IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

MISC. 20697

BETWEEN: FAITELE NANAI of Falelatai

Appellant

A N D: THE POLICE

Respondent

Counsel: F Drake for appellant
G Latu for respondent

Hearing: 23 December 1996

Judgment: 13 January 1997

JUDGMENT OF SAPOLU, CJ

This is an appeal against sentence from the Magistrates Court.

The facts of the appeal may be briefly stated. On 5 February 1996 at Fugalei, the police found the appellant driving a bus which was carrying 62 passengers even though the bus was licensed to carry only 33 passengers. So there were 29 excess passengers. Then on 10 May 1996 the police again found the appellant at Fugalei driving the same bus and at that time it was carrying 52 passengers. So there were 19 excess passengers. The police then charged the appellant with two separate counts of overloading under the relevant provisions of our traffic laws.

It was common ground between counsel that as the appellant is not a first but a repeated traffic offender the maximum penalty for his present offences is three(3) months imprisonment. Section 42(b) of the Criminal Procedure Act 1972 then provides :

> "In any case where a summons has been served on the defendant a reasonable "time before the trial, or the defendant has been released on bail to "attend personally at the trial. and the informant but not the defendant "appears at the trial, the following provisions shall apply :
>
> "(a) ....
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> "(b) If the offence charged is one in respect of which the maximum "penalty is a fine or not more than 3 months imprisonment, the Court may "proceed with the trial and (if the defendant is convicted) may pass "sentence, or may issue such a warrant to arrest the defendant and bring "him before the Court, or may adjourn the trial to such time and on such "conditions as the Court thinks fit".

In respect of the charge relating to the alleged incident on 5 February, the appellant was served with a summons on 16 August to appear before the Magistrates Court on 1 October. He failed to appear in Court on that day. His case was then adjourned to 13 December. In respect of the charge relating to the alleged incident on 10 May, a summons was served on the appellant on 1 October to appear before the Magistrates Court on 19 November. Again the appellant failed to appear and that case was also adjourned to 13 December. Although it is not expressly stated, I am able to infer from the circumstances that both cases against the appellant were adjourned to 13 December for the purpose of allowing the police to call evidence to prove the charges. That was duly done in the absence of the appellant and the learned Magistrate who tried both charges found them proved. His Worship then convicted the appellant of both charges and sentenced him to one month imprisonment on each charge, the sentences to be

concurrent.

In passing sentence, the trial Magistrate took into consideration the appellant's numerous previous traffic convictions. Those previous convictions were produced in this Court and it is clear that the appellant has 328 previous convictions for a variety of traffic offences committed over a period of 14 years from 1982 to 1996. Of those previous convictions about 270 of them were for overloading, the same offence for which he was convicted and sentenced in the present case.

There are three stated grounds of appeal. Regarding the first two grounds of appeal, the appellant admits to having being served with both summons issued against him. However in respect of the first summons requiring his appearance before the Court on 1 October he says he overlooked to appear; in respect of the second summons requiring his appearance before the Court on 19 November, he says he was unable to appear because he was sick. The third ground of appeal is that the sentences passed were manifestly excessive having regard to all the circumstances.

In support of the first two grounds of appeal, counsel for the appellant submitted that if the trial Magistrate was mindful of imposing a sentence of imprisonment then he should have exercised his discretion under section 42(b) of the Criminal Procedure Act 1972 by issuing a warrant for the appellant's arrest so that he could be present at the time sentence was passed. As I understand this submission, it also means in practical terms that the trial Magistrate should have adjourned the passing of sentence to await the execution of the

warrant of arrest. So the essence of the first two grounds of appeal, as it appears to me, is not that the sentences imposed were excessive but that the trial Magistrate wrongly exercised his discretion under section 42(b).

For the sake of abundant clarity, it should, perhaps, be stated that this appeal does not complain that the whole trial should have been adjourned and a warrant issued for the appellant's arrest so that he could be present during his whole trial. That is confirmed by the fact that the appeal is not against conviction but restricted to sentence only. I will therefore deal with the first two grounds of appeal on the basis of whether the trial Magistrate was right in sentencing the appellant to prison in his absence.

I must say that I do not accept the submission made on behalf of the appellant that where a Magistrate is mindful of passing sentence on an absent defendant under section 42(b) he should issue a warrant for the defendant's arrest so that he could be present at the time he is sentenced. Such a universal qualification on the Court's discretion is not provided in section 42(b) itself. Nor do I think that section 42(b) contemplates such a general qualification. The fact that the provision extends to include an offence which carries a maximum pernalty of up to three(3) months imprisonment shows that it contemplates the imposition of a sentence of imprisonment of up to three(3) months on an absent defendant in an appropriate case. The discretion must of course be exercised judicially and with due caution for there may be circumstances where the proper course to take is to order the presence of the defendant by issuing a warrant for his arrest or adjourn proceedings on conditions.

In case the idea of the Court passing sentence in the absence of a defendant may alarm some people, it must be pointed out that section 42(b) of the Criminal Procedure Act 1972 is not a novel provision of its kind or unique to Western Samoa. Similar provisions may be found in section 61 of the New Zealand Summary Proceedings Act 1957 and sections 15(1) and 47(1) of the United Kingdom Magistrates' Courts Act 1952 for which see *29 Halsbury's Laws of England 4th edition, para 334.* In the English case of *R v Governor of Brixton Prison, Ex parte Carbon-Waterfield [1960] 2 QB 488 at p.509* the Court stated :

> "It is, moreover, to be observed that in this country there are cases, "admittedly most exceptional, in which a man accused of misdemeanour may "be tried and sentenced in his absence : see *Rex v Browne (1906) 70 J.P. "472*, and section 15 of the Magistrates Courts Act 1952".

With the abolition of the distinction between felonies and misdemeanours in England by the Criminal Law Act 1967 (UK), the discretion in the Court to proceed with a trial in the absence of a person charged with an offence formerly described as a misdemeanour now also applies to the trial of a person charged with an offence previously known as a felony.

In the case of *R v Jones (No.2) [1972] 2 All ER 731* decided after the enactment of the Criminal Law Act 1972 (UK), the defendant who was charged with counts of fraudulent conversion and conspiracy deliberately jumped bail during the course of his trial. Application by counsel for the defendant to discharge the jury because of the absence of the defendant was refused by the trial Judge and the trial continued in the absence of the defendant who was found guilty and sentenced in his absence to 5 years imprisonment for fraudulent conversion and

3 years imprisonment for conspiracy. Many months later the defendant was traced to Denmark from where he was extradited back to England. He appealed his conviction and sentence. In refusing leave to appeal, the Court of Appeal stated that the trial Judge had a discretion to continue with the trial in the absence of the defendant and that in the circumstances the trial Judge exercised his discretion properly.

I have referred to the position in New Zealand and more particularly in England to show that the discretion vested in the Court to proceed with the trial of a defendant, then convict him as the case may be, and sentence him in his absence is not something unique to this country as to cause any undue alarm.

Coming back now to the first ground of appeal, the only reason given for the appellant's failure to comply with his summons requiring him to appear before the Court on 1 October as a result of which he did not know that his case was adjourned to 13 December was because he overlooked to do so. That is not a sufficient reason to satisfy this Court that the trial Magistrate should have exercised his discretion in a way other than he did. No reasons were also advanced to demonstrate that if the appellant had been present at his sentence a lesser penalty would have been imposed.

The evidence adduced by the police to prove the charge covered by the first ground of appeal shows that the appellant was carrying 62 passengers in his bus which was licensed to carry only 33 passengers. The number of excess passengers was almost the same as the number of passengers the apellant's bus was permitted to carry. This was therefore not a minor but a serious case of overloading. The

appellant's numerous previous traffic convictions also show that he is a person without any respect or proper regard for our traffic laws.

Given those circumstances, I am of the view that even if the appellant had been present at his sentence the learned Magistrate would still have imposed the sentences he passed. I am also of the view that the Magistrate did not err in the exercise of his discretion and no miscarriage of justice occurred.

That brings me to the second ground of appeal which is that the appellant was unable to comply with his second summons requiring his appearance before the Court on 19 November because he was sick and as a result he did not know that his case had been adjourned to 13 December when he was sentenced to one month imprisonment. A report by a registered nurse claimed to have seen the appellant on 19 November at the Falelatai Health Centre was produced for the appellant. That report states the appellant had a severe headache, coughing a lot and was wheezing when breathing. He had chest pain, a fever, painful joints, numbness and weakness of the body, epigastric pain and loss of appetite. However when advised by the nurse that he should be admitted at the Health Centre the appellant refused. He was prescribed some medication including aspirins and amoxicillin antibiotics. Two days later the appellant's condition had "well improved".

Now the appellant did not make any effort to advise the Court or the police of his condition. As a result the Court heard the police case, then convicted and sentenced the appellant to one month imprisonment in his absence. That sentence was made concurrent with the other sentence of one month imprisonment

imposed in respect of the other overloading charge. In the English case of *R v Howson (1982) 74 Crim. App. R.172* which was concerned with an appeal against conviction, Griffiths LJ in delivering the judgment of the Court of Appeal said at p.179 :

> "In an appropriate case, the Judge has a discretion to continue a trial in "the absence of one of the accused through illness. This is a discretion "which we would expect to be sparingly exercised and never if the "accused's defence could be prejudiced by his absence".

On the authority of that case, Archbold Criminal Pleadings, Evidence and Practice 43rd edition states at para 345 :

> "Trial Judges have a discretion to continue the trial in the absence of a "defendant when that absence is caused by the defendant's illness. Such "a discretion will always be sparingly exercised and never if the "accused's defence could be prejudiced by his absence".

I must sound a word of caution here. The position in Western Samoa is not clear at this stage whether the Court's discretion to proceed or continue with a trial in the absence of a defendant is as extensive as it is in England or whether that discretion is restricted only to cases encompassed within the terms of section 42(b) of the Criminal Procedure Act 1972. I have only referred to the English position for the purpose of gaining some guidance as to the exercise of the Court's discretion under section 42(b) where a defendant is absent from his trial or sentence due to illness.

In the present appeal the trial Magistrate was not aware that the appellant had been sick on 19 November when sentence was passed on 13 December. So the

appellant's illness was not a factor taken into consideration when the trial Magistrate exercised his discretion to proceed to trial on 13 December and on that day convicted and sentenced the appellant in his absence.

In my view, given the circumstances of this case the same sentence would have been passed even if the appellant had been present at his sentence. It has not been demonstrated in any way that the sentence would have been any different if the appellant was present. Neither has it been shown that the appellant's position was in any way unduly prejudiced because of his absence through illness when sentence was passed. I am also conscious of the fact that the sentence passed on the charge to which the second ground of appeal relates was made to run concurrently rather than cumulatively with the sentence passed on the charge to which the first ground of appeal relates. The absence of any effort by the appellant to make enquiries as to what had happened to his case called on 19 November when he recovered from his illness two days later is symptomatic of his could not care less attitude towards our traffic laws as evidenced by his numerous previous traffic convictions. If the appellant had only made the attempt to find out, he would have discovered that his case had been further adjourned to 13 December and so prepare himself accordingly. But no such attempt was made. On the basis of the authorities cited, I have also come to the view that absence through illness of a defendant does not prevent a Magistrate in an appropriate case from proceeding with the trial and pass sentence under section 42(b). I also do not think that any miscarriage of justice has occurred in this case. I am therefore of the view that there is no need to have the appellant's case recalled so that he may be resentenced in his presence.

As to the third and final ground of appeal, namely, that the sentence of one month imprisonment is manifestly excessive, I am of the view that in all the circumstances, and given the appellant's numerous previous traffic convictions, the concurrent sentences of one month imprisonment on each of the two charges against the appellant were not manifestly excessive.

For all those reasons the appeal is dismissed.

TFM Sapolu
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CHIEF JUSTICE