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IN THE GRAND COURT OF THE CAYMAN ISLANDS
HELD AT GEORGE TOWN, GRAND CAYMAN
BEFORE THE HON. SIR JOHN SUMMERFIELD C.B.E., Q.C.,
CHIEF JUSTICE

CAUSES NO. 277 & 278 of 1983

CRIMINAL APPEAL NO. 37 of 1983

IN THE MATTER OF AN APPLICATION
FOR JUDICIAL REVIEW

AND

IN THE MATTER OF RAUL GONZALEZ
and FREDDY SOLIZ SUAREZ

Mr. P. Boni for Raul Gonzalez
Mr. N. Levy for Freddy Soliz Suarez

Mr. A. Smellie for respondent.

JUDGMENT

The applications (as amended) of the two applicants were substantially the same and, accordingly, were heard together. The relief sought in each case was (i) an order of certiorari to quash the warrant signed by the Governor pursuant to section 16 of the Prisons Law directing that the relevant applicant be sent to a district prison in Jamaica to serve his sentence and (ii) a declaration that his removal under the warrant was unlawful. An application for an injunction restraining the removal is no longer pursued. That application was made before the removal had been effected. An interim injunction was refused on the ground that no prima facie illegality was disclosed. At the same hearing leave was granted for an application for an order of certiorari.

The applicants were convicted of controlled drug related

offences on 5 August 1983 and sentenced to lengthy terms of imprisonment together with substantial fines with terms of imprisonment in default. The date the warrants were made under section 16 is unknown as copies of them are not before the court. Technically, therefore, the applicants have not complied with rule 7 of the Grand Court (Applications for Orders of Mandamus, Prohibition, Certiorari and Habeas Corpus) Rules. The reason given is that the applicants' attorneys have been unable to procure the warrants because the originals were sent to the appropriate authority in Jamaica. I am sure that if application had been made to the Governor or the Chief Secretary or the Attorney General copies would have been supplied. In any event, there is always other process to procure such documents e.g. notice to produce or subpoena duces tecum. However, no objection was taken to this omission.

Immediately following their convictions verbal notice of appeal was given in court. The following day, 6th August, a Principal officer at Northward Prison explained to each applicant the options open to him under section 33 of the Prisons Law. Obviously, it is important that a prisoner should be put to his election under that provision as soon as it is known that he is appealing. Otherwise, complications could arise as to what time spent in prison counts or does not count towards sentence. Each opted to commence serving his sentence pursuant to section 33 (1)(a) and signed a form to that effect which was witnessed by the Principal Officer. The signed forms are exhibited. That was no doubt routine action by the prison authorities on learning that a prisoner had given notice of appeal.

There can be no criticism of the fact that this election was not made in the presence of the applicants' attorneys. Either applicant could have asked to have his attorney present to advise him before exercising the option. Advice could have been tendered before the

applicants were taken to prison. The reality is that the significance of this routine step only assumed importance when the law was examined on it becoming known that the applicants were about to be removed to Jamaica. There was some suggestion that there had been no such election or that the applicants were not fully aware of what they were doing. The fact remains that the only clear direct evidence before the court on this aspect is in the affidavits of two prison officers. The assertions to the contrary are hearsay, twice recurred, in counsel's affidavits. It was explained clearly that counsel could have an adjournment if they wished to challenge this fact with counter affidavits. Counsel declined an adjournment, the reason being that it was apprehended that widely publicised prospective leglislation with retroactive effect in its application to the area under consideration would, if enacted, abort the present applications.

As it is the only acceptable evidence on this aspect before the court is that the applicants made the election as set out above.

They were removed under the warrants on 16th August 1983. On the 19th August 1983 each applicant purported to make an election, or further election, "to be treated as a prisoner on remand" i.e. an election that the provisions of section 33 (1) (b) should apply to him. Those elections were communicated to the Attorney General and are exhibited. As it turns out, they can have no relevance to this application which is concerned only with the validity of the warrants issued on or before 16th August 1983 and the action taken pursuant to them on that date. On the days material tothis application the initial election made on the 6th August 1983 had effect. The question of whether an election made under section 33 can be revoked and an alternative option exercised must remain open.

Although not raised in any of the statements of grounds on

which relief is sought the main thrust of the arguments advanced on behalf of the applicants was that section 16 of the Prisons Law, which authorised the issue of the warrants, had been repealed by the Prisons (Amendment) (No.2) Law 1981 (Law 18 of 1981) and that section 41 of the Prisons Law, which is complementary to section 16, had also been repealed by that amending Law.

Certainly section 3 and 14 of the amending Law (No.18 of 1981) provide for the repeal of sections 16 and 41 respectively of the Prisons Law. If sections3 and 14 are in force then the application must succeed and the relief sought given.

The short answer is that no part of the Amending Law (No.18 of 1981) is yet in force. That Law has, of course, been assented to and is a Law on the Statute Book of these Islands in every sense as any other Law enacted here. But section 1 provides that it"shall come into force on such day as the Governor may by order appoint; and any such order may appoint different days for different provisions of this Law." No order has been published bringing the whole or any part of that Law into force. Until sections3 and 14 are brought into force the repeals to which they relate do not have effect. Therefore, sections 16 and 41 of the Prisons Law continue in effect and, accordingly, the Governor has power to issue warrants in accordance with sections 16 and 18 of that Law. This is a matter of which this Court must take judicial notice.

Arguments were also addressed to the question of whether or not there had been a breach of the principles of natural justice justifying the intervention of this Court. I think that there has been some confusion on this aspect. Where an order or warrant is under attack in proceedings for the issue of a writ of certiorari on the ground that there has been a breach of the principles of natural justice it must be demonstrated that the principles of natural justice apply to the making of the order or warrant and that there has been a breach of one or other of them.

The court on such a hearing is not concerned with the consequences of the order or warrant, however grave, if it is regularly made and within the competence of the authority making it. It considers only the regularity of the making of that order and not its effect.

Section 16 of the Prisons Law confers an administrative discretion on the Governor. There is no onus on the Governor to consult the prisoner likely to be affected by the issue of the warrant or to give him an opportunity to make representations. He is not exercising a judicial or quasi judicial function. It is purely administrative. It is no different from the administrative act determining which prison a prisoner is to be sent to in these Islands, or the block in which he will be housed or the cell allocated to him. The only reason for special legislative provision is that the issue of the warrant has extra-territorial effect. But it remains an administrative function.

In any event, there is no allegation in any of the statements of the grounds on which relief is sought of any breach of any of the principles of natural justice. There is no evidence before the court of any such breach. What has been urged by way of statements from the Bar is that the consequences of the issue of the warrant impede the taking of instructions for the appeal and for this particular application.

It is admitted from the Bar that the Acting Chief Secretary gave an assurance that arrangements would be made for the applicants to be present for the hearing of their appeals. Until the contrary is shown to be the case, I feel that I can safely assume that the Executive will do nothing to impede the due administration of justice. I think the allegations about difficulties in obtaining instructions for the appeal are exaggerated. The appeal is on the record. Counsel does not go through the record with his client and receive instructions from him on what point in law or fact is to be taken on appeal. However, if undue difficulties are encountered that is an aspect which can be dealt with at the hearing or by alternative means. They can

have no bearing on the regularity of the issue of the warrant under section 16.

Although it has become unnecessary for me to decide the point it may be of assistance if I deal briefly with another matter. Argument was directed to the question of whether this Court had power to quash the warrant of the Governor by way of writ of certiorari as it was a purely administrative act. My present view, subject to further argument if the point arises, is that this Court does have that power if the warrant is issued irregularly or without or in excess of authority. It is unnecessary to elaborate. It seems to me that O'Reilly v. Mackman & Ors. 1982 3 AllE.R. at 1124 is ample authority for this view. It is the latest of a line of authorities pointing in the same direction. It is also significant that rule 7 of the Grand Court (Applications for Orders of Manadamus, Prohibition, Certiorari and Habeas Corpus) Rules specifically refers to "any order, warrant...".

For the foregoing reasons the applications are dismissed.

SIR JOHN SUMMERFIELD

Dated the 12th day of September 1983.