NAMONA AND NAMONA -v- REGINAM

High Court of Solomon Islands
(Ward C.J.)
Criminal Case No. 1 of 1991
Hearing: 30 January 1991
Judgment: 4 February 1991

Mrs Samuel for the Appellants
DPP for the Respondent

WARD CJ: The appellants were each convicted of three counts of doing an act intended to prevent arrest contrary to section 217 of the Penal Code. Alfred Namona also appeals against sentence.

The ground of appeal against conviction in both cases is simply that the magistrate "convicted on evidence that under all the circumstances of the case is unsafe or unsatisfactory". Such general and vague grounds of appeal are unhelpful to the Court and suggest a lack of care or effort in preparation of the appeal. Mrs Samuel for the appellants (who did not draft the grounds of appeal) has been able to point to no more than some inconsistencies between the accounts given by the prosecution witnesses which had clearly been considered by the learned trial magistrate when reaching his conclusions. On these grounds this Court would have had no hesitation in dismissing the appeal.

However, at the hearing of the appeal, two other matters came up which are worthy of consideration and which I venture to suggest any competent counsel should have included in the grounds.

The first relates to Ben Namona. It had been put to the police witnesses in cross examination that they had been drinking and their evidence was therefore inaccurate. Counsel, in fact, went further and also suggested they may have made it up. In dealing with the case against Ben Namona on these three counts, the learned magistrate stated:

"Conflict of evidence. There is evidence of 5 Police officers who say saw Ben with some weapon. Discrepancies yes but given the nature of incident not surprising. Defence witness saw no weapons. The Defendant says Police Officer drunk or have made up story. As to being drunk 2 officers were sober. I very much doubt the other officers were as drunk as Defendant made out. As for making up story this is hard to sustain given the discrepancies. If made up all stories would agree exactly. On balance I believe evidence of Police that Ben had knife and sling and that he used these weapons in an attempt to prevent Ben's arrest. The evidence by Defendant does not cause me any doubts about Prosecution's evidence and I convict Ben of counts 2, 3 and 4."

It should be pointed out that the trial took place in Lata and the learned magistrate was under considerable pressure of time which accounts for the uncharacteristicly disjointed English but the effect of the whole passage is that the magistrate has gone wrong on the burden and standard of proof. An essential part of the appellants' attack on the prosecution case had been his suggestion the police were too drunk to be able to give a proper account. It was on the prosecution to disprove that beyond reasonable doubt and the use of the phrase "I very much doubt ....." suggests a much lower standard of proof. Similarly, the magistrate's suggestion that the allegation of making up a story "was hard to sustain" raises a doubt as to where he placed the burden of proof.

However, more serious is the passage that follows. In order to convict, the learned magistrate had to find the case proved beyond all reasonable doubt. To have reached the stage that "on balance" he believed the police evidence, does not discharge the burden on the prosecution. Neither is it a correct test of the defence case to see whether it can cause any doubts about the police evidence. That suggests the court may be looking to the accused to disprove the prosecution case rather than for the prosecution to prove it.

In the circumstances, the convictions on counts 2, 3 and 4 against Ben Namona cannot stand and are quashed.

He has not appealed against sentence and so he is left with one month imprisonment for going armed in public and two months for common assault. It appears these were all concurrent and so he is left with a total of two months imprisonment. If he has served that already he is to be released immediately.

The second matter relates to the charges against Alfred. As with Ben, he was charged under section 217(b) and the three charges used identical wording apart from the name of the police officer. I quote the particulars of count 6:-

"Alfred Namona on 9th September 1990 with intent to resist or prevent arrest unlawfully attempted to shoot P.C. 554 Mevea with bow and arrow"

Section 217(b) reads:-

"Any person who, with intent to maim, disfigure or disable any person, or to do some grievous harm to any person, or to resist or prevent the lawful arrest or detention of any person -

(b) unlawfully attempts in any manner to strike any person with any kind of projectile or with a spear, sword, knife or other dangerous or offensive weapon;

is guilty of a felony, and shall liable to imprisonment for life."

The evidence to support that charge was found by the magistrate to be that the appellant had a bow with the arrow fitted to the string and he drew the string back. As each police officer approached, the appellant swung to face him and pointed the bow and arrow at them.

The magistrate, in summing up, considered these actions in relation to the offence in this way:

"Difficult for prosecution to prove exactly what in his mind at the time. Easy for Defendant to say yes I did certain things but I didn't intend to do what you think I did. Law allows intention to be inferred from Defendant's action. If a man lights fuse on dynamite he has to give a good reason why he did so yet did not intend dynamite to explode. At the beginning of incident by Alfred's house no doubt that he was resisting arrest. Knew they were Police officers. Had a bow/arrow and pointed it in their general direction. It is obvious to anyone that bow and arrow dangerous capable of causing serious injury, doing grievous harm. The first act of anyone intending to use a bow and arrow is to fit arrow on string and point it at target. The Defendant has admitted he has done this. He has embarked on a course and second paragraph of s.371 says it is immaterial whether the Defendant does all that is necessary. His intention was clear, he was going to use a bow and arrow to resist arrest. The offence is proved on admission made by Defendant."

Section 371 to which the Magistrate referred states:

"When a person, intending to commit an offence, begins to put his intention into execution by means adapted to its fulfilment, and manifests his intention by some overt act, but does not fulfil his intention to such an extent as to commit the offence, he is deemed to attempt to commit the offence.

It is immaterial, except so far as regards punishment, whether the offender does all that is necessary on his part for completing the commission of the offence, or whether the complete fulfilment of his intention is prevented by circumstances independent of his will, or whether he desists of his own motion from the further prosecution of his intention.

It is immaterial that by reason of circumstances not known to the offender it is impossible in fact to commit the offence."

Thus it can be seen that the learned magistrate was correct to consider the acts of the appellant in relation to the complete offence. It is clear the appellant had committed an overt act that went towards the commission of the offence. However, the court must still, under section 371, consider whether that overt act manifest an intention by the appellant to commit the offence and, in order, to ascertain the intention, it may be necessary to consider the proximity of the act.

Section 217 is an unusual section in that it specifies an intention which relates to the purpose of the criminal act,namely to resist or prevent arrest. However that is not the intention referred to in section 371. What that section refers to in relation to an attempt to commit an offence under section 217(b) is the intention to attempt to strike any person with a projectile. The overt act he performed must be considered against that intention and it is in that context that proximity must be considered.

The learned magistrate correctly found that the use of the bow and arrow was intended to resist arrest. He needed then to consider whether the drawing back of the string was sufficient to drive him to the conclusion the appellant intended to strike the officer with the arrow and was attempting to do so.

The learned magistrate used the example of lighting a fuse on dynamite. With respect I feel that is not a good analogy. Once a fuse is lit, explosion will follow without any further act of the person lighting it. Of course he may still have time to stop it but the lighting of the fuse is the act that directly causes the explosion. Perhaps a closer analogy would be a gun. If an accused man, knowing he was to be arrested, pointed a gun at the officers and released the safety catch as they approached, he would clearly be resisting arrest but not attempting to strike the officer with a projectile. That would occur only when he pulled the trigger. Drawing back the bowstring is, in my opinion, an act as proximate as releasing the safety catch and therefore too remote from the commission of the actual offence.

It would fall within the classic statement of Parke B in *R. v. Eagleson* -

> *"Acts remotely leading towards the commission of the offence are not to be considered as attempts to commit it but acts immediately connected with it are"*

In *DPP v. Stonehouse* (1977) 2 All E.R. 909 @ 917 Lord Diplock cites that passage with approval and puts it in these words:

"The constituent elements of the inchoate crime of an attempt are a physical act by the offender sufficiently proximate to the complete offence and an intention on the part of the offender to commit the complete offence. Acts that are merely preparatory to the commission of the offence ..... are not sufficiently proximate to constitute an attempt. They do not indicate a fixed irrevocable intention to go on to commit the complete offence unless involuntarily prevented from doing so."

The unusual form of section 217(b) also means that the complete offence is only an attempt. Thus, had the appellant shot the arrow but missed the officer, the offence would have been complete if the Court also found that, when he released the arrow, the appellant intended it to strike the officer. Had he not, of course, he would have been attempting something else. The difficulty the magistrate faced was that, as he was considering an offence that is completed by an attempt to commit another offence, the acts he needed to consider were acts that showed an attempt to commit an attempt. The question then is, if he found a particular action was merely preparatory to an attempt to strike and, therefore, insufficiently proximate to that offence, should it be possible to say the same action was proximate enough to an attempt to attempt the offence because the additional attempt is a stage further from the actual striking? Whilst logic would give some support, I consider it is going too far and is not the intention of section 217(b).

It was also suggested the words in section 371 "It is immaterial ..... whether he desists of his own motion from the further prosecution of his intention" take it further than the English authorities. I do not think it does. When the Court considers any individual action, the intention is the accused's intention at the time he does that act. The fact he has a fixed irrevocable intention to go on to commit the complete offence but subsequently decides to desist, does not change his intention at the time of the original action. However it may, as in this case, be strong evidence to negative the suggestion he intended the complete offence at all.

Considering all these points and particularly the fact that he did not go further than drawing back the bowstring despite having time and opportunity to do so, I feel the actions described were not sufficiently proximate to show an intention to attempt to strike the officer with a projectile and so I quash the convictions on counts 6, 7 and 8..

However, at the outset of the hearing the learned magistrate referred to the fact that, if he did not convict under section 217(b), he could consider convicting under section 240(a). That is clearly within his power under section 159 of the Criminal Procedure Code and the facts found by the magistrate clearly proved the appellant had resisted arrest and committed offences under section 240(a). I therefore substitute convictions under that section.

The appellant was sentenced in the lower court to 2 years imprisonment on each offence under section 217 concurrent with each other. In view of the maximum penalty under section 240, I substitute a sentence of 12 months imprisonment on each of counts 6, 7 and 8. The trial magistrate ordered those sentences should also be concurrent with the sentences for counts 4 and 5 and did that, no doubt, in consideration of the total sentence to be served. I feel that the reduced sentences I have passed allow me to reconsider that. The offence of going armed in public such as to cause fear to members of the public is sufficiently separate from the action of using the bow and arrow to resist arrest to merit an additional sentence. In his sentencing judgment the learned magistrate plainly considered the proper sentence for that offence was three months imprisonment although he then misstated it in his summary as one month. I agree the offence merited 3 months imprisonment and I order that sentence consecutive to the sentences for counts 6, 7 and 8 but I will make it concurrent with the sentences for counts 3 and 5.

Alfred appeals against sentence on the ground that the sentences were manifestly excessive. Mrs Samuel has not attempted to urge that ground. She has rather sought to mitigate in terms of the appellant's family circumstances. The result of my order will be a considerable reduction in sentence but apart from that I see no merit in the appeal against sentence and it is dismissed.

Thus the sentence is 1 year 3 months as follows -

Count 3 - 1 month
Count 4 - 3 months
Count 5 - 1 month
To be concurrent with each other.

Count 6 - 12 months
Count 7 - 12 months
Count 8 - 12 months
To be concurrent with each other but consecutive to counts 3, 4 and 5.

(F.G.R. Ward)
CHIEF JUSTICE