Attorney-General v. Tebana

Court of Appeal
Gibbs V.P., Frost, Donne, Dillon, and Mitchell J.J.A.
19 April 1988

Criminal procedure—trial within a trial—confessions—whether trial judge has discretion to refuse to allow a trial within a trial when accused requests.
Criminal law—evidence—admissibility—confessions—whether statements taken from suspect after suspect has indicated unwillingness to answer questions are inadmissible on that account alone.
Criminal procedure—nolle prosequi—*whether court may acquit rather than discharge an accused upon presentation of* nolle prosequi *by Attorney-General.*

The Attorney-General referred three questions to the Court of Appeal pursuant to section 20 of the Court of Appeal Act. The questions arose out of a criminal trial in which the judge ruled the accused's statement inadmissible on the ground it had been taken after he had indicated that he did not wish to say anything to the police officer questioning him. The prosecution then requested an acquittal as it had no other evidence. The prosecution requested an adjournment in relation to the trial of an alleged co-offender. The questions referred to the Court of Appeal appear from the holdings below.

HELD:

(1) When an accused applies for a trial within a trial in order to challenge admissibility of a statement the trial judge has a discretion to refuse the application. This could be where there is no real question of unfairness, involuntariness of impropriety, or where the prosecution's assertions themselves lead to the conclusion that the statement should be rejected, or on other good grounds. Since trials are by judge alone there is not the same necessity to ensure inadmissible confessions are not put before a jury.

(2) The conduct of an interview after an accused or a suspect has indicated he does not want to answer questions does not of itself render any subsequent statement inadmissible on the grounds of oppression. Admissibility depends on all the facts of the case. *McDermott* v. *The King* (1948) 76 C.L.R. 501 referred to.

(3) When the Attorney-General enters a *nolle prosequi* under section 68 of the Criminal Procedure Code, the court has no power to enter an acquittal rather than a discharge. Here, however, Tebana had been acquitted prior to entry of the *nolle prosequi* in respect of him.

Other case referred to in judgment:
Ajodha v. *The State* [1981] 2 All E.R. 193

Legislation referred to in judgment:
Court of Appeal Act, section 20
Criminal Procedure Code, section 68(1)

Legal sources referred to in judgment:
Attorney-General's Reference
Phipson on Evidence (13th. ed., 1982), paragraphs 12-03, 12-05, and 12-06

Counsel:
T. Tabane for the Attorney-General
No appearance for the respondent

GIBBS V.P., FROST, DONNE, DILLON, and MITCHELL J.J.A.

Judgment:

This reference is made by the Attorney-General under section 20 of the Court of Appeal Act. The accused (with others) was charged with murder and other offences. In the course of the trial, the learned prosecutor sought to prove a statement made by the accused in an interview conducted at the house of a police officer. The interview was conducted in the Kiribati language by a detective constable. He cautioned the accused that he need not say anything unless he wished to do so and that whatever he said might be put down in writing and given in evidence. The accused then signed a statement the substance of which read: "I have nothing to say". The detective constable then told the accused that he intended to ask him a few questions concerning the death of the person who had been killed, and repeated the caution. When questioned, the accused gave answers to the questions, which were taken down in writing, and the document was signed by the accused and the officer.

When the prosecutor sought to tender that document in evidence, counsel for the accused took objection to it on the grounds that it was not obtained voluntarily and that the interview was oppressive "in that it was taken from the accused immediately after he said he had nothing to say".

After hearing argument, the learned Chief Justice, who conducted the trial, ruled that the statement was inadmissible.

When the trial resumed after an adjournment, the prosecutor asked that the accused be acquitted since he apparently considered that the available evidence against him was inadequate. The learned Chief Justice acceded to this request and acquitted the accused. The prosecutor then sought an adjournment (apparently of the trial of the co-accused) to enable a reference to be made to the Court of Appeal under section 20 of the Court of Appeal Act. When an adjournment was refused, the prosecutor presented a *nolle prosequi* in respect of the accused and the co-accused signed by the Attorney-General. Since the prosecutor already had the *nolle prosequi*, it is indeed difficult to understand why he did not present it to the Court instead of asking for an acquittal. The Chief Justice said to the accused and the co-accused: "The prosecution no longer wishes to prosecute the case against you. You are all therefore acquitted and discharged".

The first question asked on the reference is as follows:

1. Where an accused person applies to the court to hold a trial within a trial to determine the admissibility or non-admissibility of a statement given or

> answers to questions given under caution, does the court have any discretion to refuse the accused person's application?

It is to be observed that this question did not strictly arise in the case, since the accused did not apply for a trial within a trial. However, the answer to the question is plainly "Yes—the judge does have a discretion".

In general it is true to say that when an objection is taken to the admissibility of a confessional statement on the ground that it was not voluntarily made, the judge must be satisfied that the confession was voluntary before he admits it, and if the accused wishes to give or adduce evidence on that issue the judge is bound to hear it. In those circumstances there will normally be held a trial within a trial to determine the circumstances in which the confession was made, see *Ajodha* v. *the State* [1981] 2 All E.R. 193, at pages 202–203. In Kiribati the trial is of course conducted by a judge alone, and there is not the same necessity to ensure that an inadmissible confession is not put before the jury, but where there is a conflict as to the circumstances in which the confession was made it may be convenient to hold a trial within a trial to resolve the issue. However, where there is nothing to suggest that any real question of involuntariness, unfairness, or impropriety arises, there would be no point in holding a trial within a trial. Similarly, if the facts as asserted by the prosecution lead to the conclusion that the confession should be rejected, a trial within a trial would be a mere waste of time. The trial judge has a discretion to exercise, as he does in so many other matters arising in the conduct of a trial. This is not to say that in the present case it was right to reject the confession without holding a trial within a trial—that is not a question to be decided upon a reference under section 20.

The second question referred is the following:

> 2. Does the conduct of a question interview under caution, immediately after the accused person has said in his statement that he has nothing to say about the alleged offence, of itself render that question interview inadmissible on the ground that it is oppressive?

It is clear law that no statement made by an accused person is admissible in evidence unless it is shown by the prosecution to have been voluntary, in the sense that it has not been obtained from the accused either by fear of prejudice or hope of advantage exercised or held out by a person in authority, or by oppression: see *Phipson on Evidence* (13th. ed., 1982), paragraphs 12-03, 12-05, and 12-06. A statement is voluntary if it is made by the accused in the exercise of his free choice. As was said in *McDermott* v. *The King* (1948) 76 C.L.R. 501, at page 511:

> If he speaks because he is overborne, his confessional statement cannot be received in evidence, and it does not matter by what means he has been overborne. If his statement is the result of duress, intimidation, persistent importunity, or sustained or undue insistence or pressure, it cannot be voluntary.

Whether there is oppression or other conduct which renders a statement involuntary must depend on all the circumstances of the case.

The critical words in the second question referred to the Court are the words "of itself". They mean that what is asked is whether the fact that an accused is questioned further after he has said that he has nothing more to say renders his

answer inadmissible. The answer to that question is clearly "No". Although there is no power to compel an accused to answer, and although it would be wrong to put any pressure on him to do so, the fact that further questions are put after a refusal to
130 answer does not *without more* render the conduct of the questioner oppressive or the answer involuntary; whether further questioning would have that effect depends on all the circumstances. That does not necessarily mean that the confessional evidence in the present case would be admissible if a new trial of the co-accused were held, because if it appeared to the trial judge that the further answers resulted from pressure or other oppressive conduct the evidence would have to be rejected.

Question 3 is as follows:

3. Where the Attorney-General enters a *nolle prosequi* under section 68 of the Criminal Procedure Code (cap. 17), does the court have the power to acquit rather than discharge an accused person?

140 This question must be answered "No". Section 68(1) of the Criminal Procedure Code provides:

> In any criminal case and at any stage thereof before verdict or judgment, as the case may be, the Attorney-General may enter a *nolle prosequi*, either by stating in court or by informing the court in writing that the Crown intends that the proceedings shall not continue, and thereupon the accused shall be at once discharged in respect of the charge for which the *nolle prosequi* is entered, and if he has been committed to prison shall be released or if on bail his recognisances shall be discharged; but such discharge of an accused person shall not operate as a bar to any subsequent proceedings against him on account of the same facts.

150 Clearly a *nolle prosequi* may be entered at any stage before verdict or judgment, and if it is so entered the Court then has no power to acquit. In the case of the present accused, Karainging Tebana, however, the *nolle prosequi* was entered after verdict or judgment.

The questions are answered:

1. yes, he has a discretion;
2. no, not of itself;
3. no, not if entered before verdict or judgment.