Papua New Guinea

Agai v. Yarume

National Court
Bredmeyer J.
25 June 1987

Criminal appeal – natural justice – bias – appearance of justice – police prosecutor husband of victim – whether prosecutor should be disqualified because of close relationship to victim – whether miscarriage of justice.

Criminal appeal – natural justice – bias – appearance of justice – whether magistrate should recuse himself as a wantok of the prosecutor and victim – whether miscarriage of justice.

The appellant, Provincial Secretary of Chimbu Province, was convicted of five charges arising out of two drunken episodes. Appellant appealed from the decisions of the Magistrate in the District Court, on the grounds of bias. The police prosecutor, a senior inspector, was the husband of a complaining witness, and the prosecutor, and his wife, were wantoks of the magistrate.

HELD: All appeals were dismissed.

(1) As the prosecutor was not a witness, there was no impropriety in him serving as a prosecutor in a case where his wife was a witness. *Simms* v. *Moore* [1970] 2 Q.B. 327; [1970] 2 W.L.R. 1099; [1970] 3 All E.R. 1; (1970) 54 Cr. App. R. 347 considered.

(2) The identity of the Magistrate and the prosecutor as wantoks was insufficient to show a real likelihood or reasonable suspicion of bias in the Magistrate.
Kavali v. *Hoihoi* (unreported) Supreme Court, S.C. 321, 30 September 1986.
R. v. *Altricham Justices, ex parte Pennington* [1975] Q.B. 549; [1975] 2 W.L.R. 450; [1975] 2 All E.R. 78 applied.

OBSERVATION: A "wantok" is a common speaker; that is, a person who speaks the same language and is therefore from the same area.

Legislation referred to in judgment:
District Courts Act (Ch. 40), sections 138 and 230.

A. Yer for the appellant
P. Luben for the respondent

BREDMEYER J.

Judgment:

Fidelis Agai was convicted of five charges by the Kundiawa District Court. He has served the nine months' sentences imposed but he is pursuing the appeals as, he says, he wishes to clear his name.

Four of the charges arose out of a dance at the Kundiawa Hotel on 7 September 1985. They were insulting words to Miriam Kalasim, insulting words to Lyn Kim, unlawful assault of Wendy Anton, and being drunk and disorderly. The fifth charge was unrelated, that on 2 October 1985 he unlawfully assaulted Pasame Yaribe who was his domestic servant.

The dance at the Kundiawa Hotel

The five charges were heard together either by consent or without objection. The defendant was represented by Mr Isidore Kuamin of counsel. Six witnesses were called by the police on these four charges. Their evidence is as follows. The defendant came to the dance at 9.15 or 9.30 p.m. He was very drunk, unsteady on his feet, and the zipper of his trousers was undone. He was all over the place, moving around and chasing women. He came up to Lynn Kim and said, "Hey lik-lik can I fuck you tonight". He said that twice. He then went up to Margaret Satford, held her shoulders and hands, and said, "Young girl can I fuck you tonight?" She ran away for protection to Mirium Kalasim, an older woman. She said to the defendant, "Sir this girl is underage. You cannot talk to a young girl like that". He said, "I don't care how old she is, I just want to fuck her tonight." He then said to Miriam, "How about you Mama? Kan bilong you i swit moa. Can I fuck you tonight?" She said, "Secretary I am your junior officer. I have respect for you. I am married with four kids and I have respect for you. I don't expect such behaviour and insulting words from you". The defendant said, "I don't care, I still want to fuck you". I add that the defendant was the Provincial Secretary – the top public servant in the Province – and Miriam was a secretary in B.M.S.

He then held onto Wendy Anton's anus and said, "Bol bilong me bilong olgeta meri". Wendy's evidence on these two matters was corroborated by a man Poliap Kamitu.

Later he grabbed the microphone and tried to make a speech. Some one shouted out, "You drunkard, get off the microphone", and he said "Get fucked" and/or "Who are you? I'll see you later and I'll tell my security to fuck you". Then, as the climax of the evening, he pulled out his penis, held onto it and said, "My cock is everybody's tongue".

As I have said, six witnesses gave evidence of these incidents. The defendant himself gave evidence. He was drinking that day from 10 a.m. onwards, he was very drunk and cannot recall any incident at the Kundiawa Hotel. He called two other witnesses. Both said he was very drunk. One physically assisted him, propped him up onto the dance floor. They were not with him all the time, and were not able to confirm or deny the incidents mentioned by the police witnesses. The evidence was really all one way; the defence evidence did not contradict it. I can readily see how the magistrate believed the police witnesses.

There is abundant evidence that the words I have quoted were uttered to Miriam Kalasim and Lyn Kim, and clearly they were insulting. That disposes of the first ground of appeal. The second ground, in relation to those two charges, is that there was no evidence that the words were likely to lead to a breach of the peace. I consider that those insulting words, offered by a drunk at a crowded dance, are exactly the kind of words likely to cause a breach of the peace. It is likely that some male wantok or friend of the girl will tell the defendant to sit down or shut up, he will respond with a punch, a push or a shove and so start a fight.

There are hints of a fight almost starting in the evidence. After Wendy Anton was held on the anus and having heard the defendant say, "Bol bilong mi bilong olgeta meri", her brothers came and removed him from where she and her girlfriend were sitting and the defendant responded and wanted to start a fight, but he was finally taken away by his mate, George Grayson. The same thing did not happen, with the insulting words to the two women, but in my view was likely to happen.

The appeal notice says that the assault conviction was against the weight of evidence. It was not. There was no defence evidence against it. To say "I don't recall any incident", hardly contradicts first-hand evidence. Regarding the assault as a sexual one, the girl's evidence was corroborated by that of Poliap Kamitu.

There is abundant evidence that the defendant was drunk in a public place and acted in a manner that disturbed a reasonable member of the public. He was clearly drunk. I leave aside the insulting words to Miriam and Lyn and the assault on Wendy Anton – to avoid a duplication of charges out of the same incident – there are several other incidents to show that he acted in a disturbing manner. These include holding the thighs of a girl Susie Lokes, holding the hands and shoulder of Margaret Satford and saying to her, "Young girl can I fuck you", and pulling and chasing women around the room, saying the words, "Bol bilong mi bilong olgeta meri", holding his penis in his hands and saying, "My cock is everybody's tongue".

Natural justice – prosecutor husband of the victim

A ground of appeal in relation to the charge of insulting words to Miriam Kalasim is that, "The court erred in allowing the prosecutor who is the husband of the said Mirium Kalasim to prosecute when defence raised the objection."

The objection was raised. Miriam was the wife of the police prosecutor, Inspector Kalasim. Was the objection well founded in law? Mr Kuamin cited no authority on the point to the magistrate, nor Mr Yer in arguing it before me on appeal.

In a private information, where the informant is not represented by counsel, the informant is both witness and prosecutor. He is obviously partisan, yet it is permitted. In a police prosecution usually the informant is a different person from the prosecutor and it is best to keep it that way. See for example *Simms* v. *Moore* [1970] 2 Q.B. 327; [1970] 2 W.L.R. 1099; (1970) 3 All E.R. 1; (1970) 54 Cr. App. R. 347. In that case the police informant on a charge of offensive weapon, was not assisted by a prosecutor. He was likely to appear as a witness, so rather than perform the prosecutor's duties, he simply handed up the police statements to the justices' clerk to examine the witnesses. The equivalent in this country would be handing up the prosecution witnesses' statements to the magistrate and asking him to lead the evidence from them. The Queens Bench Division thought the informant acted properly.

A similar rule of ethics applies to barristers: a barrister should not accept instructions in a case in which he might appear as a witness. To summarize: a prosecutor, be he a police prosecutor or a lawyer, should not appear in a case in which he is likely to appear as a witness – unless he is an informant conducting a private prosecution. The facts of the case before me are different. The police prosecutor was not going to be a witness. I cannot see how Inspector Kalasim's appearance as the prosecutor in the case in which his wife was the victim was unlawful or improper and does not amount to a "substantial miscarriage of justice" (s. 230) District Courts Act (Ch. 40).

Natural justice – the Magistrate and the Police Prosecutor

The fourth ground of appeal in the appeal against the conviction for insulting words to Miriam Kalasim is that:

> there was reasonable suspicion of bias in favour of the prosecution, as the prosecutor and the presiding magistrate are from the same Province.

At the hearing before me I granted leave for the other four appeals to be amended by adding the same ground. The appellant did not file any affidavits or call sworn evidence on the relationship between the prosecutor and magistrate, which would have given the magistrate a chance to reply. The appellant did not point to any matter of bias or favouritism in the appeal record. Mr Yer said that the magistrate and prosecutor both come from New Ireland, that Kudiawa is a small town and that I should infer that the magistrate may well socialize together with the prosecutor and his wife. Therefore, he argued, according to my note, that the prosecutor should have withdrawn from prosecuting all charges. That argument falls short of saying that the magistrate should have barred himself from the case. The argument is stronger in relation to Miriam's case, because in that case there was a wantok victim and a wantok magistrate, than in the other cases where it was simply a wantok prosecutor and a wantok magistrate.

An instructive case of bias because of a connection between the magistrate and the victim of the offence is *R.* v. *Altricham Justices, ex parte Pennington* [1975] Q.B. 549; [1975] 2 W.L.R. 450; [1975] 2 All E.R. 78. In that case a conviction was quashed for bias. The prosecution was for selling underweight vegetables to two schools. The defendants had won a contract to supply vegetables to schools in the County Council area. That contract had been negotiated with the education committee of the Cheshire County Council. The chairman of the justices which heard the case and imposed the fines was a member of that committee. She was also a governor of two schools in the county. They were not the schools to which the underweight vegetables were sold mentioned in the charges but they were schools which also received vegetables from the defendants. She thus had a connection to the victims of the offences.

Lord Widgery C.J. said that the rule of natural justice relating to bias is well known. It is not necessary to prove that the judicial officer was biased. It is enough to show a real likelihood of bias, or at all events that a reasonable person advised of the circumstances might reasonably suspect that a judicial officer was incapable of being impartial and detached. Lord Widgery said that before embarking on his judicial tasks for the day, a magistrate who also had interests in other public work, should study the list of cases to be heard and where he was actively involved with, and known to be actively connected with, a victim of an alleged offence he should either disqualify himself from hearing that case, or at least draw his connection with the victim to the attention of the parties before the start of the hearing to see if there is any objection.

I distinguish that case from the present one. In that case the connection between the magistrate and victim was proved. Here I consider it is not proved. To say that the magistrate and victim are from the same province, that they live in a small town, and that therefore I can infer that they know each other well, see each other often socially etc., is not proof. It is suspicion not evidence.

There are nineteen provinces in Papua New Guinea and a great movement of

people, for example, Sepiks living in Port Moresby, Keremas living in Rabaul, etc. It will often happen that a magistrate or a judge will have someone from his own province before him as prosecutor or defence counsel and he may have someone from his own province as defendant or as the victim of a crime. The administration of justice would come to a standstill if every time a prosecutor and victim (or, for that matter, defence counsel and defendant) came from the same province as the magistrate, a party could apply to have the magistrate barred for bias. So I would lean against any such interpretation. The test is whether there is a real likelihood or reasonable suspicion of bias, *Kavali* v. *Hoihoi* (unreported Supreme Court judgment S.C. 321, 30 September 1986). I consider that this has not been proved in this case. I consider that there has been no substantial miscarriage of justice.

I dismiss all four appeals.

The assault on the domestic servant

The fifth charge was of assault on 2 October 1985 on Pasame Yaribe. The latter was employed by the Provincial Government as a cleaner but in practice worked at the defendant's house as a domestic servant. As I have explained above, the defendant was Provincial Secretary and head of the Department of Chimbu. The victim and the defendant were the only witnesses in this case.

On Tuesday 1 October the defendant gave a birthday party for his son and bought two cartons of beer. The next day, the 2nd, Pasimbe came to work and noticed the house had been smashed. Broken bottles and louvres were there. The party was still in progress. The defendant explained he had had a domestic problem and his family had smashed everything.

According to the victim, he was cleaning the house, got sweaty and wiped his face with the defendant's towel. The defendant, who was very drunk, "What are you doing here, you stupid man, come on outside". The defendant held onto his shirt, pulled him, threw him down, got a stick, struck him on the waist twice with the stick and then picked him up again and threw him down the steps to the ground. He got up, started to run and vomited. Two Wabag men then helped him and gave him water. He was treated at the hospital for a week.

The defendant gave sworn evidence. He said, "On 1st October there was a party. I was dead drunk. I had a domestic problem. My family smashed up everything. On Tuesday 2nd, I dropped my guest, and returned to the house . . . I saw the domestic servant . . . use the kid's towel. I was very upset. I was heated up. He was doing that for sometime. I asked him to leave quietly". The domestic said, "I didn't do anything". I must have pushed him but I did not use extreme force. In cross examination he was asked:

> Q: Would it be correct you were still drunk from the previous party?"
> A: I would not recall the incident. I would not be stupid enough to use so much force.

Section 138 was argued before the magistrate but he declined to invoke it. He imposed the six months minimum penalty then in force for assault. The sole ground of appeal is that the magistrate erred in not properly exercising his discretion under section 138. In argument Mr Yer, for the appellant, said that the prosecution failed to call the two Wabag men mentioned, and therefore should have accepted the defendant's explanation.

What evidence did the magistrate accept? After narrating the evidence of the victim and the defendant the magistrate said:

> Even though there is no corroboration evidence of the prosecution, there is consistency in the prosecution and defence evidence. I believe what the complainant said. His evidence was not damaged by the defence during cross examination. He was very honest and answered the questions directly. I also accepted the admission by the defendant that he only pushed the complainant and did not use extreme force. I am therefore convinced beyond reasonable doubt that the prosecution has proved all the elements of the charge of unlawful assault.

It is not clear from the second last sentence which version of the assault the magistrate accepted. There is nothing in his remarks on sentence which tells me either. The sentence could mean that he accepted the defendant's version – that the assault consisted only of a push; or it could mean that he accepted the complainant's version in full, and found the defendant's admission of a push but a partial admission. In the context I think that is what the magistrate is saying. i.e., "The defendant has admitted a minor assault but I find he committed the assault as stated by the complainant."

If the assault was simply a push then a suspended sentence under section 138 would be appropriate. If, however, the assault was as the victim says it was, then six months' imprisonment would not be wrong, given that the offence was committed during the period of minimum penalties and there was no sentencing option between a suspended sentence and six months' imprisonment. As I have said I think the magistrate did find, and he was entitled to find, in favour of the victim's version. I dismiss the appeal.

Reported by: L.K.