dismissed. I make no order as to costs.