Police v Moala

Supreme Court, Nuku'alofa
Hampton CJ
Cr App 59/97

11 July 1997

Passports - false statement - forms
Immigration Act - arrival - declaration - forms
Appeal - criminal proof

The police appealed against the dismissal of 3 charges brought in the Magistrates' Court; one of making a false statement when applying for a passport; the other 2 of making a false statement to immigration when entering Tonga.

Held, dismissing the appeals

1. The form signed by the respondent when applying for his passport was not the form prescribed in the Passport Act.
2. As to the other 2 charges the Magistrate had found a lack of the necesary intent required to be proved and the court, on appeal, was not brought to disagree with that.
3. (Obiter) Again the forms used did not comply with the requirements of the Immigration Act, and in any event the forms were not declarations as required by the Act.

Statutes considered : Passports Act
Immigration Act
Criminal Offences Act

Counsel for appellant : Ms Tapueluelu
Counsel for respondent : Mrs Taufaeteau

Judgment

The police have appealed against the dismissal of 3 charges brought by them against the respondent, 'Eakalafi Moala, in the Magistrates' Court; those charges having been heard by a senior and experienced Magistrate on 14th November 1996, and he having delivered a reserved judgment on the 19th November 1996.

I have reached the view that the appeal cannot succeed. The 1st charge I would deal with in this appeal is the appeal against the dismissal of the charge that had been brought under sections 19 and 21 of the Passports Act (Cap. 61). The charge was to the effect that the defendant, the respondent here, made a false statement in an application for a Tongan passport, and in particular in a statement, in section 7 B of the form that he completed on 17th August 1994, which reads "that I have not lost the status of Tongan subject".

The Magistrate in dismissing that charge gave various reasons including one which I consider to be fundamental and which meant that this prosecution could never have succeeded. Section 19 of the Passports Act, under which the respondent was charged, provides that should any person applying for a passport or renewal of passport make a false statement in any declaration required to be made by persons so applying then he will be guilty of an offence; and section 21 goes on to provide a penalty.

The wording in section 19, and in particular the words "declaration required to be made by persons so applying" relate back to section 12 of the Act where it says the applicant for a passport "shall sign a declaration in Form II of Schedule 1 hereto." Form II sets out a detailed "Declaration to be Made by Applicant for a Passport or Certificate of Identity." That form as contained in Schedule 1 of the Act bears no relationship whatsoever to the actual form filled out by the respondent in August 1994, Exhibit A, which is headed up as being "Application for Tongan Passport".

In fact not only does it bears no resemblence to the form signed by the respondent, but the form in the Schedule has a very solemn declaration and attestation to it, and "the declaration should be made before the Minister of Police in Tongatapu or before the Senior Police Official of the District in which the applicant resides if other than Tongatapu."

The Magistrate in considering this charge said that Exhibit A did not relate to the form which the Passports Act allows for when applying for a Tongan passport. And therefore, the Court had not seen any evidence that the form signed by the respondent, that is Exhibit A, was legal.

With that comment, this Court can only but agree. The effect of sections 12 and 19 are conclusive, coupled with the form set out in Form II of Schedule 1. If the authorities do not choose to abide by the prescribed forms in their own Acts of the Legislative Assembly, which control the particular activity in question, then they cannot be heard to complain if prosecutions taken, on forms which do not comply with the Act, are thrown out.

The charge was rightfully dismissed.

The other 2 charges were brought under section 64 sub-section 1 para (a) of the Criminal Offences Act (Cap. 18). They are related to what are called "Immigration Arrival Cards" completed by the defendant below (the respondent here) when he came by aeroplane to Tonga on 2 ocassions on 4 September 1995 (that Card is Exhibit C) and on 13 March 1996 (that Card is Exhibit D).

It is said in the 2 charges, Nos. 404 an 405, in the court below, that Mr Moala when

making a statement in the Immigration Arrival Card, made a statement that he knew to be false by filling in that he was a Tongan subject when he had already been naturalised as an American citizen. And the answers in the two forms, C and D, which are challenged as being false, are the answers to entry 3 which question is headed "Country of Citizenship" and in each case Mr Moala in answer had entered "Tonga".

Before looking at some of the technical aspects relating to the forms themselves that do carry some concerns in my mind, I look at the basis on which the Magistrate dealt with the 2 charges in dismissing them. The charges were brought under section 64(1) of the Criminal Offences Act which says "Any person who knowingly and wilfully makes otherwise than on oath a statement false in a material particular and the statement is made "(and it sets out where the statement should be made and I will come to that shortly,)" shall be guilty of an offence ..."

I stress the words "knowingly and wilfully makes" a statement false in a material particular. And it seems to me reading the reserved decision of the learned Magistrate, that he rightly focused on that state of mind "knowingly and wilfully" which is one of the fundamental ingredients of this criminal charge and which must be proved beyond reasonable doubt by the prosecution, if the prosecution is to succeed on a charge of this nature.

The learned Magistrate (as I say, a senior and experienced Magistrate) heard the evidence, then reserved his decision. In giving his decision he focused on that proof of state of mind "knowingly and wilfully" and made it the subject to of virtually all the remarks he made in the course of his decision. He found on all the evidence that that proof of knowingly and wilfully making a statement false in a material particular was not made out by the prosecution.

The prosecution relied, to a considerable extent, on the statements made by the respondent himself in the course of interview (question and answer interview, Exhibit E of 6th October 1996); and on the answers given as well on that same date when the respondent was charged with these 2 offences alleged of making false statements on the Arrival Cards. Consistently throughout that interview and the charging process the respondent said, repeatedly, that he believed that he was a Tongan subject, that his status had not been affected even although some years before he had taken out a US passport.

That was what he said throughout. That was picked up by the Magistrate and the Magistrate in weighing all the evidence concluded that element of knowingly and wilfully making a statement false in a material particular had not been proved beyond reasonable doubt. The Magistrate had considerable advantage over this Court. This Court is not in a position, as it has considered the notes of evidence, the argument and the Exhibits, to disagree with the conclusions of the learned Magistrate. And for that reason if no other, the appeals against the dismissals of those 2 charges should be rejected.

I go on to add some further concerns that have come to my mind, as I have listened to the argument and looked at the Exhibits in this case. It seems to me that there may be difficulties with forms involved here as well. The respondent was specifically charged under section 64(1)(a) of knowingly and wilfully making a statement false in a material particular, "and the statement is made (a) in an account, certificate, declaration, entry, inventory, notice or other document which he is authorised or required to make attest or verify by any written law."

What written law, I ask, authorises or requires a person in the position of Mr Moala

to make these Immigration Arrival Cards? I look at the Immigration Act (Cap. 62). Section 5 sub-section (1c) says this: "For the purpose of exercising his powers and functions and carrying out his duties under this Act, any Immigration Officer may ... (c) require any person who desires to enter ... the Kingdom to make and sign any prescribed form of declaration." There is no prescribed form of declaration set out in the Act, or in any Schedule to the Act (in fact there is no Schedule to the Act).

There are Regulations, Immigration Regulations, made pursuant to section 37 of the Immigration Act. Interestingly enough, and I look at the Act for a start, section 37 sub-section 1(b) says: "that the Prime Minister may with the consent of Cabinet make Regulations not inconsistent with the provisions of this Act for all or any of the following purposes ... (b) prescribing the forms to be used for the purposes of this Act ..."

The Immigration Regulations, made under section 37, do not prescribe "forms to be used for the purposes of this Act" and certainly do not prescribe forms such as the Immigration Arrival Cards which were Exhibits C and D and which were the essence of these prosecutions.

Regulation 10 does say that "The Principal Immigration Officer may cause to be used for the purposes of the Act and of these regulations such forms and stamps as he may deem necessary and convenient for carrying out or giving effect to the provisions of the Act and of these regulations."

I have real reservations about the validity of Regulation 10 and of any forms said to be made and used under Regulation 10. If one looks back at the Act, for example section 5(1)(c) : there should be a "prescribed form of declaration." Section 37(1)(b) then allows Regulations to be made (by the Prime Minister with the consent of Cabinet, I remind myself) "prescribing the forms to be used". The Regulations do not do that and to have a Regulation as Regulation 10 is, it seems to me, is to have a regulation which is ultra vires, outside the powers given in, the enactment. However I say this as obiter. It is not the basis of my decision. I gave the basis earlier on, upholding what the learned Magistrate had said, but the Regulations, the forms, the enactment, as I have said, I have real concerns about and it seems to me that they are matters that should be considered by the appropriate authorities.

In any event, and as well this is obiter, it is not the basis of my judgment, but how can a form (such as Exhibit C and Exhibit D) be said to be a declaration? There was no declaration on the forms, yet the requirement under section 5(1)(c) is for a declaration.

Again, an area of concern which I draw to the attention of the appropriate authorities in relation to the Immigration Act, the Regulations and the forms.

As with the 1st charge which I considered, in relation to these 2 other charges brought under the Criminal Offences Act, I find that this appeal broought by the prosecution should be dismissed, and it is accordingly.