REGINA-v-TINSLEY RENNIE

HIGH COURT OF SOLOMON ISLANDS
(Mwanesalua, J.)

Criminal Case No. 506 of 2006

Hearing: *30th June 2006*
Judgment: *18th August 2006*

P. Bannister for the Appellant
H. Barclay for the Respondent

JUDGMENT

Mwanesalua, J: The Respondent pleaded guilty to the Offence of possession of firearm, contrary to section 5(2) of the *Firearms and Ammunition Act (Cap. 80)* in the Central Magistrate Court on 27 July 2005. The Learned Magistrate convicted him of that offence on his own plea and sentenced him to pay a fine of one thousand dollars on 13 September 2005. The Appellant filed this appeal on 21 September 2005 against that sentence on the following grounds:

1. The sentence is manifestly inadequate.

2. The Learned Magistrate erred in not imposing an immediate term of imprisonment.

3. The Learned Magistrate erred in giving too much weight to mitigating factors advanced on behalf of the Respondent.

4. The Learned Magistrate erred in giving insufficient weight to the overall offending of the Respondent.

5. The Learned Magistrate erred in not taking into account or insufficiently taking into account the principle of general deterrence.

Facts on the Record

On 4 November 2004, the Police executed a search warrant on premises previously occupied by Jimmy Rasta at Ranadi. The Respondent was at the premises on that day. The Police told him that they were going to conduct a search of the premises for firearms. He denied any knowledge of firearms on the premises. The RAMSI Police officers then left while a local police officer

remained with him on the premises. He then revealed to the Local Police Officer that there were firearms and ammunition on the premises. The firearms and ammunition were in a car *Registration No. A8191* the key of which he kept. That revelation led to the confiscation of the firearms and ammunition from the booth of the car by the Police. The Respondent was charged and remanded in custody from 14 November 2004 to 16 September 2005. He pleaded guilty on 27 July 2005 and was sentenced on 13 September 2005. The photographs of the car, the firearms and the ammunition; the Respondent's note book; three handwritten letters in Tobaita language; and the Statements of Eric Mervyn Davies, Leonard James Logan, Donald Kaia and that of the Respondent himself were tendered to the court.

The Appellant's Case

The Appellant made these submissions in respect of its grounds of appeal:

Grounds one and two: The appropriate sentence to be imposed on the Respondent is one of immediate imprisonment for a term of between three to four years.

Ground three: First, the Magistrate made a mistake in using the time during which the Respondent was remanded in custody both as mitigating factor and as a form of punishment. And second, the Magistrate made a mistake in giving too much weight to the mitigating factors advanced on behalf of the Respondent.

Ground four: The Magistrate's sentencing comment that "*despite whatever relationship and obligations defendant has with Jimmy Rasta, he revealed everything to the Police when the search warrant was executed*" was flawed.

Ground five: The Magistrate failed to consider the principle of general deterrence while sentencing the Respondent.

The Respondent's Case

The essence of the Respondent's case is that the Appellant's appeal should be dismissed on the grounds that the Appellant failed to point to any error of fact or principles of law and that the Sentence imposed on the Respondent was proper having regard to the mitigating factors advanced on behalf of the Respondent.

Decision of the Court

I propose to deal with the grounds of appeal in the following sequence:

Ground three:

There was a delay of over ten months between the discovery of the offence and its disposal in this case. This delay was not due to any fault of the respondent. The Investigation into the offence was straight forward and simple in that the Respondent readily confessed the commission of the offence in his statement. The admission seemed to be made on the day when the offence was first discovered. I consider that such a length of delay in a simple case as this would entitle the Magistrate to consider it as a mitigating factor while passing sentencing on the Respondent.

The Appellant says that the Magistrate would merely be justified in treating delay as a mitigating factor in a situation where an offender has shown evidence of effective rehabilitation, and that a delay is not a form of punishment. It is not entirely correct to say that delay can only be taken as mitigating factor when an offender shows evidence of effective rehabilitation. This is because delay can also be taken into account by a sentencing court for other reasons, such as where anxiety and uncertainty is experienced by an accused over a long period while his fate is undetermined. Such a delay would be viewed as a punishment.[1]

The Appellant disagreed with the Magistrate who expressed the view that the defendant "cooperated with Police in revealing everything and telling them where the guns and ammunition were", in view of the facts: that the letters found on the premises were not surrendered to the police by the Respondent; that the Respondent had given conflicting evidence about how he became in possession of the guns and ammunition; and that the Respondent merely cooperated in disclosing the true location of the guns and ammunition on the premises by the insistence of the Police. These facts are new, and were not presented to the Magistrate. As such, the Magistrate was not entitled to take them into account, and was entitled to express the view that the Respondent cooperative with the Police on the basis of the facts provided to the court during sentence. Prosecutors should play a more active role in guilty pleas.

In Burchielli,[2] Young C.J. and Lush J. commented that it was "desirable that prosecutors should be prepared to take, into their discretion, a more active part in the hearing of pleas." What this means was explained by the Federal Court of Australia in Tait and Bartley[3];

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[1] ***Smith (delay of five years not due to fault of accused) see Sentencing – State and Federal Law in Victoria by Richard G. Fox and Arie Freiberg (1985 at 486 para. 11-516)***

[2] ***Burchielli 10/6/77. See Sentencing – State and Federal Law in Victoria by Richard G. Fox and Arie Freiberg 1985 at p.39 para. 2.201.***

[3] *Tait and Bartley (1979] 24 A.L.R. 473, 477*

"The Crown has been said not to be concerned with sentence (see, eg. Lawrence J- in Paprika Ltd-v-Board of Trade [1944] 1All E.R. 372 at 374; [1944] IKB 327 at 332]), but when a statutory right of appeal is conferred upon the crown, that proposition must be precisely defined. It remains true that the Crown is required to make its submissions as to sentence fairly and in an even handed manner, and that the crown does not, as an adversary, press the sentencing court for a heavy sentence. The Crown has a duty to the court to assist it in the task of passing sentence by an adequate presentation of the facts, by an appropriate reference to any special principles of sentencing which might reasonably be thought to be relevant to the case in hand, and by a fair testing of the defendants' case so far as it appears to require it. If the proposition that the Crown is not concerned with sentence was ever construed as absolving the Crown from this duty, it cannot be so construed when a crown right of appeal against the sentence is conferred. The Crown is under a duty a assist the court to avoid appealable error. The performance of that duty to the court ensures that the defendant knows the nature and extent of the case against him, and thus has a fair opportunity of meeting it. A failure by the Crown to discharge that duty may not only contribute to appealable error affecting the sentence, but may tend to deprive the defendant of a fair opportunity of meeting a case which might ultimately be made on appeal. It would be unjust to a defendant, whose freedom is in jeopardy for the second time, to consider an appeal a case made against him on a new basis – a basis which he might have successfully challenged had the case against him been fully presented before the sentencing court."

Ground 4:

The court record shows little information about the Respondent's relationship with Jimmy Rasta. That information shows that the Respondent worked for Jimmy Rasta as a part-time Mechanic; that the Respondent resided on the premises previously occupied by Jimmy Rasta before the search warrant was executed on the premises; and that their was circumstantial evidence that the firearms and ammunition recovered from the premises were owned by the Respondent and other persons. Two of the letters found on the premises by the Police were objected to by the Respondent. There was no evidence on the court record as to the manner in which that objection was resolved.

The Appellant says that the Magistrate should have dealt with the relationship which the Respondent had with Jimmy Rasta in more detail, rather than merely dismissing it out of hand with the sentencing comment that *"despite whatever relationship and obligations defendant has with Jimmy Rasta, he revealed everything to the Police when the search warrant was executed."*

My view is that it would be difficult for the Magistrate to the deal with this point in more detail as expected by the Appellant, when the Appellant itself did not provide adequate facts to the court about that relationship. In the absence of such facts, the Magistrate was entitled to deal with that point merely briefly as he did. I have already dealt with the new facts pertaining to the non cooperation of the Respondent in not surrendering the letters found on the premises and the persistence of the Police before the Respondent revealed the true location of the guns and the ammunition in ground three above, and that it would serve no useful purpose to deal with them again under this ground of appeal.

Ground five:

The Appellant says that the Magistrate failed to discuss and apply the principle of general deterrence in this case. The Appellant urged that, that should have been done so as to deter the Respondent and like minded people to possess weapons that can bring this country back to be ruled by the barrel of the gun. The Appellant submits that this is important in the light of correspondence by Jimmy Rasta to the Respondent asking him to *"Tell Mae to reassemble our weapons."* Again this fact was not placed before the Magistrate in the court below. This fact should have been included with the facts given to the Magistrate so that the Respondent would know the nature and the extent of the case against him, so that he might have a fair opportunity of meeting it.

The Magistrate was invited to consider the principle of general deterrence during the sentencing hearing on 16 August 12005. The fact that he made no mention of it in his sentence does not mean that he had not considered it at all. He might have considered the principle but might have felt, in the circumstances of this case, that the ultimate aim of protecting the community can be achieved as much by the rehabilitation of the respondent by a non – custodial sentence as by a deterrent measure.

Grounds one and two:

The Appellant says that the sentence of one thousand dollars fine is manifestly inadequate and that the appropriate sentence should have been a sentence of imprisonment for a term of three to four years. The Appellant submits that such a sentence would have been justified on the basis: that the offence was committed at a time when firearms and ammunition were banned; the number and the quantity of ammunition possessed; the reason for being in possession of the firearms and ammunition; and the need for imposing deterrent sentence for this particular offence.

- The Respondent was in possession of seven firearms and ammunition on 4th November 2004. They were hidden in a car Reg. No. A8191 parked on the premises. These firearms were comprised of *two SLR 7.62mm rifles, one SR885.56mm rifle, one 40mm gas launcher, one 12 gauge pigeon shotgun, one M1 30mm carbine rifle and one Remington.22 rifle.* Found with these firearms was a yellow solrice bag containing ammunition, ammunition belts and rounds. The firearms and ammunition were forfeited to the crown by order of the court.

One of the main purposes of punishment is to protect the public from the commission of crimes by making it clear to the offender and to other persons with similar impulses that, if they yield to them, they will meet with severe punishment.[4] This is the goal which the Appellant sought when it put forward the principle of general deterrence to the court below.

The need for deterrence helps define the lower limits of a penalty. It is accepted that too great a leniency will amount to an erroneous exercise of the sentencing discretion, first because the court fails to protect the community and, second, it destroys the public's confidence in law and order.

The seriousness of the respondent's offence was acknowledged by the Magistrate. There was no lawful reason for keeping the weapons after the cessation of hostilities in the country. There was evidence in correspondence tendered to the court below which pointed to potential use of the arms in illegal activity. That could have affected the peace, security and harmony which all residents of Honiara currently enjoy.

The imposition of a sanction by a court as a deterrent serves to two purposes. First, it serves as special deterrence to the offender from repeating his offence; and second, it serves as general deterrence by showing prospective offenders the results of violating the law. The Respondent in this case is an intelligent person. He reached the decision to hide the firearms and ammunition in the car after he considered the advantages and disadvantages of keeping them on the premises. That basis would have entitled the Magistrate to impose a custodial sentence as a deterrence to the Respondent from repeating his offence.

This court does have the power to quash the monetary sentence imposed on the Respondent and to replace it with a custodial sentence. But I decline to use that power in this case for two reasons. First, it is now well over twenty one months since the discovery of the offence. The imposition of a custodial sentence on the Respondent well over ten months after he was fined, and now living a peaceful life with his family and his community, has diminished

[4] ***Radich [1954] NZLR 86***

the deterrent effect of such a sentence. Secondly, whilst the crown sought a heavy sentence before the sentencing Magistrate, it did not present the full facts on which to pass sentence. The crown only presented the full facts of this case for purposes of this appeal. This court holds the view that it would be unjust to impose a custodial sentence on the Respondent on new facts not presented to the sentencing court. The court affirms the sentence of one thousand dollars fine imposed by Magistrate on the Respondent on 13 September 2005. This appeal is dismissed. I order accordingly.

Francis Mwanesalua
Puisne Judge