

The Republic of Kiribati v. Aritiera Bauro

Court of Appeal of Kiribati

Gibbs V.P., Frost, Donne, Dillon, and Mitchell J.J.A.

19 April 1988

Criminal law—offences—abuse of power—“right of another”—whether an act is prejudicial to the right of another when it is prejudicial not to an individual person but to government or a department of government—Penal Code, s. 90(1).

Criminal procedure—conviction—sufficiency of information—whether proof of certain particulars in an information which constitute an offence justify entry of a conviction for that offence even though accused not charged with it—Criminal Procedure Code, s. 157.

Criminal procedure—appeals—power of High Court to make orders on appeal—whether High Court may enter a conviction in circumstances where the Magistrates' Court whose decision is appealed had no power to enter such a conviction—Criminal Procedure Code, s. 280(1).

Bauro had diverted some funds from an aid project to his personal benefit by awarding a furniture-making contract to his own company rather than having the Ministry of Communication and Works carry out the work as the donor required. He was convicted of abuse of office under section 90(1) of the Penal Code. He appealed successfully to the High Court. These proceedings concerned four questions of law referred to the Court of Appeal by the Attorney-General which arose out of the appeal. Section 90(1) of the Penal Code provides that one must do an act “prejudicial to the right of another”. The first question was whether “another” meant a private individual or, as in the facts of this case, a government or a government department. (The remaining three questions and their answers appear from the findings below.)

HELD:

- (1) The “right of another” refers, in its natural meaning, to public as well as private rights. There was no basis to require the words to mean only the private rights of individuals. Therefore one committed the offence in section 90(1) by acting prejudicially to a right of government.
- (2) A person acts prejudicially to *C* when he makes a payment to *D* when *C* had a right to receive it (even when the right was conditional on *C* performing work). That was so even when *C* was a government or public body.
- (3) Section 157 of the Penal Code permits a person to be convicted of a lesser offence upon an information specifying a greater offence (for example, a conviction for robbery is possible on a charge of robbery with a weapon). The section does not permit the person to be convicted of some other offence with which he was not charged when that is not a lesser offence included in the elements of the offence charged.
- (4) Section 280(1) of the Criminal Procedure Code permits the High Court to

remit matters on appeal to the Magistrates' Court or to itself make any order it deems just, but does not permit the High Court to make an order or enter a conviction which the Magistrates' Court would have had no power to make or enter.

Legislation mentioned in judgment:

Criminal Code (Queensland), section 92
Criminal Procedure Code, sections 157 and 280(1)
Interpretation and General Clauses Ordinance, section 3
Penal Code, section 90(1)

Reference:

Four questions were referred to the Court of Appeal by the Attorney-General arising from a Magistrates' Court criminal trial and subsequent appeal to the High Court.

Counsel:

V. Aliments for the Republic of Kiribati
Respondent in person

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

Judgment:

The points of law referred to this Court by the Attorney-General for its consideration and opinion arose in criminal proceedings begun in the Single Magistrate's Court at Betio. The accused, a college principal within the civil service of Kiribati, was charged with five offences arising out of the conduct by him of certain of his administrative duties. On four of those charges he was acquitted. On the remaining charge, that of abuse of office under the Penal Code, section 90(1), he was found guilty and sentenced to twelve months' imprisonment.

The facts of the case, so far as they are material to this reference, concern the administration by the accused of an aid project grant for the building of an extension to the college, but more particularly the provision of the necessary furniture, which was included in the project.

The project was scheduled for completion during the financial years 1980-1982, but the accused delayed taking action until finally in September 1982 he formed a firm under the name of Boraraoi Handcraft Industry which consisted of his wife and himself and also a friend, a carpenter, who was to make the furniture. The furniture was made and as it was delivered payment was made on vouchers submitted to the Ministry of Finance. With some of the proceeds the accused made a down-payment of \$4000 for a car. As no proper accounts were kept, the magistrate found it not possible to determine the amount of profit earned by the business, but he was satisfied that it amounted, at the least, to the down-payment on the car.

The aid proposal assessed the cost of the furniture to be supplied at \$56,000. The actual amount charged by the firm was \$43,344.88 or more than \$12,000 less than the assessment, but that saving went to the aid donor in the United Kingdom.

As the aid proposal stated that all materials and equipment were to be ordered through the Ministry of Finance and the construction work was to be carried out by the Ministry of Communication and Works, it precluded putting the project or any

part of it out for private tender. So the accused's enterprise was plainly in breach of the duties of his office.

His defence was that he had acted throughout in good faith, and that, after delaying too long, he "panicked", and there was then no time for the government joinery department to make the furniture. He claimed that the Ministry of Works Superintendent told him, when the accused called on him, that they were too busy to undertake the work, so he took the course he did for the benefit of the college. But that conversation was denied by the Superintendent. The magistrate disbelieved the accused; he found that the accused was aware that he was to go through the Ministry, and that he had been dishonest in his dealing. He found the accused guilty of the "felonious variety" of the offence provided under section 90(1). That section, which is convenient to quote in full, is in the following terms:

(1) Any person who, being employed in the public service does or directs to be done, in abuse of the authority of his office, any arbitrary act prejudicial to the right of another, is guilty of a misdemeanor.

If the act is done or directed to be done for the purpose of gain, he shall be guilty of a felony and shall be liable to imprisonment for 3 years.

On appeal to the High Court, the Chief Justice (Jones C.J.) set aside the verdict of guilty of the offence against section 90(1) and substituted a verdict of not guilty.

The first question asked in the reference is as follows:

1. Whether section 90 of the Penal Code (cap. 67) is limited to acts of persons employed in the public service which oppress private citizens.

Put in another way, this question asks whether "the right of another" in section 90(1) refers only to the rights of individual citizens, or whether it refers also to the rights of the Government or a department of the Government.

Reference was made to the definition of "person" contained in section 3 of the Interpretation and General Clauses Ordinance, which is expressly applied to the Penal Code by section 3 of the Code. By that definition "person" includes "any public body and any body of persons, corporate or non-incorporate". However, that definition has no direct application to the critical words of section 90(1). Although "another" certainly includes "another person", the word "person" is not expressly used in the relevant phrase, so that the words of the definition do not apply.

However, the expression "the rights of another" is a wide one. It appears to comprehend any other entity which can have rights. It is not necessary to apply the definition to reach the conclusion that the phrase in section 90(1), in its natural meaning, refers to public as well as private rights.

There is no reason to restrict the generality of the meaning of the phrase. Recourse to the common law rules is not necessary because the words of the Code speak for themselves. The fact that the forms of indictment prescribed to illustrate the operation of the corresponding provisions of section 92 of the Queensland Criminal Code appear to apply only to cases in which the rights affected were those of private individuals does not mean that the Court is entitled to place on the words of the section a limitation which they do not contain.

The question should be answered, "No".

The second question is:

2. Where there is a contract between *A* and *B* which provides for work to be

done by and payment to be made to *C*, whether a person employed in the public service who causes that work to be done by and payment made to *D* acts in a way “prejudicial to the rights of another” within section 90 of the Penal Code (cap. 67).

The answer to this question presents no difficulty. Clearly when a payment is made to *D* when *C* had a right to receive it (even if the right was conditional on performing work) the rights of *C* are prejudiced. That is so even if *C* is the Government or a public body.

The second question should be answered, “Yes”.

The third question is as follows:

3. Where certain particulars in an information, the combination of which constitutes a complete separate offence are proved, whether a person can be convicted of that offence although he was not charged with it.

The answer to this question depends on the effect of section 157 of the Criminal Procedure Code. That section reads as follows:

- (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete lesser offence, and such combination is proved but the remaining particulars are not proved, he may be convicted of the lesser offence although he was not charged with it.
- (2) When a person is charged with an offence and facts are proved which reduce it to a lesser offence, he may be convicted of the lesser offence although he was not charged with it.

Section 157 deals only with cases in which a person charged with a greater offence may be convicted of a lesser offence. A lesser offence is not simply an offence which carries a lesser punishment, but an offence constituted by some, but not all, of the elements of the offence with which the accused was charged. For example, a person charged with assault occasioning actual bodily harm might be convicted of common assault. Similarly, robbery would be a lesser offence if the charge were robbery, being armed with an offensive weapon. Indeed the section of the Penal Code with which we are now concerned provides an example—a person charged under the second paragraph of section 90(1) might be convicted of an offence under the first paragraph of that subsection. However, section 157 of the Criminal Procedure Code would not provide authority for a person charged under section 90(1) of the Penal Code to be convicted under section 88 of that Code.

The question should be answered, “No, except in the case of a lesser offence as defined above”.

The fourth question is as follows:

4. Where, on an appeal from a Magistrates’ Court to the High Court, the High Court is satisfied that the accused in the lower court is not guilty of the offence charged but is guilty of another offence, and in circumstances where the Magistrates’ Court itself had no power to convict of that other offence, whether the High Court may remit the case to the Magistrates’ Court with a direction to that court to convict and/or may itself convict of that other offence.

It was submitted on behalf of the Attorney-General that section 280(1) of the Criminal Procedure Code would justify an affirmative answer to this question: Section 280(1) is in the following terms:

180 At the hearing of an appeal the High Court shall hear the appellant or his advocate, if he appears, and the respondent or his advocate, if he appears, and the High Court may thereupon confirm, reverse or vary the decision of the magistrates' court, or may remit the matter with the opinion of the High Court thereon to the magistrates' court, or may make such other order in the matter as to it may seem just, and may by such order exercise any power which the magistrates' court may have exercised:

Provided that the High Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

190 That submission cannot be accepted. Section 280 allows the High Court to make any order that is just, provided that the order was one that could have been made by the Magistrates' Court. It is designed to enable the High Court to do what the magistrate ought to have done, but it does not authorize the High Court to make an order which would have been beyond the power of the magistrate. If, in a particular case, the magistrate could not have convicted, the High Court on appeal may not do so.

The question should be answered, "No".

The order of the Court will be: questions answered as follows —

1. no;
2. yes;
- 200 3. no, except in the case of a lesser offence as defined in the reasons for judgment;
4. no.