Mafi v Police

Supreme Court, Vava'u
Lewis J
Cr. App. 426/95

22 & 24 November 1995

Evidence - criminal case - onus of proof
Intoxicating liquor - prosecution - onus of proof
Criminal law - onus - strict liability - reverse onus

The appellant was convicted of manufacturing home brew, in breach of the Manufacture of Intoxicating Liquor Act. He appealed.

Held:

(1) Although s.6 of the Act shifted the onus of proof of a liquid being intoxicating liquor to a defendant it did not shift the onus in relation to any other element of the charge, whether directly or indirectly.

(2) The prosecution had to prove, therefore, that the manufacturing was unlawful and that it must prove, as well, the negative averment that the appellant was unlicensed under the Act.

(3) The offence created by the Act was not on offence of strict liability with a shifting onus.

(4) There being no evidence that the appellant was unlicensed, the appeal must succeed and the conviction set aside.

Statutes considered : Manufacture of Intoxicating Liquor Act

Counsel for respondent Ms Weigall

Judgment

The Appellant was convicted of a breach of the provisions of section 3(a) of the Manufacture of Intoxicating Liquor Act (Cap.85) by a Magistrate sitting at Neiafu Vava'u.

Section 3(a) provides:-

"Subject to section 4 any person who -

(a) shall make or distill or aid or assist or otherwise be concerned in making or distilling any intoxicating liquor, ... shall be guilty of an offence" (my emphasis)

Section 4. (Referred to in section 3) provides:-

"4(1) The Minister of Police, may with the consent of the Privy Council, issue a licence to manufacture, and sell wholesale, intoxicating liquor, such licence to be granted on terms and conditions approved by the Privy Council.

(2) A breach of the above terms and conditions shall be an offence against this Act."

The learned Magistrate gave reasons for conviction after a submission by the Defendant that there was insufficient evidence to require him to answer the charge. The Magistrate ruled the prosecution had made a case to answer. The Defendant elected neither to give nor to call evidence.

In his reasons delivered straight away the learned Magistrate said among other things:-

"If .... he confessed that he was the one who made it (the hopi), that is enough to convict him therefore the accused is guilty."

The grounds of appeal before the court were threefold but at trial leave was given by the court to the appellant to add a fourth. The added ground is added by consent of the Respondent. They are:-

"1. That the prosecution was not able to identify where the intoxicating liquor (home brew) was from.

2. The accused was acquitted on the charge of being in possession of intoxicating liquor.

3. The confession by the accused was taken by an officer different from the officers who arrested him and no-one was able to identify the intoxicating liquor or Hopi (Home Brew) the confession was for.

4. That section 3(a) is subject to section 4 of Cap.85 was never mentioned or asked by Police during interview and confession whether accused have a licence or not."

Ground number 4. This ground gives rise to an interesting question of the requirements of the onus and standard of proof in cases such as this. In the Manufacturing of Intoxicating Liquor Act, section 3 is subject to the provisions of section 4 of the Act. It avails a person, charged with any breach of section 3 of the Act, nothing to complain that the prosecution have failed to prove that any liquid said to be intoxicating liquor is in fact intoxicating liquor containing greater than two precent of proof spirit within the meaning of section 2 of the Act because of section 6 of the Act-an "Aid-in-proof" section which effectively shifts the onus of proof to the accused to demonstrate (presumably on the balance of probabilities) that any suspected liquid is not "Intoxicating Liquor" within

the meaning of the Act.

But that is all section 6 does. What it does not do, either directly or indirectly, is shift the onus of proving any other element of the charge from the prosecution to the Defence. Proof of identity and illicit manufacture of the prohibited substance remains with the prosecution from first to last.

Once the prosecution have averred that a substance is intoxicating liquor the averment amounts to prima facie evidence that the substance is intoxicating liquor within the meaning of the Act, which averment may only be displaced by proof to the contrary by the accused. However the remaining elements of the charge must be proved beyond reasonable doubt by the prosecution. So it is here.

One of the elements of the offence under consideration is that manufacturing here was illicit. That is the prosecution must prove the negative averment that the defendant was unlicensed. The proof of that fact appears nowhere in the evidence.

Ms. Weigall for the Respondent, (prosecution) in this case suggested that in some way the provisions of section six of the Act (which bears the marginal note "Burden of Proof"), required the defendant to prove in his own defence that he was licensed at the material time. In my opinion this is not an offence of strict liability with a shifting onus. It is merely an offence where Parliament has seen the need for including in the statute an "aid in proof" of the fact of one troublesome element of a charge and an element about which the accused has the best knowledge.

Ground four of the appellant's grounds of appeal succeeds. In my opinion the judgment of the learned Magistrate must be overturned. The error, if I may call it that, was that the learned Magistrate failed to observe that there was no proof by the prosecution that the defendant was unlicensed within the meaning of section 4 of the Act, although I might add that the failure was not drawn to the attention of the learned Magistrate by Counsel.

The order of conviction is this matter is set aside and a verdict of not guilty entered. I will hear counsel on the question of costs.