TIMOTEO (TUPE PETER) v POLICE

Court of Appeal Apia
30 October 1978
Henry P, Donne and Coates JJ

CRIMINAL LAW (Trial) - Trial by Judge alone - Grave departure from proper conduct of trial - Combination of factors making trial so unsatisfactory that conviction and sentence must be quashed - Trial on charge of incest - Prosecution permitted to build strong case against accused on inadmissible evidence of conversations with both the complainant and her father concerning the alleged incestuous acts and on improper opinion evidence as to the significance of certain conduct of accused - Complainant swearing to falsity of written statement taken by Police and statement admitted as part of her evidence in chief - Complainant thereafter cross-examined without leave and without apparent self-direction by trial Judge as to limited purpose of such evidence to prove prior inconsistent statement - Conviction based on alleged acknowledgement of guilt by accused denied on oath which trial Judge accepted as unequivocal - Alleged acknowledgement unsupported by any relevant admissible testimony - Effect of evidence of son in support of father's denial not weighed.

APPEAL pursuant to Part III of the Judicature Ordinance 1961 against conviction of incest and sentence to two years' imprisonment.

Appeal allowed and conviction and sentence quashed.

Kruse for appellant.
Cruickshank for respondent.

Cur adv vult

HENRY P, DONNE AND COATES JJ (ORALLY). Appellant was convicted on a charge that between the 1st and the 12th day of September, 1978 at Vaimea he had sexual intercourse with Margaret Gwenda Timoteo, knowing her to be his daughter, thereby committing the crime of incest. The complainant was then 19 years of age. He was sentenced to two years' imprisonment. The original appeal was against sentence only. This Court, after reviewing the record thought it proper to draw to the attention of counsel to certain aspects of the evidence and of the judgment given in a trial which was heard before a Judge alone. As a result, counsel for the appellant made an application for the notice of appeal to be amended so as to include an appeal against conviction. To this course, counsel for the Crown properly acceded. Counsel were prepared to argue the new ground of appeal at once, but the Court thought it proper for the case to be adjourned until this afternoon when counsel could be heard after having time to consider the new issue.

At the trial the first witness called was the Commissioner of Police who gave evidence of a conversation with the complainant. This evidence was inadmissible, but it is not of any importance. The next witness called was Inspector Penitito. He deposed in considerable detail to statements made by the complainant. It is convenient to cite this evidence at some length. He said:-

> I asked her why and she related that her father had been having sexual intercourse with her. Another officer, Inspector Kirisome, was present. I thought her complaint strange as her father was a Pastor. I told girl that what she alleged was serious, and act that she alleged was a crime known as incest, and was punishable by imprisonment of up to seven years. Girl maintained her story and said she had run away and refused to return as her father had been having sexual intercourse with her. I questioned her and she began to relate transactions between her and her father between late August and early September, 1978 soon after her father arrived from New Zealand. She said that on first occasion her father failed in his attempt to have sexual intercourse, but on a second occasion succeeded and had sexual intercourse twice on the same night. I then proceed to take her statement. She said that on this second occasion she was sleeping on floor and he invited her into his bed as she had no mosquito net. She said about 10 p.m. when lights off her father asked her what would be her gift to him for father's day. She alleged she told him she had no present. After a while she said he asked her to give herself to him as a present. As they were both lying on bed and she was wearing a nightgown her father kissed her on mouth and asked her to remove her clothes which she did. She said her father hopped on top of her and inserted his penis in her private part and had sexual intercourse with her. She said she was pained and felt very disgusted. She said when act was completed she went to toilet, washed herself and came back to bed. She said that at some other time during night the same act was done by her father while she was in the same position. She said that on next morning things were as normal. She said her father knew she was not happy about what had taken place. She said she was asked into a room and her father told her not to worry and he apologised and he was overcome by the devil. She said she left matters like that.

No objection was taken either by the learned Judge or counsel for appellant. It was the duty of the Judge to stop this evidence at once.

The normal practice of calling a complainant as the first substantial witness was not followed seemingly because the Police had earlier taken a statement from her denying that appellant had behaved improperly and saying that the first statement was not true. Up to this stage the prosecution had built, without objection, a strong case based on inadmissible evidence given quite plainly to create an atmosphere of guilt. Inspector Penitito also went so far as to say that he interviewed complainant the next day when she maintained what she had said the previous evening thus having the effect of reinforcing its correctness.

Appellant and complainant were interviewed and again some inadmissible evidence was given about what complainant had said about an apology. This apology figured in the alleged confession, a confessional conduct of appellant, later relied on by the learned Judge in his judgment. A statement was taken from appellant, but before this was done, according to inadmissible evidence allowed in respect of an opinion formed by the Inspector, who said:-

> I did not show the complainant's statement to the defendant but its contents were related by me to the defendant during interview. I did mention to defendant both at Vaimea and on day statement was made that his daughter alleged he had sexual intercourse with her. On both occasions he said he did not argue with the allegation.

This statement was a long one given in considerable detail. It will be noted that all the witness says is that he "related" the contents as well as the fact that complainant had on two separate occasions made an accusation of sexual intercourse. He went on to say that "on both occasions" appellant said he "did not argue" with the allegation. What "both occasions" means is not certain. The clear implication is that appellant agreed with the contents of the statement, but in what words or

at what part or parts of the "relation" of its contents is not given, so that the Court could evaluate what the effect of the interview really was. The proper course was for this important evidence to be given in detail. It cannot otherwise be properly weighed. It would affect whether the words "did not argue" may not truly represent what was said. This evidence is entirely unsatisfactory. It will later be seen that the written statement of accused used the terms "confirm" the statement of complainant, and that he had "no objection" to anything. Reference will later be made to this.

The complainant was then called. After detailing some of her movements at the material time she said:-

> At first I told the Police I had had a fight with my father. They did not believe me so I continued with the story I had made up to this guy. I subsequently made a written statement on 14 September. It is the one shown to me (Exhibit 1). I read the statement and told the Police it was true.

The statement was then put in as part of her evidence in chief. It was clearly inadmissible unless leave had been obtained to treat her as hostile. No one appeared to be aware that leave was necessary, so she was in fact cross-examined without leave.

At this stage, the Inspector had by inadmissible evidence, built up a strong case against appellant, including the fact that complainant had twice made allegations of incest. Opinion evidence had been given when it was not proper, and a statement highly prejudicial to appellant had been admitted as evidence in chief and no clear distinction was made of the limited purpose for which such evidence can be used when permitted after a witness has been declared hostile. Neither the Judge nor counsel appear to have appreciated the grave departure from the proper conduct of a criminal trial. Appellant then gave evidence and called his son, who gave evidence of some importance and the probability that appellant had no opportunity to act and did not act indecently, as was set out in the complainant's statement. It will be noted later that this evidence was not considered in the judgment.

In his judgment the learned Judge commenced in the same manner in which the prosecution through Inspector Penitito had presented its case against appellant. He said:-

> After inquiries were made by the Police the complainant was located at the home of a Customs Officer, Lolagi Sheppard, and brought to the Police Station. She was spoken to at the Police Station by Inspector Penitito in the early evening and to him made a complaint about certain actions of a sexual nature towards her by her father. These included an allegation that on a particular night, some five or six days after the defendant had arrived in Western Samoa, the defendant had sexual intercourse with the complainant on two occasions. She stated that she had left home on the night of the 12th September because of further sexual overtures by the defendant.

He further said:-

> The following morning the complainant was seen again by the Inspector and her somewhat lengthy written statement was taken. This reiterated what she had said the previous night.

Some importance also appears to have been given to an opinion expressed by the Inspector that a confession was anticipated by him. After dealing with a part of the interview, the learned Judge accepted evidence of a belief of the Inspector that appellant was apologizing for an act of intercourse. Evidence of any such belief was inadmissible. It was for the Court to form an opinion on the evidence of what happened and what was said and to decide whether or not appellant was apologizing.

The learned Judge had a simple question to answer on the evidence of complainant. It was, did he believe her denial when she said no sexual impropriety had taken place? If he did not, then none of the evidence to which attention has been drawn should be considered as a part of the

judgment. The learned Judge after discussing various matters for the greater part of his judgment made this finding:-

> Having listened to her carefully I say only that her evidence before me lacked any plausibility.

If her evidence lacked "plausibility", it would seem to follow that properly the statement was plausible. This was a most unsatisfactory way of dealing with the simple question, namely, did he reject beyond reasonable doubt her assertion on oath that no indecency occurred? It should then have been made clear that all the evidence as to her previous inconsistent statements was entirely excluded from the case and that it in fact and in law had no bearing on the question of proof of guilt.

Counsel for the Crown relied heavily on the statement of accused, and the following passage, which is the final paragraph in the judgment:-

> In the end the Police are left to rely only on the acknowledgements of guilt by the defendant both in his behaviour and in his admissions, both oral and written. There will not be many occasions when a Court will feel that a conviction should be entered in such circumstances and where the complainant is denying the allegation in Court. But here the conduct and confessions of the defendant as proved before this Court are quite unequivocal and I am satisfied that this charge has been proved beyond reasonable doubt.

The conduct and confessions must be unequivocal as a confession of guilt. It is of the essence that a confession be unequivocal. Apart from voluntariness, the fact of confession must be proved, and then it must be proved that it is true. It is insufficient to hold that a confession is unequivocal. One of the important confessions put forward was that appellant did not argue with the details of the long statement of the complainant when the Inspector "related" it to him. This piece of evidence was most unsatisfactory but seems to be treated as an unequivocal confession. There is not one word of evidence as to what appellant said at any particular point in the narration.

The final paragraph above quoted commences with the words, "In the end the Police are left to rely upon the acknowledgement of guilt." The prosecution never at any time had any other relevant and admissible sworn testimony. From the beginning to the end of the page this was the position. It is by no means clear that the course of the trial and the inadmissible evidence did not colour or affect the conclusion reached "in the end". A clear statement that the evidence was inadmissible when given by the Inspector, and that the statement and cross-examination of complainant were admitted for a limited purpose only, was essential in the light of the conduct of this case, so that it was clear neither was taken into account on the question of guilt.

It is true that there are not many occasions when a conviction will be entered where the prosecution relies solely on a confession. Much more rare be the case where both the accused and the victim swear there was no criminal conduct. It has been said that even murder may be proved solely by a confession. Courts must be careful to look for some independent evidence to support the confession, and take particular care to give clear reasons why a confession denied on oath and otherwise unsupported ought to be held sufficient. Here, there was not only no independent evidence, but the evidence of the son was in favour of the appellant. It was never mentioned. The conduct and confessions finally relied on were not specifically detailed and discussed as one would expect. This was particularly necessary in this case when such terms as "he did not argue" are used on a vital occasion, and no full account of the interview is given.

We turn lastly to the written statement. The relevant paragraphs are:-

> I am being interviewed by Inspector Penitito Alai'a regarding the matter concerning me and my daughter Margaret who is now attending Samoa College at Vaivase and the matter is our having sexual intercourse with her in our family at Vaimea.

> This matter as I am being questioned for, as well as my daughter Margaret, I do confirm the statement of my daughter and I have no objection to anything. This is the first time in my life that I am being involved in a crime, not only here in Samoa but in New Zealand as well. But I do speak with honesty before God and before you Sir [Commissioner] that I realise my crime and therefore I apologise with great regret before your honour if it meets with your will that I want to be saved from disgrace and shame.

This is translation. There was no evidence to explain the nuances of the Samoan language used. This only repeats the unsatisfactory evidence given by the Inspector when he said he "related" the statement to appellant who did not argue with it. There was ample opportunity to put the particulars in detail to appellant and to record his answers. It was simple to get specific answers to the details given in the statement by appropriate questions and answers rather than to employ a method whereby apparent agreement, lack of objection, or failure to argue is stated to be the result.

A combination of all the factors which we have set out, in our opinion, makes this trial so unsatisfactory that the judgment ought to be set aside. The appeal will therefore succeed and the conviction and sentence will be quashed. Orders accordingly.