

POLICE v PIULA (VA'ASILI)

Court of Appeal Apia
Morling, Reynolds, Roper JJ
1, 2 February, 4 February 1993

CONSTITUTIONAL LAW - right of arrested person to consult a lawyer without delay.

CRIMINAL LAW - duties of police on arrest of a person.

HELD: A voluntary statement obtained without allowing the accused to consult a lawyer is admissible, at the discretion of the Court.

LEGISLATION:

- Constitution of Western Samoa, Articles 6(3), 4, 80, 81
- Judicature Ordinance 1961; S 52

Edwards, Aikman for State
Malifa for Defendant

- Cur adv vult

This matter comes before us as a case stated under the provisions of S.52 of the Judicature Ordinance 1961.

That Section is in the following terms:

"52. Questions of law may be reserved for decision of Court of Appeal -- The Supreme Court may reserve for consideration by the Court of Appeal, on a case stated, any question of law which may arise on the trial of any action, cause or matter, and may give any judgement or decision, subject to the opinion of the Court of Appeal, and the Court of Appeal shall have power to hear and determine and read such question."

The questions of law that are reserved for our consideration arose upon the trial of a matter by the Learned Chief Justice of the Supreme Court.

That matter was incidental to a murder trial about to take place and was a preliminary hearing in the nature of a voir dire heard by the judge to determine the admissibility of a confessional statement alleged to have been made by an arrested person. The hearing on this question was undertaken in this way because counsel for the accused had informed the prosecution that it was intended to challenge the admissibility of the statement.

This challenge was not based upon any question of whether the alleged confession was shown to be voluntary but upon the ground that there had been an antecedent denial to the arrested person of a right granted and guaranteed by the Constitution of the Independent State of Western Samoa.

Reliance was placed upon Article 6(3) of the Constitution which is in the following terms:

"(3) Every person who is arrested shall be informed promptly of the grounds of his arrest and of any charge against him and shall be allowed to consult a legal practitioner of his own choice without delay."

Specifically the claim depended upon a breach of the right of the accused to be allowed to consult a legal practitioner of his own choice without delay. Although the section is framed so as to place an obligation on those in authority we are prepared to accept that it gives rise to a corresponding right in the arrested person.

The learned Chief Justice held that there had been such a breach and proceeding upon the basis that it automatically and necessarily resulted in the exclusion of the confessional statement ruled that the evidence was inadmissible.

The prosecution thus in the position of an aggrieved party requested a case to be stated and the trial was stood over to a future date.

The matter had such relevance and importance to the future administration of justice and police practice in this community that an urgent and special sitting of this Court of Appeal has been convened.

The facts presented to us which underline the formulation of the three questions are simple and uncomplicated. They are that upon the arrest of the accused he was told by a police officer that he had the right to seek counsel. However he was not given a telephone or telephone directory. There was no evidence that the arrested person requested a legal practitioner and no waiver of the accused person's right to consult a legal practitioner was requested or given.

It was upon this factual basis that it was held that the arrested person was not given any assistance to enable him to exercise his right to consult a legal practitioner of his choice without delay. The learned CJ then extended this finding upon no additional facts into a further conclusion that therefore he was not allowed to consult a legal practitioner.

Whether this latter conclusion was open in law upon the facts as found is the heart of the problem posed to this Court. Before coming to this key question some procedural questions need to be considered.

It was submitted by the Respondent that the method of appeal by way of case stated was inappropriate and unavailable for 3 reasons:

- (a) that S.52 is limited to civil proceedings; and
- (b) that because a substantial question of law as to the interpretation or effect of a provision of the Constitution was involved the only right of appeal is to be found in Article 80 of the Constitution and nowhere else; and
- (c) that the proceeding before the Judge were proceedings within the meaning of Article 4 and the only right of appeal is provided by Article 81 of the Constitution.

As to (a) - This is the subject of the first question in the stated case. S.52 is not by its terms confined to civil matters and we see no reason in construing the section to introduce the suggested limitation by necessary implication or otherwise.

The learned trial Judge was engaged upon the "trial of ... a matter" and he reserved for consideration on a case stated certain questions of law and this Court has the power and indeed the duty to hear and determine and read such questions by force of the section.

It does not affect the power and jurisdiction of this Court whether or not the trial Judge chose to exercise the power granted to him by the section to give a decision on the question reserved.

In our opinion this ground of objection to the procedure by which the appellate jurisdiction of this Court was invoked has no substance.

As to (b) - Article 80 is found in an organic document, the national constitution, the provisions of which transcend the enactments of the Samoan legislature.

Its effect is that the legislature of Western Samoa cannot legislate so as to abrogate the rights of appeal granted by the article. This is not to say that the legislature cannot provide other and different procedural routes as it has done by S.52 of the Judicature Ordinance. Article 80 cannot be construed as restricting the method of challenging on appeal decisions on constitutional questions. It guarantees access to the Court of Appeal on certain conditions.

As to (c) - The simple answer to this submission is that the proceeding before the Chief Justice was not a proceeding under Article 4 of the Constitution and Article 81 can have no application.

We turn to the third question. The answer to this question depends upon whether a breach of Article 6(3) of the Constitution is established by the facts as found.

The only factual material relied upon as constituting a breach is that the police officers who held the arrested person in custody failed to provide for his use a telephone or telephone directory.

The arrested person had been told that he had the right to seek counsel and there is no evidence to suggest he expressed any wish to have access to legal counsel.

The submission of counsel for the Respondent is, as it must be, that this failure to provide a telephone or a telephone directory constituted a breach of the obligation placed upon those concerned to allow the arrested person to consult.

The scope and intendment of Article 6(3) is a matter of statutory construction. We are mindful of the Decisions of high persuasive authority which require a liberal and beneficial interpretation of provisions designed to secure fundamental human rights. We have been referred to many decisions of the Courts of those countries which have a bill of rights enshrined in their constitution or embodied in legislation. Many of these decisions import by way of implication rights and obligations beyond the literal words of the grant of a so-called fundamental right. Generally this is done on the basis that otherwise the right or immunity granted is illusory or nugatory or to put it another way, implication of a further related obligation is necessary to make effective the grant of the right.

It is to be noted that there is no requirement under Article 6(3) to inform the arrested person of his right to counsel as in other jurisdictions but it may well be that there is to be imported into the Article an unexpressed requirement to inform the person arrested that he has the right to counsel. The arrested person was so informed in this case and we understand it to be a standard practice in Samoa which in our view should continue.

We have, however, been referred to no reported case in which such a provision as S 6(3) has by a process of statutory construction been expanded to require arresting officers to actively assist and facilitate an arrested person to communicate with a legal practitioner in a case where there is no expressed desire to consult counsel.

Indeed where an arrested person has been told of his rights in this respect and has not expressed a desire to consult counsel to hand him a telephonic instrument or a telephone directory seems to say the least somewhat unreal.

It may be that in certain circumstances conduct including a failure to facilitate communication with a legal practitioner could properly be regarded as a refusal to allow consultation in cases where a desire for consultation had been expressed. There are no such circumstances here.

In our opinion, on the facts stated in this case there was no breach of Article 6(3). We reject the proposition that a failure to facilitate and assist an arrested person to arrange a consultation with a legal practitioner where no desire for such a consultation has been expressed constitutes a breach of Article 6(3).

The second question does not directly arise in this case because of our conclusion as to the correct answer to question 3. However we think it desirable to express a view. We think that incriminating statements made or obtained where there has been a breach of a fundamental right relating to personal liberty fall into the same category as those obtained by illegal means. A review of the available literature and the authorities of a number of jurisdictions persuades us that the better view of the law is that there is no requirement that such statements must be rejected but there is a discretion in the trial judge allowing him to admit the statement where the competing considerations justify such a course. We think that this should be regarded as the appropriate law for Western Samoa and that where a confessional statement is tainted in either way the onus is on the prosecution to persuade the tribunal that the statement should nevertheless be admitted.

For these reasons we answer the questions in the case stated as follows:

Q.1. In the circumstances of this case, does section 52 of the Judicature Ordinance 1961 permit this stated case to be referred to the Court of Appeal?

Answer Yes.

Q.2. If the Police obtains a cautioned statement from a person who is arrested without allowing that person to consult a legal practitioner of his own choice without delay as required by Article 6(3) of the Constitution and that person has not waived his right to consult a legal practitioner, is the cautioned statement automatically inadmissible or does the Court have a discretion to exclude it or not, if it is otherwise found to have been voluntarily obtained?

Answer The Court has a discretion to exclude it or not.

Q.3. Was the cautioned statement of Vaasili Piula correctly held to be inadmissible as having been obtained in violation of his right to be allowed to consult a legal practitioner of his own choice without delay?

Answer No.