

POLICE v STEHLIN (SONNY)

Court of Appeal Apia  
Morling, Ward, Muhammad JJ  
12 November 1992, 24 March 1993

CONSTITUTIONAL LAW - S 28 B of the Narcotics Act 1967 is inconsistent with Article 9(4)(d) of the Constitution - such evidence is inadmissible.

CASES CITED:

- Re Knight and the Tabernacle Building Society 60 LJQB 633
- Clyde Engineering v Cowburn (1926) 37 CLR 466
- Mattox v United States 156 US 237
- Robertson v Baldwin 165 US 275

LEGISLATION:

- Judicature Ordinance Act 1961; S 52
- Narcotics Act 1967; S 28 B
- Constitution of Western Samoa; Arts 2(2), 9(4)(d)
- New Zealand Misuse of Drugs Act 1975

Aikman for Informant  
Toailoa for Defendant

Cur adv vult

The Appellant has been charged under the Narcotics Act 1967 with possession and cultivation of cannabis. The prosecution intend to rely on a report from the New Zealand Department of Scientific and Industrial Research produced under section 28B of the Act to prove the substances seized are cannabis.

The Appellant indicated he will challenge the constitutional validity of section 28B and so the prosecution moved the Supreme Court to state a case for the opinion of this Court under s 52 of the Judicature Act. The case stated by Lussick AJ may be set out in full.

"1. Article 9(4)(d) of the Constitution of the Independent State of Western Samoa states that every person charged with an offence has the following minimum rights:

...(d) To examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.

2. Section 28B of the Narcotics Act 1967, as amended by the Narcotics Amendment Act 1988, states:

'28B. Reports as evidence - (1) The Court shall, in any proceedings brought under this Act, accept a certified report by the Department of Scientific and Industrial Research in New Zealand on narcotic specimens or samples sent by the Police Service to New Zealand for laboratory analysis and tests as conclusive evidence of the truth of the contents of such report without having to call the person who made the report to testify as to such report:

(2) Notwithstanding subsection (1) of this section where a defendant challenges the truth of the contents of such report, the Court may, if satisfied that the challenge is based on reasonable grounds other than the hearsay rule of evidence, refuse to accept such report as conclusive evidence of the truth of its contents'.

3. This Court seeks a ruling as to whether a certificate produced by the prosecution under section 28B is contrary to Article 9(4)(d) of the Constitution."

The supremacy of the Constitution is contained in article 2:

"2. The Supreme Law - (1) This Constitution shall be the supreme law of Western Samoa.

(2) Any existing law and any law passed after the date of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void."

Thus the question for this Court is whether the provisions of section 28B are inconsistent with the constitutional rights conferred by Article 9 and, if so, the extent of that inconsistency. We have been greatly assisted by helpful submissions by both counsel in this case.

Neither counsel has any difficulty with the meaning and intention of Article 9(4)(d). Nor does counsel for the Police dispute that section 28B is, on its face, inconsistent with it. She directs her argument to demonstrating that there is authority for construing the Article so as to permit of an exception to it being allowed.

That exceptions have been made to many jurisdictions, and frequently for reasons of administrative and financial convenience, is clear. But we are not being asked to decide whether the provisions of section 28B are an acceptable degree of erosion of the rights conferred on an accused person by Article 9(4)(a). The question for us to decide is whether a certificate produced under section 28B is contrary to Article 9(4)(d). Strictly speaking, the real question is whether section 28B is inconsistent with Article 9(4)(d). If it is, there is no authority for the admission of the certificate into evidence and it must be rejected.

What, then, is inconsistency? The word means something incompatible or discordant or not in keeping. Inconsistency between statutes must be such that it makes one impossible if the other is to have effect. In Re Knight and the Tabernacle Building Society 60 LJQB 633, Fry LJ suggested an inconsistency between statutes must be one "so at variance with the machinery and procedure indicated by the previous Act that, if that obligation were added, the machinery of the previous Act would not work". His Lordship was there dealing with the rule in relation to successive statutes.

Article 2(2) of our Constitution means that in the event of inconsistency between it and any other statute whether previous or subsequent, the Constitutional provision prevails.

The concept of inconsistency between Commonwealth and State law was considered in Clyde Engineering v Cowburn (1926) 37 CLR 466. The Court said there is inconsistency where simultaneous obedience to both laws is impossible or where one law takes away the right or privilege given by another.

As counsel agree, the meaning and intention of Article 9(4)(d) causes no difficulty. The words are clear and unambiguous and must be taken in their natural and ordinary meaning. They give a person charged with an offence the right to examine or have examined witnesses against him.

Section 28B(1) provides that the judge shall accept, as conclusive proof of the truth of its contents, a certified report of a witness who is not present in Court and available to be examined or cross-examined. We find no difficulty in concluding that subsection (1) standing alone is inconsistent with Article 9(4)(d). It allows the prosecution to prove an essential ingredient of a charge without the defendant being able to examine or have examined the person whose statement is relied upon to establish that ingredient.

However it is subject to subsection (2) which allows the Court to reject the conclusiveness of the report. We must therefore consider whether subsection (2) saves the section as a whole from being inconsistent with Article 9(4)(d).

The effect of subsection (2) is simply to give the Defendant a chance to satisfy the judge he has reasonable grounds other than the hearsay rule on which to challenge the truth of the contents of the certificate. He may need to question the maker of the report to establish the reasonableness of his challenge but he has no such right. Even if he succeeds in satisfying the judge that his challenge is reasonable, he only removes the obligation on the judge to accept the report as conclusive evidence of its truth. Whilst we accept that, in practice, a successful challenge will prevent the certificate being presented in evidence, there is no right to have it excluded. Nor is the judge prevented from still accepting it as true if he so wishes and, more important in the context of this case, it does not restore the Defendant's right to examine or have examined the maker.

Clearly the effect of section 28B is to take away completely the right guaranteed by Article 9(4)(d) to examine or have examined a witness against him. In the terms of Clyde Engineering case that is inconsistency and we so find.

Having reached that conclusion, we must consider the extent of the inconsistency to determine how much of section 28B is void. Where part only of a section is inconsistent and can be struck down without destroying the section as a whole that part alone may be declared void. However, in this case, no such severance is possible. The whole section stands or falls as one and we find it is void in its entirety.

Counsel for the Police referred to a number of cases to establish the proposition that the right of confrontation under the sixth amendment to the United States Constitution is subject to pre-existing common law exceptions. She cited the line of authority, starting with Mattox v United States 156 US 237 and Robertson v Baldwin 165 US 275, which establishes that the Bill of Rights which comprises the first ten amendments were not intended "to lay down any novel principles of government, but simply to embody certain guarantees and immunities which we had inherited from our English ancestors, and which had, from time immemorial, been subject to certain well recognised exceptions arising from the necessities of the case" (Robertson v Baldwin p 281). Whilst we do not consider these authorities bear directly on the case before us, out of deference to her research we comment on them.

It is true that common law exceptions may be allowed to a constitutional provision such as Article 9(4)(d), but we do not consider section 28B can be considered as falling within any such

exception. There are three broad categories of exception: statements made in other proceedings, statements of witnesses now deceased, and public documents. However, none of these exceptions has any relevance to the present case.

Some reliance is placed on the assumption of the proper discharge of his official duty by a public officer when considering public documents tendered in evidence. However, we cannot accept that exception can be extended to authorise the admissibility of a document which is made conclusive proof of an essential ingredient in a charge. A number of countries allow the admission of evidence by certified report but they have not introduced it by relying on the common law. They have introduced specific statutory provisions. In her submissions, Miss Aikman refers us to one such provision, section 31 of the New Zealand Misuse of Drugs Act, 1975, although her purpose was to demonstrate that analysts are rarely required by the defence to attend for examination and so evidence by analyst's certificate is common. Precisely how that advances the case for validity of section 28B is unclear. The two provisions are fundamentally different. Section 31 provides for the admissibility of certificates as evidence of the truth of the contents but specifically retains the right of the accused to require the attendance of the witness for examination. It may hedge the requirements around with procedural rules but it does not remove the right of the accused, in the last resort, to test the evidence by cross examination of the witness. Section 28B removes that right despite the clear provisions of the constitution.

We therefore hold section 28B of the Narcotics Act is inconsistent with Article 9(4)(d) of the Constitution and that a certificate of the kind referred to in the section is therefore inadmissible.