R v Kaufusi

Supreme Court, Nuku'alofa
Ward CJ
Cr 143/97

1, 2 February 1999; 3 February 1999

Criminal procedure — submission of no case to answer — based on credibility of witness
Criminal procedure — theft case stopped — could court convict of receiving on same evidence?

In August 1994 an outboard motor was stolen from a Fisheries Department vessel at Tu'imatamoana wharf. Some months later it was recovered partly dismantled from Onevai island and from a workshop in Nuku'alofa. The accused and the man originally charged with him, Lakalaka, were both living on Onevai at the time of the theft of the motor, each with his de facto wife, and making their living by fishing. Each Friday they would travel from Onevai to Nuku'alofa to sell their catch. Lakalaka pleaded guilty to receiving and was sentenced. The prosecution called him and he provided the only evidence that directly linked the accused to the theft apart from the accused's admission to the police that he was in possession of the motor shortly after it had been stolen. The accused argued there was no case to answer. Two matters of law arose for determination: first, was the court able to allow a submission based on the court's evaluation of the credibility of a witness and if so, in what circumstances; and second, if the court stopped the case of theft could the case proceed on the basis that the court could convict of receiving on the same evidence.

Held:

1. Where there was a submission of no case at the close of the prosecution case, it should be allowed if the submission were that there was no evidence upon which, if it were accepted, a reasonable jury properly directed could convict.
2. The evidence linking the accused to the offence of theft was so discredited and was so manifestly unreliable that a reasonable tribunal could not convict on it. The accused was therefore acquitted on the count of theft.
3. Whilst a jury could be directed to acquit at the close of the prosecution case, they had no power to convict until the conclusion of the case as a whole. Therefore the ability to convict of another offence could only arise at the end of the evidence as a whole. It could not apply at the end of the prosecution case following a successful submission of no case. Where such a submission was made, the court must acquit. There was only one

count and, as the accused was acquitted on that, the case was at an end. He was discharged.

Cases considered:

Practice Note [1962] 1 All ER 448
Practice Note No 1 [1992] Tonga LR 1
R v Galbraith [1981] 2 All ER 1060; (1981) 73 Cr App Rep 124 (CA)

Statutes considered:

Act of Constitution of Tonga (Amendment) Act 1990
Criminal Offences Act CAP 18
Evidence Act CAP 15

Counsel for prosecution : Mr Tapueleulu
Counsel for defendant : Mrs Palalei

Judgment

At the close of the Crown case, counsel for the accused has submitted no case to answer. In order to deal with her submission and in view of my decision, it is necessary to look briefly at the prosecution evidence.

Some time in August 1994 an outboard motor was stolen from a Fisheries Department vessel at Tu'imatamoana wharf. Some months later it was recovered partly dismantled from Onevai island and from a workshop in Nuku'alofa.

The accused and the man originally charged with him, Lakalaka, were both living on Onevai at that time, each with his de facto wife, and making their living by fishing. Each Friday they would travel from Onevai to Nuku'alofa to sell their catch. They travelled in their own boats, the accused with his wife, Olivia, and Lakalaka with his, Litia.

The prosecution called all those people except, of course, the accused and they spoke of a particular Friday in August 1994. The theft is charged as having been committed on the 16 August and the prosecution case is that it occurred during Friday night. Mrs Palelei for the accused points out that, in 1994, the 16th was in fact a Tuesday. Whilst there is some uncertainty as to how each witness was sure he or she was talking of the same Friday in August, I am willing to accept for this purpose that they were all referring to the same Friday and that it was the same day of the next morning that the motor was stolen.

Lakalaka has already pleaded guilty to receiving and has been sentenced. The prosecution called him and he provides the only evidence that directly links the accused to the theft apart from the accused's admission to the police that he was in possession of the motor shortly after it had been stolen.

The evidence the prosecution put forward to link the accused with the theft arises in this way, The four from the island were unable to sell all their catch on the Friday and so they all went to Lakalaka's 'api in Nuku'alofa to spend the night. They had some food and then started to play cards. By that time the accomplice told the court he was drunk and so, when the others played cards, he went to sleep. He awoke some time about two or three in the morning and saw the accused and Olivia were not there. He asked the others in the house and was told they had left. The next morning

he woke after it was light and eventually went to the wharf where Litia alone was selling the fish. He did not see the accused or Olivia that morning. His first knowledge of the outboard was when he saw it hidden on the island a few days later.

The account the accused gave when he was interviewed was that he slept the whole night at Lakalaka's 'api and woke once it was light. He went to the wharf and Lakalaka showed him an outboard hidden under a raincoat in the accused's boat. He realised it was stolen and took it back to the island for Lakalaka.

That undisputed interview clearly is an admission of receiving in terms of section 148(5) and the only evidence that could link the accused to the actual theft, the only offence on the indictment, is that of the accomplice that the accused left the house during the night the motor was stolen. Section 126 of the Evidence Act requires the evidence of the accomplice to be corroborated before I can convict on it; a requirement that, surprisingly, was not mentioned by either counsel. The only corroboration is the accused's admission that he was handling the motor the day after it was stolen, However, as that evidence comes solely from the accused and he denies theft but admits to receiving, it is difficult in the absence of anything else, to see any reason why the court should accept his admission he had the stolen property but reject his reason why.

The critical part of the accomplice's evidence could have been corroborated by the women but, far from supporting Lakalaka's account, they both contradict him on that point. Each woman confirms the other's account that they went to sleep at the 'api and woke in daylight. They went together to the wharf and, together, continued selling the fish leaving both the accused and Lakalaka asleep. Neither described the accused leaving the house and Olivia denied ever leaving in the night herself.

During counsel's submissions, I told counsel that I could not accept the accomplice as a credible witness. The only corroboration was weak and, if I did not consider the witness credible, it could not, in any event, save his testimony.

Counsel for the defence asks the court to say that the evidence cannot stand in such a parlous state. Prosecuting counsel points out, correctly, that assessment of witnesses and evaluation of the evidence is a matter for the conclusion of the case as a whole.

It seems to me that two matters of law arise for determination, first, is the court able to allow a submission based on the court's evaluation of the credibility of a witness at this stage and if so, in what circumstances and second, if the court stops the case of theft at this stage can the case proceed on the basis that the court could convict of receiving on the same evidence.

The first causes no difficulty. Where there is a submission of no case at the close of the prosecution, it should be allowed if there is no evidence upon which, if it were accepted, a reasonable jury properly directed could convict. The correct approach has been explained by Lord Lane CJ in the English case of *R v Galbraith* [1981] 2 All ER 1060; (1981) 73 Cr App Rep 124 (CA) at 127:

> "How then should the judge approach a submission of 'no case'? (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arise where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is

> inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty then the judge should allow the matter to be tried by the jury."

That court also disapproved of the previously used test that a judge could stop the case if, in his view, the evidence was unsafe or unsatisfactory.

In *R v Shippey* [1988] Crim LR 767, Turner J has expanded upon the effect of (b) in the Lord Lane's judgment (above). He drew back from the suggestion that it meant that if there is any evidence to support the charge, the judge had to allow the case to go to the jury He considered that the judge was entitled to make an assessment of the evidence as a whole at that stage of the case.

Both those cases were jury trials. In the present case, I am sitting without a jury and am therefore judge both of fact and law. I have already formed the view on an assessment of the evidence as a whole, that I cannot accept the accomplice is a credible witness. The prosecution case that this is theft must depend on the evidence of the accomplice and the assumption that the accused's admission in interview is untrue at least on that aspect. If I disbelieve the accomplice because his evidence has been so contradicted that it cannot stand and know, therefore, that, if no further evidence is called, no reasonable jury could convict. Is it right that the accused should be put to his defence? I think not. I am exercising summary jurisdiction similar to that of a magistrate. The position in such circumstances has been explained by Lord Parker CJ in a Practice Note reported in [1962] 1 All ER 448. Although rulings on the law should not be given in practice directions, the terms of this note have been accepted for many years as a correct statement of the law:

> "A submission that there is no case to answer may properly be made and upheld (a) when there has been no evidence to prove an essential element in the alleged offence; (b) when the evidence adduced by the prosecution has been so discredited as a result of cross-examination or is so manifestly unreliable that no reasonable tribunal could safely convict on it.
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> Apart from these two situations a tribunal should not in general be called on to reach a decision as to conviction or acquittal until the whole of the evidence which either side wishes to tender has been placed before it."

This advice is directed at Magistrates who are judges of fact and law. Clearly, applying the test of whether the evidence has been so discredited or is so manifestly unreliable will necessitate an assessment of the evidence as a whole. To that extent only a Magistrate or Judge sitting without a jury may, following a submission of no

case, go further in considering the credibility and weight of the prosecution evidence than would a judge sitting with a jury.

The evidence in this case linking the accused to the offence of theft with which he is charged has been so discredited and is so manifestly unreliable that I do not believe a reasonable tribunal could convict on it. The accused must be acquitted on the count of theft.

Before leaving this point, I would suggest that Practice Direction No 1 of 1992 in this Court (which, incidentally, falls into the same error as Parker LCJ and purports to rule on a point of law) incorrectly states the position in relation to a submission of no case in the Magistrates' Court.

That would normally be an end of the matter but the unchallenged evidence already before the court of the accused's interview amounts to a clear admission of receiving. Having ruled there is no case for the accused to answer on the charge upon which he stands indicted, is it possible to allow the case to continue nonetheless because the evidence could support a conviction of another offence?

Section 42(3) of the Criminal Offences Act provides;

> "(3) Where on a person's trial on indictment for any offence except treason or murder, the jury find him not guilty of the offence specifically charged in the indictment but the allegations in the indictment amount to or include (expressly or by implication) an allegation of another offence falling within the jurisdiction of the Court of trial, the jury may find him guilty of that other offence or of an offence of which he could be found guilty on an indictment specifically charging that other offence."

Although it has been in the Act for many years, I would suggest this provision was, until 1990, in breach of Article 13 of the Constitution which provided that, subject to exceptions in relation to attempt and alternative verdicts of theft, embezzlement and fraudulent conversion, "no one shall be tried on any charge but that which appears in the indictment, summons or warrant for which he is being brought to trial."

Section 42 clearly went behind the protection of Article 13. However, by section 5(iv) of the Act of Constitution of Tonga (Amendment) Act 1990, a new paragraph was added:

> "(d) any Act may provide that a person charged with an offence may be convicted of another offence (not being a more serious offence) arising out of the same circumstances."

That would appear to mean that a part, at least, of the provisions of section 42 no longer breaches the Constitution.

In this case, receiving is no more serious than theft as the power to sentence is the same as if the accused had committed theft. The terms of section 42 are wide and counsel for the prosecution suggests that the court can invoke them at any stage of the trial.

He also suggests section 149 of the Criminal Offences Act allows an alternative verdict in this case. I do not accept that is a correct interpretation of the section. It allows alternative charges of theft and receiving to be charged in the same summons

and the court to convict on one or the other. It only applies when there are two charges.

In this case there is no alternative count on the indictment. The prosecution may be wise to consider including an alternative in any case where the evidence might support either or both. The Crown case here has always been that the accused stole the motor and so the prosecution presumably put the interview forward as an untrue account by the accused in which he was attempting to shift the blame to his, then, co-accused. This may explain the absence of an alternative count of receiving even though the evidence contained compelling evidence of that offence.

However, having now found that there is insufficient evidence to put the accused to his defence on the count upon which he has been indicted, is it right to allow him to be put to his defence on the case of receiving revealed on the evidence so far? If it is, how is the prosecution to cross-examine the accused if he should decide to give evidence? Would counsel for the Crown be entitled to ask the accused if he did in fact steal the motor? If he said he did and so, possibly, lost the protection of autrefois acquit in accordance with Article 12 of the Constitution, could this court then convict him of the very offence of which it had just acquitted him, the trial having been allowed to proceed on an allegation of a different offence.

Common sense seems clearly against it but the law gives little guidance. I cannot accept that, having faced a trial on an offence that the prosecution has failed to establish prima facie, the accused should have to face a charge upon which, until the collapse of the indicted offence, he had never been told he stood accused.

I consider the answer is found in the terms of section 42. That section gives the jury the power to return a conviction of an alternative charge when they have acquitted him of the offence charged. Whilst a jury can be directed to acquit at the close of the prosecution case, they have no power to convict until the conclusion of the case as a whole. That must mean that the ability to convict of another offence under the section can only arise at the end of the evidence as a whole. It cannot apply at the end of the prosecution case following a successful submission of no case. Where such a submission is made, the court must acquit.

In this case there is only one count and, having acquitted the accused on that, the case is at an end. He must be discharged.