REGINA -v- FAKATONU

High Court of Solomon Islands
(Ward C.J.)
Criminal Review Case No. 22 of 1989
Hearing: 18 May 1990
Review Judgment: 1 June 1990

F. Mwanesalua, DPP, for the Crown
P. Watts for the Accused

WARD CJ: On 24th October 1989, James Fakatonu was sentenced by the learned Principal Magistrate (Central) to 4 months imprisonment for an assault causing actual bodily harm. The case involved an assault, in a cell at Central Police Station, on a man being held in custody. The accused was, at the time, a serving police officer but off duty. The magistrate also ordered a fine of $250, the whole of which was to be paid as compensation to the victim.

On seeing the record, I felt the sentence was possibly inadequate for a case of this nature and gave notice on 8th November that the accused should attend court on 13th November (later changed to 17th) to present his case before I reviewed the sentence. On that date, the Court was informed there was to be an appeal and, on 21st November, an application was made for leave to appeal out of time against conviction and sentence. I was assured that the failure to put in notice of appeal had been caused by counsel and so I gave leave. Grounds were filed with the Court on 27th November 1989 and the appeal was listed for hearing on 26th January 1990.

However, on 25th January an undated letter from the appellant's solicitor advised the Registrar that the "above appellant has just related to me that he does not wish to pursue his appeal". The next day at the hearing, the same lawyer told the court that he wished to withdraw the appeal because "I have attempted to contact my client one week ago. The appellant had already been released. I have received no instructions".

The learned Commissioner ordered the appeal be discontinued and the matter be reported to me for continuation of the review proceedings. The case was then listed for a review hearing on 26th March but the accused wrote to the Court to say he was, by then, a teacher in Makira and could not attend in Honiara until the school holiday. He asked that the case be set for May 10th. The case was then relisted for 10th May 1990 but, following service on the accused, he again wrote to the Court saying he could not

get to Honiara for 10th May. He explained he had instructed counsel to represent him. The case was adjourned to 17th May to allow his personal attendance but, at the hearing, he did not appear and was represented by Mr Watts.

Mr Watts has suggested to the court that, if I should increase the sentence now that the original sentence has been completed, it would be a breach both of section 20 of the Penal Code and of section 10 of the Constitution.

Section 20 provides that -

> *"A person cannot be punished twice either under the provisions of this Code or under the provisions of any other law for the same act or omission ....."*

The accused has, as Mr Watts points out, completed his sentence. Having been sentenced on 24th October, he must have been released from prison in January. Should I now impose a further term of imprisonment, it would be a second punishment for the same offence.

I am afraid I must disagree. By section 50(1)(a) of the Magistrates' Courts Act I may -

> *"subject to any enactment specifying any penalty, impose, reduce, enhance or alter the nature of any sentence".*

The only limitations are that the sentence imposed must be one the Magistrate could have imposed and, if the sentence is to the prejudice of the accused, he must first be heard. It is a wide power but it is a power to enhance the sentence passed. It does not impose a further penalty but increases the sentence already passed. The weight of Mr Watts' argument lies in the fact that, as the sentence imposed by the magistrate has been completed, any enhancement of the sentence will have the appearance of a second penalty.

That is an unfortunate situation but it is one entirely of the accused's making. The review was originally listed for 17th November. Had it been heard then, the result would have been well within the sentence originally imposed. However, once leave was given to appeal, by the proviso to section 50(1), it prevented my continuing with the review. Had the appeal been heard, I could not have considered the case further but, once the appeal was abandoned, my power of review revived. It is unfortunate that, by then, the sentence imposed by the magistrate had been completed but the delay was, as I have said, entirely of the accused's making. To suggest now, as the result of the simple expedient of filing an appeal and then withdrawing it, the Court's powers of review are avoided is to make nonsense of the act.

I must deal similarly with the question of section 10 of the Constitution which provides -

"If any person is charged with a criminal offence, then, unless the charge is withdrawn, that person shall be afforded a fair hearing within a reasonable time ....."

Mr Watts argues that, as the sentence has been completed, any additional hearing is not within a reasonable time. Again, it is unfortunate how this has happened but the delay is caused by the accused. The Court intended to hear the case as soon as possible but had to accommodate the accused. I must still consider, whatever the cause, whether the delay is, in these circumstances, unreasonable. I have already said it is unfortunate. The accused has still had adequate opportunity to present his case. He has, further, had an opportunity to demonstrate that he can obtain a good job and apply himself to it. That has only arisen because of the delay and is to his advantage. I am satisfied this hearing is within a reasonable time.

Finally Mr Watts suggests that, on the facts of the case, the sentence was reasonable and even if I should consider it a trifle lenient, I am bound by the principles relating to appeals and should only interfere if it is wrong in principle or manifestly inadequate.

Whilst I must bear in mind those guiding principles, I cannot agree I am bound in the same way as an appellate court. The review provisions in the Magistrates' Courts Act are to provide a means of correcting almost any aspect of cases heard by magistrates' court. I can act on my own motion or on the petition of any interested person. The scope is very wide and I believe it is to provide a means to correct even relatively small errors. However, having said that, I would always hesitate before increasing a sentence.

The facts of the case, as found by the magistrate, were that the accused and the victim were involved in a scuffle at the Mendana Public Bar. Later, after the victim had been arrested and locked in a cell at Central Police Station, the accused somehow gained access to the cell and kicked the victim on the head causing a cut to his left eye that bled substantially and needed stitching. The accused was, at the time, not in uniform or, it would appear, on duty.

When sentencing, the learned magistrate made the following comments:

"You are a first offender and entitled to leniency. I feel that the court must take a very serious view of this matter. This was after all a vicious and brutal assault on an innocent man in police custody. After hearing all the evidence I am completely satisfied that the victim did nothing to justify you assaulting him in any way at all. Despite the fact that you were not in uniform at the time such an assault by a police officer in the police station merits an exemplary sentence.

Cases of this nature, and indeed allegations of impropriety against the police generally have mercifully been rare in the past in this country. It is most

disturbing that there seems to be a general increase in such cases of late. It is also disturbing that not only you, but at least one of the other police witnesses obviously lied under oath to try and avoid conviction.

Your police record is clearly not good, and as your DPC says your temperament clearly does not suit the police force. I take into account the fact that whatever sentence I give will almost inevitably result in the loss of your career.

However having considered al the circumstances I feel that this matter is too serious to be dealt with by anything other than an immediate prison sentence.

I also feel it appropriate. that, in accordance with custom, some recompense be made to the victim for the injuries you inflicted."

With respect, I agree with all those comments but the sentence then passed was of 4 months imprisonment and $250 fine. That, Mr Watts suggests, is safe and sufficient. I do not agree.

An unprovoked assault, as the magistrate found was this, that involves kicking another person on the head would normally attract a sentence of imprisonment. In this case there are a number of serious aggravating circumstances. The victim was in police custody. He was locked in a cell from which he could not escape. The attacker gained access, no doubt, because of his position in the police. I consider those very serious matters.

Such an offence must merit an exemplary sentence as the learned magistrate so rightly said. The deterrent and punitive elements in such a penalty become important to ensure the public and the police know that the courts will do all it can to ensure the police maintain proper standards of conduct throughout the force.

In those circumstances, I feel the proper sentence in this case, after allowing for the youth and previous good character of the accused and also the fact he has a job he will again lose together with the aggravating effect of the delay, must be one of 12 months imprisonment.

By virtue of my power under section 50 of the Magistrates' Courts Act I order that the sentence of 4 moths imprisonment be enhanced to one of 12 months. The fine is to remain unaltered. A warrant must issue for the arrest of the accused and his return to prison to serve the balance outstanding of 8 months imprisonment.

(F.G.R. Ward)
CHIEF JUSTICE