

IN THE SUPREME COURT OF WESTERN SAMOAHELD AT APIAC.A. 25/93

IN THE MATTER of the Goods and Services
Tax Act 1986 and the Income
Tax Administration 1974

BETWEEN: DEREK GODINET, Director
Le Godinet Beachfront
Hotel Ltd

Appellant

A N D: COMMISSIONER OF INLAND
REVENUE

Respondent

Counsel: T. Malifa for Appellant
M. Edwards for Respondent

Hearing: 23rd June 1994

Decision: 1st July 1994

DECISION OF SAPOLU, CJ

This is an appeal against both conviction and sentence. The appellant, who is a director of Le Godinet Beachfront Hotel Ltd, faced 14 charges under sections 9, 27(2)(c) and 28 of the Goods and Services Tax Act 1986 in the Magistrates Court for failing to lodge monthly goods and services tax returns. He was represented by different counsel at the Magistrates Court and he pleaded guilty to all charges. He was accordingly convicted and ordered to pay a fine of \$2,500 by 24 December 1993, in default six(6) months imprisonment. He was also ordered to pay a fine of \$100 on each of the subsequent charges by 24 December 1993, in default one(1) month imprisonment on each charge to be concurrent.

Notwithstanding the guilty pleas entered by the appellant to the charges in the Magistrates, his new counsel is now saying that the appellant should not have been convicted and the convictions against him were wrong in law. Referring to the provisions of the Goods and Services Tax Act 1986 under which the charges were preferred, section 9 provides :

"Every provider shall, on or before the 10th day of each
"calendar month complete and sign a return of the tax
"collected by him during the preceding calendar month and
"shall lodge that return together with a remittance for
"the amount of tax which he has collected with the
"Department".

Section 27(2)(c) of the Act then provides :

"Any provider who fails to lodge a return as and when
"required by this Act shall be guilty of an offence and
"shall for each offence be liable to a fine not exceeding
"\$5,000 or to imprisonment for a term not exceeding
"2 years or to both".

Then section 28 of the Act provides :

"Where an offence against this Act is committed by a
"company every person who at the time of commission of
"the offence was a director of the company or purported
"to act in that capacity shall be guilty of the same
"offence unless he proves that the offence was committed
"without his knowledge or consent and that he exercised
"all due diligence to prevent the commission of the
"offence".

The word "provider" as used in sections 9 and 10 of the Act is not expressly defined in the Act but it appears from the definition of the word "consumer" in section 2 of the Act that a "provider" means a provider of goods and services for the purposes of the Act. Section 7 then imposes an obligation

on every provider as agent for the Inland Revenue Department to collect a goods and services tax on every fee paid by a consumer. And the goods and services tax collected by a provider from a consumer is deemed to be held upon trust by him for the Government. Section 9 then requires every provider to file a monthly goods and services tax return together with the amount of tax he has collected, with the Inland Revenue Department. And section 10 provides for a register of providers to be kept and maintained by the Commissioner of Inland Revenue and requires every provider and intending provider to apply for registration under the Act.

Now the appellant says he is not a provider in terms of the Act and he has not been registered as such. Counsel for the respondent concedes that the appellant is not a provider for the purposes of section 9 of the Act. However he maintains that the appellant should still be guilty of the charges against him by virtue of section 28. In the summary of facts presented by the respondent as informant in the Magistrates Court, there is also no reference to the appellant as a provider. Thus there is no dispute that the appellant is not a provider in terms of the Act. Leaving aside section 28 for the moment, it is clear to the Court that if the appellant is not a provider, then sections 9 and 27(2)(c) of the Act do not apply to him because those provisions deal only with providers.

However the appellant has been charged in the informations for failing to lodge monthly goods and services tax returns which clearly implies that the provisions relied on are sections 9 and 27(2)(c) as those provisions are cited in the informations. But the appellant cannot be charged for an offence under those provisions for he is not a provider. There is also no mention in the wording of the charges that the appellant was being charged

for failure on the part of the company for which he is a director to file monthly goods and services tax returns in order to give meaning to the citation of section 28 in the charges. The clear picture from the wording of the charges is that the appellant was being charged as an individual. That being so the charges against the appellant as contained in the informations do not disclose any offence. The informations are contrary to the requirements of sections 15 and 16 of the Criminal Procedure Act 1972 and are therefore invalid. Section 15 of that Act requires every information to be for an offence. Section 16 then requires every information to contain sufficient particulars as will fairly inform the defendant of the substance of the offence for which he is charged. In this appeal all the informations fail to meet those requirements because they disclose no offence or inform the appellant of the substances of any offence.

It must not be overlooked that the Criminal Procedure Act 1972 applies to an offence under any enactment subject to certain exceptions provided in section 3. Those exceptions do not apply to this case. Section 2 of that Act defines the word "offence" as follows :

"'Offence' means any act or omission for which under any enactment any person can be punished other than solely "by means of a civil proceedings".

Section 3(1) of the Act then provides :

"This Act shall apply to all proceedings in any Court "where a person is proceeded against for an offence".

As the Criminal Procedure Act 1972 applies to all proceedings in any Court for an offence, and the word offence means any act or omission for which

under any enactment any person can be punished, the provisions of the Criminal Procedure Act as to the requirements for an information must necessarily apply to an information preferred for an offence under the Goods and Services Tax Act 1986 unless the exceptions provided in section 3 of the Criminal Procedure Act apply. But as already stated those exceptions do not apply to this appeal.

Coming now to section 28 of the Goods and Services Tax Act 1986, the argument for the respondent is that the guilty plea entered by the appellant in the Magistrates Court to all the charges amounts to an admission or provides clear evidence that the company for which the appellant is a director did fail to file monthly goods and services tax returns. Therefore the company "has committed an offence" in terms of section 28. It follows that the appellant as a director of that company is guilty of the same offence that the company has committed because of the provisions of section 28. The provisions of section 28 have already been set out. And what counsel for the respondent is essentially saying is that because the appellant pleaded guilty to the charges that means the company for which he is a director did not lodge the necessary monthly returns; therefore the company "has committed an offence" in terms of section 28.

With respect to counsel for the respondent, I did not accept this argument during the hearing of the appeal and after further consideration I am still unable to accept it. In the first place the appellant was charged in the informations with his failure to file the necessary monthly returns which is not an offence since the appellant is not a provider. And that is what he pleaded guilty to. There is no reference in the informations to a failure on the part of the company to file the necessary monthly returns.

So it cannot, in my view, be said that the appellant's plea of guilty to the charges which charge him personally is also an admission of guilt on the part of his company which is not mentioned in the informations. Secondly, the company has not been charged. To condemn the company with "having committed an offence" without the company being charged, and served with those charges, and given the opportunity of a fair trial, is contrary to the principles of fundamental justice. Thirdly, Article 9(3) of the Constitution expressly provides that every person charged with an offence shall be presumed innocent until proved guilty according to law. If the presumption of innocence is applied in the Constitution to a person who is charged with an offence, one would expect that the same presumption applies with equal if not greater force to a person, like the company in this case, which has not been charged with an offence at all. And fourthly, section 11 of the Criminal Procedure Act 1972 provides that, except where it is expressly provided by any enactment, every person who has reasonable cause to suspect that "an offence has been committed" may lay an information for that offence. Then of course the usual procedures leading up to a trial will follow. It is clear to my mind that the purpose of section 11 of the Act is to set in motion the process of proving on the required standard of proof whether the suspicion on reasonable cause that an offence has been committed is well founded. So obviously a mere suspicion, even if based on reasonable cause, that an offence has been committed is not enough to justify one in saying that in law "an offence has been committed". For these reasons I do not accept that the appellant's plea of guilty to the charges or anything he might have said without more is sufficient to make the company commit an offence in terms of section 28. Likewise I do not accept that the reference in the summary of facts presented by the respondent to the Magistrates Court as to the failure of the company to file monthly goods and services tax returns

is sufficient to label the company as having committed an offence in terms of section 28. The company simply cannot be labelled that in law it has committed an offence for which it has not been charged, tried and found guilty. To so label the company in this appeal will be tantamount to condemning the company without notice of any charge against it, without being given an opportunity to be heard in its defence, and without a trial. Such a position is alien to the law. Therefore since the company has not committed an offence in terms of section 28, that provision cannot come into operation and make the appellant who is a director guilty of an offence. A precondition to the guilt of a person as a director under section 28 is that the company of which he is a director must first be found to have committed an offence through the usual process of law.

From what I have said about section 28, it must also be clear that all the informations do not disclose any offence on that score. The informations have been preferred prematurely for the company must first be found to have committed an offence through the usual process of law.

That brings me to the case of R v Stretch [1982] 1 NZLR 222, 229 cited by counsel for the respondent. That was a judgment of the New Zealand Court of Appeal and in delivering that judgment Cooke J (as he then was) says :

"As to the law, in very exceptional cases, and only in such cases, an appeal against conviction can succeed after a plea of guilty. The authorities were collected in an article by Alec Samuels in [1962] Crim. L.R 806 (which includes the statement 'a defendant who was represented 'is virtually precluded from advancing such a contention') and by T.A Gresson J in Ady v Police [1964] NZLR 235. More recent English authorities will be found in 11 Halsburys Laws of England (4th ed.,) para 611, note 6 and the supplement....."

"Under the current English legislation, the Criminal Appeal Act 1968, s.2(1) as amended in 1977, to succeed on appeal after a guilty plea the conviction must be shown to be 'unsafe' or the Court of trial must be shown to have given a wrong decision on a question of law. In New Zealand the Crimes Act 1961, s.385, reproduces the words of the original Criminal Appeal Act 1907, s.4, of the United Kingdom. The result in New Zealand is that if the conviction has followed a guilty plea, and if it cannot be sufficiently linked with a wrong decision of the Court on a question of law (see R v Barrie [1978] 2 NZLR 78), the appellant cannot succeed unless he can show within s.385(1)(c). 'That on any ground there was a miscarriage of justice'. In practical effect, however, the tests 'unsafe' and 'miscarriage of justice' are probably much the same.

"A dictum often quoted is that of Avory J delivering the judgment of the Court of Criminal Appeal in R v Forde [1923] 2 K.B 400, 403.

"A plea of guilty having being recorded, this Court can only entertain an appeal against conviction if it appears (1) that the appellant did not appreciate the nature of the charge or did not intend to admit he was guilty of it, or (2) that upon the admitted facts he could not in law have been convicted of the offence charged'.

"But that statement, which was unaccompanied by reasons or citation of other authority, is not necessarily exhaustive : see the observations of Viscount Dilhorne and Lord Salmon in Shannon [1975] A.C 717, 756; [1974] 2 All E.R 1009, 1036, 1051. And there are cases where a plea of guilty can, on appeal, be treated as a nullity, as in R v Turner [1970] 2 Q.B 321; [1970] 2 All E.R 281 where a defendant changed his plea to guilty during the trial under the misunderstanding that in advising that he might thereby avoid a prison sentence his counsel was passing on an intimation from the presiding Judge.

"There may be cases where a line of defence is sufficiently tenable to call for a fuller and more explicit explanation to the accused by counsel than seems to have occurred in the present case. We do not say that a miscarriage of justice can never be established on such a ground. But when the accused has the advice of experience counsel, such cases will be rare.... In deciding whether a miscarriage of justice has been shown the Court should, in our view look at all the circumstances".

Now the passage just quoted refers to section 385 of the New Zealand Crimes Act 1961 which relates to appeals against conviction to the Court of Appeal.

That provision is very similar to section 164 N of our Criminal Procedure Amendment Act 1992/1993 which also relates to appeals against conviction to the Court of Appeal. In fact it appears to me that our provision is based on the New Zealand provision. There is no provision in the Criminal Procedure Act 1972 in relation to appeals from the Magistrates Court to the Supreme Court which is like section 385 of the New Zealand Crimes Act 1961 or section 164 N of our Criminal Procedure Amendment Act 1992/1993. However, I am of the view that the grounds on which the power given to this Court in section 144(2)(b) of the Criminal Procedure Act 1972 on an appeal against conviction from the Magistrates Court, can be exercised to set aside a conviction and direct an acquittal or a new trial, encompasses the grounds of a wrong decision by the Court on a question of law or a miscarriage of justice. That is so notwithstanding that a plea of guilty has already been entered to a charge. And it will not be wise to attempt to set out in this judgment a list of all the circumstances where a wrong decision on a question of law or a miscarriage of justice may arise. This is in line with the thinking of Cooke J in the passage cited from R v Stretch. I also accept the exceptional circumstances referred to by Cooke J where an appeal against conviction may succeed after a plea of guilty, as instances of the application of the two criteria of a wrong decision on a question of law and miscarriage of justice.

Turning back to the present appeal, the Court has already stated that the charges disclose no offence because the appellant, not being a provider in terms of the Act, cannot be charged under sections 9 and 27(2)(c) of the Act. Likewise the charges cannot be preferred under section 28 of the Act as there must first be a finding in law that the company has committed an offence before any director of the company may be guilty of the same offence.

In all then the appeal is allowed, all informations are set aside, and the appellant is acquitted of all the charges to which he pleaded guilty in the Magistrates Court. The sentences passed must therefore quashed.

J. M. Sapala
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CHIEF JUSTICE