Pohiva v Lasike

Supreme Court, Nuku'alofa
Hampton CJ
Cr App 95/96

1 August 1997

Criminal law - autrefois convict - conditions
Constitution - criminal charge - internal proceeding of Legislative Assembly
Sentencing - probation - when appropriate

The appellant, a people's representative in the Legislative Assembly, was convicted of assault and placed on probation for 3 years as a result of throwing a book at the acting Speaker of the Assembly, whilst the Assembly was in session. The appellant was suspended from the Assembly for 14 days and lost pay and allowances.

Held:

1. A defendant cannot consent to give a court jurisdiction if it does not have such.
2. The defendant had never been jeopardy on an assault charge before the Legislative Assembly, which matter was a disciplinary, and very different, matter, so that the special plea of autrefois convict was rightly rejected by the Magistrate.
3. A court, on such a special plea, must consider whether the offence charged in the later proceedings is the same or in effect the same, as the offence charged in the former proceedings. The defendant, to succeed on such a special plea, must have been in peril for the same offence, both in fact and in law.
4. The hearing of an assault charge in these circumstances, was not an inquiry into the internal proceedings of the Assembly but was a hearing of an allegation that there had been criminal behaviour in the Assembly.
5. The sentence imposed was inappropriate, however, probation neither being necessary nor desirable. Probation is a means to try to control and modify aberrant behaviour. Probation term quashed and appellant convicted and ordered to pay costs only.

Cases considered : Connelly v D.P.P. [1964] AC 1254
Fotofili v Siale [1987] SPLR 339 [1996] Tonga LR

Appellant in person
Counsel for respondent : Mr Kaufusi

Judgment

This is an appeal by the appellant against a decision of a magistrate on a charge of common assault. The appellant was convicted on that charge and placed on probation for a period of 3 years, the maximum term permissible under section 198 of the Criminal Offences Act.

The matter arises out of events that took place in the Legislative Assembly of the Kingdom on 2nd August 1995, during a sitting of the Assembly. The incident in question occurred when the appellant, a member of the Legislative Assembly, having in his hand a Volume of the Laws of Tonga and being in the course of a speech in debate in the House, and being interrupted or cut off by the Acting Speaker, the Honourable Lasike, in an upset reaction threw the Volume at, and hit, the Honourable Lasike.

A literal version of throwing the book at somebody. The first result of that incident was that the appellant, under Rule 69 of the Rules for Proceedings and Standing Orders of the Legislative Assembly of Tonga (which Rules are made under Clause 62 of the Constitution) was brought before the Legislative Assembly and was suspended from the Assembly for a period of 14 days (the maximum allowed under Rule 69) with a resultant loss of his pay and allowances of some $1,200.

Rules 69 allows for up to 14 days suspension from the House if the members so resolve and such suspension, as I am told here was the case, was for an offence (and that is the word used in the Rule) of disregarding the authority of the Speaker and/or of abusing the Rules of the House.

The appellant says, both in his written submissions and in his oral argument before me (and he has argued the matter in person today), that what was done by the Legislative Assembly was in accordance with its Rules and procedures, as prescribed in Rule 69.

That was the first result of the incident.

The second result is that the Honourable Lasike, the Acting Speaker (as was his right under section 197, sub-section 2, of the Criminal Offences Act), as the person aggrieved, brought a private prosecution against the appellant for assault, a charge laid under section 112 of the Criminal Offences Act. That prosecution was brought in the Magistrates Court. The appellant appeared in person. Initially he seems to have pleaded guilty, but was then allowed to argue the special plea of autrefois convict, saying that he could not be dealt with by the Court (i.e. the Court did not have jurisdiction and power to deal with him) because he had already been dealt with, in relation to the same matter, by the Legislative Assembly.

In the Magistrates Court, as here, he referred to Clause 12 of the Constitution, a double jeopardy provision, which says in its relevant part that "no one shall be tried again for any offence, for which he has already been tried, whether he was acquitted or convicted".

I pause and deal with an issue which has been raised by Mr Kaufusi for the respondent here before me. Mr Kaufusi in writing, and orally, says that because of the appellant's plea of guilty in the Magistrates' Court, he had surrendered himself to the jurisdiction of that Court, and therefore could not argue the autrefois convict special plea as he was allowed to do and as he had done before me.

That argument of Mr Kaufusi's cannot be correct. Either a Court has jurisdiction or it does not. If it does not, if it does not have the jurisdiction or power to deal with the matter, then it matters not whether the accused person consents to it, or submits to it having

jurisdiction or not.

A Court cannot be given jurisdiction it does not have. And so here, if the appellant is correct in his arguments, the mere fact that he pleaded guilty does not mean that he had given, or could give, to the Court jurisdiction that it did not have.

The Magistrate dealt with that special plea of autrefois convict with a great deal of care. She heard submissions on it over a number of days. She had the opportunity to consider it, and obviously had because in her decision given on the last day of the hearing, she referred to a number of authorities both in England and in other Commonwealth jurisdictions which had not been referred to her in the course of argument. She rejected the plea of autrefois convict and rightly, in my view, rejected that submission.

The appellant was not in jeopardy, never was in jeopardy, on a criminal assault charge before the Legislative Assembly. The matter before the Legislative Assembly was a very different matter. It was, as I have said, to do with disregarding the authority of the Speaker, a disciplinary matter, and a very different matter, a substantially different matter, to the specific criminal offence charged in the Magistrates' Court under section 112 of the Criminal Offences Act, a charge of a common assault.

The authorities on the special pleas of autrefois acquit and autrefois convict make it clear that on such a special plea, a Court must consider whether the offence charged in the later proceeding is the same, or in effect the same, as the offence charged in the former proceedings. It is immaterial that the facts under examination, or the witnesses called in the later proceedings, are the same as those in the earlier proceedings.

For the doctrine of autrefois convict to apply the accused in effect must have been in peril for the same offence, both in fact and in law, with which he has been previously charged and convicted. The offences must be exactly the same in law, because legal characteristics are precise and either they are the same or they are not.

Those propositions are take from the House of Lords case of Connelly v DPP [1964] A.C. 1254. If those criteria are put alongside what happened here, it can be seen immediately that the Magistrate was right that these were very different matters, substantially different matters, i.e. the Legislative Assembly matter was very, and substantially, different to that before the Magistrate in her criminal jurisdiction.

Rule 69 appears in Part XVI of the Legislative Assembly Rules under the heading of "Rules of Debate". It is one of a number of Rules which are designed, quite properly, to regulate and control matters of debates in the House. It was a contravention of that Rule, as to debates in the House, that led to the suspension of the appellant for 14 days.

There is some force in what was said, in the course of submissions in the Magistrates' Court, on behalf of the respondent. If say this attack on the Acting Speaker had been a grievous one, is it possible that because the Legislative Assembly took immediate steps to suspend the member who was the attacker, that that member could not be charged with some offence of grievous bodily harm or indeed, if death subsequently resulted, with murder. That is not the case. It would be an absurd result and it is not what the law provides.

As argued before me, and indeed before the Magistrate, the appellant says that the Court is interfering with internal matters of the Legislative Assembly. And that in conducting, or allowing the conducting of a prosecution for assault in the Magistrates' Court, the Magistrate was inquiring into the regularity of the Legislative Assembly's own proceedings.

That misunderstands the law in relation to this aspect and in particular it misunderstands what was said by the Privy Council in the case referred to me of Fotofili & Others v Siale [1996] Tonga LR but which, for convenience sake I refer to in the report in [1987] S.P.L.R. 339 and in particular extracts at 348 and 349. Two extracts are referred to. The first page 348: "there is ample authority for the proposition that when a matter is a "proceeding" of the House beginning and terminating within its own Rules, it is outside the jurisdiction of the Courts."

The Magistrates' Court here, and this Court, is not asked to enquire into the "proceeding" before the House, which was the motion to suspend under Rule 69. The Magistrates' Court was not being asked to enquire into that at all. If it had been asked to do so in some way, to review that (and it could not, because the jurisdiction under the Constitution would be that of the Supreme Court in any event), but if it had been asked to do so then a Court would be faced with this injunction which comes from page 349 of the Siale case, that the Court if it were to inquire into internal proceedings of the Assembly, can only do so if "the Assembly has ... acted contrary to the provisions of the Constitution in the course of those proceedings."

But here in the Magistrates' Court, and in this Court, there was not an enquiry into what the Legislative Assembly did in relation to the Rule 69 proceedings. It had nothing to do with the matter and indeed, as the appellant himself conceded and as I referred to earlier, what was done by the Assembly was in accordance with its Rules and Procedures. So what was done by the Assembly was not under scrutiny at all. What was under scrutiny was the allegation that there had been criminal behaviour in the House and in that regard the Courts do have jurisdiction.

Insofar as the Magistrates' Court is concerned the line is this way. Clause 84 of the Constitution says, in its relevant part, that the judicial power of the Kingdom shall be vested in, inter alia, the Magistrates' Court. Then, in the Magistrates Court Act, section 11, sub-section 1, makes it quite clear that "Every Magistrate shall have jurisdiction to hear and determine all criminal cases in which the punishment provided by law does not exceed $1,000 or 3 years imprisonment."

The offence charged in front of the Magistrate here, under section 112 of the Criminal Offences Act, was within the jurisdiction of the Magistrate. It is spelt out in this way in s.112 "Is liable on summary conviction to a fine not exceeding $500 or to imprisonment for any period not exceeding 1 year or to both."

Therefore on both limbs that were argued in front of the Magistrate, and as are in front of me, I find that the Magistrate was correct. She was correct to reject that special plea that she had allowed, quite properly, to be argued. I do not intend to go in to further detail. The appellant was not being tried for the same offence twice, and that plea was properly rejected.

On that occurring, he indicated then his plea of guilty. He was convicted by the Magistrate, again quite properly in my view, and was then placed on probation, as I have said for 3 years, and ordered to pay costs of the prosecution in the sum of $350.

I have reached the view that latter portion of the Magistrate's decision, that is the sentence, is one that should be reviewed by me. Mr Kaufusi says that the sentence as pect was not directly raised (as I understand him) in the notice of appeal filed by the appellant. The notice of appeal is a notice of general appeal. It is an appeal against the decision of the Magistate and it refers in the notice to it being an appeal against the

conviction and the discharge on probation for 3 years, that being the decision of the Magistrate.

I take the view that the notice of appeal does raise the question of sentence. In any event, looking at section 80 of the Magistrates Court Act, in my view the sentence was open to be considered by this Court. It seems to me that a sentence of probation, particular for the maximum term of 3 years, was an in appropriate sentence. Not only was the term of probation excessive, but indeed probation itself was inappropriate in all the circumstances that were involved in this prosecution.

I cannot see anything from any of the materials before the learned Magistrate that would indicate that probation was necessary or desirable or, as I have said, appropriate. There was no need for it. I have some degree of sympathy for the appellant when he puts forward the position, as he does, that given what had happened in the House in terms of his suspension and his loss of wages and allowances of some $1,200, in reality he had been punished, and punished sufficiently, already.

Given those circumstances, I am of the view that the appropriate way to have dealt with this matter was to have marked out the seriousness of what was done by entering a conviction, so that it goes on his record as a conviction for assault; was to order the payment of the costs that were awarded(that is the $350 costs of prosecution together with the $8 Court costs), but to impose no further or other penalty.

Probation is a sentence that is supposed to be used to try and control and modify aberrant behaviour, particularly aberrant criminal behaviour. It is not, in my view, an appropriate penalty for something that has occurred in the circumstances and in the way that this event occurred.

The result is that the appeal against conviction is dismissed. The appeal against sentence is allowed. The term of probation is quashed and, in lieu, the position will be that the appellant will be convicted, ordered to pay costs of prosecution (as ordered below) that is $350 and Court costs of $8, as in the Court below, but without any further penalty.

Insofar as costs in this Court in concerned I do not intend to award costs either way, in all these circumstances.