Prison conditions and the right to a fair trial care

R v Benbrika (Ruling No 20) [2008] VSC 80

By Greg Barns

Seeking instructions from a client in custody is inherently difficult, but where prisoners' treatment by prison authorities impinges on their mental and physical wellbeing to the extent that they cannot adequately instruct their legal representatives, then an application to stay proceedings on the basis of unfairness can be made, even if trial proceedings have commenced.

This is the essence of the judgment of Bongiorno J in *R v Benbrika*.

The applicant and his 11 co-accused were charged with various offences under the anti-terrorism provisions of the *Criminal Code Act* 1995 (Cth). All the accused pleaded not guilty. They had been refused bail and remanded in custody since either November 2005 or March 2006. A jury was empanelled in early February 2008, and the prosecution commenced its opening on 13 February 2008. The trial concluded in September 2008 and, at the time of writing, sentencing was taking place with respect to the seven of the accused found guilty.

Sixteen days after the commencement of the prosecution opening, an oral application was made on behalf of the accused to stay the trial on the ground that it was unfair because of the circumstances in which the accused were being held at Barwon Prison – an hour's drive southwest of Melbourne – and the way they were being transported to court each day. This was not the first time the issue of the accuseds' detention had been brought to the court's attention (it had previously been argued in March 2007).

The accused were housed in single cells and were permitted, when out of their cells, to mix in groups of three. The court-day routine was described by a Corrections Victoria official as follows:

'[32] [Mr Prideaux said] that they were woken shortly before 6.00am and offered breakfast. Some did not eat any breakfast but he did not know why. Specifically, he did not know whether they were concerned about motion sickness whilst in transit to court. They are not permitted to have paper bags whilst in transit and, in any event, could not use them in the event of nausea because of their handcuffs which are connected closely to their waist belts. Mr Prideaux said he had never received any report of any of the accused having vomited in a van.

[33] Two vehicles are used to bring the accused to court, a large van with a capacity for about 20 prisoners and a smaller van which holds six. At about 6.50am the process of loading the vans commences. This process includes a strip-search of each accused, his change into clothes for court from his prison clothes, his being handcuffed and shackled and then being placed in the van. The handcuffs are connected to a waist belt and the shackles are chains which restrain the legs. The whole process takes about an hour, for some of which time some of the accused are seated in the van waiting for others.

[34] The trip to court takes between about 65 minutes and 80 minutes although the volume of traffic, particularly on the Westgate Bridge, can extend the travelling time on some days by a considerable amount. Upon arrival at court, between about 8.50 am and 9.30 am, the accused are placed in cells in the court custody area until required to go to the court room. They have their restraints removed when they alight from the van. The loading of the vans takes place in a locked garage (called a sally port) accessible directly from the Acacia Unit. On arrival at court unloading takes places in a similar sally port. At no time are the accused in other than a highly secured area.

[35] The vans in which the accused travel are divided into small box-like steel compartments with padded steel seats. Each compartment holds one or two prisoners, apart from one section of the larger van which holds a number of people. The compartments are lit only by artificial light. They are air conditioned by a unit controlled by one of the prison officers who travels in the driver's compartment. The accused are under video surveillance at all times whilst in the van by that prison officer...

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[36] On the return trip from court, the accused usually arrive at Barwon between about 6.00pm and 7.00pm. They are then given an evening meal and, since last month, they have been allowed to remain out of their cells until 9.00pm when they are locked in for the night. Their cells contain a shower and toilet and a television set.'

The accused were also strip-searched twice a day – before they went to court and when they returned. The 'procedure involves a prison officer inspecting the accuseds' naked body as thoroughly as possible without actually conducting a body cavity inspection. The accused are subjected to this search twice a day – before leaving Acacia to go to court and upon their return. The same search procedure is followed before and after contact visits with relatives,' Bongiorno J said.

One of the accused suffered from asthma but was not allowed to have a Ventolin inhaler in his possession on the trip to and from court, but had to ask the driver through the intercom in the van if he required it.

There appeared to be little or no justification for the classification of the accused as high-security prisoners. Bongiorno J referred to the fact that in none of the evidence before the court was there any material that justified the security rating by Corrections Victoria.

Medical evidence adduced before the court indicated that the regime applied by Corrections Victoria to the applicant and other accused was mentally and physical harmful. Bongiorno J quoted the conclusions of Dr Bell, a consultant psychiatrist who had been an expert witness:

'It is my view that taking account of the likely duration of the trial, that not only is it more likely than not that they will experience significant difficulties, but that one can at least say that at some stage during the process, [It] is likely to have a significant effect on things like the ability to concentrate, the ability to remember from day to day or week to week materials that are relevant to the proceedings to the extent that the accused experience significant levels of anxiety, of depression, of difficulties with sleep, of fatigue consequent on those things, without even beginning to talk about the possibility of the development of more serious specific psychiatric syndromes that would require their removal from Acacia Unit. It is my view that the cumulative burden of those difficulties would impact to a significant extent on the cognitive mental functions that are required to appropriately attend to a process that is as protracted and as complex as is the case in these proceedings.'

Bongiorno J concluded, at para 91, that he was 'satisfied that the evidence before the court establishes that the accused in this case are currently being subjected to an unfair trial because of the whole of the circumstances in which they are being incarcerated at HMP Barwon and the circumstances in which they are being transported to and from court.'

While the court had no power to order an alteration to the conditions in which the accused were detained, because this was a matter for the executive government, Bongiorno J said that the issue was whether or not the conditions are such as to render the trial so unfair, so as to permit the invocation of the inherent jurisdiction of the court's jurisdiction to intervene by way of a stay of proceedings or through some other means to obviate some unfairness.

Bongiorno J cited the well-known words of Lord Devlin in *Connelly v DPP* (1964) AC 1254, approved by the High Court in *Barton v R* (1980) 147 CLR 75, which referred to the fact that the court has a 'general power, taking various specific forms, to prevent unfairness to the accused (which) has always been a part of the English criminal law'.

His Honour also referred to *Jago v District Court of New South Wales* (1989) 168 CLR 23 and *Dietrich v R* (1992) 177 CLR 292, two cases in which the High Court discussed the power to stay criminal trials to prevent unfairness, and what constitutes a fair trial.

At para 80 Bongiorno J said, after a discussion of the above mentioned cases:

'The applicants' case here is that the oppressive conditions in which they are currently incarcerated and transported is having such an effect on their capacity to attend to their own interests in defence of the charges against them that the trial they are currently engaged in is unfair and will become more so as time passes.'

Bongiorno J listed a series of 'minimum alterations to the accuseds' conditions of incarceration and travel which would be necessary to remove the unfairness affecting this trial' (para 100):

'1. They be incarcerated for the rest of the trial at the Metropolitan Assessment Prison (MAP), Spencer Street.
2. They be transported to and from court directly from and to the MAP without any detour.
3. They be not shackled or subjected to any other restraining devices other than ordinary handcuffs not connected to a waist belt.
4. They not be strip-searched in any situation where they have been under constant supervision and have only been in secure areas.
5. That their out of cell hours on days when they do not attend court be not less than ten.
6. That they otherwise be subjected to conditions of incarceration not more onerous than those normally imposed on ordinary remand prisoners, including conditions as to professional and personal visitors.'

His Honour ordered the Secretary of the Department of Justice or her nominee to file an affidavit with the court in how the department proposed to appropriately ameliorate the accuseds' conditions. If this was done, the trial would resume the following day. If not, it would be stayed until further order. ■

Corrections Victoria complied with his Honour's requests and the trial proceeded.

Greg Barns *is a member of the Tasmanian Independent Bar and practises in the areas of human rights and crime. He appeared for one of the accused in R v Benbrika earlier this year.*
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