WAISALE SERU

A

v.

THE STATE

[HIGH COURT, 1996 (Fatiạki J) 10 July]

Appellate Jurisdiction

B

Crime: procedure- Magistrates' Courts- basic elements of judgment where accused found guilty- effect of omission- Criminal Procedure Code (Cap. 21) Sections 155 (1) & (2); Section 206 (2).

On appeal against a sentence imposed in the Magistrates' Court the High Court once again pointed out that a judgment declaring a person to be guilty is incurably defective if it does not precisely state the conviction(s) entered and the sentence(s) passed.

C

Cases cited:

David Kio v. R. 13 F.L.R. 21
Jean Charles Confiance v. R. (1960) E.A.567

D

Appeal against sentence imposed in the Magistrates' Court.

Appellant in Person
W. Clarke for Respondent

Fatiaki J:

E

This is an appeal against a sentence of 8 months imprisonment imposed by the Magistrates' Court, Nausori on the 5th of February 1996 after the appellant pleaded guilty to offences of Criminal Trespass and Assault Occasioning Actual Bodily Harm.

F

The appellant had been jointly charged with five others on both offences and had admitted the facts outlined by the police prosecutor, as follows :

> "On 6.1.96 at Namena between 8 p.m.-10 p.m. all 6 entered freehold land of complainant. They went to 2nd complainant who lives there. These 6 said the 2nd complainant was alleged having an affair with someone from their village. They hit him. He was badly hurt. Head injury received. Admitted to Korovou Hospital."

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In mitigation, the appellant who was the fifth accused and the eldest in the group, merely said :

> "24 years old ... seek leniency."

The trial magistrate in sentencing the appellant, quite properly observed that the

offence was serious and cowardly, involving a gang attack on a hapless young man who was alleged to be having an affair with a girl from the accuseds village. The trial magistrate also noted the prevalence of such attacks and said : "I am seriously of the view that deterrent custodial sentence, though short, is warranted."

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The trial magistrate then proceeded to sentence each accused (1-5) to 8 months imprisonment. In doing so he appears to have completely overlooked the first count of Criminal Trespass in respect of which the accuseds had earlier pleaded guilty. Indeed his sentencing remarks appear to have been directed solely at the more serious offence of Assault Occasioning.

B

In the result (assuming that convictions had been properly entered), no sentence has been imposed in respect of the first count of Criminal Trespass in clear breach of the mandatory requirements of Section 206(2) of the Criminal Procedure Code (Cap.21); nor in my view, is it clearly recorded that the sentence was imposed in respect of the second count of Assault Occasioning as is required in terms of Sections 155(1) and (2) of the Code.

C

At the hearing of the appeal State Counsel valiantly supported the trial Magistrate's sentence by submitting that a sentence of 8 months for a trespass involving an assault is not harsh.

D

I am satisfied however that the irregularity is so fundamental that the trial magistrate's sentence cannot be allowed to remain in its present state of uncertainty.

In David Kio v. R. 13 F.L.R. 21 an appeal from the Solomon Islands, the Fiji Court of Appeal in considering the Solomon equivalent of our Section 155(2) of the Code said at p.22 :

E

> "Although no particular form of words is required it would appear that the judgment must make it clear that the accused person is convicted, must specify the offence of which he is convicted, and the punishment to which he is sentenced."

Furthermore the Court of Appeal cited with approval the following passage from Jean Charles Confiance v. R. (1960) E.A.567 where Gould Ag. V.P. delivering the judgment of the Court of Appeal of East Africa said at p.571 :

F

> "... it is axiomatic that there must be a judgment in a criminal trial, it also follows that certain requirements must be regarded as basic, as non-compliance with them would result in there being no judgment at all."

G

and later at p.572 :

> "... 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."

A fortiori where the charge is comprised of more than one Count.

A In light of the foregoing there is no doubt in my mind that the absence of a clear and unequivocal conviction and sentence in respect of each count in the charge is, to adopt the language of the Court of Appeal in David Kio's case (ibid at p.24) : "... a basic defect and one which is not curable by this Court."

The appeal is accordingly allowed and the trial magistrate's conviction and sentence is hereby quashed and set aside. What then should be done in the B circumstances ? After careful consideration and mindful that the appellant has already served over three weeks of his sentence before he was released on bail pending appeal, I do not consider this an appropriate case to order a *trial de novo*.

C *(Appeal allowed; conviction and sentence quashed.)*

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