ATABAN TROPA -v- REGINA

High Court of Solomon Islands
(Ward C.J.)
Criminal Appeal Case No. 31 of 1990
Hearing: 31 October 1990
Judgment: 8 November 1990

J. Muria for the Appellant
F. Mwanesalua for the Respondent

WARD CJ: On 14 September 1990, the appellant, who is the Member of Parliament for Temotu Nende, was convicted by the learned Principal Magistrate, Lata, of unlawful assembly, going armed in public and common assault. He failed to attend court on that day and following the entry of a plea of not guilty, he was convicted and sentenced in his absence. He appeals against that conviction on three grounds all of which stem from the same point namely that the "magistrate erred in law in proceeding to hear,

1. convict and sentence the Appellant without his consent in his absence.

2. the conviction and sentence were invalid as being in contravention of section 10 of the Constitution.

3. there has been a gross miscarriage of justice.

The history of the case goes back a long way. The incident that gave rise to the charges occurred on 28th October 1986 and this appellant and a number of others were charged. Investigations took a long time and the appellant and his co-accused first appeared before the court on 5th August 1988 and all pleaded not guilty. There followed a

number of adjournments and letters by the appellant seeking to have the case withdrawn or dealt with other than by the normal court procedures. I need not detail them here but eventually the appellant was served with a summons to attend court on 7th December 1989 and failed to attend.

He was then served with a summons on 23rd April 1990 to attend a hearing on 9th May. He was apparently unable to attend then because of a sitting of Parliament and three of his co-accused were tried.

On 21st August he was again served with a summons to attend court on 11th September. On 21st August he wrote to the Officer Commanding Station at Lata saying that, as Parliament was scheduled to start on 30th August, he could not attend. However,on 23rd August the OCS replied pointing out there had been an announcement on the radio on 22nd August that the Parliamentary sitting had been postponed to October and adding that he could do nothing because the police had no power to alter the date.

On 30th August the appellant wrote a letter to the OCS on National Parliament notepaper in the following terms:-

> "Thank you for your letter D/16 of 23/8/90.
>
> All the Government systems have procedures and channels through which they function. Thus my letter was addressed to you as OCS Lata for your directive and onward transmission by the appropriate officer to the magistrate. It is not for you to reply unfortunately.
>
> I am still required by Parliament to fly to Honiara on the 1/9/90, and therefore my requests stands."

On the 11th September the Principal Magistrate sat in

Lata to hear the case.

One of the witnesses was an Inspector who had been flown from the Western Province for the second time for the trial. The learned Principal Magistrate was shown the letter and told that when the appellant was served with the summons on 20th August he was in Santa Cruz and therefore left only days before the trial was set. The record shows the magistrate knew there was no Parliamentary sitting due but, despite that, he adjourned a further day to see if the appellant would arrive on the Wednesday flight and, when he did not, proceeded in his absence. The evidence was called and the appellant convicted.

I have every sympathy with the learned Principal Magistrate. Confronted with a letter in peremptory and arrogant terms clearly showing he did not intend to attend court and written when the appellant was still in Lata and bearing in mind the history of the case, he clearly felt the patience of the court was exhausted. There was absolutely no doubt the trial should be completed. Why should other men charged with the same events have to attend and stand their trial and see a co-accused using his position as a Member of Parliament simply to avoid a similar trial?

Unfortunately, the magistrate took the wrong course to deal with it. He relied on section 191 of the Criminal Procedure Code which reads -

> "191 (1) If at the time or place to which the hearing or further hearing is adjourned, the accused person does not appear before the court which has made the order of adjournment, such court may, unless the accused person is charged with felony, proceed with the hearing or further hearing as if the accused were present ....."

Whilst that gives the court a clear discretion it must be read with section 10 of the Constitution. Section 10(2) lists a number of protective provisions for persons charged with criminal offences and concludes:-

> "..... and, except with his own consent, the trial shall not take place in his absence unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence."

The learned Principal Magistrate appreciated there was a possibility of inconsistency between these two and would, therefore, have been aware that if they were, section 191 would be void to that extent. However, he took the view that the appellant had, by his conduct in avoiding trial, rendered the proceedings in his presence impracticable in terms of section 10.

I am afraid I cannot agree with that interpretation. The wording of section 10 quoted above relates to the conduct of the accused at trial. It relates the power of the court to have him removed and to proceed thereafter in his absence. That section does not permit the court to proceed in any other circumstances without the accused's presence unless he consents.

I am satisfied, having considered the file in this case, that the appellant had absolutely no intention of attending his trial. One would expect a Member of Parliament to have sufficient respect for the law to obey the summons but, far from obeying it, this man was blatantly using his position to try and avoid it. However, that did not mean he was consenting to the trial proceeding in his absence. He was effectively saying he wanted a postponement and making sure he had one by his failure to appear at the time set for the

trial.

In such a case the learned Principal Magistrate should, once he was satisfied of service of the summons, have issued a warrant to have the appellant arrested.

I allow the appeal and quash the conviction. The case is remitted to the Magistrates Court for trial before another magistrate.

As I have said, it is clear the appellant has every intention of avoiding or delaying the trial by any means at his disposal. I, therefore, issue a warrant for his immediate arrest.

(F. G. R. Ward)
CHIEF JUSTICE