

VAIFALE (PIO) v MISA (NANAI FAITALA) AND OTHERS

Supreme Court Apia  
St John CJ  
25 August 1980

PRACTICE AND PROCEDURE - warrants to commit to prison - S 117  
Criminal Procedure Act 1972 -judicial exercise.

HELD: Warrants of commitment to prison quashed.

CASES CITED:

- R v Doherty (1910) 26 T.L.R. 502

Before the court are applications to make absolute writs of certiorari to quash a number of warrants of commitment to prison issued by the Defendants, two Faamasino Fesoasoani, in purported performance of their powers pursuant to sub-section 6 of Section 117 of the Criminal Procedure Act.

That section is in the following terms.

"117 Enforcement of penalties - (1) In this section, unless the context otherwise requires, references to the sum adjudged to be paid by any person on a conviction shall be deemed to include any sum of money adjudged or ordered to be paid on any conviction entered or by any order made in any criminal proceedings, whether as a fine or for costs, damages, compensation, restitution or otherwise.

(2) Every sum adjudged to be paid by any person on a conviction shall constitute a judgment debt due by that person to the State of Western Samoa and payment thereof shall be enforceable and recoverable accordingly by civil process of execution in the same manner in all respects as if the State had obtained judgment therefore in civil proceedings.

(3) Where the Court on a conviction adjudges any person to pay a sum of money, it may do all or any of the following things -

- (a) Allow time for payment, in which case the court may impose a period of imprisonment determined in accordance with the provisions of subsection (7) of this section in default of payment of the sum adjudged to be paid by the expiry of that time;
- (b) Direct payment to be made by instalments, in which case if default is made in the payment of any one instalment the same proceedings may be taken as if default had been made in the payment of all the instalments then remaining unpaid.
- (c) Direct payment to be made to such person or persons and in such place or places as the Court may specify.

(4) If the Court which adjudges any sum to be paid by any person on a conviction is of the opinion -

- (a) That the person has sufficient means to pay the sum adjudged to be paid forthwith; or
- (b) That the person has no fixed place of residence; or
- (c) That for any other reason, having reference to the gravity of the offence, the character of the person, or other special circumstances, execution should issue without delay -

the Court may impose on the person a period of imprisonment determined in accordance with the provisions of subsection (7) of this section in default of payment of the sum adjudged to be paid and may direct that a warrant of commitment be issued forthwith.

(5) Every direction or sentence of the Court under subsection (3) or subsection (4) of this section, shall be entered in the Criminal Record Book and shall be signed by the presiding judicial officer.

(6) Where any sum of money adjudged to be paid by any person on a conviction is not paid within twenty-eight days thereafter or within such time as may have been allowed by the Court for payment thereof, or in any case where subsection (4) of this section applies, a Judge, Magistrate or Faamasino Fesoasoani who has been granted extended jurisdiction pursuant to section 18 of the Magistrates' Courts Act 1969 may issue a warrant of commitment for such period of imprisonment as the Court has determined on conviction, or, if no period has been determined on conviction, for a period of imprisonment determined in

accordance with the provisions of subsection (7) of this section, unless the sum adjudged to be paid and the fee for the issue of the warrant are sooner paid.

(7) The period of imprisonment imposed under this section shall be such period as, in the opinion of the Judge, Magistrate or Faamasino Fesoasoani who has been granted extended jurisdiction pursuant to section 18 of the Magistrates' Courts Act 1969 fixing the period, will satisfy the justice of the case, not exceeding in any case a period of one day for each fifty sene or part thereof of the amount due (including the fee for the issue of the warrant) at the time of the issue of the warrant of commitment, or a period of one hundred and eighty days, or the maximum period (if any) prescribed in respect of the offence on which the conviction is founded, whichever is the least.

(8) When any person has been committed to prison under this section and has served a term of imprisonment determined in accordance with subsection (7) of this section, no proceedings or further proceedings shall thereafter be taken by way of civil process under this section for the enforcement or recovery of the sum adjudged to be paid."

Pio Vaifale, the Applicant, has had forty-four (44) such warrants issued against him by the Defendant in respect to non payment of small fines for minor traffic offences which have been dealt with in his absence. The second Defendant issued fifty-three (53) such warrants against this Appellant; a total of \$863.00 in fines is involved.

It is common ground that all the said warrants were prepared by a clerk in the Department of Justice, placed in bulk before the Defendants with the days of imprisonment pursuant to subsection 7 calculated and set out, and routinely signed by them as requested. No consideration was given to the circumstances, financial or otherwise, of the Applicant, the nature of the offences or of any of the matters which the judicial officer is bound to apply his mind to pursuant to subsection 4 of section 117. In many cases the warrant issued was in respect to a fine which had not been notified to the applicant.

In subsection 6 the word "may" clearly imports a discretion. The word "shall" is used in the subsection immediately preceding, namely subsection 5. The legislature must have intended different meanings to the two words. There is no room for the argument that "may" means "shall" for that reason and the nature of the subject matter being dealt with. Commitment to prison of a person dangerously ill for non payment of a fine for a trivial offence could hardly be the mandatory duty of the judicial

officer. The legal history of the issue of warrants and the terms of the section support the view that decision to issue is judicial and the warrant may be quashed on certiorari: Rv. Doherty (1910) 26 T.L.R. 502.

Within section 117, subsection 3 and 4 thereof make the fixing of the term of imprisonment and the issue of a warrant pursuant to each of those subsections part of the sentencing process; traditionally judicial in nature and subject to appeal. The use of the words and phrases "adjudges" and "the Court may impose" strengthen the conclusion that the decision to direct issue of the warrant is judicial.

Coming to subsection 6 of section 117 there are alternative conditions precedent to the issue of the warrant stated. Firstly, non-payment within 28 days or such time as has been allowed, or, secondly, where subsection 4 applies. The words "where subsection 4 applies" must mean the circumstances contained in (a) (b) and (c) of that subsection. That phrase cannot mean that where a term of imprisonment has been imposed and a warrant issued pursuant to subsection 4 another may issue because, if a warrant had been directed to issue, a further direction to issue would be unnecessary. To argue that [since] lapse of time is the only criterion on which to direct the issue of a warrant pursuant to subsection 6 would produce odd results when the Defendant is fined. If the time during which payment is allowed is fixed pursuant to subsection 3, and the period of imprisonment fixed as part of the sentence as a judicial exercise, why is it that when at a later time the same function has to be performed (it not having been done on conviction) that function then becomes mechanical and not judicial? There is ample intention expressed in the content of the section to compel the answer that obviously the function to direct issue pursuant to subsection 6 is judicial in function. This view is reinforced by subsection 9 because in fixing the term of imprisonment a maximum term in relation to the amount of the fine unpaid is fixed, but a lesser term, that "will satisfy the justice of the case" may be fixed. "Justice" is not mechanical.

This last-mentioned subsection has been ignored by the Defendant Faamasino Fesoasoani in this case. The period of imprisonment was calculated by the aforementioned clerk. The Faamasino Fesoasoani directing the warrant clearly paid no regard whether it should be lessened. This deficiency alone could justify the writ being made absolute.

The warrants set out in the affidavits of the Defendant are quashed. The application for prohibition becomes nugatory and is rejected.

The considerations to be taken into account in directing the issue of warrants pursuant to subsection 6 include: -

- (1) (a) (b) and "(c)" in subsection 4
- (2) the date of the conviction and fine
- (3) the total amount necessary to pay all the fines in respect of which warrants are requested
- (4) any delay in the application for the warrant which may tend to induce the person fined to believe the fine would not be pursued.
- (5) whether the person fined has had the fine brought to his notice and what is his re-action to a demand for payment.
- (6) the state of health of the person fined.

This list is not intended to be exhaustive.

If the person against whom issue of the warrant is sought has displayed a truculent or uncooperative attitude towards payment, the issue of warrants in respect to a number of fines may be justified. If, on the other hand reasonable offers of payment are made and adhered to, warrants should not issue.

I see no objection to the judicial officer dealing with these matters having a notice of intention to direct issue of warrants of commitment served and calling upon the recipient to produce reasons as to why issue should not take place. Satisfaction that service of such notice had been made, the lapse of a reasonable time thereafter and lack of response would then justify issue.

The decision I have made in this case produces a similar result to that reached by Dillon, J. in a judgement delivered on 16th May 1980. I direct the Registrar to circulate a copy of this judgment to all Faamasino Fesoasoani.