SUPREME COURT

A

WAQAVESI BOGITINI

v.

REGINAM

B

[SUPREME COURT, 1983 (Kermode, J.) 30th September]

Appellate Jurisdiction

Criminal Law—practice and procedure—failure to convict following guilty plea—whether curable defect. Criminal Procedure Code (Cap. 21) Section 206(2).

C

On appeal against sentence imposed by the Magistrates Court it emerged that the Magistrate had not recorded the conviction of the appellant. In view of authority tending to establish that in such circumstances the conviction could not stand, the Crown drew the Court's attention to the matter.

D

Held: Where a plea of guilty has been offered but there has been a failure to record the conviction the defect is not fatal to the conviction. The Appeal against sentence was dismissed.

Cases referred to:

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David Kio v. R. 13 FLR 21
Siru Luluakolo v. R. 8 FLR 12
Jean Charles Confiance v. R. (1960) E.A. 567
R. v. Rabjohns (1913) 3 KB 171
Rex v. Udo Unwa Ekpo & Ors. (1947) XII W.A.C.A. 153

F

Appellant in person
A.H.C.T. Gates for the Respondent

KERMODE J.:

Judgment

G

The appellant was charged with the offence of Robbery with Violence contrary to section 293 of the Penal Code. On the 25th March 1983, he pleaded guilty to the charge in the Magistrate's Court Suva and was sentenced to four years imprisonment.

He appeals against sentence.

H

Mr Gates pointed out to the Court that the record does not indicate that the learned Magistrate convicted the accused.

After the appellant has pleaded guilty to the charge, the Magistrate satisfied himself that the plea was understood and was free and voluntary. The prosecution then related the facts

to the Court which the appellant admitted. He was remanded in custody until 2.00 p.m. on the day of the trial to enable a Salvation Army representative to appear in Court. In the afternoon it was reported that no report could be obtained from the Salvation Army. The accused then stated that he had nothing further to say and the Court thereupon without recording any conviction sentenced the appellant to four years imprisonment. A

Mr Gates referred the Court to the case of *David Kio v. Reginam* 13 F.L.R. 21 where it was held (inter alia) by the Court of Appeal that the absence of a conviction is a basic defect and one not curable by the Court of Appeal. The trial Judge in that case was clearly satisfied of the guilt of the appellant on all counts as he sentenced the appellant to imprisonment on each of them but in his formal judgment he omitted to say that he convicted the appellant or found him guilty on two of the counts. B

The appeal in that case was against conviction before the Chief Justice of the Western Pacific at Honiara. C

Sections 149 and 150 of the Criminal Procedure Code Ordinance in force in the British Solomon Islands Protectorate makes provision for the manner in which judgment for every criminal trial shall be pronounced. D

Section 150(2) reads:

"In the case of a conviction the judgment shall specify the offence of which and the section of the law under which the accused person is convicted and the punishment to which he is sentenced." E

Under that Code the judgment must make it clear that the accused is convicted.

There are two provisions in the Fiji Criminal Procedure Code, one dealing with the case where an accused admits the truth of the charge and the other where after a trial the accused is (inter alia) either convicted or acquitted. F

Section 206(2) provides:

"If the accused person admits the truth of the charge, his admission shall be recorded as nearly as possible in the words used by him, and the court shall convict him and pass sentence upon or make an order against him, unless there shall appear to it sufficient cause to the contrary." G

Section 215 provides:

"The court having heard both the prosecutor and the accused person and their witnesses and evidence shall either convict the accused and pass sentence upon or make an order against him according to law or shall acquit him or make an order under the provisions of section 44 of the Penal Code." H

Both provisions make it mandatory for the Court to convict where the accused pleads

In the instant case the Record does not disclose that the Magistrate fully complied with section 206(2).

David Kio's case would appear to indicate that the failure in the instant case to record a conviction is an incurable defect.

However, the Court of Appeal in an earlier case, held that where there was no statement by a judge in his formal judgment after finding the accused guilty, that the accused was convicted or use words to that effect that was not an incurable defect. The case was the case of *Siru Luluakalo v. Reginam* 8 F.L.R. 12.

In the earlier case, it was also held that the essence of the matter is that there should be a judgment of the Court pronouncing the accused person guilty and when that has been done, the accused person has properly been convicted.

Both these cases were appeals from convictions by the High Commissioner's Court for the Western Pacific at Honiara. Another thing these two cases had in common was that the accused in both cases pleaded not guilty and after a trial were sentenced.

In the earlier case the judge in his formal judgment found the accused guilty and then proceeded to sentence the appellant but at no time did he say that the appellant was convicted or used words to that effect. That case is similar to the instant case except that in the instant case the accused pleaded guilty.

In David Kio's case, in respect of two counts, the judge omitted to say either that he convicted the accused or found him guilty. The failure to find him guilty in my view distinguishes David Kio's case from the earlier case which appears at first glance to conflict with Kio's case.

In my view the Court of Appeal in Kio's case did not intend to overrule its decision in the earlier case and in the report the words "the absence of a conviction is a basic defect and one not curable by the Court of Appeal" must be read in the context of that case that is that the trial judge did not find the accused guilty on the two counts. Whether the judge purported to convict or not there was an absence of a legal conviction because a fundamental requirement was missing namely a finding of guilt.

The Court of Appeal in David Kio's case quoted with approval from the judgment in Siru Luluakalo's case which I have referred to earlier which supports my view that it did not intend to overrule the earlier case.

The Court of Appeal in David Kio's case also referred to the case of *Jean Charles Confiance v. R.* (1960) E.A. 567 and quoted part of the judgment of the Court of Appeal for East Africa delivered by Gould Ag. V.P. (as he was then) where the Court said:

> "..... in a case where a court has decided that an accused person is guilty the basic elements of the judgment are the conviction and sentence."

elements of the judgment are the conviction and sentence." A

In that case the Court of Appeal was again referring to a case where a court after trial has decided that an accused person is guilty.

In the instant case the appellant pleaded guilty and this in my view differentiates the case from the case of David Kio. B

I am of the view, with respect, that the Court of Appeal in *Siru Luluakalo's* case in applying what Bankes J. said in *R. v. Rabjohns* (1913) 3 K.B. 171 at page 174 may not have appreciated that the provisions of the Penal Servitude Act 1864 indicate that there was a conviction either by verdict of a jury or upon an accused's own confession.

C

Bankes J. said:

"There has in the opinion of the Court been a conviction within the meaning of section 4 of the Penal Servitude Act 1864 whenever a prisoner has been found guilty on indictment by a jury *or on his own confession."*

D

(emphasis is mine)

The Court of Appeal used that statement as the basis for the following statement:

"From this it would appear that it is the finding of guilt by the appropriate authority—in the instant case the trial judge—that constitutes the conviction. The essence of the matter is that there should be a judgment of the court pronouncing the accused person guilty and when that has been done the accused has been properly convicted whether or not that precise word is used in the judgment." E

The Court went on to point out that the exact point was considered by the West African Court of Appeal, Nigeria in *Rex v. Udo Unwa Ekpo & Ors.* (1947) XII, W.A.C.A. 153 in which it was held that the statement in a judgment that an accused person is guilty of murder is tantamount to the recording of a conviction of murder against him. F

The Court went on to say:

"In our opinion the failure of the trial Judge to use the word 'convict' is not, as counsel for appellant contends, a fatal error, and we can find no grounds for quashing the judgment of the Court and the sentence imposed upon the appellant. The learned trial Judge heard the evidence, considered the whole matter, and found the accused guilty in the course of his judgment. That, in our view, is a substantial compliance with his obligations under Rule 101. It is certainly more usual to employ the actual word 'convict', but failure to use that word in a judgment which finds the accused guilty of the offence charged is not an incurable defect and does not, in our opinion, vitiate the verdict of the trial Judge and the sentence imposed after that verdict." G H

The learned Magistrate may have been influenced by the procedure followed in England on a plea of guilty.

A *Archbold* in *Criminal Pleading Evidence and Procedure* 39th Edition paragraph 367 states:

> "If the defendant pleads guilty, and it appears to the satisfaction of the judge that he rightly comprehends the effect of his plea, his confession is recorded, and sentence is forthwith passed, or he is removed from the bar to be again brought up for judgment".

B No case has been quoted to me where it has been held in a case where an accused has pleaded guilty that the conviction must be quashed because there has been an omission to record that the accused is convicted.

One reason may be that section 309 of the Criminal Procedure Code limits appeals where
C an accused has pleaded guilty to the extent or legality of the sentence. This would seem to indicate that the legislature viewed a proper plea of guilty as final on the issue of guilt and conviction lending force to the view that failure to formally record a conviction is not a fatal defect.

I hold that *David Kio's* case has no application where an accused has pleaded guilty and that I am bound by Siru Luluakalo's case because, a fortiori, a recording of a plea of guilty
D is equivalent to a record of guilty in a contested trial.

If I am wrong in that view I would still hold that neither case has any application where an accused pleads guilty and a failure merely to record a conviction is not fatal notwithstanding the mandatory provisions of Criminal Procedure Code 206(2).

E Magistrates should, however, comply with the provisions of the Code at all times.

I turn now to consider the appeal against sentence.

The facts of the case are that the appellant on the day in question approached, at about 10.00 p.m. a taxi driver and told him to take him to Nailuva Road. At the Nailuva shopping centre the taxi stopped and the appellant told the driver to give all the money back. The driver
F thinking he was joking refused. The accused thereupon stabbed the driver in the back left shoulder with a small kitchen knife. When the taxi driver turned around the accused threw himself forward into the driver's seat, knife still in hand, and grabbed money from the driver's shirt pocket. The driver managed to get out of the taxi and while on the road trying to raise alarm, the appellant with knife still in his hand approached him punched him on the nose cutting his left eye. When the driver, bleeding from the eye, covered his eye the accused got
G money from the driver's pocket.

The appellant is a young man who has just turned 19 and has no prior convictions. But for the premeditated and vicious nature of the attack and using a knife there may have been some grounds for considering this a case where leniency should be considered. The nature of the offence however is one which is very prevalent. Where a knife is used a deterrent
H sentence is called for even for a young first offender.

The sentence of 4 years imprisonment in all the circumstances is not excessive in my view and accordingly I dismiss the appeal.

Appeal dismissed.