McCOLGAN v. DANINO

SUPREME COURT (Schofield, C.J.): November 11th, 1996

Constitutional Law—fundamental rights and freedoms—trial in absence of accused—no trial in absence of accused without his express consent—Criminal Procedure Ordinance, s.114 offends against Constitution, s.8(2)—legislative amendment needed to avoid need to issue warrant in case of non-attendance following summons if no consent

The appellant was charged in the magistrates' court with, *inter alia*, aiding and abetting the sale of liquor outside the permitted hours.

The appellant did not attend court when summoned to appear and, in accordance with s.114(1) and (3) of the Criminal Procedure Ordinance, upon proof of service of the summons on him, the magistrate convicted him in his absence and fined him.

On appeal, he submitted that the magistrate had erred in convicting him in his absence since (a) the proof of service of the summons had not complied with the requirements of the applicable rules; and (b) s.114 offended against s.8(2) of the Constitution, which provided that an accused should not, without his consent, be tried in his absence unless he had conducted himself in so disorderly a manner as to be removed from the court.

The Crown submitted in reply that (a) it was conceded that the convictions must be quashed on the ground that service of the summons had been inadequately proved; but (b) the provisions of s.114(1) and (3) were not unconstitutional, since an accused could be taken to have consented to be tried in his absence if, having received a summons, he decided not to appear in court.

Held, quashing the conviction:

Since the appellant had a constitutional right under s.8(2) not to be convicted without his consent in his absence save in the circumstances described therein, the Criminal Procedure Ordinance, s.114 offended against the Constitution and should not have been applied. The appellant was not to be taken to have consented to being tried in his absence merely because he did not answer the summons and, in any event, service of the summons was in this case insufficiently proved. Accordingly, the convictions would be quashed. Unless and until the law were amended, it would be necessary to issue a warrant to bring to court an accused who failed to attend in answer to a summons and did not signify his willingness to be tried in his absence (page 384, line 45 – page 385, line 4; page 385, line 31 – page 386, line 5).

Legislation construed:

Criminal Procedure Ordinance (1984 Edition), s.114: The relevant terms of this section are set out at page 384, lines 29–41.

Gibraltar Constitution Order 1969 (Unnumbered S.I. 1969, p. 3602), Annex 1, s.8(2): The relevant terms of this sub-section are set out at page 385, lines 5–30.

C. Finch for the appellant;
Miss S. Davidson for the Crown.

SCHOFIELD, C.J.: John Dermot McColgan, the appellant, was convicted by the Acting Stipendiary Magistrate on charges of aiding and abetting Gifted Ltd. to sell intoxicating liquors after the hours permitted by its licence and allowing persons to remain on licensed premises after the permitted hours. He was fined £50 on each charge and now appeals against his convictions.

The appeal must succeed. This much is conceded by Miss Davidson for the Crown. The appellant was convicted in his absence and the proof of service of the summonses upon him was inadequate, under the rules followed in the magistrates' court, to permit the magistrate to so proceed. However, in addition to the inadequacy of the proof of service, in this particular case Mr. Finch has raised the more fundamental question of whether the procedure adopted by the magistrates' court of dealing with a criminal charge in the absence of the defendant after service upon him has been proved offends against s.8 of the Constitution. As I am with Mr. Finch on this general ground, I need not consider the second head of argument relating to inadequacy of service.

Section 114 of the Criminal Procedure Ordinance reads as follows:

> "(1) Where at the time and place appointed for the trial or adjourned trial of an information the prosecutor appears but the defendant does not, the court may, subject to subsection (3), proceed in his absence.
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> . . .
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> (3) Where a summons has been issued, the court shall not begin to try the information in the absence of the accused or issue a warrant under this section unless either it is proved to the satisfaction of the court, on oath, or in such other manner as may be prescribed, that the summons was served on the accused within what appears to the court to be a reasonable time before the trial or adjourned trial or the accused has appeared on a previous occasion to answer to the information."

It was under these provisions that the appellant was dealt with. Upon proof of service of the summonses (inadequate proof as it has turned out) the magistrate proceeded to deal with the appellant in his absence, hear evidence against him and convict and sentence him on the two charges. I

have—somewhat reluctantly because of the practical implications of the decision—come to the conclusion that the provisions of s.114 set out above offend against s.8(2) of the Gibraltar Constitution, and should not therefore be applied. Section 8(2) reads:

"Every person who is charged with a criminal offence—

(*a*) shall be presumed to be innocent until he is proved or has pleaded guilty;

(*b*) shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence;

(*c*) shall be given adequate time and facilities for the preparation of his defence;

(*d*) shall be permitted to defend himself in person or, at his own expense, by a legal representative of his own choice or, where so prescribed, by a legal representative provided at the public expense;

(*e*) shall be afforded facilities to examine, in person or by his legal representative, the witnesses called by the prosecution before any court, and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before that court on the same conditions as those applying to witnesses called by the prosecution; and

(*f*) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the offence,

and, except with his own consent, the trial shall not take place in his absence unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence."

It will be seen, therefore, that it is a constitutional right for a person charged with a criminal offence to be present at his trial and he may only be dealt with in his absence if, having appeared in court, his conduct is such that he has to be removed or if he consents to being so dealt with. I have given careful consideration to whether a person can be taken to have consented to a trial being conducted in his absence if he has received a summons and voluntarily determines not to attend court. However, in my judgment that would be straining the clear requirements of the Constitution. It appears, therefore, that before a person charged with any criminal offence may be dealt with he must be present in court or in some manner have indicated his consent to the trial being conducted in his absence. This the appellant did not do.

This decision poses practical problems in the magistrates' court for it means that in every case where a person is summoned to appear in court and does not signify his willingness for the case to be dealt with in his

absence, if he fails to attend in answer to the summons, a warrant must be issued to bring him to court. It may be that some amendment to the law is required.

In the event the appeal succeeds, the convictions are quashed and the sentences imposed are set aside.

Appeal allowed.