OLOSA'A (AMANI) v POLICE

Court of Appeal Apia

7 November 1990

CRIMINAL LAW - Arson - leave to appeal - granting of special leave - no written transcript of Magistrate's decision - inconsistencies in prosecution evidence both with confessional statement and oral testimony.

HELD: The evidence of an alibi and the evidence of the Defendants inability to read or write raised questions of unfairness as to the confession he signed. The Magistrate's lack of notes on the trial meant weighting of the evidence could not be established. In the interest of justice a new trial was ordered.

R v Dalby [1990] 1 NZLR 184

LEGISLATION:

- Judicature Ordinance 1961; S 64

J Upton, R Drake for Appellant
C Peteru for Respondent

JUDGMENT. Amani Olosa'a was convicted on a charge of arson in the Magistrate's Court Apia on 14 September 1988. He appealed to the Supreme Court, but his appeal was dismissed on 14 November 1988. On the 27th February 1989 the then Chief Justice Maxwell purported to give leave to appeal to this Court and gave certain consequential directions.

On Wednesday 7th November we announced that the appeal would be allowed and that our reasons would be given later. This we now do.

JURISDICTION

At the hearing before us both Counsel accepted that Maxwell CJ's order granting leave was a nullity. It was delivered surprisingly enough without the Chief Justice having the transcript of Ryan J's decision on the appeal.

The question then arose whether, in the circumstances of this case we should grant special leave under section 64 of the Judicature Ordinance 1961 which empowers this Court at any time to grant special leave to appeal from any final judgment of the Supreme Court.

Leave was accordingly granted under section 64 if only because the Appellant had been lead to believe that his appeal would be entertained.

ADMISSION OF FURTHER EVIDENCE

As part of his directions Maxwell CJ allowed the Appellant to adduce additional evidence to support an alibi. Clearly this order is also a nullity that issue being for this Court.

We therefore heard submissions whether this Court should grant that leave in order to determine whether there was any basis for the submission that a possible miscarriage of justice had occurred. For this purpose we looked at the record only.

The principal grounds for the Appellant's case in this respect were:

(a) There was no written transcript of the Magistrate's decision;

(b) That there were patent inconsistencies in the prosecution evidence and in particular between the confessional statement and the oral testimony.

The Respondent submitted that the Appellant chose not to have Counsel at the hearing in the Magistrate's Court, that the essential findings of fact made by the Magistrate were implicit from the fact of conviction and that Ryan J had fully considered the matter.

In our judgment the dominant factor is the absence of any note or transcript of the Magistrate's decision. We say this for two reasons:

1. While it may be inferred from his actual decision that he rejected the Appellant's evidence on the voluntariness of the confessional statement, we do not know if he directed

his mind to the correct onus of proof in proving a statement was voluntary nor do we know if he adopted the correct standard i.e. proof beyond reasonable doubt;

2. There was material in the prosecution evidence from the witness Sivea which, if accepted, could lead to the conclusion that the Appellant could not have lit the fire. We do not know if the Magistrate found the witness credible and if so what weight he placed on that evidence or indeed whether he dealt with this important piece of evidence at all.

Hence we gave leave to adduce the further evidence in affidavit form for this limited purpose.

We now turn to the appeal itself.

FACTS

On 13th March 1988 Meredith's store at Salelologa was destroyed by fire. There was evidence that this fire was deliberately lit. An insurance claim for a large sum was lodged and rejected on 22 June 1988. On 18th August 1988 the Appellant was interviewed by the Police when he made the statement and convicted on 14 September 1988 and on 13 October 1988 sentenced to two years imprisonment.

EVIDENCE BEFORE MAGISTRATE'S COURT

The only evidence implicating the Appellant was the statement made some five months after the fire. The statement recorded that he had been employed by Meredith before the fire, not given any pay, had a grudge against Meredith and for that reason lit the fire.

The interviewing officer Sgt Tame gave evidence of his conversation with the Appellant in which he said "I burned the house of Herman" and the Sgt deposed that the Appellant read the statement wrote on it at the Sgt's direction in Samoan "I have read it (the statement) and found it true and correct" and signed it.

A prosecution witness Epenses Fiu Sivea said that the Appellant was home when Meredith's house burned and when the fire was progressing well "he had just woken with his wife - my sister".

The Appellant testified that the statement was false, that he only signed because he wanted to go home and that the Sgt helped him with his signature, he being illiterate.

He was convicted but we do not know on what basis.

HEARING IN SUPREME COURT

On his appeal he was represented by Counsel but at the hearing before us a very surprising fact emerged namely that Counsel did not have the Notes of Evidence when the Appeal was heard. Clearly the Judge did, as he referred to them and why Counsel did not protest is beyond us.

Reading the Judgment of Ryan J we are left with the uneasy feeling that this case was not fully argued before him as material in the notes favourable to the Appellant cannot have been advanced by his Counsel.

His appeal was dismissed.

HEARING IN THIS COURT

In this Court Ryan J's judgment was attacked on a number of grounds principally the treatment of the statement coupled with the absence of the transcript.

It further emerged in this court (albeit somewhat grudgingly) that the party with the real interest in this matter was the insurance company because the Appellant's conviction for arson would weaken the insurance company's stance that it was Meredith himself who lit the fire. Hence we view with reserve some of Counsel's eloquent rhetoric as to the liberty of the subject in Western Samoa; excessive Police zeal and the absence of Legal Aid in the Magistrate's Court. For instance the judgement records that two Police Officers were present when the statement was taken, but the evidence shows that there was only one. Further the Judge erred in saying that the Magistrate had a discretion whether or not to admit the evidence when the position is that the prosecution must prove beyond reasonable doubt that the statement was voluntary and it is only then that the issue of fairness arises and if circumstances showing unfairness are raised the burden thereafter rests on the prosecution to negate unfairness to the exclusion of any reasonable doubt. R v Dalby [1990] 1 NZLR 184.

CONCLUSION

We think the affidavit evidence as to alibi if accepted would confirm what Sivea said. Again we think that the affidavit evidence as to the Appellant's inability to read and write, if accepted, would impugn the statement or at least raise issues of unfairness which the prosecution would then have to negate.

When all this is set against the fact that we do not know how the Magistrate set about his task we think that the possibility that a miscarriage of justice has occurred is strong enough to lead us to the decision already announced, namely that pursuant to Section 56 there shall be a new trial before the Magistrate's Court.

In the circumstances there will be no order as to costs.

The Appellant is granted bail on this matter to take effect if circumstances so permit on the same terms as where originally set.