

IN THE SOLOMON ISLANDS

COURT OF APPEAL

Criminal Appeal Case No. 1 of 1991

Connolly P

Savage JA

Goldsbrough JA

BETWEEN:

JIMMY ROBIN KELLY
ROBIN ZONGA
WILLIAM WARAU
NELSON MANASA
JACOB MOFFAT
ROBERT SAUL
SILAS MODU NINAMO

Appellants

AND:

DIRECTOR OF PUBLIC PROSECUTIONS

Respondent

JUDGMENT OF THE COURT

Delivered the 13 day of September 1991.

These are appeals against sentence by several appellants, each one having been convicted of several offences, including armed robbery, in respect of which they were sentenced to terms of imprisonment ranging from eight to twelve years. They were convicted before the Chief Magistrate on 12 December 1990 and thereafter committed to the High Court for sentence. In the High Court, on 13 December 1990 they were sentenced by the learned Chief Justice. It is against those sentences that these appeals are brought, leave having been granted to bring such appeals on 15 January 1991.

Mr A. Radclyffe appeared on behalf of each of the seven appellants. The Director of Public Prosecutions, Mr Mwanosalua appeared as the respondent.

The offences occurred on 9 and 10 August 1990 when these seven men arrived together, from Bougainville, in the Shortland Islands, in the north of the Solomon Islands and only a few miles from Bougainville Island. The facts of the offences as found by the Magistrates' Court, are set out in the judgment of that court, re-iterated in the judgment when sentence was imposed in the High Court, and so are merely summarised here.

As an armed band, this group visited three villages, Samanago, Toumoa and Kariki. At two of those villages, villagers were threatened at gunpoint. In each of those villages, the inhabitants were put in fear at the sight of this group of seven armed men.

The offence which attracted the most severe penalty, that of armed robbery, occurred on the island of Ovau. There, in the middle of the night, seven people were awakened by this band and told to line up on the beach, after which they were held at gunpoint and subjected to threats and abuse.

One of the accused (Kelly) told these people that he and his fellows were members of the Bougainville Revolutionary Army. He boasted of previous killings. The seven were told that they were to be taken as hostages. Following negotiations it was decided that only one of them would be taken to be held as a hostage for the release of seven prisoners at Kieta. Some while later this last man was released, and was returned to his colleagues with sufficient petrol for all of them to return to their homes at Korovou. During this incident a bag of trochus shells and a quantity of petrol were stolen, the theft of which together with the display of arms is the basis for the conviction of the offence of armed robbery.

The court in sentencing took the view that this series of offences was a single continuing and deliberate action. All sentences of imprisonment were therefore ordered to be served concurrently, a decision which is not complained of. The sentences other than that for

armed robbery are of either one or two years imprisonment, and so the appeal are in the main concerned with the sentence imposed in respect of the charge of armed robbery.

For that offence Kelly was sentenced to 12 years imprisonment, Ninamo, Saul, Moffat and Manasa 10 years imprisonment and Zonga and Warau eight years imprisonment. The grounds of the appeals relied upon were set out in a notice dated 20 March 1991. They are:-

1. In respect of all the applicants that the sentence for armed robbery was in all the circumstances excessive as:
 - (i) no actual violence was used or physical injury caused
 - (ii) the learned Principal Magistrate and the learned Chief Justice were wrong to treat these offences as "quite possibly the most serious offences ever to have come before the court in Solomon Islands"
 - (iii) they had no previous convictions.
2. In respect of all the applicants except Jimmy Robin Kelly that they were obeying the orders of the said Kelly and were acting under duress which in the circumstances is a mitigating factor.
3. In respect of Zonga and Warau that insufficient allowance was made for their youth and that they were acting under the influence of older men.

In support of ground 2 it was submitted on behalf of the appellants that the sentences of 12, 10 and 8 years were excessive when taking into account that no actual violence was used or injury caused, and that the group, by releasing their hostages and releasing him to his friends with the wherewithal to return home showed some compassion. This, it was said, showed that they did not act all the time as a ruthless gang of terrorists.

Reference was made to the judgment of the lower court in particular its use of the description "quite possibly the most serious offences ever to have come before the court in Solomon Islands". The appellants contend that offences of murder and rape are surely more serious.

As a final point to ground one reference was made to the appellants' previous good character, only Kelly having been previously convicted, and that for an unrelated, non-violent offence.

It is clear from the judgment of the learned Chief Justice that he took into account that no actual violence was used or physical injury caused. It is dealt with at page 2 paragraph 3 of his judgment. It is equally clear that he agreed with the learned Chief Magistrate's comment about the seriousness of the offences. The adoption of that sentence as an expression of the gravity with which the court views these offences is in this court's view quite unobjectionable, particularly when it is immediately followed by an explanation as to how the court came to such a conclusion

"The gravity of the offences lies in the fact that the people of these villages believed that all (the accused) were members of the Bougainville Republican Army and (the villagers) were quite clearly terrified by the threats of the accused",

was also used by the learned Chief Magistrate and adopted by the learned Chief Justice. Indeed one can quite understand what lead the learned Chief Magistrate to so describe these offences. These seven men, as an armed band, illegally entered the Solomons, displayed their arms, intimidated local inhabitants, threatened, in what must have been quite a terrifying way, violence if their warnings were not heeded, and boasted of earlier killings, and committed offences previously unseen in this jurisdiction. The additional fact that they claimed to be members of the Bougainville Republican Army, a revolutionary organisation which opposes the legitimate government in their own country merely adds to the gravity of these offences, perhaps one could say an additional reason

for the terror struck into those Solomon Islanders who had the great misfortune to encounter them.

These were undoubtedly serious offences. Many people were put in fear by the actions of these appellants. Their actions were the actions of terrorists, and their intentions were to intimidate their victims so that they might escape the normal consequences of the law.

In these circumstances the view that a sentence of twelve years imprisonment is excessive cannot be supported.

One of the appellants, Kelly, is throughout described as the leader of this group. That is a position he himself acknowledges. The remaining six describe themselves as being under his command. This is the basis for the second ground of appeal. Each of the appellants, it is said, considers himself to be a member of the Bougainville Revolutionary Army, a para-military organisation with a chain of command. It is submitted on their behalf that they were merely obeying the orders of Kelly, and that this should be reflected in their sentences. It is conceded that the situation in which they found themselves did not amount to duress such as would provide a defence to any of these charges.

In the view of this court the relative positioning between the participants has already been adequately and properly considered by the learned Chief Justice. In particular it appears on page 42 of the record in the penultimate paragraph. The resultant differential is 2 years imprisonment. It cannot therefore be said that Kelly's leadership had not been taken into account, and it is our view that it has been quite sufficiently considered.

Ground 3 of the appeal refers to only two of the appellants, Zonga and Warau. It again considers differential, on the grounds of age. The appellants Zonga and Warau are both 18 years of age, at least nine years younger than the next eldest accused. It is submitted on their behalf because of this youth that their actions were more than others influenced by their elders, and the question is put as to whether sufficient allowance has been taken of that. This factor was considered by the learned Chief Justice (particularly at page 42 penultimate paragraph of the record) and resulted in a reduction of 2 years imprisonment

from their sentences as compared with their 4 elders colleagues. This variation in sentencing is in this court's view more than adequate to take into account this mitigating factor.

The appeals against sentence in respect of each of these seven appellants are accordingly dismissed.

By the Court

Goldsbrough JA.