

PHILIP KIAP -v- REGINA

HIGH COURT OF SOLOMON ISLANDS
(KABUI, J.)

Criminal Appeal No. 237 of 2005

Date of Hearing: 22nd September 2005.

Date of Hearing: 28th September 2005.

J. Chauchi for the Crown.

K. L. Anderson (Mrs) for the Appellant.

JUDGMENT

Kabui, J. Philip Kiap is a prisoner serving a sentence of imprisonment for twelve months in the Rove Prisons. He pleaded guilty to a charge of making liquor without the permission of the Minister, contravening section 50 of the Liquor Act. He disputes the fact that he pleaded guilty and wants his conviction quashed. If his conviction is not quashed, he wants his sentence reduced. This is why he has appealed against his conviction and sentence. The grounds for his appeal are set out in his notice of appeal.

Grounds of appeal.

The first ground of appeal is that the Magistrate was wrong in law in not allowing him to speak or ask questions in court being a lay man and so his pleading guilty as recorded by the Magistrate was not a valid guilty plea. In the event he does not succeed on the first ground, he alleges that the sentence of imprisonment for twelve months is manifestly excessive.

The appeal against conviction.

Kiap wrote to the Public Solicitor in Honiara on 13th April 2005 from Lata Prison expressing his wish to appeal against his conviction and sentence. His appeal was formulated and filed by the Public Solicitor's Office on 26th April 2005. Kiap is the oldest of his co-accused being of fifty-five years old. His co-accused are fit to be his sons, being nineteen, twenty-one and twenty-three years old respectively. The court record shows that the Magistrate put the charge to the accused and then the charge was read and explained to them. The Magistrate recorded, "We understand the charges." When the plea was taken, each of the accused, including Kiap, said, "Hemi true." The Magistrate then entered a guilty plea for each of them and sentenced each of them accordingly. Kiap does not say he did not understand the nature of the

charge but rather he did not participate in the production of kwaso as alleged by the Crown. He says the Magistrate did not listen to him and gave him time to speak and defend himself against the charge laid against him. It is now a question of whether or not I should believe him.

In his affidavit dated 21st September 2005, he says that the Magistrate did not ask him separately whether the charge was true or not. He says when his co-accused pleaded guilty and sat down, he remained standing and tried to tell his story to the court. He says the Magistrate told him to sit down and he did so and said no more. He says he had told the Magistrate that he had gone to the house to have food after prayers. In terms of section 195 of the CPC, the Magistrate made no error. That is to say, the Magistrate did put the charge to them and each of them pleaded guilty by saying "Hemi true". There is nothing on the record which would cause me to question the correctness of Kiap's guilty plea.

The facts presented to the Magistrate.

The facts were that Kiap and his co-accused were inside a copra drier building when they were seen by Aloha. The time they were seen was about 2am in the night. Peter Taea was holding a tube and a cylinder and a bucket were beside them. After Kiap and his co-accused returned to the village, Aloha went back to the copra drier building and saw a one and half litre of brewed kwaso. He confirmed it was kwaso by smelling it. He took a sample of it and gave it to the Police.

The circumstantial evidence.

It is not disputed that the copra drier building is some distance from the village. It was obvious that the kwaso making implements were there in the copra drier building. Aloha did not say what Ben Kimala and David Manikeni were doing at the time he saw them with Kiap and Peter Taea in the same way he did not say what Kiap was doing. The evidence against all of them was circumstantial but a strong one at that. It was night time and they were alone, away from the village. What else would Kiap have been in that copra drier building for at that time of the night? In his letter of appeal to the Public Solicitor, he said that he was at the place where his co-accused were but he did not see what they were doing. He said the charge was forced upon him by a certain police officer who had a grudge against him. However, he did not say exactly where in the copra drier building he was to distance himself from his co-accused. Was he not the instigator? Was he just an innocent bystander? Did he not turn a blind eye to what was being done? Was he not part of it? Why did he not stop his co-accused from brewing kwaso? He was the oldest, the matured man and wise counsel to his co-

accused. Why did he blame a certain police officer for bringing the charge against him? He said in mitigation that he was invited but that is no excuse if he had participated in aiding and abetting the brewing of kwaso after the invitation.

Conclusion.

Whilst his co-accused filed affidavits supporting him, they were his co-accused. Is it not the case that they were shielding Kiap because he is old and should not be imprisoned?

The Magistrate is a Principal Magistrate with experience. I do not think the Magistrate was foolish enough to do what Kiap said the Magistrate did to him. The charge sheets are separate and so the plea taken on each of them must have been separate also. They were not jointly charged with one count of brewing kwaso without the Minister's consent. Each of the accused understood the charge being put to him and pleaded separately. It is possible that each charge was put and explained separately but the individual answers were combined and recorded as "**We understand the charges**". The same was done after the facts had been read out. The Magistrate recorded, "**We understand the facts and it is true and correct.**" However, when the pleas were taken, the guilty pleas were unequivocal. The plea "**Hemi true**" in each case can be nothing else but an admission that the charge was true. The charge was not a complicated one to explain and be understood by Kiap and his co-accused. I do not believe that Kiap intended to plead not guilty and the Magistrate entered a plea of guilty instead for reasons only known to the Magistrate. Kiap does paint the picture that the Magistrate was biased towards him for some unexplained reason. I find it unconvincing the affidavit evidence of Kiap's co-accused because of the inherent risk of being biased and colluding to get Kiap out of trouble and for his co-accused to bear the blame and spare the old man from punishment. Even if the Magistrate was not biased but made an innocent error during the arraignment process, that error can be corrected on an appeal. I find no such error on the record. The appeal against conviction is dismissed.

Appeal against sentence.

The Magistrate took into account Kiap's guilty plea. He expressed remorse. He admitted being in the house but on invitation. Whilst that invitation may point to a defence, it is not because participation in the commission of the offence after invitation can be no defence. He has one previous conviction in August, 2004 for a similar offence for which he was sentenced to imprisonment for four months. The Magistrate did regard the social effect kwaso drinking had on the community as being undesirable and should be

stopped. The sentence of imprisonment for twelve months was to reflect the abhorrence of the community towards kwaso drinking and its manufacture by persons like Kiap. Kiap is a re-offender but is nearing sixty years old. The sentence I would impose is imprisonment for seven months in substitution for the sentence imposed by the Magistrate. That is, I quash the sentence of imprisonment for twelve months and substitute a sentence of imprisonment for seven months.

The orders of the Court.

1. Appeal against conviction is dismissed.
2. Appeal against sentence is allowed.
3. Sentence of imprisonment for twelve months is quashed and a sentence of imprisonment for seven months is substituted.

I order accordingly.

F.O. Kabui
Puisne Judge