Hu'ahulu & another v Police

Supreme Court, Nuku'alofa
Ward CJ
Criminal Appeals 5861 & 587/94

19, 26 August, 1994

Criminal Law - jurisdiction - sentence - bodily harm
Sentencing - causing bodily harm - no evidence of injuries - weapons
Practice & procedure - summary trial - causing bodily harm preliminary enquiry as to injuries - before Magistrate takes jurisdiction.

Both appellants, first offenders, appealed against prison terms of 9 months imposed for offences of bodily harm.

Held:

1. Sentencing on such charges will depend to a considerable extent on the nature and the extent of injuries received.
2. A magistrate, before deciding whether he should take jurisdiction in such a case, should hold an enquiry first as to the injuries and that enquiry should be noted in the record.
3. Anyone who commits an offence of violence against another person runs a serious risk of immediate imprisonment.
4. The likelihood of going to prison becomes a virtual certainty if two or more people take part in a joint attack on one person or in any case where the victim is kicked whilst he is on the ground or when a weapon of any type is used.
5. In one case here the appellant used a stone on another's face - 9 months was entirely appropriate and his appeal was dismissed.
6. In the other case a broken bottle was used on the victim's face and, even although there was no evidence as to the injury, 9 months was not appropriate and a sentence of 12 months imprisonment was substituted.

Cases referred to : R v King's Lynn Justices [1969] 1QB 488
R v Hartlepool Justices (1973) Crim LR 637

Statutes referred to : Criminal Offences Act s.107
Magistrates' Court Act s.35

Counsel for Appellant : Mr Hola
Counsel for Respondent : Mrs Taumoepeau

Judgment

These two appeals have been heard together. The appellants are related but the two cases are entirely distinct. However, each appellant was charged with a single offence of causing bodily harm contrary to section 107 of the Criminal Offences Act, both used a weapon, both pleaded guilty in the magistrates' court and both were sentenced to terms of imprisonment. They now both appeal against sentence.

The first appellant, Lolo Hu'ahulu, had been drinking on 7 January 1994 as had the victim. They met and argued and the appellant thrust a broken bottle in the victim's face. The prosecution claim he broke it in order to use it and that was not denied by the appellant in the court below. At the appeal hearing, it was suggested he picked up the bottle only when the victim attacked him and it was already broken. The complainant attended the lower court to confirm he had forgiven the appellant. The magistrate was told the appellant was the only member of the family able to look after his elderly father. He had no previous convictions and was sentenced to 9 months imprisonment.

The second appellant had also been drinking at the time of the incident with which he was charged which was in September 1993. He was at a dance and the victim was a warden in the hall. When he tried to stop the appellant attacking another man, the appellant struck him in the face with a stone. This appellant also was the only peron able to support his aged father and his brothers and sisters. He had a good job driving a grader. He also had no previous convictions and was likewise sentenced to 9 months imprisonment.

The ground of appeal in each case refer to the fact the sentence was severe for a first offender. In the case of the first appellant it is also pleaded that both he and the victim were drunk and it is suggested the acts were done in self defence. The second appellant points out he is a useful member of society skills.

A number of matters arise from these cases that require comment.

In neither case does the record show any information having been given to the magistrate relating to the extent of the victim's injuries. Section 107 creates the offence of causing actual harm. It falls between common assault contrary to section 112 and causing grievous bodily harm contrary to section 106. The difference between the offences and the penalties that may be imposed is one of degree. In those circumstances, it is incomprehensible that a prosecutor would present a case to the magistrate without such evidence.

The maximum penalty under section 107 is 5 years imprisonment. Where the magistrates should place the case on such a scale will depend to a considerable extent on the nature and extent of the injuries caused. No magistrate faced with such a case should pass sentence until that information is provided. If the prosecution do not provide it, the case should be adjourned until it is provided.

Similarly, a magistrate faced with a request for summary trial must, by section 35 of the Magistrates' Court Act "having regard to any representations made in the presence of the accused by the prosecution or made by the accused and to the nature and circumstances of the case," decide whether his powers of punishment would be adequate. How can the adequacy of his power of punishment in an assault case under section 107

be ascertained without evidence of the injuries?

In passing I note that, in neither record, is there a reference to the magistrate's decision to allow summary trial. There should have been. The decision whether or not to try the case summarily is a judicial decision and should be recorded with the reasons why the magistrate reached that decision.

It is an important decision because it can limit the magistrate's power of sentence. Section 35(3) provides that, where the accused is convicted on summary trial, the magistrate may only send him to the Supreme Court for sentence "if on obtaining information about his character and antecedents the magistrate is of opinion that they are such that greater punishment should be inflicted for the offence than the magistrate has power to inflict." If, having allowed summary trial and heard the case, the magistrate considers it more serious than he originally thought, he is not empowered to send it up for sentence on that basis. The words underlined in the passage above mean that he can only commit for sentence if he receives information, unknown to him when he agreed to summary trial, relating to previous convictions or other matters concerning the accused's character; R v King's Lynn Justices exp. Carter [1969] 1 QB 488, R v Hartlepool Justices exp. King (1973) Crim L.R. 637. It is only in the rarest cases that a man with no previous convictions can be sent for sentence to the Supreme Court after summary trial.

In a case of causing bodily harm, I would suggest the decision whether or not to proceed summarily can not properly be made without enquiry first as to the injuries. When that has occurred, the fact that enquiry has been made should be noted in the record.

Even at the appeal, counsel for the respondent was unable to obtain evidence from the police of the nature of degree of the injuries caused by the first appellant with the broken bottle. The victim of the assault by the second appellant gave evidence in this Court that the injury attributable to the blow by the second appellant caused a cut on the left side of his face which required six stitches.

Both these appeals involve alcoholic drink. In one case it is a ground of appeal that both the appellant and the victim had been drinking. Counsel suggested the fact that the victim had also been drinking made the argument more likely and, therefore, reduced the appellant's blameworthiness. I do not agree.

It has been stated many times that an accused man who drinks so he is less able to control himself must expect that to be an aggravating rather than a mitigating factor. In this case, he was confronted by a drunken man. Had he been sober he could no doubt have dealt with the situation. He was not. He was drunk and, as a result of that, acted in an aggressive way.

It was also suggested to this Court that the same appellant was acting in self defence. That would require a plea of not guilty. The appellant pleaded guilty in the court below and there is nothing on the record to suggest his plea was equivocal in any way. Without any evidence of equivocation, the Court will not entertain a change of plea on appeal and it will be dealt with as plea of guilty.

Finally, I pass to the sentence actually passed in each case.

What is the basis on which such cases should be sentenced? The fundamental point is that anyone who commits an offence of violence against another person runs a serious risk of immediate imprisonment. That will apply even to a first offender.

The likelihood of going to prison becomes a virtual certainty if two or more people

take part in a joint attack on one person or in any case where the victim is kicked whilst he is on the ground and when a weapon of any type is used.

In the case of second Appellant, he used a stone in the other man's face and is lucky only to have caused a relatively minor injury. For such an attack, the sentence of 9 months inprisonment was entirely appropriate and his appeal is dismissed.

In the case of the first Appellant, he used a broken bottle which is a far more dangerous weapon. No case where such a weapon is used offensively should result in a sentence other than immediate imprisonment. That he used it on the other man's face is a serious aggravation. He is saved to some extent by the failure of the police to provide any evidence of the actual injury caused except to say it was a cut. As such I do not consider I can add anything for the injury and must sentence only on the type of weapon.

A broken bottle is a very nasty weapon. It is capable of very serious injury and, used on another person's face, can cause dreadful results. Any man who uses a broken bottle must be taken to be aware of that potential and the sentence will take that into account.

I do not consider, even accepting there is no evidence that the injury was serious, that 9 months is a proper sentence. The Court has the power to amend the sentence to any that the magistrate could have passed. I quash the sentence of the magistrate and substitute therefor one of 12 months imprisonment. Had there been any evidence of serious injury it would have been substantially longer.