IN THE SUPREME COURT OF TONGA
CRIMINAL JURISDICTION
NUKU'ALOFA REGISTRY

AM 17 of 2021

REX

-v-

Siu Holani

RULING

BEFORE : THE HONOURABLE COOPER J
Counsel : Mr. T. 'Aho for the Appellant
Mr. S. Fili for the Respondent
Date of Ruling : 25th March 2022

1. On 18th March 2022 the appeal in this matter was heard before me.

2. The prosecution had appealed the decision of the Magistrate to acquit the respondent on 26th May 2021 of a single count possession illicit drug, namely 0.05 g methamphetamine, contrary to section 4 (1) (a) (iii) Illicit Drugs Control Act.

The Trial in the Magistrates' Court

3. The brief facts were that on 10th March 2021 at Kolofo'ou police officers attended the commercial premises where Mr. Holani worked; known as Ti'oto's shop.

4. The Crown's evidence was the officers had received information and attended the scene swiftly, they had no warrant and were acting under their powers under section 24 Illicit Drugs Control Act to search and seize in an emergency.

5. The defendant told an officer present, Officer 'Akauola, that he had drugs in the pocket of his trousers and also in the toilet.

6. A police dog was brought in to aid the search. Recovered from the toilet was a package containing 0.05 g of methamphetamine.

7. The defendant then signed two documents that were written up by a second officer, Officer Vi.

8. Those documents were the Diary of Action and also the officer's personal diary.

9. Both documents recorded what the officer stated the defendant had said at the scene, which was that the drugs found in the toilet were his. The defendant signed both entries.

10. The defendant gave evidence and he gave explanations as to why he had signed, stating that the admissions came as a result of threatening language by one officer and that he thought he was signing a document without reading the contents and so did not know he was signing that he accepted having made the admission.

11. The Magistrate acquitted the defendant.

The Magistrates' reasons

12. Important factors the Magistrate identified in coming to his conclusion included these :

13. Point (iii) "...the accused did not voluntarily make the admission...in the Diary of Action [and the] personal dairy...[which] the prosecution tendered...as exhibit 6 and the accused and his Counsel did not oppose."

14. Point (iv) "...it is important to look at the section 21 Evidence Act Chapter 15..." and the Magistrate made reference then to the allegation made by the defendant that there had been threatening words uttered to him and caused him confess.

15. The Magistrate went on to find in a four point conclusion that there was no evidence of possession on the part of the defendant because the toilet the drugs were recovered was used by both the public, the office of the Statistical Department as well as the defendant having access and there were two keys to it.

16. The Magistrate also stated that the required standard of proof was that the prosecution had to prove the case so there was no doubt.

Submissions

17. Put as simply as possible the submissions were these :

18. The Appellant has argued that the material key to the forming of the Magistrate's decision was not put to the relevant witnesses and so the rule in Browne v Dunn was breached.

19. They also argue that the formulation of the standard of proof has been incorrect.

20. Both significant errors and errors in the law that ought to lead the verdict to be set aside they submit.

21. The Respondent has argued the Magistrate was still entitled to come to the verdict he did and that there was insufficient evidence to prove the defendant's knowledge.

Decision

22. Before me what is submitted is that the arguments the magistrate considered in relation to the confession evidence causing him to exclude them, so reaching the verdict he did, was not based on any cross-examination of the relevant prosecution witnesses.

23. The Appellant relies on Browne v Dunn (1983) 6 R 67 (H.L.) that the case for the defendant had to be "put" to the witnesses.

24. In this case that was not done. The officers were not cross-examined on the points the defendant later contended were the reasons why he had apparently made the admissions.

25. The Magistrate, rightly, wished to consider carefully the issue of possession in relation to the drugs; an item recovered from a communally used area. Yet in relation to the confessions, which would put the question of possession by the defendant beyond doubt, the only evidence so as to reject them was the defendant's assertions untested by any cross-examination. As such it was impermissible to take that into account in arriving at the conclusions and verdict that he did.

26. Accordingly I find that there has been an error in law so as to mean the verdict ought be set aside.

27. I mention a further matter the Crown raised in submissions; that the required standard the prosecution must prove its case to is beyond reasonable doubt, not so that there is "no doubt", as the Magistrate stated.

28. The Magistrate is very experienced, I suspect very strongly he was applying the correct test in his own mind, but it is so vital the pronouncement of the core function of the court and the test towards the proving of guilt be stated accurately that to depart from the correct words is not permissible and could, of itself, lead to the setting aside of a verdict.

29. I have in mind the words of Mr. Justice Foskett in Shehzad, R (on the application of) v Newcastle Crown Court & Anor [2012] EWCH 1453 (Admin) [10] :

> "I am bound to say that this being an extremely experienced judge who plainly applies the statutory test on an almost daily basis is very unlikely to have misapplied the usual approach to decisions of this nature and in many cases I might have been disposed simply to say that this was an unintentional misuse of language that did not reflect as accurately as it might the normal statutory test. That may well indeed simply be the case, but on the other hand this does involve the liberty of the subject."

Conclusion

30. Because the challenge to central evidence in the case, the admissions, was not put at trial, the proper course is to remit this case back to the Magistrates' Court and a re-trial be heard by another Magistrate when the matter can be looked at afresh.

31. I adjourn this case to 11th April 2022 at 1000 hrs, Fasi Magistrates' court.

SUPREME COURT TONGA

NUKU'ALOFA
25 March 2022

N. J. Cooper
JUDGE