TUMANUVAO (MELESALA) v POLICE

Supreme Court Apia
3 April; 1 May 1978
Nicholson CJ

CRIMINAL LAW (Evidence) - Statement to Police (Procedure to determine admissibility) - Proper procedure in Magistrates' Courts to permit statement to be put in as exhibit and defer consideration of its admissibility until all of the evidence, including that for the defence, is completed - Procedure by "trial within a trial" (voire dire or voir dire) inappropriate when judge sitting alone.

- Statement to Police (Evidence as to admissibility) - Magistrate's ruling admitting statement as voluntary based on proper application of relevant authorities and distinction between admissibility and weight of statement - Ruling upheld on appeal - Ruling as to voluntariness made despite lengthy time (28 hours) spent by appellant in company of the Police before cautioning and taking of statement - Magistrate deploring procedure but indicating clearly his awareness that breaches of Article 6(4) of the Constitution or the Judges' Rules not necessarily resulting in exclusion of statements: vide Police v Samasoni Apa [1950-1959] WSLR 106 referred to - No error found in Magistrate's considering rank and long service records of Police witnesses as a factor in assessing their credibility.

- Evidence of past wrong-doing (Admissibility) - Appellant charged with arson in connection with a dwelling-house - Evidence that he threatened to burn the same house some five days prior to alleged offence - Evidence not sufficiently contemporaneous to form part of the res gestae but admissible to corroborate his statement to Police in which he referred to the threat.

- Discrepancies in evidence not affecting real issue - Desirable that all discrepancies in the evidence be dealt with in criminal trials but failure to do so held not to have given rise to a reasonable doubt as to appellant's guilt.

- Magistrate's personal knowledge of Samoan characteristics - Observation during trial as to known characteristic - Claim by appellant's counsel that Magistrate considered it to corroborate prosecution's case rejected as completely unjustified.

GENERAL APPEAL pursuant to s 138 of the Criminal Procedure Act 1972 against conviction of arson contrary to s 112 of the Crimes Ordinance 1961 and sentence of eighteen months' imprisonment followed by one year's probation.

Appeal against conviction dismissed.
Sentence contrary to s 7(3) of the Offenders Probation Act 1971. Court intervening and fixing date for submissions as to appropriate substituted sentence.

Va'ai for appellant.
Cruickshank for respondent.

Cur adv vult

NICHOLSON CJ. This is an appeal originally against both conviction and sentence of eighteen months' imprisonment and twelve months' probation imposed upon the appellant on a charge of arson by Mr F.J. Thomsen, Magistrate, sitting at Apia on 14th March, 1978.

The brief facts as revealed by the evidence are that in the early hours of 22nd November, 1977 at Asau, Savai'i, the premises of Ulualofaiga Talamaivao Masoe Niko caught fire and were completely destroyed. The occupants of the two-storied shop and living premises at the time were Mrs Masoe and several other persons, including a 22-month-old child, who managed to escape without loss of life. Certain louvred windows on the ground floor of the premises had been left open that night.

On 30th December, 1977 at 4 p.m. the appellant made a written statement to the Police under caution admitting that he had deliberately set fire to the complainant's premises by throwing what is commonly called a "Molitov Cocktail", i.e., a bottle of petrol with a lighted rag placed in the bottle-neck, through the open louvre into the shop. In the course of that statement the appellant admitted that on 16th November, 1977 he had, in conversation during a drinking session with friends in a parked bus, punched the seat of the bus and suggested that the group go and burn Masoe Niko's house and kill Masoe Niko. Other witnesses gave evidence that the appellant had uttered similar words on that occasion of the 16th November, 1977.

The appellant, in evidence, acknowledged making the statement, but said he made it because he was scared of the Police. He said the officer recording the statement had promised him he could go home for New Year, and that he would get probation if he gave the statement, and that he was kept in custody until he made it.

The learned Magistrate found as a fact that the appellant was in the company of the Police for about twenty-eight hours before he made his statement at Apia. He referred to the appellant being in Police "custody" during that time, but concluded that he was free to come and go during that time.

Four grounds of appeal against conviction were put forward. The first was that the learned Magistrate erred in deferring his ruling as to the admissibility of the appellant's Police statement until he gave judgment. Mr Va'ai argued that the "trial within a trial" procedure should have been adopted before the prosecution proceeded. I indicated at the hearing of this appeal that this ground is rejected. The procedure adopted by the learned Magistrate was correct. The "voire dire" procedure is inappropriate where a magistrate or judge is sitting alone. It is a procedure that was specifically devised to deal with the judge and jury system. If a magistrate were to adopt such a procedure, he would almost inevitably be obliged to make a finding of credibility of both prosecution witnesses and the defendant in the course of the trial, and would thereby be disqualified from continuing the hearing.

The second ground of appeal offered is that the learned Magistrate erred in admitting the Police statement of the appellant. Mr Va'ai developed his argument by criticism of the reasoning for the Magistrate's acceptance of the evidence of the statement. He submitted that in assessing the credibility of the Police officer involved in the recording of the statement he relied upon matters, which were not in evidence; that he had tended to confuse the issues of admissibility and truthfulness; that he erred in inferring that the appellant was free to leave the Police Station; that he had failed to consider discrepancies in Inspector Timani's evidence as to the date when he first saw the appellant; and that he had not dealt with the defence argument based upon a breach of the Judges' Rules.

The relevant passages of the learned Magistrate's judgment in this respect are as follows:-

> I should like first to deal with the admissibility of the statement, as promised. I have heard the evidence and observed the demeanour of the witnesses during the examination in chief and under cross-examination. I have heard the submissions by

counsel and have reflected on the cases cited. Furthermore, I would like to point out that this question was fully considered by Mr Justice C.C. Marsack, Chief Judge of the High Court, in Police v. Samasoni Apa [1950-1959] WSLR 106, and in my view there is no point in my repeating the principles referred to not only in that case, but also in the cases cited by counsel.

Suffice it to say I have accepted the evidence of Chief Inspector Timani Samau as corroborated by Chief Inspector Tanielu Galuvao as the true position. I can find no reason why I should not accept that evidence, particularly in view of the fact that they are experienced and trusted members of the Police Force of high ranking. I cannot believe that they would intentionally endanger their careers by giving false evidence before the Court. It follows that the evidence of the defendant has been rejected.

The evidence of the other prosecution witnesses, in particular that of Avealalo Fereti, Na'i Feomaia and Tauaga Masoe Taisi, shows that they were free to come and go as they pleased at any time. The defendant must have been in exactly the same position until Chief Inspector Timani Samau had decided to charge him on 30 December, 1977. In any case, whether or not the provisions of Article 6 of the Constitution have been infringed, (which I doubt), it is my respectful view that so long as the statement was made voluntarily it should be accepted.

I am satisfied that the defendant was not labouring under any mental distress, nor was there any harassing cross examination by the Police, and that no inducement was held out to the defendant, nor was there any threat involved at any time before and/or during the taking of the statement. The statement was voluntary, and I use the word "voluntary" in the sense in which that expression is used in the Courts here and elsewhere, which means that the statement was obtained without threat or hope of reward and without oppression. For these reasons I rule that the statement is admissible. As to what weight I shall place on it, or parts thereof, will become evident later on.

I think it obvious from the reference to the decision in Samasoni Apa's case that the learned Magistrate was fully conscious of the principles to be applied in considering the admissibility of the Police statement and that by inference he must have considered and rejected the argument based upon a breach of the Judges' Rules. I reject the suggestion that the learned Magistrate confused truth with admissibility in the light of the last two sentences of the passage quoted above. The Magistrate, in the circumstances, was obliged to make a finding of credibility of witnesses in order to decide the issue of admissibility, but he correctly addressed himself to the difference between admissibility and the weight to be attached to the statement. On the question of assessing the two senior Police officers' evidence, I think it reasonable that the Magistrate infer from their rank that the two officers in question were experienced and trusted officers who would be unlikely to jeopardise their careers by perjury. In the case of Chief Inspector Timani, moreover, there is evidence of his experience on the record. He has twenty-four years' Police service to his credit. In any event, the judgment as a whole shows there was a careful consideration of their demeanour, and it would be inaccurate to suggest that the rank, experience and inferred trustworthiness were the only reasons for believing the two witnesses. As to the suggestion of discrepancies in Chief Inspector Timani's evidence as to the date he first saw appellant, a perusal of the notes of evidence does not reveal any discrepancy either in his own evidence or with other Police officers' evidence. As I read his evidence, he saw the appellant on 29 December, 1977 but did not converse with him until 30 December, 1977.

I would agree with counsel for appellant that the Magistrate was not justified in inferring that because three other witnesses being questioned were free to come and go the appellant was in the same position.

Nevertheless, the learned Magistrate gave full consideration to the exceptionally long period which the appellant spent in the company of the Police before he was taken to Apia to make his statement and still concluded that the statement was voluntary and not made under any inducement. (Of course, had there been inducement, the Magistrate would still have had a discretion to admit the statement in terms of section 18 of the Evidence Ordinance 1961).

I conclude that the ruling as to the admissibility of the appellant's statement must stand.

The third ground of appeal is that the Magistrate erred in admitting evidence of past wrong-doing. This relates to a portion of the evidence devoted to the description of the threat uttered by the appellant on 16 November, 1977. Mr Va'ai argues that such evidence is irrelevant and unduly prejudicial. My reading of the authorities does suggest that normally such a statement would only be admissible if made with a high degree of contemporaneity with the offence, i.e., so as to make the statement part of the res gestae.

Certainly I do not think it was admissible as part of the res because the offence occurred some five days later. It was therefore not admissible to prove the truth of the words, i.e., to show the appellant's real intent, but a major issue in this case was the admissibility and genuineness of the appellant's Police statement. That statement contained an admission by the appellant that he had uttered this threat on this occasion on 16 November, 1977. I conclude that the evidence of other witnesses that appellant voiced this threat was admissible to corroborate the evidence of the Police officers as to the accuracy and genuineness of the Police statement. I should add for the guidance of the Magistrate that it is desirable to briefly record the reasons for admitting evidence that has been objected to. The third ground of appeal is rejected.

The fourth ground of appeal is a general ground that there was a reasonable doubt as to the appellant's guilt. In this respect counsel for appellant made detailed submissions that certain discrepancies in the evidence had not been dealt with in the Magistrate's judgment. There was also a suggestion that the Magistrate used his own knowledge to corroborate the prosecution case and that he misdirected himself as to whether all the appellant's drinking companions confirmed his alleged threat. While it is desirable that a judgment in a criminal case deal with all discrepancies, it is not absolutely necessary and the comprehensive Police statement of the appellant was the real issue to which I am satisfied the Magistrate gave proper attention. I reject as completely unjustified the suggestion that the learned Magistrate's observation on a known characteristic of Samoan life was used by him as corroboration of the prosecution case. Finally, it is correct that only three of the five drinking companions referred to in the judgment corroborated the account of the threat, but this misdirection on the evidence would have been unlikely to affect the outcome of the case. I reject the fourth ground of appeal.

The appeal against conviction is dismissed.

Turning to the question of sentence, the appellant has indicated to the Court that he does not intend to proceed with the appeal against sentence. However the sentence passed is not one permitted by law. Section 7(3) of the Offenders Probation Act 1971 provides:-

> (3) Where any Court sentences any person to imprisonment for less than one year it may in its discretion order, as part of the sentence, that on his release from imprisonment he shall be on probation for any period not exceeding one year . . . .

The learned Magistrate had no jurisdiction to impose the sentence of eighteen months' imprisonment followed by twelve months' probation. This Court is therefore obliged to intervene in the matter of sentence, and I therefore refrained at the last hearing from indicating to counsel for the appellant that the Court accepted or rejected his statement that he did not intend to proceed with the appeal as to sentence.

I direct that the matter be set down for 2 p.m. on 8th May, 1978 to enable counsel to make submissions as to the appropriate substituted sentence to be imposed.