IVAN TIMOFEYEVICH POLYUKHOVICH v. THE COMMONWEALTH OF AUSTRALIA AND ANOR S. 90/005 [1990] HCA 40 (17 September 1990)

COURT
High Court of Australia
Gaudron J.(1)
HRNG
Canberra
#DATE 17:9:1990

Solicitors for the Plaintiff: David Stokes and Associates

Solicitors for the First Defendant: Australian Government Solicitor

Solicitors for the Second Defendant: Commonwealth Director of Public Prosecutions
JUDGE1
GAUDRON J. Ivan Timofeyevich Polyukhovich ("the applicant") stands charged with a number of offences upon an information laid under the War Crimes Act 1945 (Cth) ("the Act"). The applicant, who is of advanced years, has brought proceedings in this Court challenging the constitutional validity of the provisions of the Act under which he was charged. Those proceedings presently stand adjourned part heard. The applicant now seeks that further proceedings on the information, including proceedings to determine his fitness to be tried for the offences charged, be stayed pending the determination of the constitutional challenge.

2. The applicant was charged on 26 January 1990 pursuant to an information laid on the same day. Later, on 7 August 1990, a new information was sworn and filed in the Adelaide Magistrates Court ("the Magistrates Court"). In the meantime, a change in the applicant's personal circumstances resulted in his being admitted on 29 July 1990 to The Queen Elizabeth Hospital, Adelaide, where he has since remained. On 27 August 1990 the information laid on 26 January 1990 was, on the application of the Director of Public Prosecutions of the Commonwealth ("the DPP"), dismissed. On the same day the DPP raised the question of the applicant's fitness to be tried and an order was made referring the proceedings (presumably, the proceedings on the information sworn on 7 August 1990) to the Supreme Court of South Australia under s.20B of the Crimes Act 1914 (Cth). The applicant was not present in the Magistrates

Court on that day.

3. The Crimes Legislation Amendment Act (No.2) 1989 (Cth) effected various amendments to the Crimes Act, including the insertion of Div.6 which establishes a new regime with respect to accused persons who are not fit to be tried. Section 20B(1), which is in Div.6, provides:

> "Where, in proceedings for the commitment of a person for trial of a federal offence on indictment, being proceedings begun after this section commences, the question of the person's fitness to be tried in respect of the offence, is raised by the prosecution, the person or the person's legal representative, the magistrate must refer the proceedings to the court to which the proceedings would have been referred had the person been committed for trial."

The section commenced on 17 July 1990.

4. The new regime established by Div.6 of the Crimes Act requires the court to which the proceedings are referred to determine whether the person is or is not fit to be tried (s.20B(2)). If he or she is fit to be tried, the proceedings must be remitted to the magistrate and "proceedings for the commitment must be continued as soon as practicable" (s.20B(2)). If he or she is not fit to be tried the court must determine whether a prima facie case has been established (s.20B(3)). If no prima facie case is made out, or if a prima facie case is made out but the court is satisfied that punishment is inappropriate, the court must dismiss the charge and, if the person is in custody, order his or her release (s.20BA(1) and (2)). Otherwise, the court must determine whether the accused will become fit to be tried within 12 months following the finding of unfitness (s.20BA(4)). If he or she will become fit to be tried within 12 months, the court must determine whether he or she is suffering from a mental illness or condition for which treatment is available in a hospital and, if so, whether the person objects to being detained in a hospital (s.20BB(1)(a) and (b)), and must then order detention in hospital or in a place other than a hospital (including a prison) or grant bail, for a period ending when the person becomes fit to be tried or as soon as practicable after the expiration of 12 months (s.20BB(2)). If the accused becomes fit to be tried within 12 months, then proceedings, either for commitment or for trial of the charges, must be continued as soon as practicable (s.20BB(3)). If the accused does not become fit to be tried

within that period, then he or she is treated as if there had been a finding
that he or she would not become
fit to be tried within 12 months (s.20BB(4)).
Where it is found that a person will not become fit to be tried within 12 months, then
the court must determine the same matters as required by
s.20BB(1)(a) and (b) in the case of a person who will become fit to be tried
within 12 months and must order that the person be detained
in a hospital or a
place other than a hospital (including a prison) for a period not exceeding the maximum period of imprisonment
that could have been imposed had he or she
been convicted of the offence charged (s.20BC(1) and (2)). Provision is made,
in the case
of a person whose detention has been ordered under s.20BC(2), for
the variation of the place of detention (s.20BC(3) and (4)) and for the Attorney-General to review the person's condition
and to consider whether the
person should be released from detention (s.20BD).

5. It is necessary to note two matters concerning
the reference of the
proceedings to the Supreme Court pursuant to s.20B of the Crimes Act.
First,
it is contended on behalf of the applicant that the regime established by Div.6 has no application to the present matter.
It is said that, for the
purposes of s.20B(1) of the Crimes Act, the proceedings were commenced in January 1990 and not in August 1990 when the new information was sworn and filed. And, even if
the regime is applicable, it is suggested that the order
referring the proceedings may otherwise be invalid. On the basis of these matters an application has been made to the Supreme Court for a stay or an order quashing the reference. That application is listed
for hearing today,
Monday, 17 September 1990. Secondly, the DPP and the applicant's legal advisers differ as to certain procedural
requirements involved in the regime.
Apparently, it was anticipated that those procedural matters would be the subject of argument
and determination in the course of the proceedings to stay
or quash the reference.

6. It should also be noted that, on the assumption
that the question of the
applicant's fitness to be tried is properly before the Supreme Court under s.20B of the Crimes Act, that court has set aside time at the end of October
1990 to determine whether the applicant is fit to be tried and, if not, some
further time at the beginning of 1991 to determine whether there is a prima facie case.

7. It was conceded by counsel for the Commonwealth
and for the DPP that this
Court has jurisdiction to stay further proceedings on the information, including proceedings to determine
the applicant's fitness to be tried.

However, it was strongly argued that a stay was inappropriate and contrary to the public interest. Alternatively, it was put that the application is premature.

8. There is much to be said for the view that the present application is premature, particularly as proceedings are on foot in the Supreme Court which, if determined in favour of the applicant, will, to some extent, render academic the question whether the proceedings to determine his fitness to be tried should be stayed. And, although the present application is to stay further proceedings on the information, it is clear that its main purpose is to avoid, pending the determination of the constitutional challenge, a finding on the question of fitness to be tried. Moreover, it would seem from the statements of counsel that very little, if anything, will otherwise be done in the proceedings on the information until early 1991 because, until then, the DPP will not be able to call evidence going to the offences charged.

9. Notwithstanding the matters which can be advanced as to the prematurity of the present application, I am of the view that it should be determined in the light of the general principles that would otherwise be applicable. In the first place, a determination adverse to the applicant on the basis of prematurity might well result in uncertainty as to the future course of proceedings pending this Court's determination of the constitutional challenge. A person in the present circumstances of the applicant is entitled to be spared that uncertainty. Moreover, the question of the applicant's fitness to be tried having been raised, then, unless the charges are not proceeded with (as will be the case if the applicant's constitutional challenge is successful), either as a matter of law under Div.6 of the Crimes Act or as a matter of practicality, that question must be determined. Even a determination that Div.6 does not apply to the applicant would not affect the practical necessity for the question to be answered. It may be that, if Div.6 does not apply, the question cannot be determined before an indictment is presented. However, a contrary proposition was asserted by counsel for the Commonwealth and the DPP in the course of the present proceedings. This assertion, whether or not it be correct, renders it desirable that the application be dealt with by application of general principles.

10. In Castlemaine Tooheys Ltd. v. South Australia (1986) 161 CLR 148, at p 155, Mason A.C.J. considered the matters relevant to the grant of an interlocutory injunction to restrain the enforcement of a statute challenged on constitutional grounds. His Honour cited a passage from Morgentaler v. Ackroyd (1983) 42 OR (2d) 659, at p 668, in which it was said that "the balance of convenience normally dictates that those who challenge the constitutional validity of laws must obey those laws pending the court's decision". In that same passage it was said that "an interim injunction (may be granted) to prevent grave injustice, but that will be rare indeed". Mason A.C.J. considered that the last-quoted sentence stated the position too strongly against a plaintiff, saying:

> "(T)he Court, on a proper balance of convenience, will restrain enforcement of a statute in aid of a plaintiff's constitutional right. In arriving at a balance of convenience the Court will take into account the seriousness of the conduct enjoined by the statute and the damage to the public interest that may be caused by restraining its enforcement. And in some cases the balance of convenience may be affected by the Court's perception or evaluation of the strength of the plaintiff's case for invalidity. But, subject to these qualifications there can be no reason to doubt the correctness of the general thrust of the comments in the passage (from Morgentaler v. Ackroyd)."

11. In Castlemaine Tooheys Ltd. Mason A.C.J. also noted, at pp 154-155, after reviewing a number of the relevant cases, that "(i)n none of (those) cases did the Court go so far as to restrain the defendant from commencing prosecutions" and that in Clements and Marshall Pty. Ltd. v. Field Peas Marketing Board (Tas.) (1947) 76 CLR 401 "prosecutions had been launched yet nothing was done to restrain the continuation of them". And his Honour, at p 156, specifically dealt with the institution of prosecutions in these terms:

> "In the ordinary course of affairs the courts should hesitate before interfering with the Executive Government's discretion to decide whether it should prosecute for offences against a statute, even a statute which is under constitutional challenge, more particularly when the statute is designed to protect and safeguard a recognizable public interest, such as the environment. It is perhaps undesirable that prosecutions should

be commenced whilst the validity of the relevant sections is under challenge in proceedings pending in this Court. But there may be circumstances not readily to be foreseen by the Court which would justify the commencement of prosecutions in which event they would ordinarily be adjourned pending the determination of validity."

12. Where a prosecution is commenced there may be circumstances that would militate against its adjournment, although it would be a most extraordinary case if the prosecution were to proceed to conviction and punishment whilst the question of validity, although the subject of proceedings in this Court, remained unresolved. But it must be observed that this Court would be most reluctant to stay a prosecution if the court in which it was pending had not had an opportunity to consider whether it ought to be adjourned or whether other steps might be taken to avoid risk of injustice. The position in this regard is very similar to that which obtains when a stay of execution is sought pending the grant of special leave to appeal to this Court. See, as to the latter position, Jennings Construction Ltd. v. Burgundy Royale Investments Pty. Ltd. (No.1) (1986) 161 CLR 681.

13. In the present case the Supreme Court has, to some extent, indicated the course that any proceedings under s.20B of the Crimes Act are likely to take by setting aside times in October 1990 and early in 1991. However, it is not clear that it has been given any real opportunity to consider whether the proceedings or any particular step in the proceedings should await the determination by this Court of the applicant's constitutional challenge. Even so, in the special circumstances of this case, the desirability that the applicant be spared, so far as possible, any uncertainty as to the future course of proceedings outweighs the consideration that the Supreme Court has not or may not have had an adequate opportunity to consider the course that proceedings should take in that court.

14. It is convenient to state, before turning to the right sought to be vindicated by the present application and the damage to the public interest that may be involved if the application is granted, that, in my view, the applicant's case for constitutional invalidity has some prospect of success. It is undesirable that that aspect be further elaborated.

15. The present application seeks to vindicate the right of personal freedom

by ensuring that the applicant's freedom is not put at risk other than by operation of a valid law. In this respect, it is the combined operation of the Act with Div.6 of the Crimes Act or such other regime as may be applicable that puts that freedom at risk. And the validity of that combined operation is necessarily put in issue by the constitutional challenge to the Act. The risk to freedom may be slight in the sense that a finding that the applicant is not fit to be tried would not necessarily result in a change in the present arrangements made for his care. However, the arrangements would then operate by force of law and not by force of circumstances. And a finding that the applicant was not fit to be tried would necessitate, unless the constitutional challenge is earlier determined, a determination of whether a prima facie case had been established and, if so, whether the applicant would be fit to be tried within 12 months and, if not, the making of an order for his detention. It is by no means inevitable that a decision would be given on the question of constitutional validity before a finding could be made as to whether a prima facie case had been established. It was stated in the course of argument that the hearing time required for that issue might be as little as three weeks, which, as things presently stand, could allow for a determination of that issue by the end of January 1991. The prejudice involved in a finding that a prima facie case had been established would, if the constitutional challenge were upheld, be extreme and irreparable.

16. The public interest considerations in relation to the enforcement of the Act are somewhat different from those which would normally obtain. The challenged provisions of the Act do not, in any relevant sense, enjoin conduct. Instead they operate by reference to conduct that occurred some 45 or 50 years ago. That conduct is now internationally condemned as horrific. And, if the constitutional challenge is not successful, the prospects of a trial of the applicant for the offences with which he is charged are necessarily reduced by any passage of time, for the prosecution witnesses, like the applicant, are aged and, possibly, frail. Many of the witnesses must be brought to Australia from other parts of the world and, thus, some three months is necessary to organize their availability. Naturally, the DPP does

not wish to bring these persons to Australia if their evidence cannot be taken and, if Div.6 of the Crimes Act applies to the present case, that evidence cannot be taken for any purpose until a finding has been made as to the applicant's fitness to be tried.

17. The DPP is in a most difficult position and can invoke considerable public interest in support of the proposition that the proceedings under Div.6 of the Crimes Act should not be stayed. However, there is also very considerable public interest in the humane administration of justice and in the avoiding of what, if the applicant's constitutional challenge is successful, might be serious and irreparable prejudice. In my view the balance favours a stay of proceedings pending the determination of the constitutional challenge but limited to so much of the proceedings as would involve a determination of the applicant's fitness to be tried, whether under Div.6 of the Crimes Act or under some other regime. The stay should be so limited because, if the applicant's constitutional challenge is not successful, questions will still remain as to his fitness to be tried. It may be that other issues bearing on that issue, including the question whether Div.6 has application to the present case, can usefully be determined in the meantime. However, whether they can or should be determined is a matter for decision by the Supreme Court.

18. One other matter should be noted. It seems from the affidavit material that the applicant's legal advisers have kept the DPP informed as to the applicant's medical condition so far as it bears on the question of his fitness to be tried. The stay should be granted only on terms that the applicant's legal advisers keep the DPP informed of all matters bearing upon that question. On those terms order that proceedings on the information charging the applicant with offences under the Act be stayed so far as those proceedings involve the determination of the applicant's fitness to be tried, whether under Div.6 of the Crimes Act or otherwise.

19. Liberty to either side to apply on three days notice.

ORDER

On terms that the applicant's legal advisers keep the Commonwealth Director of Public Prosecutions informed as to the applicant's medical condition, so far as it bears on the question of his fitness to be tried, ORDER that proceedings on the information charging the applicant with offences under the War Crimes Act 1945 (Cth) be stayed so far as those proceedings involve the determination of the applicant's fitness to be tried, whether under Div.6 of

the Crimes Act 1914 (Cth) or otherwise.

Liberty to either side to apply on three days notice.
