TOLOVA'A (AGAFILI LA'AU) v POLICE

Supreme Court Apia
5 December 1973
Donne CJ

CRIMINAL LAW (Practice and procedure) - Trial (with assessors) - Right and duty of assessors to deliberate in private - Presence throughout deliberations of person chosen to replace any assessor who might become incapacitated during trial - Contravention of principle of privacy even although such person took no part in the deliberations - Irregularity not specified in s 102 of the Criminal Procedure Act 1972 properly to be regarded as a substantial irregularity likely to affect the verdict and lead accused to believe he had not had a fair trial - Such irregularity satisfying Court there had been a miscarriage of justice as contemplated by s 170 of the Act and justification for setting aside the verdict and ordering a retrial:

R v Willmont (1914) Crim App R 173, Goby v Weatherill [1915] 2 KB 674, R v Glen [1966] Crim LR 112, R v McNeil [1967] Crim LR considered.

- Number of assessors - s 93 of the Criminal Procedure Act 1972 makes it mandatory that only the stipulated number of assessors be empanelled - Former practice of empanelling one more than stipulated number as 'emergency assessor' no longer permissible.

APPLICATION for retrial pursuant to s 108 of the Criminal Procedure Act 1972.
Retrial ordered.

Ryan (New Zealand Bar) for applicant.
Scott for Police.

DONNE CJ (orally). This is an application for a retrial made pursuant to the provisions of section 108 of the Criminal Procedure Act 1972. The applicant applied for a retrial on three grounds, the first being that one of the assessors could have been biased against him; the second ground being that he believed another assessor empanelled to be connected to him through a title; and the third ground being that a person, who is called an emergency assessor, sat in on the deliberations which resulted in his being found guilty, and returned with the assessors when they announced their verdict. I have no hesitation in saying, and indeed it is not pressed upon me to hold otherwise, that the first two grounds have not been sustained, the burden being on the applicant to sustain them. It is upon the third ground that the contest lies. It has been the practice for many years in Western Samoa in cases of murder to empanel one more assessor than the number required to deliberate on the trial. That assessor has been

known as the 'emergency assessor' and, while he does not take part in the deliberation unless one of the assessors during the course of the trial becomes incapacitated, he nevertheless sits and listens to the evidence so that if necessary he can take the place of any incapacitated assessor. That practice grew up under the wide procedural powers given to this Court by firstly, the Samoa Act 1921, and subsequently the Judicature Ordinance 1961. However, in 1972 there came in force in Western Samoa the Criminal Procedure Act 1972, section 93 of which says:-

> (1) On a trial in the Supreme Court with assessors the number of assessors shall be 4: Provided that in every trial in which the defendant is charged with an offence punishable by death the number of assessors shall be 5.
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> (2) The assessors for each trial shall be chosen from the list of assessors by the Judge who is to preside at the trial.

Now Mr Ryan on behalf of the applicant contends that this provision is mandatory and makes no allowance for the empanelling of more than the number prescribed in section 93(1). In answer to that submission I am asked by Mr Scott to consider the practice which from time immemorial has been adopted by the Court as a matter of convenience, and to hold that in fact the provision of an emergency assessor does not infringe the law as provided in section 93. Although there is no limit to the number of assessors who may in fact be summoned, I have come to the firm conclusion that the mandatory provision of section 93 requires that there be empanelled only those specified in section 93(1). I feel that the day of emergency assessors is finished unless the Legislature in its wisdom in future sees fit to revive the practice. Consequently, therefore, there is an irregularity as far as the law is concerned in the empanelling of assessors in this particular case.

But the matter goes further than that, in that it has been established that the emergency assessor while not taking any part in the deliberation was in fact present during the whole of the time during which the assessors deliberated. He then came out with the assessors and sat on the assessors' bench when they gave their verdict. Mr Ryan suggests that that irregularity is so substantial that a retrial should be granted. I have been referred to authorities by both counsel for the applicant and for the respondent and I propose to refer to them briefly. The first case which is of assistance is the case of Goby v. Weatherill [1915] 2 K.B. 674, a case where there was in the jury room for a substantial time a stranger. He was the town sergeant, who went into the jury room and remained there for twenty minutes while the jury were considering their verdict. He did not in anyway take part in the deliberations. It was considered by the Court of first instance that this did not amount to an irregularity substantial enough to upset the verdict. However, the matter went to appeal, and Mr Justice Bailhache at p. 675 in a very brief judgment said:-

> The principle is that the jury are entitled, and bound, to deliberate in private. If a stranger, whether an officer of the Court or not, is present for a substantial time during their deliberations, then the verdict is vitiated.

And also at p. 675, Mr Justice Shearman said, "I agree. It is a cardinal principle of the jury system that a jury must deliberate in private."

Again too, I considered the case of the R. v. Glen [1966] Crim. L.R. 112. In that case the jury had retired and the clerk was instructed by the Judge to go to the jury room to enquire whether the jury had reached a verdict or wanted further guidance. He did no more than that. While he was there the jury in fact asked him questions which he quite properly refused to answer. In that case it was held there was no irregularity of a substantial nature as to permit a retrial being ordered.

That case was distinguished from the facts in Goby's case, supra. In that case the stranger decided to go to the room without any instructions from the Judge whereas in Glen's case the Judge had instructed the sergeant to go in to enquire whether the jury required any assistance. And I turn to the case of R. v. Willmont (1914) 10 Cr. App. R. 173. The facts in that particular case are substantially different from the facts of the case before me, but in that decision the Court of Criminal Appeal does make an observation which I think can very well be read here now to indicate the limit which must be observed where a clerk goes to the assessors to enquire the progress of the jurors' deliberations. Reading, L.C.J. said at page 175:-

> He ought not to have entered into any discussion with the jury, or to have put any question to them except, in accordance with the learned judge's request, to have asked whether they had agreed upon their verdict, or were likely to come to an agreement, and he might have asked whether there was any question which they wanted to ask the judge, or whether they required any further direction from the judge, or whether there was any matter on which they required the assistance of the judge. Outside such matters no discussion ought to take place with the jury.

I next turn to the case of R. v. McNeil [1967] Crim. L.R. 540. In that case a person who had previous convictions was convicted of larceny and two uniformed Police officers who were the Court bailiffs in charge of the jury retired with the jury, being unaware that they ought not to do so. This was discovered when the jury returned to the Court to give their verdict. The trial Judge, after being assured by the foreman of the jury that the officers took no part in deliberations, and that the jury did not wish to reconsider the matter, allowed the verdict to be given by the jury. The case went to appeal, and the headnote to the judgment of the Court of Appeal reported in the Criminal Law Review reads:-

> If strangers retire with the jury during their deliberations that is an irregularity which is difficult to cure. In the present case, although no harm was done, McNeil, who had a criminal record, might well feel that he had not had a fair trial when two Police officers retired with the jury.

Those are authorities which I think are apposite in this case.

Now, although undoubtedly there has been an irregularity, I consider that the Court must have due regard to the provision of section 170 of the Criminal Procedure Act 1972, which reads as follows:-

> No information, complaint, summons, conviction, sentence, order, bond, warrant, or other document, and no process or proceeding shall be quashed, set aside, or held invalid by any Court by reason only of any defect, irregularity, omission, or want of form unless the Court is satisfied that there has been a miscarriage of justice.

I must, therefore, be satisfied that by this irregularity there has been a miscarriage of justice. The Court must also have regard to section 102 which deals expressly with the irregularities in relation to assessors, and provides that in such cases the verdict shall not be affected. Section 102 says:-

> No verdict shall be in any way affected by reason of any error, omission or informality in or with respect to any list of assessors, nor by reason of any assessor having been notified to sit as an assessor otherwise than as hereinbefore in that behalf provided, nor by reason of any assessor not being qualified to sit as an assessor as hereinbefore in that behalf provided.

In my view, section 102 must be considered because it sets out what the Legislature is prepared to allow by way of irregularities relating to assessors without affecting the verdict. There are three such irregularities, and since the one in this case is not one of those, I consider the Court can properly regard it as substantial, particularly in the light of the above cases. The Legislature has defined the insubstantial irregularities, anything else must be regarded as substantial. As was said in the commentary to McNeil's case to which I have referred:-

> The Court attaches great importance to the prevention of a feeling of grievance on the part of accused persons and that seems to have been the main reason for quashing the conviction in the present case. Cf. cases in which sentences are reduced on the ground that otherwise the convicted person will feel a sense of grievance.

In my view, the accused could feel that there had been an irregularity which could have affected the decision. The irregularity I have found to be a substantial one, and on weighing all these matters, I have come to the conclusion that there has been a miscarriage of justice. I accordingly order a retrial in this matter to take place in the next sessions of this Court commencing in February, the date to be notified.

Solicitor for applicant: Ryan (New Zealand Bar).
Solicitors for Police: Office of the Attorney-General.