

Sikuea & 'Akau'ola v Police

Supreme Court, Nuku'alofa

10 Lewis J
App 933/96

20 May & 13 June 1997

Constitution - trial - exclusion of defendants

Appeal - Magistrates Court - exclusion of defendants

Practice and procedure - summary trial - exclusion of defendants

20 The appellants were convicted after summary trial in the Magistrates' Court, of breaches of provisions of the Criminal Offences Act. The decision of the Magistrate recorded the exclusion of the defendants from court whilst their witnesses were giving evidence.

Held:

1. That was in breach of s.24(4) Magistrates Courts Act and in contravention of cl.11 of the Constitution.
2. An accused person is entitled to be present at every stage of the trial against him, as of right.
3. Convictions set aside.

30

Statutes considered : Constitution, cl 11
Magistrates Courts Act s.24(4)

Counsel for first appellant : Mr Tu'utafaiva
Counsel for second appellant : Mrs Taufaeetau
Counsel for respondent : Mr Cauchi

40 Judgment

These Appeals are against the Judgment of a Magistrate at Halaano delivered on 15 April 1996, in respect of both judgment and sentence.

The Appellants on a large number of grounds would seek to have this Appeal allowed and the convictions, sentences and the Judgment of the Magistrate set aside.

The Appellants were charged (together with one Vaha'akolo Fonofehi whom the Magistrate found not guilty), with breaches of the Criminal Offences Act Cap.15 ('The Act'), section 57. The Defendant Sikuea was convicted of a breach of one count of s.57. The Appellant 'Akau'ola was convicted of a breach of s.57 and under the provisions of section 8 of the Act, was convicted of the offence of abetting a breach of s.57 by Sikuea.

50

The Magistrate further found 'Akau'ola not guilty of a second count of a breach of s.57 and not guilty of a second count of abetting.

In the result, Sikuea appeals a conviction and sentence for one count of a breach of s.57 and a conviction for abetting the commission of an offence by encouraging (abetting) Sikuea in the commission of an offence.

At page 7 of the Judgment of 15 April the Magistrate says:-

"The court told the Defendants to wait outside while their witnesses gave evidence. This is in accordance with s.24(4) of Cap 11 Magistrates Court Act."

60 The statement of the Magistrate is plainly quite incorrect. The Magistrates' Courts Act s.24(4) provides:-

"(4) If the Defendant says that he is not guilty the magistrate shall order the witnesses on both sides to remain out of the hearing of the Court until called upon to give their evidence." (emphasis added)

70 S.24(4) excludes witnesses not Defendants. Counsel tell me that in fact the Defendants were excluded. In my opinion their exclusion is a defect so fundamental that it amounts to a denial of natural justice and vitiates the proceedings. It is in contravention of clause 11 of the Constitution. The defendants at trial were denied the right of hearing just what was being put to their witnesses and consequently what was being said about them in their absence by counsel for the prosecution and indeed, by their co-accused.

It must be understood by all involved in the administration of criminal justice that a person accused of an offence or offences is entitled as of right to be present at every stage of the trial of charges brought against that person. The person charged may of course waive that right but that is a choice which may be made only after the person is made aware of the existence of the choice and the consequences of it. That did not happen in the present case. The Judgment makes it clear in so many words.

80 There are a number of grounds of appeal. Some may have merit, some may not. I am not prepared to comment on rulings I may have made. Regrettably this is one of those cases where the breach at the hearing was so fundamental to the fair trial of the Appellants that I must allow the appeal without going further even though it was not a ground of appeal simply a matter observed by the court at the hearing of the Appeal.

In light of what Counsel have put to me about the matter I propose to allow the appeal, set aside the findings and orders of the Magistrate and discharge the Appellants. I so order. I would add that having regard to the age and nature of the proceedings and the comments of Counsel I do not propose to remit the matter to the Magistrates.