

HIGH COURT OF AUSTRALIA

KIRBY J

HAKIJA SINANOVIC

APPLICANT

AND

THE QUEEN

RESPONDENT

Sinanovic v The Queen (S175-1995) [1998] HCA 40

Date of Order: 2 June 1998

Date of Publication of Reasons: 11 June 1998

ORDER

Motion dismissed.

Ex parte application for leave to issue process

Representation:

Maria Sinanovic (by leave) for the applicant

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Sinanovic v The Queen

Practice and procedure - High Court - Applications for leave of a Justice to issue process - Motion to set aside decision refusing special leave to appeal - Motion by prisoner without legal representation - Wife permitted to speak on prisoner's behalf - Prisoner claims difficulties in Court of Criminal Appeal and High Court by reason of being unrepresented, non English speaking and illiterate - Provision made for supply by Crown of trial transcript - Motion refused as having no prospect of success.

International law - Human rights - Right to equality before courts - *International Covenant on Civil and Political Rights*, Art 14.1 - Whether breached by failure to provide legal representation to illiterate prisoner with difficulties of communication - Decision that no substance in ground of appeal - Relevance of unincorporated international law for Australian domestic law - Motion to re-open special leave hearing refused.

Criminal law - Appeal - Legal representation - Whether right to legal counsel at public expense - Prisoner claims severe difficulties of communication - Whether proceedings should have been adjourned - Applicability to appeals against conviction of *Dietrich v The Queen* (1992) 177 CLR 292.

High Court Rules, O 58 r 4(3).

1 KIRBY J. It is an admirable thing for a wife to speak up for a husband who is in custody. Indeed, it is admirable for any friend to do so. Courts must listen when prisoners, by proper process, bring their complaints before them. They must never allow weariness born of many hopeless proceedings nor the pressure of heavy lists of cases, professionally presented, to dull their vigilance against the possibility that an unrepresented prisoner's complaint may have merit¹. Courts remain the ultimate protector of everyone in society, including prisoners who have no lawyers to speak for them.

2 Now, before me, is a motion by Mrs Maria Sinanovic, the wife of a prisoner, Hakija Sinanovic. He is not in court. In the course of making her submissions, Mrs Sinanovic told me that she felt a great responsibility on her shoulders. She said that she was trying to put the application on behalf of her husband as he would do, were he here. She wished not to disadvantage him nor to deny him justice. I accept that she feels that responsibility keenly. She has made every endeavour to discharge it.

History of the proceedings

3 I come to these proceedings at the end of a very long journey through the courts by Mr and Mrs Sinanovic. It began when Mr Sinanovic was indicted on two counts of dishonestly obtaining money, one count of dishonestly obtaining money and a valuable thing (a bank cheque) by deception, and three counts of attempting to obtain money by deception. The deception in each case was the representation that certain foreign banknotes of a series which had been withdrawn were current legal tender which Mr Sinanovic was entitled to exchange for Australian currency.

4 Upon the counts of the indictment, Mr Sinanovic underwent his trial in the District Court of New South Wales. He was legally represented. The jury found him guilty on all counts. He was convicted and sentenced. He appealed to the Court of Criminal Appeal of New South Wales. His appeal was successful. His convictions were set aside. The basis for that order was that evidence had been wrongly received of a deposition of a witness, contrary to the provisions of the *Crimes Act* 1900 (NSW), s 409(1).

5 Mr Sinanovic was put up for trial once again. At the retrial, the witness gave oral evidence. Once again, Mr Sinanovic was found guilty on all counts, convicted and sentenced. Once again, he appealed to the Court of Criminal Appeal of New South Wales. That appeal came before that court on 20 November 1995. The court was constituted by Gleeson CJ and Allen and Sully JJ. Although the Crown was represented, Mr Sinanovic was not. He appeared in person to argue his case.

1 cf *Coppedge v United States* 369 US 438 at 447-449 (1962); *Hussainara Khatoon v State of Bihar* AIR 1979 SC 1369 at 1376.

Allegedly, this was because he was denied legal aid and could not afford a lawyer. The proceedings before me have gone forward on the basis that Mr Sinanovic has difficulties with the English language and is also illiterate.

- 6 Allen J, who gave the judgment of the Court of Criminal Appeal dismissing the second appeal, said:

"The appellant was represented at his trial but appears in person before this Court. The Court has written submissions from him which, although diffuse, make clear the substance of his complaints."

Mrs Sinanovic, speaking for her husband who is detained in the Junee Correctional Centre, has told me today that this statement seriously underestimated the difficulties of a person in custody presenting an appeal to the Court of Criminal Appeal, especially where his first language was not English and where he was illiterate. In effect, he must present the appeal from memory. He must do so without the advantages which a person who is legally represented, or who is at least a native speaker and a literate person, enjoy. I do not doubt that there would be great disadvantages facing a person such as Mr Sinanovic, placed in the position that he was.

Dietrich and appeals

- 7 In *Dietrich v The Queen*² this Court held that the right to a fair trial which exists in Australian courts may authorise or require a judge to stay the trial of an indigent accused on serious criminal charges who, through no fault of his or her own, is unable to obtain legal representation at the trial. So far, the principle expressed in that case has not been extended to appeals to courts of criminal appeal against conviction. Obviously, any such extension would have significant economic and other implications. It might be argued that it is a matter for the legislatures of Australia and not for the courts³. However that may be, no established principle of constitutional or general law affords a prisoner in Australia a right to publicly funded legal representation on appeal. This is so even where the absence of such representation might effectively deny the prisoner the fair opportunity to present his case to the appellate court.

- 8 One day the significance of *Dietrich* for appeals against conviction may need to be considered by this Court. The facility of appeal against conviction is long established by our law. The right to have a conviction and sentence reviewed by a higher tribunal is recognised as a fundamental right in statements of universal

2 (1992) 177 CLR 292.

3 cf *Dietrich* (1992) 177 CLR 292 at 320-321.

human rights to which Australia has subscribed⁴. Upon one view the right of such review is a feature of the right to a fair trial itself⁵. However, this is not the case in which consideration of that question will be given. Although it was mentioned by Mrs Sinanovic in previous proceedings before the Court, the point was not pressed to finality. Procedural obstacles, which I will describe, stand in the way of its being considered now by me. Other cases will doubtless present where the issue of the fairness of proceedings on appeal, and whether there has been a true appeal at all in the absence of proper representation, will need to be decided.

9 As I have indicated, Allen J stated that, in this case, the written submissions which the Court of Criminal Appeal had made clear the substance of Mr Sinanovic's complaints about his conviction. Accordingly, this would not be the case in which to consider the ambit of the *Dietrich* principle as it may be thought to apply to appeals.

10 Following the decision of the Court of Criminal Appeal dismissing his appeal, Mr Sinanovic applied for special leave to appeal to this Court. Once again, he was unrepresented. He was in custody when the application first came before the Court, as it was then constituted (Brennan CJ and Callinan J) on 13 February 1998. Mrs Sinanovic was permitted to speak on behalf of her husband. Mrs Sinanovic made clear to the Court the disadvantages which, she claimed, her husband faced in presenting his application for special leave to appeal. Most particularly, she referred to the lack of the transcript of the trial and the lack of a full opportunity to discuss the matter with her so that, in his absence in prison, she might put his submissions to the Court.

11 In the face of these complaints and, exceptionally, the Court adjourned the consideration of the application for special leave. It did so for a month and ordered that the application be heard in the next sittings of the Court in Sydney. The stated purpose of the adjournment was to permit the Crown, which had the transcript and other relevant documents, to make copies and to provide them to Mr Sinanovic in prison. The object of the adjournment was clearly to permit an unrepresented prisoner, with such assistance as his wife could give him, to put his arguments for special leave to the Court so that his entitlement to a special leave hearing was a reality and not a charade.

4 See *International Covenant on Civil and Political Rights*, Art 14.2 discussed *Young v Registrar, Court of Appeal* (1993) 32 NSWLR 262 at 269, 290 and authorities there cited.

5 See *Jago v District Court (NSW)* (1989) 168 CLR 23 at 29 per Mason CJ, at 57 per Deane J.

Disposal of the special leave application

12 The matter then came back before the Court on 13 March 1998. On that occasion the Court was constituted by Gaudron and McHugh JJ. Mrs Sinanovic once again sought leave to speak for her husband, still in custody and not present in the Court. The Court gave that leave. Mrs Sinanovic first applied for a further adjournment. She did so on the footing that, although the transcript and some other documents had been made available to her husband, effectively, they had been made available only a week before the hearing of the adjourned proceeding. Because of Mr Sinanovic's disabilities with the English language and with reading, and because of the difficulty of communicating with him in person, it was claimed that he had effectively been prevented from using the facility which the Court had earlier provided.

13 The application for adjournment was opposed by senior counsel appearing for the Crown. Having heard the argument, Gaudron J, on behalf of the Court, said:

"Chief Justice Brennan told you that the matter would have to go on. The matter you now wish to argue has been part of the application from day one and the Court wishes you to proceed today. There will be no adjournment."

Mrs Sinanovic, on behalf of her husband, accepted the ruling. The proceedings then continued in the ordinary way as the hearing of Mr Sinanovic's application for special leave to appeal.

14 During that hearing it was clear that the Justices constituting the Court were well familiar with the issues which had been raised in the Court of Criminal Appeal and at the trial. Mrs Sinanovic was asked questions concerning those issues. The members of the Court were clearly anxious to understand whether, on any footing, there was a proper basis for concern: either, that an important point was raised by the application or that a miscarriage of justice may have occurred against which the Court should protect Mr Sinanovic.

15 However, it became plain fairly quickly that the Justices constituting the Court were not convinced on either basis that special leave should be granted. For example, at one point McHugh J said of the trial:

"Evidence was given by bank officials. If we get down from the high-flown theory to the facts of this case, it is an identity case plus your husband's explanation that in obtaining this money for these foreign notes he was not aware that they were no longer in legal circulation. The jury disbelieved him on both accounts and found he was guilty beyond reasonable doubt."

And later his Honour said:

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"The Court of Criminal Appeal had written submissions. They said that those written submissions, although diffuse, made clear the substance of the appellant's complaint and that they were that his Honour had erred in declining to order a separate trial in respect of each offence and that the convictions were unsafe and unsatisfactory and, included in that ground were complaints as to the reception of certain evidence and as to his Honour's directions in his summing up in relation to that evidence. Now, that was the substance of the complaint and the Court of Criminal Appeal examined them and rejected it. Where is the special leave point?"

- 16 Having heard further submissions from Mrs Sinanovic, the Court refused special leave to appeal without calling on the Crown. Gaudron J, announcing the decision of the Court, said:

"We are of the view that there is no error in the judgment of the Court of Criminal Appeal and, moreover, that there has been no miscarriage of justice in this case. Accordingly, special leave is refused."

Proposed motion to re-open the hearing

- 17 Ordinarily, that would have been the end of the matter. However, nothing daunted, Mrs Sinanovic filed in this Court a further motion on behalf of her husband. It seeks an order from the Court setting aside the decision of 13 March 1998:

"due to prejudice to the applicant who had been 'denied natural justice' by being refused an adjournment to properly prepare and present his application as for the first time he was only made aware of its contents less than one week prior to the hearing resulted in a decision based on an incomplete application before the High Court."

- 18 Pursuant to O 58 r 4(3) of the High Court Rules, Gummow J, on 23 March 1998, directed the Registrar to refuse to issue the motion without the leave of a Justice first had and obtained by the party seeking to issue it.

- 19 The matter has now come before me as duty Judge on an application for such leave. In light of the fact that the applicant is a prisoner in custody, who speaks to the Court only through his wife and who is said to have disabilities of communication already mentioned, I directed that the matter be heard in open court. So it has today. Once again, Mrs Sinanovic applied to speak for her husband and she was heard to do so. She informed me that, although her husband was not aware of all of the matters that she would be putting before the Court, he was generally aware of, and agreed to, the application which she was making on his behalf and the thrust of the arguments which she intended to place before me.

20 Mrs Sinanovic was heard for upwards of an hour. She submitted that her husband had been denied natural justice both in the Court of Criminal Appeal and in this Court by not having had at all, or not having had for a sufficient time, the transcript of the trial. However, whatever was the position in the courts below, as a result of the exceptional orders made by Brennan CJ and Callinan J when the matter was first heard in this Court, there is no doubt that Mr Sinanovic, and also Mrs Sinanovic, had the transcript of the trial for at least a week prior to the hearing on the second occasion.

21 Whilst I fully understand the difficulties of preparing an application to this Court without legal training in the space of a week, and whilst I also understand Mrs Sinanovic's complaint about the ill-balance between the experience at the Crown's end of the Bar table and that existing at her end of the table, the national obligations of this Court and its procedures require a high degree of efficiency in the presentation and disposal of applications. This was properly acknowledged by Mrs Sinanovic who accepted the reasons for such necessities. It is also relevant, as Gaudron J pointed out, that Brennan CJ made it plain that the exceptional adjournment which was provided was for a short time only and that the matter would have to proceed on its next return before the Court.

22 The Court, duly constituted with authority to deal with the application, then heard the request for a further adjournment. In the exercise of its discretion, it refused that request. Clearly there is no error in that refusal which would attract any prospect that it would be reversed on reconsideration by the Court. Accordingly, in so far as the application to file the notice of motion is based upon an objection to the refusal of the adjournment when the matter was before the Court on 13 March 1998, it is bound to fail. It would therefore not attract leave to permit Mr Sinanovic to file the notice of motion proffered to the Registrar by his wife.

A misconceived appeal to international law

23 That leaves the complaint about the disposal of the substance of the application. On this, Mrs Sinanovic went through various factual objections. However, none of these is different from those which were advanced when Gaudron and McHugh JJ were hearing the matter.

24 Mrs Sinanovic then appealed to the principles of international law. In particular, she referred to those provisions of the *International Covenant on Civil and Political Rights*, Art 14.1 of which provides that:

"All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him ... everyone shall be entitled to a fair ... hearing by a competent, independent and impartial tribunal established by law."

Mrs Sinanovic's complaint was that her husband was not treated equally. In particular, this was because, in the Court of Criminal Appeal and initially in this Court, he did not have the transcript and the facilities for discussion of the matter with a properly qualified representative, or even with his wife.

25 The principles of international law to which Mrs Sinanovic has referred are not, as such, part of the domestic law of Australia. Australian courts may take them into account in performing their functions where the law is ambiguous or uncertain. An illustration of the way in which they may be used in the case of a litigant unable to communicate with a court in Australia may be found in the decision in *Gradidge v Grace Bros Pty Ltd*⁶ - a case involving the entitlement to interpretation of proceedings in open court of a litigant who was both deaf and mute. In my view courts may be assisted by such universal principles when constitutional or other rights are involved which are ambiguous and which may be made clear by reference to such principles⁷.

26 The arrangements which were made by the Court when the matter was first before it were designed to ensure, so far as was possible, the equality of Mr Sinanovic before the Court. The complaint of an unacceptable lack of equality was considered by the Court and rejected by it on 13 March 1998. Moreover, when the Court turned to the substance of the matter on that occasion it was unconvinced that there was any merit in the objections to the actual decision of the Court of Criminal Appeal or to the trial of Mr Sinanovic before the District Court of New South Wales.

27 On that footing, there is nothing in the international law to which Mrs Sinanovic has referred which would give a foothold for a new ground to set aside the decision of the Justices who disposed of the special leave application on 13 March 1998. It is understandable, perhaps, for a lay person to think that international law, being at a higher plane, overrides Australian domestic law to the extent of inconsistency: just as State law may override a local government law or, federal law, if valid, may override State law. However, the position is not as simple as that for reasons which I endeavoured to explain in *Thorpe v The Commonwealth [No 3]*⁸. The use that may be made of international law in Australian domestic

6 (1988) 93 FLR 414 at 422.

7 See eg *Mabo v Queensland [No 2]* (1992) 175 CLR 1 at 42; *Newcrest Mining Co v The Commonwealth* (1997) 71 ALJR 1346 at 1424; 147 ALR 42 at 147-148; *Kartinyeri v The Commonwealth* (1998) 72 ALJR 722 at 765-766; 152 ALR 540 at 598-599.

8 (1997) 71 ALJR 767 at 779; 144 ALR 677 at 693.

law is much more indirect, subtle and controversial. It does not avail Mr Sinanovic in this case.

Conclusion and order

- 28 Accordingly, as to the challenge to the substance of the Court's disposal of the application for special leave on 13 March 1998, no ground has been shown which would give any basis for hope that a reconsideration of the matter would be successful. That being the case, no foundation has been demonstrated that would authorise me to grant leave for the issue of the proposed notice of motion. The application for such leave is therefore refused.
- 29 I should add, in closing, that the matter has proceeded today *ex parte*, in the absence of the Crown. That, apparently, is the procedure that is contemplated by the Rules. In many cases, it will be appropriate for such applications to be dealt with in private chambers on the papers. However, for the reasons which I have stated, I have heard the application in open court and have permitted Mrs Sinanovic to say what she wished to say in support of the application on behalf of the prisoner.
- 30 I will direct that a copy of the transcript and of these reasons be sent to the applicant, Hakija Sinanovic, at the June Correctional Centre, and to his wife who represented him.
- 31 The order of the Court is that the application for leave to issue the notice of motion is refused.

