THE RIGHT TO COUNSEL — A PRIVY COUNCIL VIEW

Thornhill v. *Attorney-General of Trinidad and Tobago*

Now that appeals from the Federal Court in Malaysia to the Privy Council in constitutional cases have been abolished, the Federal Court will have to decide how to deal with Privy Council decisions from other jurisdictions in relation to constitutional provisions similar to those obtaining in Malaysia. A Privy Council decision which falls into this category and which may well merit serious consideration in cases involving the right of an arrested person to counsel given by article 5 of the Malaysian Constitution is the recent case *Thornhill* v. *Attorney-General of Trinidad and Tobago.*[1]

The facts of the case are as follows. In the early afternoon of 17 October 1973, after what was described as a "shootout" with the police, the appellant was arrested and detained by the police and Charged with certain offences. He was suspected by the police of other offences about which they wished to interrogate him. He was not brought before a judicial authority until those interrogations had been completed and an identity parade held. A legal adviser retained on his behalf attempted to see him at 5.30 p.m. the same day, and in the morning and the afternoon on 18 October, but was denied an opportunity to communicate with him until after the identity parade at 12.45 p.m. on 20 October. It was found as a fact that when the requests were made on 18 October the appellant was not being interviewed by the police and there was nothing in connection with the investigation that would have made it inconvenient for him to be allowed to consult his legal adviser; the only reason why he was not allowed to do so was that the police were of the opinion that if the appellant were advised as to his legal right to decline to reply to questions the answers to which might incriminate him, they would be less likely to obtain from him extra-judicial confessions that he had committed the earlier offences of which he was suspected but with which he had not been charged.

The appellant sought redress in the High Court in the form *inter alia*,[2] of a declaration that the refusal by the police to allow him to instruct and communicate with his legal adviser amounted to a contravention of the constitutional right to counsel, given by section 2(c)(ii) of the Constitution of Trinidad and Tobago in the following terms: "the right to retain and instruct without delay a legal adviser of his own choice and to hold communication with him." A declaration was granted at first instance, but on appeal by the respondent the Court of Appeal of Trinidad and Tobago found it unnecessary to decide whether the right to counsel had been contravened and

[1] The writer is once again indebted to the learned Lord President for a copy of the judgment, which is, at the time of writing, unreported. Judgment was delivered on 27 November 1979.

[2] The appellant also sought a declaration that all statements taken from him were unconstitutional and void, and further applied for orders to prevent the use of any of those statements in any prosecution of the appellant or other proceedings in which he might be concerned. The trial judge was content to leave these matters to the judge who would preside over the trial of the appellant for the offences to which the statements related. Only the declaration referred to in the text was pursued before the Privy Council.

allowed the appeal on the narrow ground that the Constitution did not give the appellant any right to apply for redress for a contravention of his constitutional right by a police officer. This argument had been rendered invalid prior to the appeal to the Privy Council by the decision of the Privy Council in *Maharaj* v. *Attorney-General of Trinidad and Tobago* (*No. 2*)[3] in which a similar argument had been rejected. Accordingly the arguments before the Privy Council centred on the interpretation of section 2(c)(ii).

Much of the argument concerned the effect of section 3(1) of the Constitution, which stated that "sections 1 and 2 of this Constitution shall not apply in relation to any law that is in force in Trinidad and Tobago at the commencement of this Constitution." It was argued for the respondent that the effect of section 3(1) was to restrict the ambit of sections 1 and 2 to rights of the individual which could be shown to have been legally enforceable under a written law or under the common law before the Constitution came into effect, and since there was no authority for the existence of a right of an arrested person to counsel at that time there had been no contravention of the Constitution.

Lord Diplock, delivering the board's opinion, was able to turn the argument on its back. Section 1 declared that the fundamental rights set out in the Constitution had existed in Trinidad and Tobago and would continue to exist, so that "[t]he hopes raised by... the Constitution that the protection of human rights and fundamental freedoms was to be ensured would indeed be betrayed if [the Constitution] did not preserve to the People of Trinidad and Tobago all those human rights and fundamental freedoms that in practice they had hitherto been permitted to enjoy." "Permitted" is the operative word, for the right to counsel had been contained in the Judges Rules and was therefore a matter of administrative discretion rather than law. Thus the effect of section 3 on the exercise of rights enjoyed *de facto* (as opposed to *de jure*) was merely to prevent their being converted into legally enforceable rights where their exercise previously had been contrary to a mandatory legal provision. Thus the board were able to agree with the trial judge that "the burden lay on the respondents... to show that the settled practice of allowing an arrested person to consult a lawyer of his choice at the earliest opportunity, when to do so would not cause unreasonable delay or hinder the processes of investigation or the administration of justice, was contrary to law at the time of commencement of the... Constitution." This burden the respondents clearly could not fulfil.

The way was clear then for the board to decide the case on the question whether the right had been infringed. Their Lordships noted that the right contained in section 2(c)(ii) was the same in substance if not in language as the principle set out in the Judges Rules:

> "That every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor. This is so even if he is in custody provided that in such a case no unreasonable delay or hindrance is caused to the processes of investigation or the administration of justice by his doing so."

[3] [1978] 2 W.L.R. 902.

"Delay" in section 2(c)(ii), their Lordships considered, was a word which connoted not simply a lapse of time but one which in the circumstances was longer than it should have been. Since the only hindrance to the processes of investigation was that the police would be less likely to succeed in obtaining self-incriminating statements from the appellant, any delay for which this was the only reason was clearly an unreasonable delay. Accordingly in their Lordships view the appellant was entitled to the declaration he sought.

Significance of the decision for Malaysia and Singapore:

What is the significance of this decision in the context of article 5 of the Malaysian Constitution, and article 9 of the Constitution of Singapore, which is identical to it?

The courts in Malaysia have interpreted the right to counsel under article 5(3) of the Federal Constitution somewhat restrictively. In the most important case, *Ooi Ah Phua* v. *Officer in Charge, Criminal Investigations, Kedah/Perlis*[4] the Federal Court held that a delay of ten days between arrest and access to counsel was lawful.[5] In *Hashim bin Saud* v. *Yahaya bin Hashim*[6] a delay of six days was regarded by the Federal Court as lawful. Yet on the face of it the principles laid down by the courts in the Malaysian cases are identical to the principles applied in *Thornhill's* case:

> "the right... begins from the moment of arrest but... cannot be exercised immediately after arrest. A balance has to be struck between the right of the arrested person to consult his lawyer on the one hand and on the other the duty of the police to protect the public from wrong-doers by apprehending them and collecting whatever evidence exists against them." *(Per* Suffian L.P. in *Ooi Ah Phua's* case)

> "Such right starts right from the day of his arrest but it cannot be exercised immediately after arrest if it impedes police investigation or the administration of justice." *(Per* Raja Azlan Shah F.J. in *Hashim bin Saud's* case)

One can also add a dictum of Wee Chong Jin C.J. in the Singapore case *Lee Mau Seng* v. *Minister for Home Affairs, Singapore*:[7]

> "If a person who is arrested wishes to consult a legal practitioner of his choice, he is, beyond a shadow of doubt, entitled to have this constitutional right granted to him... and this right must be granted to him within a reasonable time after his arrest."

It will be observed that the absence of any such phrase as "without delay" from article 5(3) is immaterial, since the courts have in effect supplied the omission, if by "delay" we mean "unreasonable delay", the meaning adopted in *Thornhill's* case. The apparent difference between the Federal Court's view and the Privy Council's view can only be explained in terms of the reasons which are regarded as justifying the delay in affording access to counsel. In *Ooi Ah Phua's*

[4] [1975] 2 M.L.J. 198.
[5] The decision has been criticised by Sheridan and Groves. See *The Constitution of Malaysia,* 3rd ed., p. 51.
[6] [1977] 2 M.L.J. 116.
[7] [1971] 2 M.L.J. 137. The *dictum* cited refers to article 5(3) as applied to Singapore by the Republic of Singapore Independence Act 1965, and has been cited with approval in Malaysia in *Ramli bin Salleh* v. *Inspector Yahya bin Hashim* [1973] 1 M.L.J. 54 and in *Ooi Ah Phua's* case.

case Suffian L.P. said that it was quite reasonable of the police to give facilities to counsel to interview Ooi for the first time ten days after the arrest "as in this case there had been a daylight robbery committed in the heart of the state capital involving the use of a pistol and the loss of $14,000 to $15,000 not to mention the loss of one life and ... as many young men are prepared to go to any length in the pursuit of instant wealth armed robberies are therefore quite common...." In *Hashim bin Saud's* case the justification would appear to have been simply that the police had not completed their investigations and had demonstrated good faith by releasing the appellant after six days, for the alleged offence was nothing more serious than the theft of an electric generator.

With respect it is suggested that although the burden has been put squarely on the police to prove that giving effect to the right to counsel would impede police investigation or the administration of justice,[8] the burden has been too easily discharged in both of the cases cited above. The seriousness of the crime should not be relevant, nor the continuance of investigations, nor for that matter post facto demonstrations of *bona fides.* The only relevant consideration should be whether proper investigations would actually be impeded by the intervention of the lawyer, so that in the absence of exceptional circumstances, only the actual or imminent interrogation of the arrested person, or possibly others charged with him, in relation to the offences for which he has been arrested, would justify refusing access to counsel. Clearly also if the denial of access is designed to prevent the lawyer from advising his client not to answer the questions put to him, it will be unlawful.[9]

There is one further complication arising from this discussion. It has been held[10] that *habeas corpus* is not an available remedy where the constitutional right to counsel is infringed. The language of the Privy Council in *Thornhill's* case suggest otherwise. In connection with the respondent's argument that the Constitution of Trinidad and Tobago did not give redress for contraventions of constitutional rights by a police officer, their Lordships did not "find it necessary to consider to what extent... the old common law rule that those persons who... have been responsible for appointing a "constable" were not vicariously liable for *tortious* acts done by him in purported exercise of his common law powers of arrest has survived in Trinidad and Tobago ...." [emphasis added]. Elsewhere their Lordships regarded observance of the rights of an arrested person as "a condition of his continued detention." Thus there appears to be an assumption that an infringement of the right to counsel would render the detention

[8] *Hashim bin Saud's* case, *per* Raja Azlan Shah F.J.

[9] The position with regard to the right to silence is essentially the same in Malaysia as in Trinidad and Tobago, see Joseph [1976] 2 M.L.J. iv. The policy questions raised by the right to counsel are also discussed by Tan Sri Mohamed Salleh bin Abas [1972] 2 M.L.J. lxiii, and Karpal Singh [1973] 1 M.L.J. xxi, for comment on which see also Azmi bin Abdul Khalid (1975) 2 J.M.C.L. 175. It would appear that the decision in *Thornhill's* case is directly contrary to Salleh bin Abas' view that the police may refuse access if there is reason to suppose that the lawyer may encourage the arrested person to refuse to answer lawful questions. Since he is entitled to refuse to answer such questions, this would clearly be an improper consideration.

[10] See *Lee Mau Seng's* case, followed in *Ooi Ah Phua's* case.

unlawful and the authorities liable in the tort of false imprisonment, for which *habeas corpus* is a remedy.

In *Ooi Ah Phua's* case Suffian L.P. explained his decision that *habeas corpus* was not available as follows:

> "The juxtaposition of clauses (2) and (3) of article 5 does not mean that a person who is denied immediate access to his lawyer has his remedy by way of habeas corpus, for it is possible for a person to be lawfully detained and yet unlawfully denied communication with his lawyer."

However the scheme of article 5 strongly suggests that *habeas corpus* is a remedy. Article 5(1) sets out the general principle that "No person shall be deprived of his life or personal liberty save in accordance with law. Article 5(2) states:

> "Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him."

This is a clear statement of the common law rule of *habeas corpus.* Article 5(3) and (4) should be taken as listing the occasions when the above remedy is available, since they are clearly intended to be regarded as amplifying what is meant by "in accordance with law" in article 5(1). Clearly failure to inform the arrested person of the grounds for his arrest would render the detention unlawful,[11] and this right is dealt with in the very same subsection as the right to counsel; in both cases enforcement of the right by *mandamus* would seem to be of little avail, since the damage will have already been done. For these reasons it is submitted that the Federal Court should reconsider this point also should it arise again.

A.J. HARDING

[11] See *Christie* v. *Leachinsky* [1947] A.C. 573, and the arguments advanced by Joseph, [1976] 2 M.L.J. ii.