Spoutz v Police (No.2)

Court of Appeal
Morling, Burchett & Tompkins JJ
App 7/97

16 & 20 June 1997

Criminal law - appeal - sentence - increase - no cross appeal - double jeopardy
Statutory interpretation - construction - abolition of common law rights

The facts are set out in the headnote of the case in the Court below, reported above. The appellant applied for leave to appeal to the Court of Appeal on a point of law against the increased sentence on the basis the Supreme Court had no jurisdiction to increase the sentence, in the absence of a Crown cross - appeal.

Held:

1. The sentence imposed in the Supreme Court should be quashed and the sentences in the Magistrates' Court restored.
2. Although the word "amend" in s.80(1) Magistrates' Courts Act in its ordinary meaning and taken on its own would give a power to increase as well as decrease a sentence, yet s.80 have to be looked at in the light of s 75(1) the Court is hearing the appeal brought by the person sentenced.
3. S.80(1) should not be interpreted to give the Supreme Court jurisdiction to increase a sentence in the absence of clear language conferring that jurisdiction, that principle involving the rule against double jeopardy (a common law rule).
4. In the absence of such express statutory power, to increase a sentence on an appeal by the person sentenced offends the rule against double jeopardy. It is a well-established rule of construction that a statute should not be taken as abolishing or modifying fundamental common law rights unless it uses words that point clearly and unambiguously to that conclusion. Such a power cannot be read into s.80(1) as it now is.
5. Even where there is express power it should not be exercised without giving notice to the appellant to enable him to decide whether to withdraw the appeal or to continue with the opportunity to make further submissions on why the sentence should not be increased. To increase the sentence without notice is to deny the appellant an opportunity to be adequately and fairly heard.
6. There is a need for firmly deterrent sentences in cases of importation, supply and possession of hard drugs. This decision is not intended in any way to detract from the Chief Justice's clear warning.

Cases considered : R v Tait (1979) 24 ALR 473
Whittaker v R (1928) 41 CLR 230
Thompson v Mastertouch TV (1978) 19 ALR 547

Statutes considered : Magistrates' Courts Act ss74(2), 80(1), 74(1), 75(1), 81
Court of Appeal Act s.17(3)
(N.Z) Summary Proceedings Act 1957 s.121

80 Counsel for appellant : Mr Niu
Counsel for respondent : Ms Tapueluelu

Judgment

The appellant has applied for leave to appeal on a question of law, pursuant to s 74(2) of the Magistrates' Court Act (Cap 11) ("the Act") against the judgment of the Chief Justice delivered on 11 April 1997, whereby concurrent sentences of one month's imprisonment for possession of cocaine, and two weeks' imprisonment for importation of cocaine, were each quashed and increased to six months imprisonment, also concurrent.

At the conclusion of the hearing we gave judgment allowing the appeal, quashing the sentences imposed in the Supreme Court, and restoring the sentences imposed in the Magistrates' Court. The judgment affirmed the order made by the Chief Justice that the cocaine be forfeited. These are the reasons for that judgment.

The sequence of events

The appellant, aged 45, is a citizen of the United States. He entered Tonga on 5 April 1997 via Fua'amotu airport. He was found to have 1.56 grams of cocaine in his possession. He said that he had purchased it in Fiji, and that it was for his own use.

On 9 April 1997, he pleaded guilty in the Magistrates' Court to one charge of possession of cocaine, for which he was sentenced to one month's imprisonment and fined $600, and to one charge of importation of cocaine, for which he was sentenced to two weeks' imprisonment to be served concurrently.

He appealed against the sentence. The appeal was heard before the Chief Justice on11 April 1997. The Crown did not appeal. No notice was given by the Court that a more severe sentence was being considered. However, in delivering judgment, the sentences of imprisonment imposed in the Magistrates' Court were quashed. Sentences of six months imprisonment were imposed on each charge, to be served concurrently.

He applied to the Supreme Court for leave to appeal to this court on a question of law. On 3 May 1997 that application was refused by the Chief Justice, who held that there was no question of law to be taken on appeal, as s.80(1) of the Act is wide enough to authorise the Supreme Court to increase the sentence imposed by the Magistrate. On 20 May 1997 the appellant applied to this Court for leave to appeal on the same question on law.

The question of law

There are two questions of law for determination. First, whether, on an appeal against sentence imposed in the Magistrates' Court, brought by the person sentenced, and in the absence of a Crown appeal, the Supreme Court has jurisdiction to quash that sentence and impose a more severe sentence.

Secondly, whether, if the Supreme Court does have jurisdiction, is the Court, as a matter of law, required not to increase the sentence on an appeal by the person sentenced, without giving notice to the appellant of its intention to consider such an increase?

The answer to the first question turns on the proper interpretation of s.80(1) Act, read in the context of Part VII, relating to appeals. It provides:

> "The Supreme Court may adjourn the hearing of the appeal and may upon the hearing thereof affirm reverse or amend the decision of the magistrate, or may remit the case with the opinion of the Supreme Court thereon to the magistrate, or may make such other order (including any order as to the payment of costs by either party) as it thinks just and may by its order exercise any power which the magistrate may have exercised."

Put shortly, the issue is whether, read in context, the provision in the subsection

whereby the Supreme Court may "affirm reverse or amend" the sentence the subject of the appeal, gives the Supreme Court the power to impose a sentence more severe than the sentence imposed in the Magistrates' Court on an appeal by the person sentenced.

Also relevant is s.74(1) of the Magistrates' Courts Act. It provides inter alia, that in every criminal case, any party, that is either the accused or the Crown, shall have a right of appeal to the Supreme Court from the sentence of a magistrate. Thus an accused can appeal on the ground that a sentence is too severe, or the Crown can appeal on the ground that a sentence is too lenient.

120 However, s74(1) does not relate only to criminal appeals. It gives a right of appeal in every civil case and in every criminal case triable summarily. The power of the Supreme Court to determine appeals, conferred by s.80(1), therefore applies to both civil and criminal appeals. The words in question should be interpreted in the context of this wide power.

The submissions on the appeal

Mr Niu submitted that an appeal against sentence is either an appeal by the person convicted that the sentence imposed in the Magistrates' Court is too severe, or an appeal by the Crown that the sentence imposed is not severe enough. He drew attention to the 130 requirement imposed by s.75(1) of the Act, requiring the appellant to give notice of the appeal within ten days, with the general grounds of the appeal.

He also relied, by way of comparison, on s.17(3) of the Court of Appeal Act (Cap 9). It provides:

> "On an appeal against sentence, the Court of Appeal shall, if they think that a different sentence should have been passed, quash the sentence passed at the trial and pass such other sentence warranted in law by the verdict (*whether more or less severe*) in substitution therefore as they think ought to have been passed, and in any other case shall dismiss the appeal." (Emphasis added)

Mr Niu submitted that the express power given to the Court of Appeal to impose a 140 sentence "more or less severe" is to be contrasted to the provisions in s.80(1) of the Magistrates' Courts Act, where no such express power is given. If the legislature intended the Supreme Court to have the power to increase, he submitted, it would have expressed that power in the same way as it did in s.17 (3) of the Court of Appeal Act.

He further relied on s.81 of the Magistrates' Courts Act that requires that every appeal "shall be decided on its merits only". It has the effect, he submitted, that an appeal against sentence can only be decided in accordance with the merits of that appeal on the grounds stated in support, so that where the appeal is by the person sentenced, the Supreme Court can only confirm the sentence, or impose a lesser sentence.

150 He further submitted that in the absence of an express provision in the section indicating that a more severe sentence may be imposed, if there is such a power, the principles of natural justice are to be followed, requiring notice to be given to the appellant that a more severe sentence may be imposed.

Miss Tapueluelu submitted that, on their ordinary meaning, the words "affirm reverse or amend" mean that the Court may either not change, or reduce, or change, that is make any change, to the sentence. On that reading of the words, the possibility of increasing a sentence is included.

Further, she submitted, and this is confirmed in the judgment, that the Crown 160 submitted at the hearing that the sentence was lenient and should be corrected. In that

event, it is difficult to understand why the Crown did not appeal on the ground that the sentence was too lenient, seeking a more severe sentence, as it undoubtedly could have done.

Conclusion

The ordinary meaning of the verb "to amend", taken on its own, gives a power to increase as well as decrease the sentence. The Shorter Oxford English Dictionary, volume 1 page 58 gives one of the meanings of the verb "to amend" as "to free from faults, correct, ... to recify". In that sense, the Supreme Court is rectifying or correcting a sentence it considers to be inappropriate. Thus, in the event of a Crown appeal, it is the power to amend that enables the Court to increase the sentence.

But when considering the power to amend on an appeal by a person sentenced, there are other considerations. When the Supreme Court comes to exercise its power under s 80(1), it does so ... "upon the hearing of [the appeal] ...", that is the appeal brought by the person sentenced in respect of which he has given the grounds of the appeal pursuant to s 75(1), It is not hearing any other appeal. Section 80(1) should not be interpreted to give the Supreme Court jurisdiction to increase the sentence in the absence of clear language conferring that jurisdiction. Such clear language is to be found in s 13(3) of the Court of Appeal Act, and, to give another example from New Zealand, in s 121 of the Summary Proceedings Act 1957, which gives the High Court power on an appeal against sentence, to "Quash the sentence and ... pass such other sentence warranted in law (whether more or less severe) in substitution thereof ..."

Even where there is express power, it should not be exercised without giving notice to the appellant to enable him to decide whether to withdraw the appeal, or to continue, with the opportunity to make further submissions on why the sentence should not be increased. To increase the sentence without notice is to deny the appellant an opportunity to be adequately and fairly heard. In the New Zealand text, Adams on Criminal Law, Ch 3.6.15, the authors say:

> "A sentence which is manifestly inadequate may be increased on a defence appeal. The Courts generally intimate that the sentence might be increased and give the offender the opportunity to withdraw the appeal instead."

There are good reasons for concluding that the power can only be exercised if expressly conferred. In accordance with the common law principles governing the administration of justice, the Crown has no right to appeal against an acquittal, nor against sentence, in the absence of express legislative authority. In Australia, this principle has been held to involve the rule against double jeopardy. Thus is the context of sentence:: "The freedom beyond the sentence imposed is, for the second time, in jeopardy on a Crown appeal against sentence. It was first in jeopardy before the sentencing court: *Reg v Tait* (1979) 24 ALR 473 at 476-477. Or, as it was put by Isaacs J in *Whittaker v The King* (1928) 41 CLR 230 at 248, a prosecution appeal puts in jeopardy "the vested interest that a man has to the freedom which is his, subject to the sentence of the primary tribunal."

The common law rule, of course, can be overridden by express statutory power, as it has been in many jurisdictions, including Tonga, in the case of Crown appeals against sentence. Similarly, the right to increase a sentence on an appeal by the person sentenced can be given by express statutory power, as it has been in the examples we have given. But in the absence of such express power, to increase a sentence on an appeal by the person sentenced offends the rule against double jeopardy. It is a well established rule of

construction that a statute should not be taken as abolishing or modifying fundamental common law rights unless it uses words that point clearly and unambiguously to that conclusion: *Thompson v Mastertouch TV* (1978) 19 ALR 547, Deane J at 556. Such a power cannot be read into s 80(1) as it now is.

The answer to the first question of law is "no". This makes it unnecessary to answer the second question. But it will be apparent from what we have said that, had it been necessary, the answer would have been "yes".

We add this further observation. We agree with the comments by the Chief Justice about the need for firmly deterrent sentences in cases of importation, supply, and possession of hard drugs. As he said, the sentence in such cases should be one which "... clearly marks out to the world that Tonga will not countenance such offending ..." Our decision in this case is not intended in any way to detract from this clear warning.