Ta'ani v Police

Supreme Court, Nuku'alofa
Ward C.J.
Criminal Appeals 585 & 728/94

16, 18 August 1994

Criminal law - appeal against sentence - disparity - apology
Sentencing - apology a reconciliation - disparity

On appeals against sentences of 9 months and 18 months imprisonment (cumulative) for two separate thefts of pigs both committed before any appearance in any Court it was,

Held:

1. Although, on the first sentence, there was an unexplained disparity between the Appellants sentence and that of his co-offender none the less a sentence of 3 months immediate imprisonment for theft of stock from a farm is not, in itself, manifestly excessive or wrong in principle.
2. It is on the Appellant, in a disparity argument, to demonstrate an injustice and demostrate (if he can) a lack of reasons for the disparity.
3. Apology and reconciliation are valuable and important features of Tongan custom. Given in the right spirit they can be a clear sign of genuine contrition.
4. However it is always a matter for the sentencing court which must be satisfied, on evidence, that a genuine apology has been given and reconciliation has resulted.
5. A court in sentencing, will bear in mind the views of the victim but it should not pursue a course that, in effect, allows an offender to buy or bargain his way out of criminal liability.
6. As this was not a case where the Appellant had re-offended after being first sentenced the second Magistrate if told that the second offence predated the first sentence, should have considered a penalty that added to the earlier sentence, but not to the extent here.
7. Appeal against 9 months sentence dismissed; appeal allowed against 18 months sentence and that sentence quashed and a sentence of 12 months concurrent on the first sentence substituted.

Counsel for Appellant : Mr Tu'ivai
Counsel for Respondent : Mrs Taumoepeau

Judgment

The appellant pleaded guilty at the Magistrates' Court to two offences of theft of pigs.

The first offence involved 17 pigs on 10 May 1994 in company with one other man and the second offence 7 pigs in company with two other men on 25 May 1994.

The first offence was heard at the Magistrates' Court on 9 June 1994 and the appellant was sentenced to 9 months imprisonment and ordered to pay $340 compensation or an additional year in default. His co-accused was ordered to pay a similar sum in compensation but was sentenced to only 3 months imprisonment.

The appellant appeared for the second offence on 12 July 1994 and pleaded guilty but, as one of his co-accused pleaded not guilty, the appellant's case was adjourned to the end of the trial. He was sentenced, by a different Magistrate, on 19 July 1994 to 18 months imprisonment.

He appeals against both sentence and I have heard both cases together. Combining the grounds of appeal, there are four matters raised:

1. That there was no reason for the disparity in sentences between the appellant and his co-accused in the first case.
2. That he has reconciled with the victims in Tongan custom in each case.
3. That, in the second case, he should have been sentenced by the Magistrate before whom he first appeared.
4. He is a born again Christian and this has changed his life since these offences.

I shall deal with them in that order.

No reason has been given to this Court for the substantial difference between the sentences imposed on the appellant and his co-accused or whether the case were heard by the same or different Magistrates. It is clear the Magistrate considered the compensation should be equally divided between each accused and it is hard to envisage what could have reduced the other sentence so much in comparison with that of the appellant who was, at that time, a man of good character and had pleaded guilty.

Different sentences for the same offence do not necessarily mean either sentence is wrong although, where there is an inexplicable difference or where the difference is very marked, it may give rise to a very real sense of grievance. If not justified, an appellate court may interfere but it is on the appellant to demonstrate the injustice and no attempt has been made before me to provide reasons or to demonstrate lack of reasons for the disparity. In those circumstances, I am not prepared to speculate. A sentence of 9 months immediate imprisonment for theft of stock from a farm is not, itself, manifestly excessive or wrong in principle and this ground fails.

The second ground is that the appellant has reconciled with the victims. Apology and reconciliation are important and valuable features of Tongan custom. In a small community it is frequently essential if the parties are again to live in harmony and the frequency with which it is accepted by the victim is a positive and constructive side of Tongan society. I accept that, when given in the right spirit, it can be a clear sign of genuine contrition by the offender.

However, it is always for the sentencing court. If it is considered to be genuine it may mitigate the penalty but the court must be satisfied an apology has been given and

reconciliation has resulted and those issues will require evidence to the satisfaction of the court. Equally, courts must be careful to distinguish cases of genuine apology from those done for expediency by an offender who knows it may help to avoid some or all of the consequences of his criminal act. It is a common misconception that, once the loss has been made good or the injury compensated, the accused need no longer be tried or punished. That is, of course, wrong. The court has a duty to try and, if convicted, to sentence criminals. It is a duty carried out in the public interest. Many victims of a crime would be happy, once recompense has been made, to withdraw the charge but that is a decision for the court once the case comes before it. When sentencing, the court will, of course, bear in mind the views of the victim but it should not pursue a course that, in effect, allows the offender to buy or bargain his way out of his criminal liability.

In both these cases, the Magistrate was aware of the suggested reconciliation and will have allowed such weight for it as was appropriate. There is no suggestion the court acted on wrong principles and this ground also fails.

The suggestion in the third ground is that the case should not have been heard on the adjournment by a different Magistrate. No arguments were advanced to support this and it fails.

The first Magistrate took the appellant's plea and, sensibly, adjourned the case until the result of the co-accused's trial was known. He had heard no facts outlined against this appellant. When the case was next heard, it was listed before a different Magistrate who not only took the plea again but heard the whole case.

It is generally wise for a Magistrate, once seized of a case, to complete it. Once he has started to hear evidence he should only fail to complete it in exceptional circumstances and for good reason. If however he does have to withdraw from a case, there is no reason why a different Magistrate should not take over the trial but it will be a fresh proceeding and he must hear the whole case again.

The last ground is that the appellant has, since these offences and, I am bound to say, very soon after them, attended church with the Salvation Army and immediately accepted Jesus. I have heard very helpful testimony from the pastor who said the appellant, since that first moment, has not missed a church meeting and has brought his parents into the congregation as well.

This all occurred after he was sentenced for the first offence and had been bailed pending appeal. I mean no disrespect to the pastor's assessment of the appellant's conversion when I say that his commitment to regular attendance was only tested for a few weeks because, on 19 July, he went to prison and has been there since.

How does the court assess such matters? Many a repentant criminal has sought the help of Christ whilst awaiting trial and many have forgotten shortly afterwards. That is a gloomy fact every experienced Magistrate knows only too well but it does not mean all such cases are not genuine. I am willing to accept the pastor's view and to share the pastor's hope that this is a true change of heart.

More difficult is the suggestion that, as a consequence, the sentence of imprisonment should not be served.

The pastor rightly says that, if the appellant does not go to prison, he can and, no doubt, will receive encouragement and help from the congregation. That will be a powerful factor in helping him resist any temptation to return to his former ways. Clearly,

whilst in prison, the pressures of evil are much greater but, if his new found faith means anything and with the strength that flows from a new conversion, he ought, one can only hope, to prevail.

I cannot, I am afraid, accept that this new born faith should stop him going to prison. However, I can give him some hope because, despite the remarkable fact that the length of sentence was not part of the appeal, I feel I should alter the period he should serve.

Sentencing a second offender to 18 months imprisonment for a planned and deliberate theft of pigs is not manifestly excessive but, in this case, the appellant had already been sentenced to 9 months. The second offence was committed before that sentence was passed. Clearly the penalty for two offences should be higher than for a single crime but this was not a case where he has re-offended after being sentenced. With respect, the Magistrate should, if told the second offence predated the first sentence, have considered a penalty that added to the earlier sentence but not to the extent that it would produce a total jail term of 2 years and three months.

I shall, to correct that, allow the appeal on the second offence and substitute a sentence of 12 months imprisonment concurrent with the sentence on the first.

Appeal against sentence in case number 585/94 dismissed. Appeal against sentence in case 728/94 allowed. Sentence of 18 months quashed and a sentence of 12 months concurrent to the sentence on case 585/94 substituted.

The sentence of 12 months on 728/94 will run from the date of sentence in the Magistrates Court i.e. 19 July 1994.