IN THE SOLOMON ISLANDS COURT OF APPEAL

NATURE OF JURISDICTION:	Appeal from Judgment of the High Court of Solomon Islands (Lewis, Commissioner)
COURT FILE NUMBER:	Criminal Appeal Case No. 22 of 2008 (On Appeal from High Court Criminal Case No. 300 of 2006)
DATE OF HEARING:	Tuesday 14 July 2009
DATE OF JUDGMENT:	
THE COURT:	Goldsbrough AP McPherson, JA Williams, JA.
PARTIES:	**Maoma and Futa** Appellants -V- **Regina** Respondent
ADVOCATES:	
Appellant:	Ms Brown & Wagavonovono
Respondent:	M Coates
KEY WORDS:	Criminal law – amnesty - procedure – right of appeal against refusal – "combat conditions in connection with armed conflict" considered.
EX TEMPORE/RESERVED:	
ALLOWED/DISMISSED:	Dismissed.
PAGES:	

JUDGMENT OF THE COURT

An information was presented to the High Court charging each of the appellants and others with three counts of murder and other offences. The appellants claimed before the court they were entitled to amnesty pursuant to the provisions of the Solomon Islands Amnesty Act 2001 ("the Act") if it were found they did acts which would otherwise constitute the offences charged. In consequence each entered a plea of not guilty.

After a lengthy trial the Commissioner constituting the High Court concluded that each of the appellants had committed the relevant acts, and before formally recording convictions went on to deal with the claim for amnesty. He concluded on the evidence the appellants had not brought themselves within the conditions for amnesty set out in section 3 of the Act. It followed that each appellant was convicted, inter alia, of three counts of murder. A sentence of life imprisonment was imposed on each of the murder counts, and lesser periods if imprisonment for the other offences.

A notice of appeal was filed by each appellant seeking to have all convictions set aside and also seeking to have the order refusing amnesty set aside. By amended notices of appeal dated 30 June 2009 each appellant abandoned the general appeal against all convictions and limited the appeal against each of the three murder counts to the refusal to grant amnesty. It follows that Futa's convictions and sentences on counts 5, 6 and 8 on the information and Maoma's convictions and sentences on counts 6 and 8 stand.

Following the Marau Peace Agreement the Act was passed. It recited the Marau Peace Agreement and the fact it was therein agreed that "militants of the ... Marau Eagle Force be granted an amnesty or immunity from prosecution to the extent and on the conditions hereinafter provided." Relevantly section 3 provided:-

> "(1) Notwithstanding any provisions of the Penal Code or any other law, the following persons shall be granted an amnesty or immunity from criminal prosecution as hereinafter provided –
>
> (a) leaders, members ... associated with the Marau Eagle Force;

...

(2) Subject to the provisions of section 4, the amnesty or immunity from criminal prosecution referred to in subsection (1), shall be in respect of any criminal acts committed in the execution by any person –

...

(b) of the Marau Eagle Force in retaliation against acts committeed by the Isatambu Freedom Movement on Marau during the period commencing 10 June 2000 and ending 7th February 2001.

(3) The amnesty or immunity from prosecution referred to in this section shall be on condition that all weapons and ammunition … in the custody of the militant groups referred to in subsection (2) are surrendered and returned in the manner and within the periods specified in the Marau Peace Agreement … .

(4) In this section "criminal acts" means unlawful acts which are directly connected with matters specified in subsection (2) and in particular –

...

(b) killing or wounding in combat conditions or in connection with the armed conflict on Guadalcanal;

...

(5) The amnesty or immunity referred to in this section does not apply to criminal acts done in violation of international humanitarian laws, human rights violations or abuses or which have no direct connection with the circumstances referred to in subsection (2)… (b) of this section."

The reference in s.3 (2) to section 4 should obviously be a reference to sub-section (4). That is confirmed by looking at the corresponding section in Amnesty Act 2000.

The Privy Council has regarded amnesty as a form of pardon : Phillip -v- DPP (1992) 1 All E R 665 at 668 and Attorney General of Trinidad and Tobago -v- Phillip (1995) 1 All E R 93 at 101 – 2. That is consistent with s.4 of the Act which provides that in certain circumstances effect is to be given to the amnesty granted by the Act by invoking s.45 of the Constitution, the pardon provision. Those Privy Council decisions also confirm that the granting of a pardon or amnesty is within the jurisdiction of the executive government (cf. also Salemi -v- MacKellar (no.2) (1977) 137 C.L.R. 396 at 455-6 per Murphy J). As is recognized in all of those authorities the amnesty may be granted to a particular person or to all persons within a defined class or group. Further there seems no doubt that the executive power to grant amnesty may be exercised by enacting an act of Parliament as was done here.

When one has regard to the recitals in the Act incorporating provisions of the Marau Peace Agreement and the terms of section 3, it is clear that the Government of the Solomon Islands has by section 3 granted to those persons who come within the class therein defined, and who meet the other conditions of the legislation, amnesty or immunity from prosecution with respect to criminal acts therein defined. That amnesty is derived from the statute and no further act by any state authority or court is necessary to give it effect. However some further act or court ruling may be necessary to confirm that a particular person is entitled to the protection afforded by the amnesty with respect to some particular act which would otherwise be a criminal act which could be the subject of a prosecution in the courts.

It is because of that latter consideration that section 4 has been included in the Act; relevantly it provides:-

> "4 (1) Where any criminal proceedings are pending against any person referred to in section 3, who in terms of the Act qualifies for an amnesty or immunity from prosecution, the Director of Public Prosecutions may enter a nolle prosequi or where such proceedings continue and result in a conviction, the provisions of section 45 of the Constitution relating to the prerogative of mercy may apply.

(2) Where any person referred to in section 3 has been convicted of an offence prior to coming into operation of the Act who in terms of the Act would have qualified for an amnesty or immunity from prosecution, the provisions of the section 45 of the Constitution relating to the prerogative of mercy may apply."

Apparently the Director of Public Prosecutions was concerned that s.4(1) might impact on the discretion conferred by s.91 (4) of the Constitution and so there was contemporaneously with the Act an amendment made to the Constitution inserting a proviso to s.91 (4) (Act No. 2 of 2001). That proviso effectively stated that the Director should not prosecute anyone granted amnesty pursuant to and in accordance with the Act.

In the light of s.4 (1) of the Act and the proviso inserted in the Constitution if an indictment is presented against a person and a claim of amnesty is made, the Director must enter a nolle prosequi if satisfied that the accused person is within the class granted amnesty. Counsel for the Director in this case agreed that in those circumstances it should be expressly recorded that the nolle prosequi was entered pursuant to section 4 of the Act.

The problem arises, and it did in this case, what is the appropriate procedure where the Director does not accept, despite the accuseds' assertions , that the accused has been granted immunity by section 3. The question then becomes one which the High court can determine. The jurisdiction of the court to consider whether the accused person has the benefit of amnesty is implicit in the reasoning of the two Privy Council decisions referred to above. Murphy J in Salemi at 456 said: "If any question arises whether the plaintiff fulfills the conditions, that can, if necessary, be determined by the court." Section 10 (6) of the Constitution provides: "No person shall be tried for a criminal offence if he shows that he has been pardoned for that offence." As noted above amnesty is in law a form of pardon. Section 18 (1) of the Constitution provides that any person claiming a likely contravention of s.10 (6) may apply to the High Court for redress. That provides conclusive authority, if such be needed, that the High Court has jurisdiction to determine whether or not a particular person has amnesty with respect to a particular offence.

As amnesty is a form of pardon the plea where the commission of the acts was not disputed should be in conformity with s.255 (b) of the Criminal Procedure Code and then the Court would proceed to "try whether such plea is true in fact or not." If the Court determined that a person was protected from prosecution by amnesty one would hope that the Director would enter a nolle prosequi; but if the Director refused to do so, say because he wanted to appeal the findings, the Court could record an acquittal.

It should be noted that pursuant to s.18 (4) of the Constitution the Director could appeal to the Court of Appeal against a finding by the High Court that the accused was entitled to amnesty resulting in acquittal and the accused could likewise appeal against a finding he was not entitled to the benefit of amnesty.

That still leaves the situation which existed here of the accused wishing to plead not guilty on the ground that the criminal acts were not committed, yet claim amnesty if it were found beyond reasonable doubt that he had committed those acts. If it is correct to hold, as we have done, that s.3 of the Act itself confers the amnesty, the protection cannot be lost by the conduct of an accused in denying the commission of the acts in question. There is little authority to be found on the point, but the Supreme Court of the Philippines sitting "en banc" held that the fact an accused "had declined to take advantage of the Amnesty Proclamation at the beginning of his trial before the Court martial does not now preclude him from invoking it, especially after he was found guilty and convicted." (Viray –v- The Amnesty Commission of the Armed Forces of the Philippines (1950, G.R No. L-2540)). There is no reason in principle why that should not be the position here.

It follows that what occurred at the hearing before the Commissioner in this case was not objectionable. He concluded that the appellants had committed the acts which otherwise would constitute murder and before recording convictions considered the claim of each appellant to the protection from prosecution afforded by the granting of amnesty. He then went on to hold that the appellants had not established to the reasonable satisfaction of the tribunal (Briginshaw -v- Briginshaw (1938) 60 CLR 336 at 361-2 and R –v- Coughlan and Young (1976) 63 Cr. Ap. R.33) that either had satisfied the conditions in s.3 (3) and (4) of the Act. That is the finding which the appellants now wish to challenge.

Relying on R -v- Maga and Nokia (2007) SB HC 6 counsel for the Director contended that the Court of Appeal had no jurisdiction to entertain an appeal against such a finding. Section 85 of the Constitution creates the Court of Appeal and provides that it shall have the jurisdiction conferred on it by the Constitution or by Parliament. As noted above the combination of s.10 (6) and s.18 (1) and (4) of the Constitution confer relevant jurisdiction on this Court.

It is now necessary to consider the merits of the appeal.

It is convenient to deal firstly with the finding that the appellants had not discharged the onus of proving that weapons had been surrendered as required by s.3 (3) of the Act. The offences in question occurred on or about 21 August 2000 and at that time each appellant was in possession of a gun. The Marau Peace Agreement was executed on 7 February 2001 and required surrender of arms within 30 days. There was no evidence either appellant was in possession of a gun within the 30 days period after 7 February 2001 and counsel for the Director in this Court conceded the issue must be resolved on the basis neither was in possession of a weapon at that time. The evidence of each appellant was that each left the weapon in his possession at the time of the killings in question in the boat under the control of their commander shortly after the events in question. On that basis their contention was they could do no more with respect to the surrender of weapons. The Commissioner concluded that the statute required each appellant to prove the surrender to authorities of the particular weapon used at the time the offence was committed. As the weapon used by each appellant in the killings could not be specifically identified amongst weapons surrendered pursuant to the Peace Agreement he concluded the onus on the appellants had not been discharged.

On the hearing of this appeal counsel for the Director conceded that, there being no evidence the appellants were in possession of weapons in February 2001, and given the evidence of the appellants that the weapons used were put into the possession of their commander, there should be a finding that the appellants had complied with the surrender of arms provisions.

That leaves for consideration compliance with the conditions imposed by s.3 (4) of the Act.

The Commissioner made the following relevant findings of fact:

(i) The appellants were members of the Marau Eagle Force;

(ii) The subject killings were in retaliation against acts committed by the Isatabu Freedom Movement, in particular the killing of Shadrach Hariu;

(iii) The boys killed (aged 12, 16 and 18) were residents of hideout huts and were neutral, that is bearing no allegiance either to Marau Eagle Force or Isatabu Freedom Movement. They were sleeping when the attack began;

(iv) The deceased were murdered in their sleeping hut. There were no sentries, no resistance was offered and no weapons were seen or found at their sleeping hut.

On the basis of those findings he concluded that the killings in question were not in "combat conditions or in connection with the armed conflict in Guadalcanal." He stated that the wording of s.3 (4) required the acts to be "conducted in a military and operational sense."

Ms. Brown for the appellants in this Court stressed the wide import of the words "in connection with", particularly in the context of the conflict between the two groups which frequently involved indiscriminate killing. The village to which the deceased belonged was within the area of conflict and she submitted there was evidence the appellants believed the village was sympathetic to the Isatabu Freedom Movement.

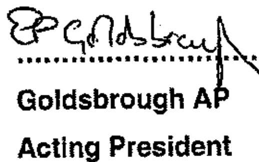
Counsel for the Director emphasized this was the killing of young boys whilst they were asleep in hideout huts some distance from the main village. He submitted such killings were in violation of international humanitarian laws. Finally he submitted this Court should be slow to interfere with the Commissioner's findings of fact which were well supported by evidence.

Counsel also referred the Court to the decision of Cameron J in Lusibaea -v- R (2008) SB HC 4 where he said: "I simply do not accept that the wounding for retribution of an innocent victim, who was not a member of either warring faction and who had

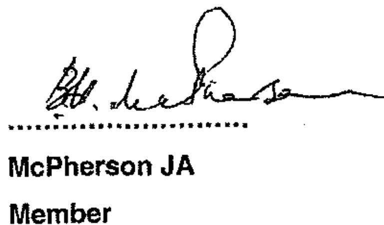
taken no part in the hostilities, can be said to be in connection with the armed conflict." That statement is clearly correct.

In the circumstances the Commissioner was correct in concluding neither appellant had discharged the onus of satisfying the conditions on the granting of amnesty imposed by s.3 (4) of the Act.

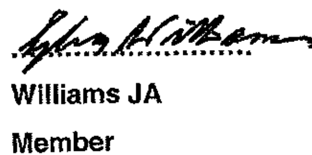
It follows that each appeal should be dismissed.



Goldsbrough AP
Acting President



McPherson JA
Member



Williams JA
Member