LINO RAUHOURA -v- REGINAM

High Court of Solomon Islands
(Awich, Commissioner)
Criminal Case No. 33 of 1995
Hearing:
Ruling: 5 December 1995

J. Remobatu for Appellant
DPP for Crown

Awich, Commissioner: The appellant Mr. Lino Rauhoura and one David Maoi, were charged in the same charge sheet and jointly tried by principal magistrates' court for Malaita magisterial district. The charges were two counts against the appellant alone namely; common assault contrary to section 237 of the Penal Code, and Criminal Trespass contrary to section 182(1)(a) of the Penal Code. The property alleged trespassed was a dwelling. Each of the offences is punishable with upto one year. Mr. Maoi was charged alone with Going Armed in Public Place contrary to section 78 of the Penal Code, in the third count. They were both convicted on the respective counts charging them. Mr Maoi did not appeal.

The particulars of the charges against the appellant were: In count one; "That LINO RAUHOURA of TA'ARUMANI VILLAGE EAST AREARE AREA at OTERAMA VILLAGE in the MALAITA Province on 25th March 1995, UNLAWFULLY ASSAULTED MR. RAMOGA. In count two, "That LINO RAUHOURA of TA'ARUMANU VILLAGE, WEST AREARE at OTEREMA VILLAGE in the MALAITA Province, on 25th MARCH 1995, UNLAWFULLY ENTERED INTO THE DWELLING HOUSE OF MR. ALBERT HAUHERE WITH INTENT TO INTIMIDATE OR ANNOY THE SAID ALBERT HAUHERE. On conviction, the appellant was sentenced to 6 months imprisonment on each count, the two sentences to run concurrently.

The grounds of appeal were that there was, "insufficient evidence: to convict on the count of Criminal Trespass, there was inconsistency in the prosecution evidence about the act of striking the bush knife by the appellant, the sentences were excessive, the magistrate had been influenced outside court by someone asking him to imprison the appellant, the sentence "will cause hardship to the Appellant in that he will lose his membership of the Provincial Assembly and that it was imposed without submission by appellant's counsel. The ground that he did not call his witness, "due to insufficient time given ...." was withdrawn.

On the evidence on record, the conviction for common Assault cannot be faulted The definition of the offence of common assault in Archibald, 43rd edition at page 1980 cited by the learned principal magistrate in his judgment is the correct one followed in this

jurisdiction - see another definition in the 36th edition at paragraph 2631. It covers instances when the court will convict such as striking a blow even if it misses, throwing an object even if it misses, pointing a loaded or unloaded gun close to the victim. In all, there is intent to cause apprehension in the mind of the victim; that apprehension is fear of imminent danger to his person. Actual battery may be treated as common assault. If body injury results, the more serious charge of actual bodily harm may be preferred. The injury may be a physical one or nervous condition arising from hysteria caused by the unlawful threat of violence to the person, See R v MILLER [1954] 2QB 282.

Much was said by both counsels about the blow appellant struck with a bush knife on the table at which the complainant was, and as to whether there was inconsistency about striking with the sharp edge or the flat side of the blade. It does not matter in the conviction for common assault. The appellant admitted striking on the table with the flat side. There was no inconsistency in the fact that the blow was struck at the complainant. Whether or not it was to cut him, it resulted in instant apprehension of immediate danger to his person. The real evidence there was his instant flight through the window. There was again no inconsistency about that. The offence of common assault was conclusively proved beyond reasonable doubt, the learned magistrate was right to enter verdict of guilty and convict on the count charging common assault c/s 237 of the Penal Code. The appeal against conviction on count one is dismissed.

The charge of criminal trespass in count two is connected to the act of assault in count one. The appellant and Maoi entered one part of the house of Mr. Albert Hauhere to buy beer which was being sold to the public and indeed bought beer. He noticed the complainant and one Martin Maehoua, in another part of the house described as kitchen, connected by a passage some 7 metres long. The complainant is his cousin. He walked over to him. He asked him what party the complainant belonged to. He did not like the answer; he snatched the bush knife from the complainant and struck twice. Learned Deputy Director of Prosecution Mr. Talasasa attractively urged the court to accept that for purposes of that count, entering of the kitchen part of the house was a distinct entering without the implied permission of Mr Hauhere and that the permission of Hauhere was readily available only for that part where beer was being sold. Learned Counsel Mr. Remobatu urged otherwise, emphasizing that the house was a place for selling beer and opened to the public and so to the appellant. I am inclined to agree with Mr Remobatu on the evidence on record. It was not explained, the burden being on the prosecution, why the complainant and Manehoua were sitting in the kitchen at a table, were they drinking beer as customers? Even if I were to accept the submission of Mr. Talasasa that there was no permission to enter the kitchen part of the building, the question remains, did the appellant enter, even if unlawfully, with intent to commit an offence or to intimidate or annoy? The evidence does not bear out

the positive answer. On the contrary probably not. The complainant is appellant's cousin and appellant was visiting that village. It is not unlikely that he would walk over to his cousin even if only to exchange pleasantries. More important though, it comes out in evidence that the answer that his cousin gave that he, the cousin belonged to no party was the immediate cause of the appellant's unlawful striking. It caused him to seize the bush knife from the complainant and to strike twice in anger. That unlawful act occurred, after lawfully entering the kitchen. There is no evidence to support suggestion that he remained there. In any case he was not charged under section 182(1)(b).

I find that the charge of Criminal Trespass contrary to section 182 (1)(a) has not been proved. The appeal against conviction on count 2 is allowed. The conviction is quashed and the sentence set aside.

There is an aspect of that charge which needs to be looked into; that is charging the offence of criminal trespass together with common assault; that common assault being the basis of the criminal aspect of the trespass. It seems to me that it is unfair multiplicity. Occasion may arise to consider it.

Mr Remobatu submitted that there may have been bias in the principal magistrate when passing sentence. He submitted that certainly that is what the appellant felt. That arose from allegation of a co-inmate, Mr. Aloisio Mason that he heard one Peter Taraumae tell the magistrate that the appellant, Lino was showing off too much around, so the magistrate should send appellant straight to prison, not fine him. That according to evidence, would be after the trial and submission, but before judgement and sentence. Mason is serving prison term on a conviction for assaulting Peter Taraumae. Affidavit was obtained from him and the court granted leave to have him cross-examined.

Mr. Mason's evidence did not impress me. He seems to have heard only the statement about sending the appellant to prison, and no other conversation. That together with a most likely motive against Taraumae make me dismiss his testimony as false. Note that he says that the magistrate did not reply or comment. To determine that ground of bias on question of law would require the court to ask the question, was there a real likelihood of bias in the circumstances of this case? A reasonable person would not answer in the positive. Even if I were to accept that the utterance was made, the next relevant fact was that the magistrate did not say anything back, he did not respond. It must also be noted that he did not invite the utterance and indeed like anybody else, he could not have stopped it before it was uttered. If I were to find that the circumstances gave the impression of bias, I would simply set aside the sentence without having to assess whether there is presence of bias in the judgment or to evaluate excessiveness to see whether there has actually been

bias - see the recent case of PAUL MAENU'U v. GABRIEL LAMANI, Civil Appeal 2 of 1992 in which His Lordship Palmer J. detailed the approach to the question of bias. That was a civil case but the principle there is applicable in criminal cases. I must, however, state here that I was not able to detect bias in the judgment or sentence in any way.

Although appeal court will allow appeal simply on finding circumstances giving rise to real likelihood of bias even if there has actually been no bias in the proceedings, judgement and sentence, it will be useful for solicitor whose client alleges bias, to assess the presence of bias. If he cannot find it, notwithstanding the circumstances giving the impression of bias, to advise client accordingly. That is because even a baseless allegation of bias could undermine confidence in a court. I may well mention here that recently some magistrate reacted with admirable commendation to action of a member of public, intended to influence that magistrate. That is overt reaction confirming confidence in our magistrates in Solomon Islands, we must all be proud about it.

Mr. Remobatu also ably submitted that because the sentence of 6 months imprisonment on the appellant will result in him losing his seat in the provincial assembly in terms of s.15 of the Provincial governments Act, that fact ought to have been balanced against the aggravating features. He said that the learned magistrate overlooked that. He cited the case of GINA v R [1987] SIR 35 in support. In that case, his Lordship Ward CJ stated strong reasons for keeping penalty on conviction below disqualification point for a member of parliament in Solomon Islands. His Lordship however, also stated that once the member of parliament has committed an offence that so clearly merits a sentence above the disqualification point, the mitigating effect of the "loss of his seat is already gone ....." In the end, he stated, "out of mercy [I] would allow a reduction of two months, for the strain of such a sentence being felt so acutely." I do not think His Lordship laid a hard and fast rule on the point. Some judges have unequivocally expressed the view that the position of accused and or his privilege should not influence sentence. In DOUGLAS CAMPBELL v R [1911] Cr App R 131, the appellant was described as an educated man and a gentleman who had held a good position as an army coach. Their Lordships in Court of Criminal Appeal in England said at page 132: "nor in our view the fact that the prisoner was a man of education any ground for lenient treatment." I agree with learned Deputy DPP, that the privilege of one in society should not be over emphasized and I add, lest it be misunderstood for lack of equality before law, an important factor in maintaining law and order and justice, but the loss of it must be taken into account in mitigation in cases where the sentence could fall right on or only slightly above the crucial point at which privilage is lost. That would alleviate the additional pain of losing priviledge or position that such a person would feel over and above others in borderline sentence.

Is the sentence imposed on the appellant merited by the offence he committed when balanced against the mitigating factors that principal magistrate outlined? Appellant is a member of provincial assembly, married and bears great responsibility for his family. He has no previous conviction. The offence he was convicted of was common assault with a bush knife a potentially lethal weapon, struck twice at the complainant. In my view such degree of aggression coming from someone who should be an example to his community such as the accused, merits custodial sentence of anywhere between 4 to 7 months. The 6 months imposed by the magistrate is not unduly excessive. I have however, considered two factors which appeared in the records. Mr Remobatu called the Courts attention to the fact that shortly after the incident, the appellant and co accused stood outside together with the complainant. It is commendable that after such fury he should show willingness to reconcile or at least to appear not to pose a long lasting threat. The second point is the fact that on page 9 of the proceedings the appellant told the court twice that his solicitor was not present, the second time being when he was offered opportunity to say something in mitigation. He was clearly apprehensive of the risk of concluding submission without counsel. I endorse fully what the magistrate said about the irresponsible conduct of accused's counsel at the trial, Mr. Wasiraro who had been present in Court when the case was adjourned for judgment on a specified date. He did not attend court nor inform the court nor leave word with his client, the appellant nor with his office. Nonetheless it was the appellant to suffer. The proper course was to ask the accused then whether he wished to instruct another solicitor or he would proceed without one and indeed to afford him at least one opportunity to do so if he wished to instruct another solicitor. The magistrate would if he wished inquire into the disrespectful conduct of the solicitor.

For that I am bound, this being a borderline case in which 6 months sentence or slightly less or higher would be appropriate, to reduce that sentence of the appellant. The sentence of 6 months for the conviction for Common Assault contrary to section 237 of the Penal Code is set aside and substituted therefor a sentence of 4 months imprisonment to run from the day he was first imprisoned. Prison authority is to immediately compute to see whether or not he is due for release.

Dated this 5th day of December 1995 at Honiara.

(Sam Awich)
COMMISSIONER