Moala & ors v Minister of Police (No.2)

Supreme Court, Nuku'alofa
Lewis J
C.938, 1045 & 1046/96

4 & 7 October 1996

Habeas corpus - contempt of Parliament - close of Parliament
Constitution - habeas corpus - contempt of Parliament
Parliament - committal for contempt - close of - habeas corpus

This was the second application for habeas corpus by the two journalists Moala and 'Akau'ola and the first by a parliamentarian, Pohiva (although he applied for judicial review which the Court held was inappropriate and treated as an application for habeas corpus).

Held:

1. The claim that the detention was unlawful and unjustifiable was a repeat of the previous application, and failed.
2. A new ground was argued - that Parliament having closed (on 3 October 1996) they should now be released.
3. The Order of the Assembly was clear and unambiguous they were not to be released until after the expiration of 30 days or otherwise ordered by Parliament for a shorter time.
4. Parliament must be presumed to mean what it says. The Order does not say that if Parliament ends (in anyway) then the applicants should be released. The Parliament had expressed its will in specific terms and the court may not interfere.
5. All 3 applications were declined.

Cases considered : Stockdale v Hansard (1839) 9 Ad & E 114
R v Richards exp. Fitzpatrick & Browne (1955) 92 CLR 157

Counsel for applicants : Mrs Taufaeteau
Hon. Minister of Police in person

Judgment

These are three applications for writs of habeas corpus. Two applications, those of 'Akau'ola and Moala are second and subsequent applications to earlier applications for the issue of a writ of habeas corpus which were denied.

The third application is that of one 'Akilisi Pohiva. Putting it shortly, his application is by hand-written letter couched in lay-language and not in the form prescribed by R.S.C. 0.28. The application of Mr. Pohiva is for "Judicial review of the imprisonment penalty awarded against me by the assembly" .... and .. "A Court Order Terminating the Imprionment Penalty".

Mr. Pohiva makes an allegation that he ought not be held in custody since the Legislative Assembly which imposed the committal to prison order "is already closed"

I hold that this court is not bound by matters of form in these circumstances. The authority holding all three men at the direction of the Speaker of the House, is the Hon. the Minister of Police and Prisons, W.C. Edwards doing so at the direction of the chairman of the Legislative Assembly to Tonga.

The Hon. the Minister undertook to appear in person, to make submissions and to produce all three men from prison in order that they may be heard. So it was.

Having read the application of Mr. Pohiva and having hear his submissions I conclude that he has taken a course not open to him in choosing judicial review. R.S.C. Order 27 makes no provision for such an application to be made against the Legislative Assembly in the context of this application or at all.

Next, I treat his application for release, or, as he puts it "A Court Order terminating the imprisonment penalty" as simply an application for a writ of Habeas Corpus - the only recourse open to him at law.

I turn to the applications of Messrs 'Akau'ola and Moala. Each man advances two grounds in this his second application for the issue of a writ:-

(i) That their detention in unlawful and unjustifiable. This ground appears to repeat their application to this court for a writ on 25 September. Accordingly, as on that occasion, their application fails.

(ii) Since the parliament which committed them to prison is no longer is session, they should be freed. This second ground requires further consideration.

The decision of His Majesty in Council of 27 September 1996 is as follows:-

"The 1996 session of the Tonga Legislative Assembly is to be officially closed by His Majesty on Thursday 3rd October 1996".

Judicial notice may be and is taken of the fact of the closing of the session.

By letter dated 29 September 1996 the chairman of the Legislative Assembly wrote to the Minister of Police, the respondent to this application, stating.

"To the Minister of Police
Nuku'alofa

The Legislative Assembly Ordered ot imprison:-

1. 'Eakalafi Moala
2. Filokalafi 'Akau'ola
3. 'Akilisi Pohiva

for 30 days commencing 5 o'clock on the afternoon of 19 September 1996 by virtue of the power vested in the Legislative Assembly by clause 70 of the Constitution and the judgment of the House on this day regarding their imprisonment.
They are not to be released until after the expiration of 30 days or otherwise ordered by Parliament for a shorter time.
I ask to immediately give effect to this Order.

.....
CHAIRMAN OF THE LEGISLATIVE ASSEMBLY."

Thus the argument run by the three applicants is that they cannot lawfully be held by the Minister or indeed anyone, once Parliament ceases to be in session. They argue that since Parliament is no longer in session they must be immediately released.

The Minister submits in answer to the three applications that the order of the Legislative Assembly is not indeterminate but clear and unambiguous. It is indeed clear and unambiguous. It concludes with the admonition -

". . . They are not to be released until after the expiration of 30 days or otherwise ordered by Parliament for a shorter time".

Parliament must be presumed to mean precisely what it says. What the speaker's direction does not say is - if Parliament be brought to an end by dissolution, by prorogation or by, (as happened here), the decision of His Majesty in Council to officially close it, then the three applicants shall be released.

In England the House of Commons appears no longer to have power to detain offenders in prison beyond the period of a session.

> "The privilege of committing for contempt is inherent in every deliberative body invested with authority by the constitution. But, however flagrant the contempt, the House of Commons can only commit till the close of the existing session. Their privilege to commit is not better known than this limitation of it. Though the party should deserve the severest penalties,yet, his offence being committed the day before a prorogation, if the House ordered his imprisonment for but a week, every court in Westminister hall and every judge of all the courts would be bound to discharge him by habeas corpus".
>
> Stockdale v Hansard (1839) 9 AD & E 114 per Lord Denman CJ

The most recent practice had been for the Commons to commit during its pleasure until the offender had expressed contrition for his offence or the house was satisfied on motion that it was proper to release him.

In R v Richards Ex parte Fitzpatrick and Browne (1955) 92 C.L.R. 157 the Australian House of Representatives (which has the same privileges as the House of Commons), imprisoned two men for a specified period, the house directing that they be "Kept in custody until 10.9.55 or until earlier prorogation or dissolution unless this house should sooner order his (sic) discharge".

In this case the Legislative Assembly has expressed its will in specific terms. The direction of the speaker makes no mention of prorogation or of dissolution. It is specific.

In my opinion the direction here given to the Minister of Police is unambiguous and legitimate as a command of the Parliament. It is that the three men shall be imprisoned for thirty days commencing 5.00 pm in the afternoon of 19 September 1996 ..... and that they are not to be released until after the expiration of thirty days "or otherwise ordered by Parliament for a shorter time". There is no Order of Parliament is existence which

shortens the time of the duration of the sentences.

I conclude that this court may not interfere with this direction and Order of the Legislative Assembly. I find that the Order is neither unlawful nor in any technical sense unjustifiable concerning the commital of these two men.

As to the prisoner 'Akilisi Pohiva, he makes no complaint of the unlawfulness of his committal to prison nor the duration of it. He says nothing of those matters. He argues that the 1996 Legislative Assembly session having officially closed, he should be freed. There may have been merit in Mr. Pohiva's argument that since the Order of Parliament contemplates that Parliament may decide to order a shorter time, that event in now an impossibility. At the time at which Parliament rose, Parliament made no order of release and must be taken to have intended no release otherwise it would have said so.

I am, for the reasons given unable to meet the request for release. All three applications for habeas corpus are denied.