Fa'aoso v R

Court of Appeal
Burchett, Tompkins & Neaves JJ
App.8/96

28 & 31 May 1996

Criminal law - confession sufficient
Criminal law - sentence - rape
Evidence - criminal law - confession - sufficiency
Sentencing - rape - factors - tariff

The facts are reported in the case immediately above. On appeal against conviction and sentence.

Held:

1. All the evidence relating to the event was not hearsay, as submitted.
2. There is no requirement that a confession must be corroborated. A confession alone can be sufficient to justify a conviction, where the judge or jury is satisfied that the confession is reliable and cogent evidence.
3. The appeal against conviction was dismissed.
4. In sentencing a judge must have regard to such factors as the seriousness of the crime, the maximum sentence prescribed, the need to deter others, sentences imposed in other similar cases to achieve consistency, any sentencing guidelines given by an appellate court, the desirability of encouraging rehabilitation, the need to show society's rejection of the conduct, and any aggravating features such as the accused's previous criminal history, the effect on a victim, the age of the victim, the degree of any violence, and the use of a weapon. Mitigating factors may include the age of the accused, an early plea of guilty, genuine expressions of remorse, any relevant medical, psychological or other condition, the accused's standing in the community and his family and personal circumstances. There will often be other factors to be taken into account in aggravation or mitigation.
5. The appropriate starting point for a rape sentence in Tonga should be five years.
6. Clearly the 5 year starting point should be increased here because of aggravating factors, particularly the violence. But when regard was had to the mitigating factors the sentence of 8 years was excessive and reduced to 6 1/2 years.

Cases considered : R v Clark [1987] 1 NZLR 380
R v A (CA 5/3/93) [1994] 2 NZLR 129

Counsel for appellant : Mr Veikoso
Counsel for respondent : Ms Weigall

Judgment

The appellant was charged with rape, and causing grievous bodily harm. Following a trial on 12 and 13 February 1996 before the Chief Justice sitting without a jury, he was convicted on the charge o rape and acquitted on the charge of causing grievous bodily harm. He was sentenced to a term of imprisonment of eight years. He has appealed against the conviction on the rape charge, and the sentence.

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The facts as found by the trial

On 29 November 1994 the complainant went to the Elite Night Club with her cousin, Lisa Leger. The appellant was a security officer at that night club. It appears - the complainant did not give evidence as she had departed the Kingdom after these events but before trial - that the complainant and Lisa Leger left together, arriving at Lisa Leger's home at about 2 am. Shortly after, the complainant left to see her boyfriend, apparently on foot.

From the statement of the appellant, he picked her up on his bicycle. The complainant asked him to take her to the boyfriend's place. When they were on the bike on a road in Ngele'ia, the appellant decided that he was "going to do something to the girl", so he steered the bike into a container beside the road. She fell, losing consciousness. The appellant dismounted, and after forcibly removing some of her clothing, he raped her. As she recovered consciousness, he punched her in an attempt to make her lose consciousness, then made off on his bicycle.

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The complainant went to a nearby house. The occupant was woken between 4 am and 5 am by the complainant. She was crying, her face was swollen, she was barely able to speak, she had lacerations to her lips and a black eye, and she had clothing only on the top part of her body. She returned to her cousin's place at about 8 am, who described her condition in similar terms. They went to the police. Later she was examined by a dentist, who described her injuries. He found she had a fracture of the mandible.

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This and the other injuries were consistent with falling down, or with being hit on the mouth with a hard object.

The appellant was interviewed by the police. He made a full statement that amounted to a confession of the crime of rape. He described how he met up with her, how she asked him to take her to the place of her boyfriend, how he "thought of doing it to her", how he removed her clothes and had sexual intercourse with her, how she started to regain consciousness, and how he punched her to make her lose consciousness so he could get away. The appellant signed his initials beside each answer as well as signing the statement at the end. No challenge was made to the admissibility of the statement.

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The appellant did not give evidence. The trial judge found that he could rely on the answers in the statement, and that that evidence, together with the evidence from other witnesses, proved the charge of rape beyond reasonable doubt.

The appeal against conviction

Mr Veikoso based the appeal against conviction on a submission that the conviction could not stand because the complainant had not given evidence. As he put it, "[her] voice was not heard in court". She was not available for cross-examination. The Crown, he submitted, had a duty to apply, pursuant to s44 of the Magistrates' Courts Act (Cap 11)

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to have her evidence taken before a magistrate, before she left the country.

The result, he submitted, was, for reasons we are still not able to understand, that all the evidence relating to the event was hearsay. This is obviously wrong. He also submitted that, in the absence of the complainant, the appellant was not bound by his statement because there was no evidence to corroborate it. This submission also is obviously wrong. There is no requirement that a confession must be corroborated. A confession alone can be sufficient to justify a conviction, where the judge or the jury is satisfied that the confession is reliable and cogent evidence. In this case, the correctness of the confession was unchallenged. The appellant, as we have said, did not give evidence. Counsel for the accused at the trial told the trial judge that he did not dispute any of it. Further, what the appellant said in the statement is consistent with the evidence of Lisa Leger and of the person to whose house the complainant went immediately afterwards. The appellant himself provided some corroboration when he took police officers to the scene to point out where the events had occurred.

No grounds for challenging the conviction have been made out. The appeal against conviction is dismissed.

The appeal against sentence

Assessing an appropriate sentence following a conviction has always been recognised as a difficult task. This is so particularly when assessing the length of a prison sentence, where such a sentence is required. The sentencing judge must have regard to such factors as the seriousness of the crime, the maximum sentence prescribed, the need to deter others, sentences imposed in other similar cases to achieve consistency, any sentencing guidelines given by an appellate court, the desirability of encouraging rehabilitation, the need to show society's rejection of the conduct, and any aggravating features such as the accused's previous criminal history, the effect on a victim, the age of the victim, the degree of any violence, and the use of a weapon. Mitigating factors may include the age of the accused, an early plea of guilty, genuine expressions of remorse, any relevant medical, psychological, or other condition, the accused's standing in the community, and his family and personal circumstances. There will often be other factors to be taken into account in aggravation or mitigation.

It can be helpful in assessing the length of a sentence to adopt an appropriate starting point, then adjust the sentence up or down to allow for aggravating or mitigating circumstances. For rape, the maximum sentence is fifteen years. That is to be imposed for only the very worst case imaginable. In our view, the appropriate starting point for a rape sentence in Tonga should be five years. This accords with that adopted in New Zealand, when the maximum sentence was fourteen years; *R v Clark* [1987] 1 NZLR 380. In that case, the Court of Appeal adopted that starting point after a review of guideline cases in New Zealand and in England. When in New Zealand the maximum penalty for rape was increased to twenty years, the Court of Appeal there adjusted the starting point to eight years, to reflect the sentencing policy indicated by the legislative change: *R v A* (CA513/93) 2 NZLR 129. In Tonga, when the Legislative Assembly increased the maximum sentences for some categories of sexual offending, it made no change to the maximum sentence for rape.

In this case, we do not have the advantage of the comments made by the trial judge when imposing sentence. But the aggravating and mitigating factors are clear.

The principal aggravating factor was the violence inflicted on the complainant by

the appellant, in addition to the violence inherent in the act of rape itself. This violence was substantial, resulting in her suffering a fractured jaw, as well as other less serious injuries. The complainant was a virtual stranger, he knew her only by sight. The decision to drive her into the container with the intention of raping her, was deliberate. There is no victim impact report. But we assume that the rape had the serious effect on the victim that is usual in a case of rape.

There are several mitigating factors. The appellant made a full confession to the police shortly afterwards, and co-operated to the extent of taking them to the scene to show 210 them where the offence had occurred. Why, after making this confession and co-operating in this way, he pleaded not guilty, and appealed against the conviction, remains a mystery. It may have been due to erroneous advice by counsel. But at least his confession saved the Crown the cost of bringing the complainant back to Tonga, and the complainant the agony of reliving her experience in the witness box.

On the advice of the probation officer, a report was obtained from Dr Puloka, the medical officer in charge of the psychiatric unit at the Vaiola Hospital. For reasons he details in the report, he concludes that the appellant suffers from the recognised psychiatric conditions known as anit-social personality disorder and very mild post-traumatic demetia, the latter probably due to head trauma resulting from his past activities 220 as an amateur boxer. These conditions have a number of symptoms. The fantasies associated with them are not particularly relevant. But they do result in a characteristic that has been recognised in the appellant by others, namely frequent episodes of explosive, uncontrolled, short-lived outbursts. These are instances of loss of impulse control. He is aware of what is happening but cannot control himself, and usually experiences regret afterwards.

These psychiatric conditions do not excuse his conduct in raping the complainant. But they can be taken into account when considering the level of his culpability.

He has no recent relevant previous convictions. Eleven years ago, in 1985, he was 230 convicted of two charges of causing grievous bodily harm, but these could not have been serious, as he was fined $50, and ordered to pay $100 compensation. In that same year, he was convicted of housebreaking, theft and common assault. These offences are consistent with his psychiatric conditions. He has no consistent with his psychiatric conditions. He has no convictions for sexual offences.

The appellant is aged 31, married with five dependant children, and a dependant mother-in-law who suffers from senile dementia. The probation officer observes that overuse of alcohol has contributed to aggressive behaviour. His wife has confirmed that he has ceased drinking beer since April 1995.

240 We have weighed up these considerations. Clearly, the five year starting point should be increased because of the aggravating factors, particularly the violence. But we have concluded that, when regard is had to the mitigating factors to which we have referred, a sentence of eight years is excessive. An appropriate sentence is six and a half years imprisonment.

The appeal against sentence is allowed. The sentence imposed in the Supreme Court is quashed. In its place, he is sentenced to imprisonment for a term of six and a half years.

We make a firm recommendation to the prison authorities. Dr Puloka has said in his report that the appellant needs time in the hospital psychiatric unit for psychotherapy 250 in the form of insight oriented therapy while he is in custody. It is essential that the prison

authorities implement this recommendation, not only in the interest of the appellant, but also in the interests of the community. This treatment may well lessen the risk of re-offending after his release.