REGINA -v- CLEMENT ROJUMANA AND JOHN MAETIA KALUAE

HIGH COURT OF SOLOMON ISLANDS.
(KABUI, J.).

Criminal Appeal No. 348 of 2005.

Date of Hearing: 1st February 2006.
Date of Judgment: 8th February 2006.

N. Monstnsky, Q.C. and J. Seuika for the Appellant.
P.Lavery for Clement Rojumana.
S. Lawrence for John Maetia Kaluae.

JUDGMENT.

Kabui, J.: This is an appeal filed by the DPP challenging the correctness of an order the learned Magistrate made withdrawing a number of charges laid against Clement Rojumana, a politician who had been appointed a Minister of the Crown and John Maetia Kaluae, a private person, (the respondents), who had been appointed the Chairman of the Citizen Commission. The appeal is about the application of section 91(a) of the Penal Code Act, (Cap. 26), 'the Code' to the standing of the two respondents as persons who can be prosecuted under this section. The relevant of section 91(a) states-

" **A person who-**
(a) being employed in the public service, and being charged with the performance of any duty by virtue of such employment, corruptly asks for, solicits, receives or obtains, or agrees or attempts to receive or obtain, any property or benefit of any kind for himself or any other person on account of anything already done or omitted to be done, or to be afterwards done or omitted to be done, by him in the discharge of his duties of his office;

(b) ---,
shall be guilty of a felony and shall be liable to imprisonment for seven years".

The appeal arises from the manner in which the learned Magistrate dealt with the issue of whether or not the respondents are caught by section 91(a) of the Code. That is, whether or not the learned Magistrate was correct in accepting a pre-trial determination of an argument over the correct interpretation of section 91(a) as read with section 4 of the Code which resulted in his ordering the withdrawal of the charges laid against the respondents under section 191(2)(b)(i) of the Criminal Procedure Code Act (Cap. 7), 'the CPC' to reflect his finding and the correct interpretation of section 91(a) as read with section 4 of the Code.

The trial in the Magistrate Court.

The court record shows that on 18th April 2005, Counsel for Mr. Rojumana indicated to the learned Magistrate that he was to argue that section 91(a) of the Code did not apply to the respondents because they were not public officers employed in the public service within the meaning of section 91(a) of the Code above. Counsel for Mr. Maetia Kaluae took the same stand. No pleas were taken and no evidence was called. The case was then adjourned to 12th May 2005 for arguments to take place by Counsel. On that date, Counsel for Mr.Maetia Kaluae sought an adjournment and the learned Magistrate adjourned the hearing for mention on 16th June 2005 and that submissions were to be filed by the parties by 23rd June 2005. On this date, the defence made their submissions and the Crown responded to them accordingly. The learned Magistrate made his ruling on 21st July 2005 and acquitted both respondents by ordering the withdrawal of the charges against them. The DPP then appealed to the High Court against the order for acquittal.

The appeal by the Crown.

The grounds of appeal can be reduced to two basic grounds of appeal. The first is that the learned Magistrate erred in his finding that the appellants were public officers serving in the public service within the meaning of section 4 of the Code. Second, the learned Magistrate erred in law by ordering the respondents to be acquitted under section 190(2)(b)(i) of the CPC.

The second ground of appeal directly puts in question the power of the learned Magistrate to order a unilateral acquittal of the respondents as he did in this case. This situation appears to have been brought about by the procedure adopted in disposing of the argument raised by the defence as to the application of section 91(a) of the Code to the respondents. The learned Magistrate did not follow the trial procedure set out in sections 195 to 203 of the CPC as the argument was treated as a pre-trial issue.

Is pre-trial practice available in the High Court and not in the Magistrates' Courts?

The answer to this question may provide a guide to Crown prosecutors, defence lawyers and the magistrates who deal with summary offences in the magistrates' courts. There is of course the practice to quash by motion an indictment before a judge. The motion can be moved even before the indictment is put so that if it is successful, the accused does not even have to plead to the indictment. The success of such a motion is often short lived because often fresh proceedings or a suitable amendment is brought in to cure the defect.

The usefulness of such a motion is also limited because the grounds for filing such a motion are limited. That is to say, either the indictment is without authority or the wording of or the count reveals a fundamental defect or the offence is not the offence for which the accused had been committed for trial. (See page 74 in Emmins on Criminal Procedure, by John Sprack, Fifth Edition, 1992).

This practice can be found in section 252 of the CPC which is a procedure in the High Court.

Whilst his practice in the High Court may be applied in the magistrates' courts it does not seem to be sanctioned for use in the magistrates' courts. The question is why not? The answer seems to lie in the history of the CPC. All magistrates until the Principal Magistrate's Court was introduced in 1976 were lay magistrates. The CPC has not since been amended to bring about any required changes. In my view therefore, the procedure for pre-trial quashing of charges in the magistrates' courts as in the High Court is not available in the magistrates' courts. It is also noteworthy that in this case, the defence did not file a motion to quash the charges as would have been the case in the High Court; instead, the point of argument had been turned into a pre-trial issue. No orders in terms of relief had been asked for by the defence.

The scenario was likened to that of a determination of a question under Order 58, rule 2 of the High Court, (Civil Procedure) Rules, 1964, (the High Court Rules) except that in this case, no declaration of any right was being asked for by the respondents. The pre-trial issue was left hanging in the air without any order being requested as the relief sought by the respondents. This is why the learned Magistrate had been forced to act extraordinarily in this case. The learned Magistrate was forced to make an order to make sense of his finding although no one had asked for that order to be made. Although the pre-trial issue appeared to be a preliminary issue, it was not because it was the trial issue itself in this case. There was no case for the determination of any preliminary issue. The case for the Crown either stood or fell on the issue that section 91(a) of the Code did or did not apply to the respondents. The learned Magistrate might have been confused by the procedure under Order 27 of the High Court Rules for the determination of a point or points of law which determination disposes of the case at hand. Order 27 of the High Court Rules does not apply to criminal trials.

The correct trial procedure in the Principal Magistrate Court.

As usual, the charges against the respondents should have been put to them by the learned Magistrate and then be asked to plead to the charges. If they pleaded not guilty, the Crown would then call evidence subject to cross-examination and re-examination. After the close of the case for the Crown, the defence would then make a no case to answer submission on the ground that the respondents had committed no offence because they were not public officers serving in the public service. The learned Magistrate would then rule on the submission.

If the learned Magistrate ruled that there was no case to answer on the point of law raised by the defence, he would acquit them there and then. If the Crown did not agree with the ruling made by the learned Magistrate, the Crown would then appeal to the High Court against that ruling.

If, on the other hand, the learned Magistrate did rule that there was a case to answer, the defence would call no evidence and simply repeat the arguments for a case to answer. If the learned Magistrate ruled against the Crown and entered a verdict of acquittal, the Crown would then appeal to the High Court against that verdict.

The other option available to the learned Magistrate was to apply section 207 of the CPC and proceeded to commit the respondents to stand their trial in the High Court.

The Magistrate fell into a procedural error in the trial.

Lest I missed anything, I have combed the Magistrate file and have not found any record of the proceedings showing that the respondents had in fact been arraigned by the learned Magistrate after 18th April 2005 hearing. That is to say, each of them had not been asked to plead to the charges laid against each of them. What is on record is their intention to plead not guilty expressed in court through their respective Counsel. The undisputed fact on the record therefore is that each of them had not pleaded to the charges laid against him. No criminal trial in the magistrate court of an accused person commences until the accused has pleaded guilty or not guilty to the charge laid against the accused. The Crown cannot set out to prove its case against the accused unless the accused has pleaded not guilty. Likewise, the Crown cannot produce the facts which prove the charge or charges unless the accused has pleaded guilty to the charge. The guilt or the innocence of the accused cannot be determined in a vacuum before evidence on oath is given or before a guilty plea has been entered. To do otherwise would be an academic exercise that does not determine the guilt of the accused because guilt or innocence can only be determined on sworn evidence or a guilty plea as the case may be. To do otherwise would be to commit a mistake in the court process because the court would be engaging in an exercise to determine whether the charge or charges as the case may be should be withdrawn before it is put to the accused and the trial commences. There is no such procedure in the criminal law process in summary jurisdiction in this country.

The procedure adopted by the learned Magistrate got him into trouble when having ruled that section 91(a) of the Code did not apply to the respondents, the Crown refused to withdraw the charges. It was not a case where the charges were defective and the learned Magistrate could use his powers under section 201 of the CPC to vary the charges either in substance or form to suit the facts. It was a case where the defence was alleging that the charges had no legal basis in the first place. Since the charges had been laid in court, they must be formally put to the respondents in court and get them to plead to the charges.

The problem in this case was that the Crown prosecutor did not say why he was refusing to withdraw the charges. The learned Magistrate, on the other hand, did not see how the charges could sit well with his finding that the charges had no legal basis. To be consistent with his finding, the learned Magistrate saw no other way to throw out the charges but to order that the charges be withdrawn under section 190(2)(b)(i) of the CPC without the consent of the Crown.

The Crown prosecutor should have resisted the defence stance and asked the learned Magistrate take the plea and the trial to proceed in the usual way. The learned Magistrate could have also insisted, if the Crown prosecutor had said nothing, that the plea be taken and the trial to proceed as a normal trial. Neither the learned Magistrate nor the Crown prosecutor did this. The Crown prosecutor would have perhaps never thought that the learned Magistrate would make the order as he did. The learned Magistrate also perhaps would have thought the Crown prosecutor would drop the charges once he ruled

against the Crown. The Crown prosecutor did not drop the charges and the learned Magistrate acted as he thought fit.

Both of them were caught by the wrong procedure adopted by the learned Magistrate and each of them made self-preservation decisions. The learned Magistrate made a mistake when he made the unilateral order for withdrawal of the charges. In my view, he had no power to do what he did. The decision to withdraw any charges belongs to the prosecutor but the learned Magistrate must consent before that decision is valid. In this case, the prosecutor refused to withdraw the charges in the strongest term but the learned Magistrate overruled him and made the order for withdrawal.

This is a case of the wrong beginning ending with the wrong ending. It is unfortunate that this happened in this case. Had it been a motion to quash the information in the High Court and the judge had ruled in favour of the respondents, the Crown prosecutor in this case would have had no basis to make any comments about the charges. The information had been quashed and that would have been the end of the matter.

Conclusion.

The respondents have been charged with official corruption. They are however innocent until proven guilty in a court of law. However, it is in the public interest that the application of section 191(a) of the Code to them should be conclusively determined, if necessary, by the proper procedure under the CPC. The result achieved by the Magistrate is not satisfactory on this issue. The case must go back to the Magistrate Court for re-trial.

It is not right for me to substitute the order of the Magistrate with mine, if it needs be, because there had been no trial below. No evidence had been called. It is therefore for this reason unnecessary for me to consider and rule on the first ground of appeal. What I can do under section 293 of the CPC however is to quash the order made by the Magistrate and order that this case be remitted to the Magistrate Court for re-trial on a date to be fixed. I order accordingly. The Principal Magistrate Court may try the case in the usual manner or else deal with it under section 207 of the CPC.

The appeal is allowed.

F.O.Kabui, J.