R. v. GERADA and FOUR OTHERS

SUPREME COURT (Kneller, C.J.): February 7th, 1995

Constitutional Law—fundamental rights and freedoms—right to fair hearing within reasonable time—delay—defendant to show on balance of probabilities that fair hearing impossible due to delay not substantially caused by him—stay of proceedings only in exceptional circumstances

Constitutional Law—fundamental rights and freedoms—right to fair hearing within reasonable time—delay—reliance after long delay on witness's memory may preclude fair hearing, especially if no contemporaneous documentary evidence from which to refresh memory

Evidence—improperly obtained evidence—unauthorized surveillance—police not required to obtain judicial permission to use eavesdropping equipment on suspect's property—evidence not inadmissible by reason only of trespass

Evidence—documentary evidence—tape recordings—testimony of police officer identifying speakers on audio tape admissible as evidence of fact

The defendants were charged with unlawful possession of cannabis with intent to supply others and with its unlawful importation.

The defendants were arrested, together with six others, in possession of over 300 kg. of cannabis valued at £600,000. Information leading to the arrests was obtained by the use of surveillance equipment which the Gibraltar police installed on the defendants' property without authority.

After a number of appearances before the magistrates' court over a six-month period, the defendants were discharged when the Crown finally sought a six-month adjournment to allow it to have transcribed and to examine the large quantities of audio and video tape evidence generated by the surveillance equipment.

The Crown challenged the Stipendiary Magistrate's ruling that it had abused the process of the court by an application for appeal by case stated (later withdrawn) and an application for leave to apply for judicial review (later revoked). Meanwhile, the defendants were rearrested, charged again and bailed for six months, whereupon four of them left Gibraltar.

A further 16 months passed before the defendants and two others were indicted and pleaded not guilty to the charges. These delays arose partly from the need for defence counsel to seek specialist advice on the authenticity of the taped evidence. However, it was claimed that the equipment itself and the method of its use were privileged from inspection and disclosure on the ground of public interest immunity, and so could not be

examined. Further delays arose from problems in selecting suitable jurors. The trial was aborted on more than one occasion when a juror was found to be disqualified and the defendants themselves objected to others for cause, although the repeal of the Criminal Procedure Ordinance, s.140 subsequent to their arraignment removed their right to make peremptory challenges to up to eight jurors.

The defendants finally applied for a permanent stay of the proceedings on the ground that the lapse of $4\frac{1}{2}$ years since their arrests would preclude their receiving a fair trial.

The defendants submitted that (a) it would be impossible for the facts to be accurately established since the memories of all the witnesses, including themselves, of the events of $4\frac{1}{2}$ years ago would be unreliable; (b) since the documentary evidence in the form of police log-books and observation reports, on which the Crown intended to rely, had admittedly been altered in parts and the originals destroyed, it was not a contemporaneous account of investigations at the time and could not properly be used to refresh witnesses' memories; (c) the audio and video tape evidence from the surveillance operation was inadmissible since (i) it had been obtained without proper authorization and in breach of the search provisions of s.7 of the Constitution, and (ii) defence counsel had been denied the opportunity properly to test its authenticity by access to the surveillance equipment and information on its use; (d) they should be permitted to challenge without cause up to eight members of any jury which was to try them since they had been arraigned before the change in the law removing this right, and would be significantly prejudiced if they were unable to do so; and (e) for all these reasons they would not, if tried, receive the fair hearing within a reasonable time to which they were entitled under s.8(1) of the Constitution.

The Crown submitted in reply that (a) witnesses with fading recollections of the period before the arrests could refer to the contemporaneous accounts of events contained in police logs and observation reports for the purpose of refreshing their memories; (b) the delay in disclosure of the audio and video tape evidence resulted from the failure of the Gibraltar police to inform Crown Counsel of its existence and not from any prevarication on the part of the prosecution, and should not be taken into account in deciding whether a fair trial could be held; (c) the surveillance evidence was admissible since (i) under Gibraltar law the police were not required to obtain permission from a magistrate before monitoring a suspect by surveillance, and the fact that they had trespassed in order to install the equipment did not affect the admissibility of any information gathered, and (ii) defence counsel had had ample opportunity to examine the evidence and instruct experts to deal with its authenticity; (d) although the repeal of s.140 of the Criminal Procedure Ordinance had removed the defendants' right to challenge jurors without cause, this would not significantly prejudice them in receiving a fair trial; and (e) the exceptional circumstances in which a stay of proceedings could be granted did not exist in this case, since the defendants were

charged with very serious offences which ought not to go untried, and the delays which had occurred were substantially beyond the prosecution's control.

Held, staying the proceedings and discharging the defendants:

(1) The defendants had shown on the balance of probabilities that, owing to delays for which they were not themselves significantly responsible, they could not receive a fair trial. Exceptional circumstances had been established, justifying a stay of the proceedings: the seriousness of the offences with which they were charged was as much a reason why a trial should not take place in such circumstances as it was a reason why they should not go untried (page 6, lines 1–16; page 8, line 44 – page 9, line 5).

(2) The delay occasioned by adjournments sought by the prosecution and the problems of court administration would result in difficulties for witnesses on both sides in recalling relevant events. They could not be cured by reference to documentary evidence which had since been altered and therefore could not be described as contemporaneous (page 8, lines 37–43).

(3) Nor could the taped evidence assist in that regard, since it did not cover the actual arrests or the period immediately preceding them. The surveillance evidence would probably be admissible since the police were not required under Gibraltar law to seek a magistrate's permission to use this kind of equipment and the fact of trespass would not in itself preclude the use in court of evidence obtained thereby. Police officers testifying as to the identity of voices on tape were witnesses of fact whose evidence a jury could accept or reject. However, there remained gaps in the prosecution evidence which had been accentuated by the passage of time (page 7, lines 3–15; page 8, lines 24–26; lines 34–37).

(4) Whilst the court would make no finding as to whether the defendants retained the right to challenge jurors peremptorily despite the change in the law since their arraignment, their opportunity to be fairly tried would not be significantly prejudiced if the new law were applied to them. In view of the other factors prevailing, however, the court would order a stay of proceedings against them (page 5, lines 39–45; page 9, lines 9–13).

Cases cited:

(1) *Barker* v. *Wingo* (1972), 407 U.S. 514; 92 S. Ct. 2182.
(2) *R.* v. *Cheng* (1976), 63 Cr. App. R. 20; [1976] Crim. L.R. 379.
(3) *R.* v. *Cruz*, Supreme Ct., Crim. Case No. 13 of 1993, December 13th, 1994, unreported.
(4) *R.* v. *Robb* (1991), 93 Cr. App. R. 161; [1991] Crim. L.R. 539.
(5) *R.* v. *Taylor* (1993), 98 Cr. App. R. 361; *The Times*, June 15th, 1993.

(6) *R.* v. *Tonner*, [1985] 1 W.L.R. 344; [1985] 1 All E.R. 807; (1985), 80 Cr. App. R. 170.
(7) *Tan* v. *Cameron*, [1992] 2 A.C. 205; [1993] 2 All E.R. 493; *sub nom. Gin* v. *Judge Cameron* (1992), 96 Cr. App. R. 172.

Legislation construed:
Criminal Procedure Ordinance (1984 Edition), s.140(2):

> "On the arraignment of any person or on indictment for any offence other than an offence punishable by death it shall be lawful for the prosecutor and defendant respectively to challenge not more than eight jurors without cause, and any juror or jurors for cause."

Gibraltar Constitution Order 1969 (Unnumbered, S.I. 1969, p.3602), Annex 1, s.7(1):

> "Except with his own consent, no person shall be subject to the search of his person or his property or the entry by others on his premises."

s.8(1): The relevant terms of this subsection are set out at page 5, lines 11–14.
s.8(2)(*a*): The relevant terms of this paragraph are set out at page 4, lines 44–45.

J. Gittings for the Crown;
C. Finch, J.J. Neish and *G. Licudi* for the defendants.

KNELLER, C.J.: On August 21st, 1990 Edward Mario Victory, Ernest Mario Ullger, Obdulio Victory, Alexander Palao, Victor Rodriguez, Abramovic Suetozar, Luis Francisco Pereira Do Carmo, Antonio Da Palma Costa, Mohamed Larbi Mohamed Layachi, Pedro Martin Garcia and Henry Gerada were charged before the Stipendiary Magistrate with unlawful possession of a controlled drug with intent to supply another or others. Mohamed Larbi Mohamed Layache, Abramovic Suetozar and Pedro Martin Garcia were also charged with unlawfully importing the drug. These three have been called "the front-line defendants."

The controlled drug was a Class B one, cannabis resin, and the amount was 301 kg., of which the street value was said to be £600,000. The importation and the unlawful possession with intent to supply were alleged to have happened on August 14th, 1990, so we are now a week short of 4½ years after the date of these alleged offences.

On December 23rd, 1992 an indictment was filed in this court charging Gerada, Palao, Rodriguez, Ullger, Edward Victory, Obdulio Victory and Pereira Do Carmo with unlawful possession with intent to supply, or alternatively unlawful possession, and with unlawful importation of the controlled drug. To each count the defendants pleaded not guilty and so under the Constitution of Gibraltar, s.8(2)(*a*), they are "presumed to be innocent" until they are proved guilty.

Mohamed Larbi Mohamed Layachi, Abramovic Suetozar and Pedro Martin Garcia, the front-line defendants, left the jurisdiction on February 19th, 1991 and have not yet returned. So did Luis Francisco Pereira Do Carmo, of whom it was said last week that he has since died. Obdulio Victory failed to appear on January 16th this year and a bench warrant for his arrest was issued. Out of the 11 defendants who appeared before the Stipendiary Magistrate only five remain before the court. There was an attempt to have one of the missing ones extradited from Malta but it failed because a discharge by a magistrate under the law of Malta amounts to *autrefois acquit.*

Under s.8(1) of the Constitution "if any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law." During the past six days, in lengthy submissions by Mr. Finch, Mr. Neish and Mr. Licudi for the five defendants and Mr. Gittings for the Crown, it has not been suggested that this court is not one established by law or that it is not independent and impartial, but much has been said and many authorities cited on the issue of whether the five can have a fair hearing within a reasonable time if the case proceeds.

Complaint was made of the press reports of the committal proceedings and the various attempts to get the case in the Supreme Court on the rails and keep it moving along them. The cuttings I was shown and other examples cited singly or together did not amount to press coverage that could be described as unremitting, extensive, sensational, inaccurate or misleading or such that it would be impossible to say that the jury would not be influenced in their decision by what they had read. They would be warned several times in the summing up that they should decide the case on the evidence before them and there would be no real risk of prejudice against the defendants such as there was in *R.* v. *Taylor* (5).

The court held in *R.* v. *Cruz* (3), in which I myself sat, that a defendant who was alleged to have committed an offence or was arrested, charged and committed before s.140 of the Criminal Procedure Ordinance was repealed still could not challenge a juror except for cause. The defendants' counsel submitted that whilst Cruz had not been arraigned before the right to make eight peremptory challenges was abolished, the defendants had, and therefore could each still exercise the right to eight peremptory challenges, and if that principle were not upheld they would be greatly prejudiced. Mr. Gittings drew the court's attention to *R.* v. *Tonner* (6) (80 Cr. App. R. at 171) in which it was held that the defendant's trial would begin when he was put in the charge of the jury and not on arraignment, which has not happened in the fresh start to this case. I have not ruled on this yet but, assuming I held that the defendants may not challenge a juror except for just cause, that would not constitute a real risk to their having a fair trial.

What has exercised the mind of the court during the last six days is whether the delay means these five defendants will suffer serious prejudice to the extent that no fair trial can be held. They have to prove on the balance of probabilities that, due to delay, no fair trial can be held. This is a heavy burden for the defendants to bear. A stay should only be granted in exceptional circumstances, and delay due to the complexity of the case or contributed to by the actions of the defendants should never be the foundation for a stay. It must be remembered that if the trial proceeds the trial judge can redress any obvious unfairness.

The way to approach this question is to ask "whether in all the circumstances the situation created by the delay was such as to make it an unfair employment of the power of the Court any longer to hold the defendant to account?" This should be considered in the round without introducing shifting burdens of proof. It is a simple matter of what is or is not unfair (see the Privy Council case of *Tan* v. *Cameron* (7) ([1992] 2 A.C. at 225)).

The reasons for the delay include the availability of hearing dates in the lists of the magistrates' court and this court. The administration of justice here at the present time suffers from a disparity between the demand for legal services (such as early hearing dates) and the resources to supply them. It does not shorten matters if the trial is postponed when the presiding judge has to have a specialist's opinion following a medical examination and later there are changes in the prosecution team and the replacements need further time to master the brief.

The case has also had an unfortunate history of the discharge of jurors due to the sudden discovery of disqualification or the existence of a close relationship with one of the defendants or an important prosecution witness. The court has been unable to find a full jury because those called have been objected to for cause or, quite lawfully in those days, peremptorily by the prosecution and the defendants, and because some cannot afford the time for a long trial or some, armed with medical certificates, have afflictions which excuse them from jury service. There were also some whose comprehension of English meant they were unsuitable for this sort of trial. And so on and so forth.

Some delay resulted from the defendants' advisers needing time to study the tape recordings of conversations said to have taken place over a period of five months between the defendants in some area where their launches are kept. They had them tested for authenticity by an overseas expert as did the prosecution. They also had tested in the United Kingdom a detective inspector's vessel movement log-sheet of August 13th, 1990, which was said to be the record of information passed to him by officers engaged in the operation, and a detective sergeant's manuscript record of his observations on the same date in the area known as Farringdons. Those delays are, however, accounted for satisfactorily by the defendants. They were entitled to have the documents tested.

The prosecution's tapes were the result of the loan of highly sensitive eavesdropping equipment by the Technical Support Group of New Scotland Yard to the Royal Gibraltar Police Force. Together they placed the equipment in position on the premises used by the defendants, amounting to a civil trespass. They re-entered to change the batteries and later to recover the equipment and return it to Scotland Yard. This was done without the permission of any magistrate or other lawful authority and would be impermissible in the United Kingdom because it breaches the guidelines for the use of such devices in that jurisdiction. There are no such guidelines here yet, I believe, so it cannot be said the process was flawed in that respect. This was in breach of s.7 of the Constitution of Gibraltar but, nevertheless, the tapes and transcripts, if properly proved and the voices identified satisfactorily, might be held to be admissible. I do not make a ruling on the point because I have not heard full submissions on it. It is, however, the background to part of the delay in this case.

The New Scotland Yard authorities lent the device to the Royal Gibraltar Police Force, we have been told, on the undertaking that neither its form, equipment, methodology nor the tapes were to be revealed in any proceedings. The prosecution complied with that undertaking throughout the five months' surveillance and throughout the defendants' appearances before the magistrates' court which were between August 15th, 1990 and February 19th, 1991. At about the beginning of February 1991 Mr. Benjamin Marrache, counsel for the front-line defendants, is reputed to have asked Senior Crown Counsel if the prosecution had any tapes or other material evidence relevant to this case and he was told it had none.

On Friday February 15th, 1991, the Commissioner of Police told Senior Crown Counsel that 800 audio and 200 video tapes existed and the relevant New Scotland Yard officer had agreed that they should be proffered in evidence at the committal proceedings. On February 19th, 1991, when the hybrid committal proceedings were due to begin before the learned Stipendiary Magistrate, Senior Crown Counsel asked for an adjournment of six months so that he could have the tapes transcribed, study them and add the relevant ones to the docket, though he could begin the prosecution case then and add the transcripts and tapes by serving them on the defendants with notices of additional evidence.

The Stipendiary Magistrate discharged all the defendants because, he explained later in his case stated, the prosecution's conduct was an abuse of the process of the court. Whether or not that is so I do not have to make a ruling on the point. The prosecution abandoned the case stated application in the Supreme Court and instead obtained on March 4th, 1991 *ex parte* leave from Alcantara, A.J. to apply for judicial review of the Stipendiary Magistrate's decision to discharge the defendants. This leave was revoked on May 21st, 1991 because the prosecution had not disclosed in its application matters that it ought to have disclosed.

The defendants were re-arrested before they had left the court's precincts, escorted to the police station and bailed or released to report back in six months' time. The prosecution thereby gained the six months which the Stipendiary Magistrate had refused to grant. The front-line defendants left Gibraltar and have not yet returned. Luis Francisco Pereira do Carmo did the same and it seems will never return. The remainder were re-charged and re-appeared before the Stipendiary Magistrate on August 20th, 1991. There was a delay of 12 months which was not the fault of any defendant. It was caused by the retention and concealment of the tapes and is, for whatever reason, the fault of the prosecution and I cannot specify which arm of it is to blame since I am not conducting an inquiry into this.

Mr. Gittings submitted that the delay of $4\frac{1}{2}$ years would not prejudice the defendants because the prosecution evidence lay in the tapes, their transcripts, Det. Insp. Rodriguez's typed vessel movements log-sheet, which set out what Det. Sgt. Massias, Det. Const. Vinet, Det. Const. Brier and Det. Const. Wright saw from various vantage points on August 13th, 1990 in this operation and signed as a correct record of their reports and Det. Sgt. Alcantara's manuscript observation report from Farringdons on the same date. It is a case that depends on documents with which the prosecution witnesses, and even the defendants, can refresh their memories of their movements on August 13th, 1989 if they have faded because of the $4\frac{1}{2}$ year delay.

Mr. Finch, Mr. Neish and Mr. Licudi united in pointing out that the tapes, log-sheet and observation report did not cover all the events of that night, especially the arrival point of the 300 kg. of cannabis. The admissibility of the tapes was not a foregone conclusion because public interest immunity had been claimed and granted in a *voir dire* in an earlier aborted trial and this might be repeated which meant the defence could not test the device, equipment or methodology for the authenticity of the tapes. The prosecution's expert witness Dr. Windsor Lewis could hear only a limited number of words so if he is called he will not bolster the Crown's case.

Mr. Gittings argues that the evidence of the police officers who recognize the voice of a defendant on the tapes would be evidence of fact, admissible and for the jury to accept or reject: see *R.* v. *Robb* (4). This is so, but the tapes do not cover all the events of the operation. The log-sheet and the observation report were tendered as originals but examination has revealed they are not and have been altered for some reason. The original parts, which could have supported the validity of the reasons for the alterations or replacements, have not been kept. All in all those documents will not be a reliable source of information for refreshing anyone's memory: see *R.* v. *Cheng* (2).

There is the public interest in the attainment of justice in each case and especially so in a case as important as this one. Generally, a defendant

who may be guilty of a serious crime should not go free without having been tried: see *Barker* v. *Wingo* (1) (407 U.S. at 523, *per* Powell, J.). Here, however, the defendants are presumed to be innocent until they are proved guilty and, unless the charges are withdrawn, their case should be afforded a fair hearing within a reasonable time.

I find that by their counsel the defendants have proved on the balance of probabilities that due to the delay they would suffer serious prejudice if they were tried because no fair trial could be held. Their actions since their first arrest have not unreasonably contributed to this delay. In all the circumstances of this case the situation created by the delay makes it unfair for the court to hold them to account. I have considered the factors in the round and reached the conclusion that a stay must be granted and the defendants be discharged and I so order.

Orders accordingly.