Court No. T-888-76

In The Federal Court of Canada
Trial Division

BETWEEN:

WILLIAM (BILLY) SOLOSKY

Plaintiff

- and -

HER MAJESTY THE QUEEN
in the Right of Canada

Defendant

REASONS FOR JUDGMENT

ADDY, J.:

The Plaintiff, an inmate of Millhaven Institution, sues for a declaration that all items of correspondence properly identified as directed to or received from his solicitor be regarded as privileged communications and be forwarded unopened by the prison authorities.

The director of Millhaven Institution has ordered that the Plaintiff's mail be opened and read. The order has been applied to mail originating from his solicitor as well as other mail. Directive 219 of the Commissioner of Penitentiaries dated the 26th of September, 1974, and amended on the 28th of June, 1976, reads in part as follows:

5. DIRECTIVE

a. Penitentiary staff shall promote and facilitate correspondence between inmates and their families, friends, and other individuals and agencies who can be expected to make a contribution to the inmate's rehabilitation within the institution and to assist in his subsequent and eventual return to the community.

. . .

c. Subject to the provisions of paragraph 14 every inmate shall be permitted to correspond with any person, and shall be responsible for the contents of every article of correspondence of which he is the author. There shall be no restriction to the number of letters sent or received by inmates, unless it is evident that there is mass production.

d. Subject to the provisions of paragraph 8, every item of correspondence to or from an inmate may be opened by institutional authorities for inspection for contraband.

7. CENSORSHIP

b. Censorship of correspondence in any form shall be avoided, but nothing herein shall be deemed to limit the authority of the Commissioner to direct, or the Institutional Director to order, censorship of correspondence in any form, to the extent considered necessary or desirable for the rehabilitation of the inmate or the security of the institution. (PSR 2.18). Any form of censorship shall be undertaken only with the approval of the Institutional Director.

8. PRIVILEGED CORRESPONDENCE

a. "Privileged correspondence" is defined as properly identified and addressed items directed to and received from any of the following:

(1) Members of the Senate

(2) Members of the House of Commons

(3) Members of provincial legislatures

(4) Members of legislative councils for Yukon and Northwest Territories

(5) The Solicitor General

(6) The Commissioner of Penitentiaries

(7) The Chairman of the National Parole Board

(8) The Federal Correctional Investigator

(9) Provincial Ombudsmen (see Annex "A").

b. Privileged correspondence shall be forwarded to the addressee unopened.

c. In exceptional cases where institutional staff suspect contraband in such privileged correspondence, the Commissioner's approval shall be obtained before it is opened.

Although these directives of the Commissioner of Penitentiaries are made pursuant to section 29(3) of the *Penitentiaries Act*[1], they are made solely for the proper administration of the institution under him, do not have the force of law and cannot create jurisdiction or a legal authority for actions taken pursuant thereto which are not otherwise authorized by law; see *Regina v. Institutional Head of Beaver Creek Correctional Camp, Ex Parte MacCaud*[2] at pages 380 and 381:

> His directives, which are internal to the Penitentiary Service, may and probably do govern the employer-employee relationship between the staff member and his superiors as part of the administrative structure. They define for the staff member the manner in which, and the limits within which, he and other members of this service are expected to perform their duties; departure from the directives may constitute an infraction of the obligation owed by the staff member to his superior, but any conduct on the part of a staff member which, in the absence of the directives, would not constitute an infringement of some civil right or right conferred on the inmate by the statute and Regulations, does not by virtue of the directives become such an infringement. In other words, there is no obligation owed by a staff member to the inmate to adhere to the directives. The duty owed by the staff member to the inmate must be found in the statute and Regulations.

However, in addition to the right of the Commissioner to issue directives of the *Penitentiaries Act* by section 29(1) provides that the Governor in Council has the power to make regulations. It reads as follows:

> 29.(1) The Governor in Council may make regulations
>
> (a) for the organization, training, discipline, efficiency, administration and good government of the Service
>
> (b) for the custody, treatment, training, employment and discipline of inmates; and
>
> (c) generally, for carrying into effect the purposes and provisions of this Act.

---

[1] R.S.C. 1970, Chapter P-6

[2] [1969] 1 O.R. 373

Pursuant to section 29(1) of the *Penitentiaries Act*, section 2.18 of the *Penitentiaries Regulations*[3] was enacted. It reads as follows:

> 2.18. In so far as practicable the censorship of correspondence shall be avoided and the privacy of visits shall be maintained, but nothing herein shall be deemed to limit the authority of the Commissioner to direct or the institutional head to order censorship of correspondence or supervision of visiting to the extent considered necessary or desirable for the reformation and rehabilitation of inmates or the security of the institution.

It is clear that the head of an institution, such as Millhaven, has the legal right and authority "to order censorship of correspondence . . . to the extent considered necessary or desirable for . . . the security of the institution."

The Plaintiff denies that the head of the institution may order the censorship of mail and especially of mail between an inmate and his solicitor.

The general right to ~~censure~~ censor mail is disputed on the grounds that it constitutes contravention of section 43 of the *Post Office Act*[4] which states that ". . . nothing is liable to . . . seizure . . . while in the course of post, except as provided in the Act or the regulations." There is no merit to this contention. In so far as mail emanating from the inmates is concerned the mail is not "in the course of post" until it is mailed in a mail box or deposited in a post office. In so far as mail addressed to an inmate is concerned, it is no longer in the course of post once it has been delivered to the institution where the inmate resides because section 2 of the *Post Office Act* reads in part as follows:

> 2.(1) In this Act
> . . .
> "delivery", as applied to mail, means delivery to the addressee thereof, and, for the purposes of this Act,
>
> (a) leaving mail at the residence or place of business of the addressee,
> . . . .

---

[3] The Canada Gazette, Part II, Volume 96, SOR/62-90, March 28, 1962

[4] R.S.C. 1970, Chapter P-14

The second ground of objection is that the opening of mail between an inmate and his solicitor constitutes a breach of the long-established and very jealously protected common law privilege which exists regarding communications between a solicitor and his client.

It is important of course to realize that under the common law itself a prisoner, who has been incarcerated following his conviction for a criminal offence, does not enjoy all of the common law rights and privileges of an ordinary free citizen. He, for instance, forfeits his very basic right to freedom and his right to communicate freely with his fellow citizens is, of necessity, considerably restricted. The *Canadian Bill of Rights* does not to any extent purport to enlarge on traditional common law rights and privileges, but constitutes rather a re-statement or codification of those rights and privileges. It recognizes them in a solemn manner, subject however to the normal qualifications and limitations which have always characterized them. The main innovative thrust of the *Bill of Rights* is against any statutory enactments past, present and future tending to abrogate, limit or derogate from any rights or privileges otherwise recognized by law.

In any event, and more specifically, the *Bill of Rights* contains no provision which for the Plaintiff, in the circumstances of the case at Bar, might create for him or add to any common law rights or privileges.

Assuming that a convicted person, whilst incarcerated as a convicted criminal, still enjoys the right to communicate privately with his solicitor and I cannot see how that right can be completely denied to him, although for the proper administration of the penal institution or for other reasons such as mere limitations of staff and facilities

the right might still be subject to certain limitations and control such as the time of day or the frequency with which the right may be exercised, it also seems trite to say that any privilege attached to such right of a prisoner to communicate with his solicitor will be no higher than that enjoyed by any other citizen.

In the case of the ordinary citizen, the privilege does not exist merely because the communication is between a solicitor and his client. The seeking or giving of legal advice must be the object of the communication and it is privileged only to that extent; see *Regina v. Bencardino and De Carlo*[5] at page 181:

> Not every communication by a client to his solicitor is privileged. To be privileged the communication must be made in the course of seeking legal advice and with the intention of confidentiality. As stated by Wigmore on Evidence, 3rd ed., vol. VIII, p.600, s. 2311:
>
> "No *express* request for secrecy, to be sure, is necessary. But the mere relation of attorney and client does not raise a presumption of confidentiality, and the circumstances are to indicate whether by implication the communication was of a sort intended to be confidential. These circumstances will of course vary in individual cases, and the ruling must therefore depend much on the case in hand."
>
> In my opinion the new trial Judge should conduct a voir dire as to what Quaranta said to Mr. Greenspan and if it appears that Quaranta was not seeking legal advice, but rather relief from intimidation in prison, or if it appears that he expressly or impliedly authorized Mr. Greenspan to divulge his plight to the authorities, then I think Mr. Greenspan can be required to testify before the jury as to what Quaranta said to him in that connection.

See also *O'Shea v. Wood*[6] at page 289:

> Letters are not necessarily privileged because they pass between solicitor and client; in order to be privileged, there must be a professional element in the correspondence.

---

[5] (1974) 24 C.R.N.S. 173

[6] [1891] P.D. 286

And also at page 290:

> Letters containing mere statements of fact are not privileged; they must be of a professional and confidential character. The affidavit in the present case does not allege enough to shew that the correspondence is privileged.

See also *Clergue v. McKay et al.*[7] at page 480:

> It appears to be necessary, therefore, that the affidavit on production should not only state that the correspondence is confidential and of a professional character, but the nature of it must be set forth, without any ambiguity whatever, in order that there may be no doubt as to its being privileged.

It seems evident that privilege can only be claimed document by document and each document can be considered as privileged only to the extent that it meets the criterion which will allow privilege to attach to it. In this regard it has also been held quite frequently that, while part of a document might be privileged, another part of the same document might not be considered as privileged.

When a letter is addressed to a solicitor by the Plaintiff or received by him from his solicitor, it is clear that the question of whether the letter does in fact contain a privileged ocmmunication cannot be determined until it has been opened and read.

There can be no logical nor legal justification for correspondence which appears to have emanated from or to be addressed to a solicitor, enjoying any special aura of protection. It is too easy for a person to obtain envelopes and letterheads bearing the name and title of a real or of a fictitious solicitor and it is equally as easy for a prisoner to camouflage the true identity of an addressee. Even if the correspondence is in fact exchanged with a solicitor,

---

[7] Vol. III, O.L.R. 478

altogether apart from the strict limitations placed on privilege by the common law, one would have to be singularly naïve to believe that, because a person has been either clever enough or fortunate enough to meet the academic requirements to be enrolled as a solicitor or called to the Bar, that that person has attained a higher degree of moral perfection than the ordinary citizen and would somehow be incapable of engaging in correspondence with prisoners which might endanger the security of the institution or of its personnel. Unfortunately, the legal profession has its own fair share of shady characters and even felons. In any event, it is trite to say that the privilege is that of the prisoner and not of the solicitor.

In essence, the problem is the age old one of striking a reasonable balance between conflicting rights and privileges: those of the individual on the one hand and those of society and its essential institutions on the other. It must be borne in mind, however, that the citizen who stands convicted of a criminal offence is presumed to have voluntarily assumed the risk of incarceration with others and all that it entails. If it requires certain restrictive measures to be taken and those measures are not forbidden by law, then, the prisoner must be deemed to have voluntarily run the risk of his normal rights and privileges as a free citizen in our society being limited to the extent that is reasonably necessary to ensure his and his fellow prisoners' welfare and continued incarceration as prescribed by law as well as the security of the institution and of its staff. Indeed, every citizen must expect his normal rights and privileges to be curtailed to the extent that is reasonably necessary to allow the society in which he lives to attain its legitimate objects.

In the present ~~application~~ action there was no evidence nor any suggestion that any communication between the ~~Applicant~~ Plaintiff and his solicitor to which privilege would attach was improperly used or communicated to any other party by the person charged by the head of the institution with the duty of censoring the mail. Furthermore, the relief sought by the ~~Applicant~~ Plaintiff is not to prohibit an improper use of censored mail but to prohibit the opening of the mail to examine its contents even where the head of the institution deems the action necessary. Although it follows that I am not obliged to decide the question, I nevertheless wish to express my view that it would be illegal as well as improper for any person charged with the duty of censoring a prisoner's mail in order to ensure the safety of the institution or of its staff or the continued incarceration or welfare of any of its inmates, to inform any other person of the contents of a privileged communication especially a person who might be the subject of, directly concerned with or indirectly affected by that communication. It is one thing to say that the law gives the institution the right to protect itself, and quite another to say that any privileged communication obtained during the legitimate exercise of that right may be used indiscriminately or improperly after its true character has been ascertained.

It is also unnecessary for me, in order to dispose of the present case, to decide whether once privilege attaches to a communication between a convicted prisoner and his solicitor, that privilege remains an absolute one or whether it cannot even then, in certain circumstances, be subject to or subordinate to other considerations such as the security of the institution or the welfare of the prisoner himself.

A practice seems to be developing lately whereby costs, which are normally awarded against an unsuccessful litigant in a civil matter, are not awarded when the litigant happens to be convicted criminal. This practice, in my view, is to be deplored and discouraged. I can see no reason whatsoever why a person in the position of the ~~Applicant~~ Plaintiff should be afforded special treatment regarding costs which would not be enjoyed by an ordinary citizen. Furthermore, in deciding whether costs should or should not be awarded against an unsuccessful ~~applicant~~ plaintiff, neither the ability to pay nor the difficulty of collection should be a deciding factor but, on the contrary, the awarding or refusal of costs should be based on the merits of the case. Unless special circumstances exist to justify an order to the contrary, costs should normally follow the event. No such circumstances exist here.

For the above reasons, the action will be dismissed with costs.

O T T A W A

November 19, 1976

J.F.C.C.

In the Federal Court of Canada

TRIAL DIVISION

Court No. T-888-76

BETWEEN

WILLIAM (BILLY) SOLOSKY

Plaintiff

— and —

HER MAJESTY THE QUEEN
in the Right of Canada

Defendant

REASONS FOR JUDGMENT
