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CASE NOTE

Human Rights Violations by the Executive: Complicity of the Judiciary in Cameroon?

The People v. *Nya Henry*
The People v. *Dr. Martin Luma*

Introduction

In a previous article in this journal,[1] on remedies in national law for breach of the African Charter on Human and Peoples' Rights (the African Charter), the decision of a magistrate in the Cameroonian case of *The People* v. *Nya Henry* was discussed in detail. In that case the department in charge of public prosecutions (the Legal Department) had, in breach of a court order, refused to release the defendants on bail. The magistrate held that that action of the Legal Department amounted to a violation of the defendants' right to the presumption of innocence guaranteed by the Cameroon constitution and the African Charter. As a remedy, the magistrate stayed the proceedings and ordered the release of the defendants. That decision was hailed as one of the few "courageous and bold" decisions in a gradually rising tide of judicial protection of human rights in Africa and in Cameroon in particular.[2] But, in two recent judgments,[3] the Court of Appeal has now reversed that decision together with the original decision admitting the defendants to bail.

This note examines the two judgments of the Court of Appeal and the reasons advanced for reversing the decisions of the magistrate. It will endeavour to show that the two decisions of the Court of Appeal are not well founded in law. The decision of the court on the issue of stay of proceedings will be examined first before considering the decision on the question of bail.

Stay of Proceedings: Judicial Failure to Condemn Executive Misconduct

It will be submitted that on the issue of stay of proceedings on the ground of abuse of process by the executive the Court of Appeal misapplied the law. The impartiality of the court will also be questioned. However, it is helpful to begin with an account of the actual decision of the court.

The decision

The facts of the case are simple. The defendants, who had been arrested on 1 October, 2001, applied to a Magistrate for an order admitting them to bail. In a ruling on 24 October the Magistrate, Bea Abednego, granted them bail

[1] N. Enonchong, [2002] 46 *J.A.L.* 197.
[2] Ibid., at 198.
[3] *The People* v. *Nya Henry Tichandum* (22 August, 2002), Appeal No. BCA/MS/11C/2002, unreported, and *The People* v. *Dr Martin Luma* (22 August, 2002), Appeal No. BCA/MS/8C/2002.

and ordered their release. But the Legal Department defied the court order. Instead on 29 October the Department brought the defendants before the same Magistrate charged with two offences.[4] The issue arose whether their continued detention in breach of the bail order amounted to a violation of the defendants' right to the presumption of innocence. The magistrate answered that question in the affirmative and, as a remedy, he stayed the proceedings and ordered the release of the defendants.[5] On appeal by the Legal Department the Court of Appeal (MOFAW, C.J., MOUTCHIA and TUME, J.J.) reversed the ruling of the magistrate, set aside his order and ordered a retrial of the defendants.

In order to see more clearly the fallacies in this judgment, it is helpful to note the grounds of appeal and the way in which the Court of Appeal dealt with them. There were three main grounds of appeal.[6] First, that the magistrate "failed to arraign all the defendants". Second, that the magistrate "did not give any opportunity to the prosecution to call any of its witnesses to prove its case". And, third, that the magistrate "erred in dismissing the case under section 301(1) [of the Criminal Procedure Ordinance] when no trial was conducted." All three grounds of appeal complained in essence that the magistrate did not proceed with the trial as normal and instead stopped the proceedings before it got off the ground.

It was argued for the respondents that in effect the issue for the Court of Appeal to decide was whether the magistrate's decision to stop the proceedings and deprive the prosecution of the opportunity to prove the guilt of the defendants was wrong in law. To that question, counsel for the respondents contended that the answer is clearly in the negative. Counsel relied on *Connelly* v. *Director of Public Prosecutions*[7] for the proposition that the court has general and inherent powers to protect its process from abuse. The magistrate in this case, it was argued, simply stopped the proceedings in order to protect the process of the court from abuse by the prosecution who had been involved in unlawful conduct by disobeying a court order and detaining the defendants in contravention of the law. To put it another way, the Legal Department committed an illegal act and violated the human rights of the defendants by the continued illegal detention. The Department then sought to use or rather abuse the process of the court as a means to continue to violate the human rights of the defendants. No court should allow its process to be abused in this way. The jurisdiction to stay proceedings exists to prevent such abuse. The magistrate, it was argued, was right to exercise that jurisdiction.

The Court of Appeal rejected the submissions of the respondents and found for the prosecution on all the grounds of appeal. The court took the view that the magistrate should have allowed the trial to continue in the normal way in

[4] One, for unlawful assembly under s. 231 of the Penal Code (punishable by imprisonment for a period between 15 days to 6 months and with a fine of from 5,000–100,000 francs CFA), and the other offence was for failing to obey a prefectorial order, punishable under s. R 370(12) of the Penal Code (imprisonment of from 5–10 days or a fine of from 4,000–25,000 francs or with both imprisonment and fine). This second offence is a minor offence. It is classified by the Penal Code as a "simple offence of the fourth class".

[5] The Magistrate did so under s. 301(1) of the Criminal Procedure Ordinance.

[6] There was a fourth ground of appeal, that the magistrate erred in holding that an appeal does not lie against an interlocutory decision, but that was not a crucial part of the case and this note will not go into it.

[7] [1964] AC 1254, 1354.

spite of the undisputed illegal conduct of the Legal Department. MOUTCHIA, J., delivering the judgment of the Court of Appeal, said that "the prosecution was not given the chance to make their complaint. The trial court, instead of acting as an arbiter, descended into the arena and stopped both the prosecution and the defence from saying anything in the name of preventing abuse of court process. It was a complete departure from any known legal procedure." It is submitted that this view of the Court of Appeal has no support either in principle or in authority.

Stay of proceedings to prevent abuse of process

The jurisdiction of the court to stay proceedings in order to prevent abuse of process is well founded as a matter of principle. The existence of the power and duty to stay proceedings to prevent abuse of process is a fundamental principle of the rule of law. This is because it is an important means by which the court can ensure that executive agents of the state do not oppress citizens by misusing the coercive functions of the court. It is no surprise, therefore, to see that this jurisdiction to stay proceedings in order to prevent abuse of process is well established in Commonwealth jurisdictions. In *R* v. *Horseferry Road Magistrates' Court, Ex p Bennett*,[8] for example, the House of Lords held that the court has jurisdiction to stay proceedings and order the release of the accused when the court becomes aware that there has been a serious abuse of power by the executive. By exercising this jurisdiction the court can refuse to allow the police or the prosecuting authorities to take advantage of their abuse of power (such as illegal detention or kidnapping). This is done by the court regarding that abuse of power as an abuse of the court's process. In *Ex p Bennett* the accused had been kidnapped abroad with the collusion of the UK police and brought to stand trial in England. The involvement of the UK police in the breach of international law meant that they were involved in illegal conduct. It was held by the House of Lords that the court had jurisdiction to stay the proceedings as an abuse of the process of the court. Lord Griffiths said that this jurisdiction is necessary to enable the court to refuse to countenance misconduct by the executive which threatens (a) basic human rights and (b) the rule of law. More recently in *R* v. *Looseley* (where executive agents of the state were involved in entrapment) Lord Nicholls of Birkenhead opened his judgment with these words: "Every court has an inherent power and duty to prevent abuse of its process. This is a fundamental principle of the rule of law."[9]

It is not easy to understand how the Court of Appeal in Cameroon could come to the view that by granting a stay of proceedings, in the exercise of the inherent power and duty of the court to prevent abuse of its process, the trial magistrate did something which was "a complete departure from any known procedure". It would appear that the Court of Appeal was under the impression that the magistrate should first have conducted the trial in the normal way by allowing the prosecution to make their complaint, to call their witnesses, and so on. Only at the end of the trial should the magistrate have

[8] [1994] 1 AC 42.
[9] [2001] UKHL 53; [2001] 1 WLR 2060, para 1.

considered whether there was an abuse of process. But this misses the point completely. The point is that in the light of the misconduct of the prosecuting authorities (the executive) there should be no trial *at all*. The misconduct of the executive goes to the propriety of there being a prosecution at all for the relevant offence.[10] The question is not whether the proceedings would be a fair determination of guilt, but whether the proceedings should have been brought at all. To put it another way, by granting a stay of proceedings, the court is saying that no valid trial could take place at all. So, the question of fairness of the trial in determining guilt or otherwise does not arise.

The Court of Appeal seemed concerned with the fairness of the proceedings when it complained that the fact that the magistrate did not allow the prosecution or the defence to make an opening address and to call witnesses meant that "both sides were cheated".[11] But this shows that the court was confusing two very distinct and separate issues: the fairness of the proceedings and a stay of proceedings as an abuse of process. A stay of proceedings to prevent abuse of process is granted not because the accused was not guilty or because he could not receive a fair trial but to prevent abuse of the court's process and thereby protect the integrity of the criminal justice system. A stay in this context is, as Lord Hoffmann has described it, "a jurisdiction to prevent abuse of executive power".[12] So, in the *Nya Henry* case the question was not whether a fair trial was possible or not. It may be that a fair trial was possible. Yet the issue was whether, despite the fact that a fair trial was possible, the court will be failing in its duty to protect its process from abuse if it did not intervene to stay the proceedings once it became aware of the misconduct of the executive. If, as in *Nya Henry*, the circumstances are such that because of the misconduct of the Legal Department the prosecution ought not to be allowed at all, then it is idle for the Court of Appeal to complain that the court did not give the prosecution the chance to make their complaint and to call their witnesses. There is therefore no justification in principle for the view of the Court of Appeal that the court has no power to stay its proceedings to prevent abuse of process.

Devoid of any sound basis in principle, the decision of the Court of Appeal is also ill-founded as a matter of authority. There is no binding authority which compelled the Court of Appeal to this deplorable decision. Indeed, no authority whatsoever was cited by the Court of Appeal in support of the view that the court does not have inherent powers to stay proceedings to prevent abuse of process. No statute was cited, no Cameroonian case was relied upon. Not even a foreign decision was referred to as supporting that view of the Court of Appeal. On the contrary, the respondents cited *Connelly* v. *DPP*[13] as persuasive authority for the view that "the court has general and inherent powers to protect its process from abuse".[14] But the Court of Appeal failed to address this point and made no comment at all on *Connelly's* case. It is plain to see that the decision of the Court of Appeal on the issue of stay leaves much to be desired.

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[10] Cf. [2001] 1 WLR 2060, para. 17, *per* Lord Nicholls of Birkenhead and para. 36, *per* Lord Hoffman.

[11] P. 3, line 20 of the judgment.

[12] *R.* v. *Looseley* [2001] 1 WLR 2060, para. 40.

[13] [1964] AC 1245, 1354–1355.

[14] P. 4, lines 10–12, of the Court of Appeal judgment.

(Im)partial court?

A sad and shameful aspect of this case is that the Court of Appeal was blatantly more concerned with "justice" for the prosecution than with the human rights of the accused. For, although, as noted above, the Court appeared to be complaining that both sides had been cheated, it is clear that the court was more concerned with "fairness" to the prosecution. Thus the court completely ignored the serious abuse of power committed by the prosecuting authorities who had disobeyed a court order and violated the human rights of the accused by keeping them in detention without lawful excuse. It is interesting to note that the Court of Appeal did not dispute the fact that the Procureur General, the head of the Legal Department in the province, gave instructions that the order of the magistrate (that the defendants be released on bail) should not be obeyed. Nor did the court deny that the action of the Procureur General amounted to a violation of the defendants' right to the presumption of innocence and their right not to be detained without lawful excuse. Yet nowhere in the judgment of the Court of Appeal can one find even a hint of disapproval of this outrageous conduct of the prosecuting authorities.

This is a case where the prosecuting authorities violated basic human rights and trampled upon the rule of law. Instead of refusing to countenance such dangerous behaviour, as the magistrate did, the judges in the Court of Appeal have, by their silence, condoned it. Indeed, it is not too much to say that, by their deliberate failure to act, the judges in the Court of Appeal have participated in the misconduct of the executive; they have colluded in the human rights violations inflicted upon the defendants.

Why, it may be asked, were the judges in the Court of Appeal so blatantly partial towards the executive? The answer, it is suggested, lies in the lack of judicial independence in Cameroon.[15] It is no secret that the system of appointment, promotion, and transfer of judges in Cameroon is one which ensures that judges are at the mercy of the executive and therefore extremely vulnerable to pressure from the executive.[16] As one human rights NGO has stated,[17] the judiciary in Cameroon "lacks independence" and is "vulnerable to political influence". And there is little doubt that the two cases under comment are cases in which the executive was particularly interested because of its significant political implications. The Government has long been anxious to counteract the political activities of the movement (the SCNC[18]) of which the defendants were members. This movement has been campaigning for secession of the Southern Cameroons from the Republic of Cameroon. And the demonstrations which led to the arrests of the defendants were demonstrations calling for or celebrating the separate statehood of Southern Cameroons. It appears that the Government had attempted, through the

[15] The practice is very different from what is proclaimed in Article 37(2) of the Constitution that the judiciary "shall be independent of the executive and legislative powers".

[16] The source of this judicial submissiveness to the executive is Article 37(3) of the Constitution which puts the absolute and unfettered power to appoint, promote, and discipline judges all in the hands of the President of the Republic, the head of the executive arm of the state.

[17] Human Rights Watch, Report on Cameroon, at http://www.hrw.org/reports/2001/africa/cameroon/cameroon.html.

[18] Short for, "Southern Cameroons National Council".

President of the Bamenda Court of Appeal, to lean on the magistrate not to release the defendants. But the magistrate resisted the pressure and asserted his independence by deciding the case according to "the law and [his] conscience", as required by Article 37(2) of the Constitution. Sadly, as we now know,[19] he paid for this with his career. He was removed from the bench and sent to serve as an official in the office of the Legal Department in the South West Province.[20] It is extremely likely that judges in the Court of Appeal, seeing what happened to the magistrate as a result of his decision against the wishes of the Government, needed no direct pressure or threats to know which way to decide the appeal, if they wished to stay on the bench or even to continue to aspire for promotion.

The Issue of Bail: Judicial Violation of the Right to the Presumption of Innocence

The decision

The second judgment of the Court of Appeal in the same saga concerned the decision of the magistrate to order the release of the defendants on bail. As already indicated, the defendants were arrested and detained on 1 October, 2001. Three days later, they had not yet been charged or released. On 4 October, through their counsel, they filed a motion on notice, praying the court for an order that they be released on bail pending any charges against them. The application for bail was supported by an affidavit which was served on the respondents, the Legal Department, on 18 October. At the hearing, on 24 October, counsel for the respondents made a preliminary application for the matter to be adjourned to enable the Legal Department to file a counter-affidavit on which they claimed they were still working. The magistrate refused the application, proceeded to hear the application for bail and admitted each applicant to bail. On appeal by the prosecution, the Court of Appeal (Morfaw, C.J., Bawak and Moutchia, J.J.)[21] set aside the decision of the magistrate. The appeal raised just one question; whether the magistrate was wrong to have granted bail to the applicants when the prosecution had asked for an adjournment in order to prepare their counter-affidavit. The Court of Appeal answered that question in the affirmative.

Two reasons were advanced by the court for its decision. The first is that one of the factors normally taken into account when deciding whether or not to grant bail is whether the applicant had a previous conviction, and in the absence of a counter-affidavit "this vital information was unavailable to the court." Therefore, the Court of Appeal said, it was wrong for the magistrate to have granted bail without this information. The applicants had argued that this was an urgent application in a case where "some of the applicants are sick and others are of old age".[22] Their argument was that by the applicable rules

[19] See N. Enonchong, [2002] 46 *J.A.L.* 197, 215.
[20] This is a punishment commonly visited upon judges who attempt to go against the government line.
[21] *The People* v. *Dr Martin Luma* (2002) BCA/MS/8c/2002, unreported.
[22] *Dr Luma & 18 Ors* v. *The People* (2001) BA/13m/01-02, unreported, p. 1.

the time limit for the Legal Department to file a counter-affidavit in an urgent application of this type was 48 hours. Since the Legal Department was served on 18 October, it had had at least five clear days—more than enough time—to prepare and file the counter-affidavit. Therefore, it was argued, the application for further extra time was rightly rejected because it was dilatory. But this contention was brushed aside by the Court of Appeal. The court took the view that the Legal Department was entitled to additional extra time to prepare and file their counter-affidavit in this case. Why?

Excessive sympathy for the prosecution

The only reason given by the Court of Appeal was that the matter was "serious and needed proper investigation for the appellants to come up with a counter affidavit". Yet the Court of Appeal failed to identify the circumstances which made this case such a special case to warrant so much additional time for the Legal Department to prepare a counter-affidavit. Surely it was not enough for the Court of Appeal simply to say that this was a serious matter. Indeed the charges ultimately laid against the defendants (under sections 231 and R 370(12) of the Penal Code[23]) do not support this view. This reason is therefore not a convincing justification for the Court of Appeal to disturb the order of the magistrate.[24]

Moreover, even if it is accepted that more time was needed in this case, the Legal Department had already had more than double the usual time allowed. Why was the Court of Appeal prepared to give the Legal Department additional extra time? The Legal Department was served with the affidavit of the applicants on 18 October. The hearing took place on 24 October. This means that by the date of the hearing the respondents had had five days within which to prepare their counter-affidavit. During the hearing they asked for an adjournment until 29 October—in other words asking for a total of 11 days to prepare the counter-affidavit rather than the usual 48 hours. The magistrate did not think this to be right. But the Court of Appeal found it necessary to

[23] These are not serious offences. None is punishable with imprisonment for more than six months (see, n. 4 above). Indeed the maximum sentence for the offence under s. R 370(12) is 10 days imprisonment or such imprisonment and fine not exceeding CFA 25,000, the equivalent of roughly £25 (pounds sterling).

[24] Another gripe of the Court of Appeal was that although the record of proceedings shows that counsel for the prosecution said in court that "We are strongly opposed to the prayers of the [applicants]" yet the magistrate "embarrassingly" stated that "The Respondents are not opposed to the prayers of the applicants." This criticism by the Court of Appeal suggests that the magistrate misheard the respondents or deliberately misstated what counsel for the respondents said. But this is not the case. The truth is that the Court of Appeal missed the point completely. The point is that it had been submitted for the applicants (at p. 2, lines 27–29 of the records of proceedings) that since the respondents, the Legal Department, had failed to file a counter-affidavit, "the presumption is that the Legal Department is not minded to oppose the application." That presumption is not rebutted by a bare statement that "we are strongly opposed to the application". So, after hearing both sides, the magistrate's conclusion was that the presumption applied, since it had not been rebutted. Hence his statement that "the respondents are not opposed to the prayers of the applicants". The Court of Appeal judges misunderstood this statement because they read it without reference to the legal arguments canvassed at the bar. It may be that perhaps the magistrate could have stated more distinctly that he was applying the presumption contended for by the applicants, but, in my view, it is sufficiently clear from the record of the ruling that that is what he did, when he made the statement which the Court of Appeal finds embarrassing.

give the Legal Department such extra time in a case where the defendants were eventually charged with two simple offences.[25]

A question which presents itself at this stage is this, why was the Court of Appeal bending over backwards to help the Legal Department? And why is it that the Court of Appeal showed no concern whatsoever for the liberty of the applicants who were still in detention, without charge? Why did the court fail even to mention the liberty of the detainees and the protection of their human rights as one of the factors to be taken into account in deciding whether or not to grant bail?

Violation of the applicants' right to the presumption of innocence

The second reason advanced by the Court of Appeal for setting aside the decision of the magistrate also stems from the shocking fact that at the time of the hearing, some 24 days after their original arrest and detention, the applicants had not yet been charged. Some might think that this fact alone would be a cause for concern to any judge. Yet the judges in the Bamenda Court of Appeal used the fact that the applicants had not yet been charged as a reason why bail should not have been granted. Their rather bizarre argument was that since there had been no charges yet, the magistrate did not know whether any charge which may subsequently be made would "be bailable or not". Consequently bail should not have been granted just in case the charge, if any, eventually made turns out to be one where bail was not available. This is astonishing. What the Court of Appeal was saying is that because the Legal Department had failed to prefer charges on time, the magistrate should have presumed (against the detainees) that any charges preferred will not be bailable and, on this basis, the court should have refused bail. This reasoning is unattractive and should be rejected, for it punishes the detainees (with continued detention) for the delay of the Legal Department. If this view is adopted, it will make it possible for the Legal Department to use pre-trial detention as punishment simply by delaying the preparation of the counter-affidavit in a case of this kind. That would be an unsatisfactory position for the law to be in considering its adverse effects on the liberty of citizens.

It is interesting to observe that in the affidavit deposed to by the applicants' counsel it was said that the applicants were arrested "during a peaceful march". The Court of Appeal retorted, shamelessly, that "if the march was peaceful why were the applicants now respondents arrested?" This statement amounts to a clear breach of the applicants' right to the presumption of innocence.[26] For, it clearly shows that the Court of Appeal had already made up its mind that, because the applicants had been arrested, they must have been guilty of some wrongdoing. This presumption of guilt perhaps explains the appalling decision of the court on the issue of stay of proceedings discussed above. It may also explain why the Court of Appeal was prepared to

[25] Indeed by the time of the hearing of the application for bail, the applicants had already been detained for more than 10 days, which is the maximum sentence for one of the offences with which they were subsequently charged (see n. 4 above).

[26] For a discussion of the scope of the right to the presumption of innocence under the African Charter of Human and Peoples' Rights, see, N. Enonchong, [2002] 46 *J.A.L.*, 197, 200–203.

allow the prosecution so much extra time to prepare and file their counter-affidavit, in the full knowledge that in the meantime the applicants remained in detention. The judges of the Court of Appeal were not worried by the long period that the applicants had spent in detention without charge because the judges had already concluded that the applicants were guilty. It is not too much to say that by presuming the applicants guilty and refusing them bail as a result, the learned judges of the Court of Appeal were colluding with the Legal Department to use pre-trial detention as a punishment.

The use of pre-trial detention as punishment is not uncommon in Cameroon. As Sir Nigel Rodley, the U.N. Special Rapporteur, has observed,[27] it is common knowledge that in Cameroon pre-trial detention is widely used by the executive (police and prosecuting authorities) as a form of punishment rather than for its primary goal of upholding order and security or facilitating investigations. This is disturbing and has already been justly condemned elsewhere.[28] What is more worrying about this decision of the Court of Appeal is that it indicates that senior members of the judiciary are now willing to participate in this appalling violation of human rights.

Conclusion

The judgment of the Court of Appeal in the *Nya Henry* case is not only devoid of legal basis, it constitutes a threat to the rule of law and to basic human rights. For it takes away from the judiciary an important weapon in their limited armoury designed to promote the rule of law and protect basic human rights. The decision is likely to encourage executive agents of the state to continue to oppress ordinary citizens by abusing the coercive functions of the court. It is therefore hoped that this disgraceful decision will be rejected at the earliest opportunity. The decision of the Court of Appeal on the question of bail is no less deplorable. By presuming the applicants guilty and using that as a ground to refuse them bail, the Court of Appeal itself committed a breach of the applicants' right to the presumption of innocence and joined with the executive in the appalling practice of using pre-trial detention as punishment. This is also a shameful decision which should be disowned by the Supreme Court and other courts not bound by it whenever the opportunity presents itself.

The manifest partiality of the Court of Appeal in both decisions is a strong hint of the lack of judicial independence in Cameroon. This is a long-standing problem. It has been said that "forty years after [national] independence, the judiciary [in Cameroon] still has to fight to gain its own independence."[29] The two decisions of the Court of Appeal under discussion appear to indicate that some senior members of the judiciary have given up the fight for judicial independence, preferring instead to collude with the executive in human rights violations. Lord Denning once classified judges into "bold spirits",

[27] See e.g. E/CN.4/2000/9/Add.2, Report of the UN Special Rapporteur, submitted pursuant to UN Commission on Human Rights resolution 1998/38, paras. 52 and 53.

[28] Ibid.

[29] Innocent Bonu, Esq, "Neglect of the Judiciary" (2002) 1 *Cameroon Common Law Journal* 5, para. 4.

who would allow new causes of action, and "timorous souls", who would not.[30] In the context of the *Nya Henry* and *Dr Martin Luma* cases, it is clear that the magistrate, Bea Abednego, falls into the first class and the judges of the Court of Appeal who reversed him belong to the second.

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[30] *Candler* v. *Crane*, *Christmas & Co*. [1951] 2 KB 164, 178.

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