[1988–90 Gib LR 73]

CELECIA v. COMMISSIONER OF POLICE

SUPREME COURT (Alcantara, A.J.): April 19th, 1988

Evidence—judicial notice—notorious facts—courts to take notice of matters so well-known that evidence unnecessary—judicial notice extends only to event's occurrence and still necessary to show how or why occurred—shooting of I.R.A. members in Gibraltar and I.R.A.'s status as terrorist organization may be judicially noticed

Injunctions—mandatory injunction—return of property—court to consider urgency of return of private photographs being used in police investigation in deciding whether to grant interlocutory mandatory injunction—range of factors to be considered includes ongoing police investigation, lack of consequential effect on plaintiff's rights and indirect comfort that interlocutory injunction would give to alleged criminals—if no interlocutory injunction granted, court may order preservation of property until after trial

Police—property relevant to investigation—retention of property—police may retain witness's photographs as evidence in ongoing investigation—interlocutory injunction for return granted only when urgent need for property by owner—lack of consequential effect on owner's rights among factors militating against grant of interlocutory injunction—court may order preservation of property until after trial if no interlocutory injunction granted

The plaintiff sought an interlocutory mandatory injunction ordering the return of film negatives and prints.

The plaintiff had witnessed the shooting of three members of the I.R.A., and its aftermath, from his house, and had taken 15 photographs of the scene. He surrendered the film from his camera to the police voluntarily. He went to the police station several times to demand the return of the film, and in the end obtained the negatives of the other pictures on the film

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but not those of the pictures relating to the shootings. The plaintiff issued a writ seeking the return of the photographs or £50,000, together with damages, interest and costs; the following day, he issued the present application for interlocutory relief.

The plaintiff submitted that (a) official bodies should not be allowed to deprive citizens of private property without any explanation, or an indication as to when it would be returned; (b) he had given the police the film on the condition that it be returned to him once it had been developed and prints taken; (c) the proposition that mandatory injunctions could be issued on an interlocutory application when the applicant's freedom was, as here, being restricted by official action, was supported by English authority; (d) he had received threats from the I.R.A., which further militated in favour of the court's exercising its discretion in his favour; (e) the defendant could not claim Crown privilege, as the relevant procedure for claiming it had not been followed; and (f) the Commissioner of Police was not a servant of the Crown, but rather the holder of a statutory post created by the Police Ordinance, and so was subject to the inherent jurisdiction of the Supreme Court and liable to mandatory injunctions.

The defendant submitted in reply that (a) whatever the merits of the plaintiff's claim, they were not so pressing that interlocutory relief should be granted; (b) no assurance had been given as to when the film would be returned, but the plaintiff had been told that it would be returned when it was no longer of use to the police in their enquiries; (c) the plaintiff's contention that he wanted the photographs "for posterity" indicated that there was no urgency to support the issue of an interlocutory injunction, and, in any case, deprivation of property was not as severe a hardship to the plaintiff as deprivation of freedom of movement (which was the basis of the English authority relied upon); (d) the granting of an interlocutory injunction was a discretionary remedy, which was a "very exceptional" form of relief, and the court's discretion ought not to be used to give comfort, however indirect, to terrorist organizations; (e) he would object to the disclosure of the photographs, claiming Crown privilege; and (f) the police, including the Commissioner of Police, were servants of the Crown, and were therefore protected by s.14 of the Crown Proceedings Ordinance, which prevented the granting of a mandatory injunction against the Commissioner of Police.

Held, refusing the application, but making an order for the preservation of the film:

(1) The plaintiff had not shown that the return of the film was an urgent enough matter for the court to exercise its discretion in his favour by issuing an interlocutory mandatory injunction before the trial. While official bodies could not, in general, deprive citizens of their private property, the present facts, including the non-urgent nature of the plaintiff's indicated desire to have the pictures "for posterity," the ongoing police investigation, and the indirect comfort that a terrorist group might derive from the return of the pictures to the plaintiff all militated against

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the court's exercise of its discretion in the plaintiff's favour. Although such an injunction had been granted in England, it had been granted because there had been a restriction on the plaintiffs' freedom of movement, whereas the confiscation of the photographs in the present case had no such consequential effect; moreover, the release of the photographs to the plaintiff in the present case might give some solace to the I.R.A., which the court would be loath to do (para. 13; paras. 16–17; paras. 20–21).

(2) The film had been handed to the police voluntarily; whether or not there were any conditions under which they were given to the police was a matter to be determined at the trial, as there was clearly a conflict of evidence (para. 6; para. 11).

(3) The court was entitled to take judicial notice of facts that were so obvious or clearly established that evidence of their existence was unnecessary. The shooting of the I.R.A. members on March 6th, 1988 and the fact that the I.R.A. was a terrorist organization were both matters of which the court was entitled to take judicial notice. Nevertheless, the doctrine of judicial notice only extended to the occurrence of events; it would still be necessary to show how or why an event occurred, although such evidence was not required for the hearing of the present application (paras. 2–3; para. 19).

Cases cited:

(1) *American Cyanamid Co.* v. *Ethicon Ltd.*, [1975] A.C. 396; [1975] 2 W.L.R. 316; [1975] 1 All E.R. 504; [1975] F.S.R. 101; [1975] R.P.C. 513, applied.

(2) *Ghani* v. *Jones*, [1970] 1 Q.B. 693; [1969] 3 W.L.R. 1158; [1969] 3 All E.R. 1700; (1969), 113 Sol. Jo. 854; 134 J.P. 166, distinguished.

(3) *R.* v. *Vine Street Police Station Supt.*, *ex p. Liebmann*, [1916] 1 K.B. 268; [1914–15] All E.R. Rep. 393; (1915), 85 L.J.K.B. 210; 113 L.T. 971, referred to.

(4) *Ward* v. *Murray*, *The Times*, March 5th, 1900, referred to.

Legislation construed:

Crown Proceedings Ordinance (1984 Edition), s.14: The relevant terms of this section are set out at para. 25.

C. Finch for the plaintiff;
K.W. Harris, *Senior Crown Counsel*, for the defendant.

1 **ALCANTARA, A.J.:** The plaintiff moves this court for an interlocutory mandatory injunction against the Commissioner of Police asking that a film containing 15 exposures be returned to him, or in the alternative either that he be given access to the film to make prints or that there be an order for its preservation and inspection.

2 The matter arises in this manner. On Sunday, March 6th, 1988, Gibraltar underwent a traumatic experience. The I.R.A. came to Gibraltar

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for the avowed purpose of committing an outrage and three of its members were killed in Winston Churchill Avenue. I think that I am justified in taking judicial notice of this happening in the same way as I would take judicial notice of the fact that the civilian population of Gibraltar was evacuated during World War II, of the *S.S. Bedenham* explosion, or of the opening of the frontier.

3 There are a number of English authorities which support the contention that the courts will take judicial notice of various matters which are so notorious or clearly established that evidence of their existence is unnecessary. For example, the siege and relief of Kimberley (*Ward* v. *Murray* (4)); or that German civilians in Britain were carrying on war by intrigues, and were communicating information to enemy submarines and Zeppelins (*R.* v. *Vine Street Police Station Supt*., *ex p. Liebmann* (3)). One takes judicial notice of an event's occurrence, and not of how or why it has happened. For that, evidence must be adduced. Evidence will be required as to how the outrage was going to be committed, and evidence would also be required as to how the killing took place. In these proceedings I am not concerned with that: I am concerned with photographs.

4 On that Sunday afternoon of March 6th, 1988, Mr. Douglas Celecia, the plaintiff, was in his house at 6 George Jeger House, Glacis Estate. His house overlooks that part of Winston Churchill Avenue where two of the I.R.A. members met their death. The plaintiff heard shooting, grabbed his loaded camera and took 15 shots of the scene: he states that he "began to take photographs of the two bodies which were totally unattended and exposed and quite clearly bleeding."

5 That same night, two C.I.D. officers came to his house, making inquiries about the shooting. This is what the plaintiff deposes to in his affidavit:

> "I told them that my wife had personally witnessed the incident and that I had taken photographs of the scene and moreover the bodies directly after the shootings. I said that if I could be of help to the police that I would give them the film but strictly on condition that the film was given back to me."

6 There is no doubt in my mind that the plaintiff gave the film to the police voluntarily. There is, however, a dispute or a triable issue as to the terms under which it was handed over. The plaintiff says that it was a condition that the film would be returned to him once it had been developed and prints taken, and that an assurance was given to him to that effect. The police in turn say that they were given the film willingly and that there was no condition, stipulation or assurance as to when it would be returned, but that it should be returned after they "no longer found it to be of any use in the enquiries they were making."

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7 The following day, March 7th, 1988, at 10 a.m., Mr. Celecia was already asking for the film back. He did not get it. He persisted, and on Tuesday, March 8th, he saw Chief Insp. Ullger, the head of the Special Branch. This is what the Chief Inspector deposes to in his affidavit dated March 31st, 1988, at para. 3:

> "I did make it quite clear to the plaintiff that all that could be returned was such photographs on the film which did not relate to the said incident March 6th, 1988, as my instructions were that these would have to be retained in police custody."

8 Still not satisfied, Mr. Celecia went back to the police again on Wednesday, March 9th, 1988. This is what Det. Chief Insp. Correa deposes to in his affidavit dated March 31st, 1988:

> "The plaintiff then asked me when he would get his photographs back. I told him a lot of photographs had been taken by the police that day also, and his film was only one of several awaiting development and printing. He asked me if it would be ready by the wekeend. I informed him I could not say, but that all photographs, including his, would have to be carefully studied for security purposes."

9 On Friday, March 8th, 1988, the plaintiff was again at the police station demanding the film. Detective Chief Insp. Correa deposes in his affidavit:

> "I had already received instructions from the Commissioner of Police that the plaintiff was to have returned to him a small canister containing the negatives of the photographs which he had termed 'family' pictures, but that the police must retain the photographs and negatives relevant to the incident on March 6th, 1988."

10 The plaintiff does not agree with what Chief Insp. Ullger and Det. Chief Insp. Correa say. The plaintiff in his affidavit states:

> "I think it was Tuesday afternoon that Insp. Ullger rang me to tell me not to worry about the film; he said quite specifically that he would send an officer over the same evening with the film or at the least the following morning, namely Wednesday."

In that same affidavit, at para. 13, the plaintiff says that Det. Chief Insp. Correa said that he would definitely have the film back before the weekend.

11 There is thus a conflict of evidence which will have to be resolved at the trial when the several witnesses are subject to cross-examination. One thing is clear: the police were not willing to hand the film back. This is exactly what happened: the plaintiff got back the negatives of the "family" pictures, but no negatives or prints of the March 6th incident.

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12 On March 23rd, 1988, the plaintiff issued a writ, and, on March 24th, the present motion for interlocutory relief. In the writ the plaintiff claims under six headings: (a) delivery of the said photographs or their stated value (which he assesses in the statement of claim endorsed at £50,000); (b) damages for detinue; (c) damages for conversion; (d) exemplary damages; (e) interest; and (f) costs.

13 Mr. Finch for the plaintiff puts forward the following proposition in the form of a question: can an official body arbitrarily deprive a citizen of his private property without giving any explanation whatsoever or indication as to whether he will ever receive the property back? Stated thus, there is no need to refer to any authorities to answer in the negative. But courts of law should shy away from answering generalities and concentrate on specific instances. In other words, what I have to answer in these proceedings is not whether the plaintiff should have the film back or be compensated, but whether he should have the film back now before this claim or action is even heard? I am dealing with an interlocutory mandatory injunction.

14 Counsel places great reliance on the case of *Ghani* v. *Jones* (2). The facts of that case can be taken from the headnote to the case in *The All England Law Reports* ([1969] 3 All E.R. at 1700):

> "In the course of investigating a suspected murder the defendant, a police officer, went to a house where the plaintiffs lived. The first plaintiff invited the defendant and another police officer to enter the house. The police asked questions about the disappearance of the person whom they believed to have been murdered and searched the house. The police asked for their passports and were handed the passports issued to the first and second plaintiffs. The police took these away and also took some letters. At a later date the police returned, and asked for, and were handed, the third plaintiff's passport. The police retained the passports and letters asserting that they believed that the enquiries that they were pursuing would lead to the apprehension of those concerned in the murder and that, in the event of charges being preferred, some of the passports and letters would be of evidential value and others of potential evidential value."

15 The Court of Appeal held that the police had no right to retain the passports and made a mandatory order that they should be returned. Lord Denning, M.R. in his judgment laid down the following rules ([1969] 3 All E.R. at 1705):

> "We have to consider, on the one hand, the freedom of the individual. His privacy and his possessions are not to be invaded except for the most compelling reasons. On the other hand, we have to consider the interest of society at large in finding out wrongdoers and repressing crime. Honest citizens should help the police and not hinder them in

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> their efforts to track down criminals. Balancing these interests, 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:
>
> *First.* The police officers must have reasonable grounds for believing that a serious offence has been committed—so serious that it is of the first importance that the offenders should be caught and brought to justice.
>
> *Secondly.* The police officers must have reasonable grounds for believing that the article in question is either the fruit of the crime (as in the case of stolen goods) or is the instrument by which the crime was committed (as in the case of the axe used by the murderer) or is material evidence to prove the commission of the crime (as in the case of the car used by a bank raider or the saucer used by a train robber).
>
> *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, or at any rate his refusal must be quite unreasonable.
>
> *Fourthly.* The police must not keep the article, nor prevent its removal, for any longer than is reasonably necessary to complete their investigations or preserve it for evidence. If a copy will suffice, it should be made and the original returned. As soon as the case is over, or 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."

16 Tested by the above criteria, and rejecting the evidence for the defence for the purpose of argument, the plaintiff would appear to be entitled to have the film back or be compensated. But there are two important differences between *Ghani* v. *Jones* (2) and the present case. In *Ghani* v. *Jones*, the *ratio decidendi* for the exercise of the court of its equitable jurisdiction and the issue of the mandatory injunction is to be found in the following words of Lord Denning, M.R. ([1969] 3 All E.R. at 1706):

> "A man's liberty of movement is regarded so highly by the law of England that it is not to be hindered or prevented except on the surest grounds. It must not be taken away on a suspicion which is not grave enough to warrant his arrest."

17 In the present case the liberty of the subject or his movements is not at stake. His property, in the form of photographs, is. Mr. Celecia, in his

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affidavit, says that he just wants them for posterity. There is therefore no urgency in the matter which would require the issue of an interlocutory mandatory injunction before trial.

18 Mr. Harris for the defendant has argued forcefully that the granting of an interim injunction is a discretionary remedy and has drawn my attention to the well-known case of *American Cyanamid Co.* v. *Ethicon Ltd.* (1) on the balance of convenience and preserving the *status quo*. He has also brought to my notice O.29, r.1 of the Rules of the Supreme Court, and the notes on it in *The Supreme Court Practice 1988*, para. 29/1/5, where it is clearly stated at 473 that "the Court has jurisdiction to grant a mandatory injunction upon an interlocutory application . . . but it is a very exceptional form of relief."

19 The other difference between *Ghani* v. *Jones* and the present case is that in *Ghani* v. *Jones* Lord Denning, M.R. was directing his mind to what I would call common criminals. In this case, I would be closing my eyes to reality if I lost sight that there is I.R.A. involvement. I am perfectly entitled to take judicial notice that the I.R.A. is no Scout or British Legion movement, but that it is akin to ETA, the Baader-Meinhof group or the Red Brigades. Mr. Celecia in his affidavit says: "I have since received a threatening telephone call from someone who said the I.R.A. would get us. We have taken such threats seriously." The police are reticent about the contents of the photographs, but speak of security.

20 Whilst I would champion the liberty of the subject and lean heavily in favour of his rights against the state or the executive, yet, whilst not denying to anyone, be he who he may, full legal rights, I am not prepared to give comfort or solace, obliquely or indirectly, to any terrorist organization.

21 In the exercise of my judicial discretion I refuse the interlocutory mandatory injunction, but make an order for the preservation of the film so that at the trial I can decide whether the plaintiff should have it back or be compensated. In effect, what I have done is to tell the plaintiff to wait; there is no hurry.

22 I will now deal briefly with two other matters which have been argued before me. They are of interest but no longer essential in the present proceedings as I have already ruled on not granting an interlocutory remedy.

23 One is Crown privilege. Mr. Harris informed the court that the Crown would be claiming Crown privilege and would be objecting to the disclosure of the photographs. This the Crown can do in any proceedings in respect of any documents. A procedure has to be followed. Whether the Crown succeeds is a matter for the court, which can inspect the documents (in this case the photographs) and decide. In the present proceedings, the

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procedure, which would be to obtain a certificate or an affidavit from the Deputy Governor stating the grounds for non-disclosure, has not been followed. It is, therefore, unnecessary for me to arrive at any decision or even to inspect the photographs. If so minded, the Crown is at liberty to raise this matter at the trial. Whether the Crown will succeed is another matter.

24 The other issue which was argued at length is the constitutional position of the Commissioner of Police in Gibraltar. A number of English authorities have been brought to my attention, but the position in England, for historical reasons, is different from that in Gibraltar.

25 The contention of Mr. Harris is that the police, including the Commissioner, are servants of the Crown. As such, they are covered by the Crown Proceedings Ordinance. This is important to him in these proceedings, as s.14 of the said Ordinance reads as follows:

> "(1) In any civil proceedings by or against the Crown the court shall subject to the provisions of this Ordinance, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require;
>
> Provided that—
>
> (a) where in any proceedings against the Crown any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and
>
> (b) in any proceedings against the Crown for the recovery of land or other property the court shall not make an order for the recovery of the land or the delivery of the property, but may in lieu thereof make an order declaring that the plaintiff is entitled as against the Crown to the land or property or to the possession thereof.
>
> (2) The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Crown if the effect of granting the injunction or making the order would be to give any relief against the Crown which could not have been obtained in proceedings against the Crown."

26 The effect of this section is that, had I been disposed to accede to the plaintiff's request for equitable relief, I would still have been unable to grant a mandatory injunction against the Commissioner of Police either as a servant of the Crown or even as an officer of the Crown, even if sued

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personally. I could have made a declaration, which I have no reason to believe is not an effective remedy.

27 Mr. Finch, on the other hand, contends that the Commissioner of Police is not a servant of the Crown. According to him he is the creature of legislation, the Police Ordinance, and as such under the inherent jurisdiction of this court and subject to mandatory injunctions. He is definitely not "protected" by the Crown Proceedings Ordinance.

28 I refuse to be tempted to give a definite view at this stage of the position of the Commissioner of Police; whether he is a servant of the Crown, an officer of the Crown or a creature of statute. I think that the matter deserves further argument at the trial. However, even although I am not giving any final view, I think it is only fair to say provisionally that I think that Mr. Harris is on the right track.

Application dismissed.

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