Iuka and Tokoia v. The Republic of Kiribati

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

Criminal procedure—trial by judge alone—whether judge required to state in detail matters upon which a jury would have been directed had the matter been heard with a jury.

The appellants had been convicted of arson and malicious damage contrary to the Penal Code, sections 312(a) and 319(1). Their alibi evidence had been rejected by the trial judge as a concoction. They appealed on the grounds that the trial judge had misdirected himself as to onus and standard of proof, as to identification, and as to the alibi evidence.

HELD:
There was no basis for disturbing the trial judge's findings of fact. A judge sitting without a jury is not required to state in detail all the matters which, if sitting with a jury, he should have directed the jury upon. *R.* v. *Connell* [1985] 2 N.Z.L.R. 233 (C.A.) followed.

Other case mentioned in judgment:
R v. *Turnbull* [1977] Q.B. 224; [1976] 3 W.L.R. 445; [1976] 3 All E.R. 549; 63 Cr. App. R. 132

Legislation referred to in judgment:
Penal Code, sections 312(1) and 309(1)

Criminal appeal:
The appellant appealed against his conviction on arson and malicious damage charges.

Counsel:
R. Koaru for the appellant
V. Altments for the Republic of Kiribati

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

Judgment:
On 15 July 1984, the dwelling-house, cooking hut, and raised-floor hut belonging to one Teatonga who lived at Teabiki were deliberately set alight and the contents of the house were destroyed. There was no doubt that the fire was lit intentionally and unlawfully. Teatonga was not at home when the fire occurred. His grandmother,

Benikira Teuataake, and his wife were in the house immediately before the fire was lit. The grandmother said that the appellant Iuka came to the house with the appellant Tokoia, that she heard stones thrown on the roof of the house and heard people whispering outside. Sticks were used to beat the house, then Iuka told her and her granddaughter-in-law to move out and he started to look for Teatonga. She told him that Teatonga was not in the house and then both Iuka and Tokoia started to burn the house.

The appellants were charged with arson contrary to section 312(a) of the Penal Code and malicious damage contrary to section 319(1) of the Code. They pleaded not guilty to each offence. After a hearing before the learned Chief Justice, Maxwell C.J., each was convicted of both offences and each sentenced to eighteen months' imprisonment. The issue in the trial was whether the accused were the persons guilty of setting fire to and destroying the house and huts and the goods. Each gave evidence and claimed to have been sleeping at the Maneaba at Utiroa Village at the time the offences were committed. They called, as a witness, one Takeiaki Teitibunnang. It appears that both the accused were, on that day, in Utiroa Village to take part in a football game which marked Independence Day. They were required to sleep in the Maneaba. Their witness Takeiaki said that he looked after the members of the football team in the Maneaba from 10 p.m. to 3 a.m. He said that on the night of 15 July the accused were at the Maneaba from 10 p.m. to 3 a.m.

Teatonga's grandmother said that, after she and her granddaughter-in-law left the house, she saw both the accused pour fuel around the house and set it alight. She said that she was about two yards from the first accused when he lit the match and about the same distance from the second accused. She knew both of them previously. Teatonga's wife said that there were a number of people outside the house. She did not recognize anyone setting alight to the house, but she saw the first accused coming from the burning house when he was about ten yards from it and she saw the second accused about fifteen yards from the burning house. She had known both accused for abut five years and she knew the first accused well because she attended school with him. The learned trial judge was satisfied that the witnesses for the prosecution correctly identified the two accused and that the alibi set up by both accused was "a concocted story calculated to deceive this court".

A number of issues are raised in the appeal. In summary, they consist of claims that the learned Chief Justice failed to direct himself properly as to the onus or standard of proof, that he should have accepted the alibi evidence given on behalf of the accused and that he misdirected himself in relation to the alibi evidence, that he misdirected himself as to the evidence of identification, should not have permitted the witnesses to make a dock identification of the accused, and should not have been satisfied beyond reasonable doubt that the accused had been correctly identified.

In his reasons for decision the learned Chief Justice referred to the facts which had "to be proved" including the fact that the accused had wilfully and unlawfully set fire to the dwelling house and other property, and said that the prosecution had "proved its case beyond all reasonable doubt". He cited *R.* v. *Turnbull* [1976] 3 All E.R. 549 and in particular that passage in which the Court of Appeal said:

> Care should be taken by the judge when directing the jury about the support for an identification which may be derived from the fact that they have rejected an alibi. . . . It is only when the jury are satisfied that the sole reason for the

fabrication was to deceive them and there is no other explanation for it being put forward that fabrication can provide any support for identification evidence. (page 553)

The appellants' counsel referred in his argument to the fact: that the offences were committed in the early hours of the morning or at about midnight; that torches were shone at the witnesses; that sticks and stones were thrown at the house; that it was not shown how bright the light was in the house; and that there were about thirty people outside the house, some wearing leaves on their heads and some wearing laplaps on their heads. These facts were referred to in general terms by the learned Chief Justice in his reasons for decision. He said, however, "I am satisfied with the quality of the identification evidence before me and hold that the two witnesses were not mistaken in their identification of the accused persons".

He said also, "I have no doubts in my mind as to the quality of the identification given by the two witnesses. I believe that they did see the accused persons burning the house". He did not place reliance upon the dock identification but rather upon the fact that the accused were known to the witnesses. Those findings of fact were open on the evidence and should not be disturbed by this Court.

In discussing the evidence for the defence the learned Chief Justice referred to a conflict between the statement which each of the accused gave to the police and the evidence of each at the trial. He also referred to the fact that, in their statements to the police, the accused did not mention that Takeiaki had been present in the Maneaba. It is claimed by the appellants that Takeiaki's evidence should have been accepted by the learned Chief Justice. Obviously it was not accepted. The learned Chief Justice saw and heard the witnesses. There is no basis upon which his findings as to credibility should be disturbed by this Court.

A judge sitting without a jury is not required to state in detail all the matters upon which, if sitting with a jury, he should direct the jury (see *R.* v. *Connell* [1985] 2 N.Z.L.R. 233 C.A.). In this matter the learned Chief Justice adverted to the salient points upon which he had to be satisfied beyond reasonable doubt before the accused could be found guilty. He did not fall into error.

The appeal will be dismissed.