Tauvaka v Police

Supreme Court, Neiafu, Vava'u
Hampton CJ
Cr App 746/95 & 218/97

2 May 1997

Criminal law - appeal against sentence - delay - behaviour
Appeal - sentence - behavioural offending - overcharging
Practice & procedure - prosecutors duties

The appellant appealed against sentences of imprisonment (totalling 21 months) on a variety of behavioural offences, on Niuatoputapu.

Held:

1. The prosecution should not make improper remarks during the course of a defended trial, nor on sentencing, which might, wrongly affect the view of the presiding Magistrate.
2. To charge an accused under s.57 Criminal Offences Act for abusive drunken swearing is to charge too serious an offence, when s.3 Order in Public Places Act is available and appropriate.
3. The sentences of imprisonment were inappropriate in all the circumstances, including the time lapse; and in one case imprisonment could not be imposed as a matter of law.
4. Imprisonment quashed; and fines substituted.

Statutes considered : Criminal Offences Act ss.57, 178
Order in Public Places Act s.3

Counsel for appellant : Mr Vaipulu
Counsel for respondent : Mr Cauchi

Judgment

I do not intend to go into the matter in any detail. I preface my judgment by saying that because I do not want to spend a lot of time on it, and there are some areas which I could get drawn into and say things about, that might have some value in the future but I simply do not want, today, to get into these areas.

There are in effect two separate appeals in front of me today brought by the appellant, both being appeals against sentences of imprisonment imposed upon him by the Magistrates' Court sitting in Niuatoputapu. The first sitting being in March 1995 where, on four charges, the appellant was sentenced to a total of 13 months imprisonment, and the second being in February 1997 where, on two charges, he was sentenced to 8 months imprisonment.

As I read the records, on the March '95 matters, he immediately appealed and was bailed the same day. On the February '97 matters he had, perhaps, some 3 days in custody as I see the record before he was bailed on the 21st of February. The appellant is now 27 years of age, and I stress the "now" because of the passage of time between the offending and with him being dealt with in the Magistrates' Court, let alone on appeal here. He is now married, has one child, a second on the way, still lives in Niuatoputapu and is a planter or a grower.

It is said on his behalf, and was said in February '97 on his behalf, that he is settling down, showing some signs of maturity, in effect, and I hope that is so at age 27.

The charges he faced in 1995 were four of a whole series of some 9 matters. The other 5 matters were dealt with by way of monetary penalty. The four that are before me involved offences brought under the Criminal Offences Act, three under section 57 which is in effect using threatening or abusive or insulting language towards a government officer, and the fourth relating to intentional damage of some louvre windows.

The first two of those charges, both under the Criminal Offences Act, section 57, relate to the same incident on 17th October 1992, and I stress the date, and quite why it took such a length of time to get it to the Magistrates' Court is of some concern to me, although I note the suggestions made in the middle of the defended hearing about the appellant avoiding the authorities. That should not have been said during the course of the defendant trial, by the prosecution.

Put shortly on that date in October '92, apparently the appellant had got drunk, had been disorderly, the authorities were notified. When they came to find him, that is a police officer and a town officer, they found him on his land, sleeping. They woke him, they took him away and it was whilst they were taking him away, that he called them "arseholes". That led to these charges brought under section 57.

I am concerned with the use of section 57 in these sort of circumstances. It seems to me there may well be some element of overcharging or charging too serious an offence in relation to such as incident and I am sure that there are other provisions, for example in section 3 of the Order in Public Places Act, that may be more appropriate to such circumstances.

The Criminal Offences Act charges carry a maximum of 2 years imprisonment or 500 fine, or both, which are serious penalties. On those 2 charges, the appellant was given 6 months imprisonment on each, concurrent.

I find that sentence was not only excessive, as put to me on behalf of the appellant, but in fact was inappropriate in all the circumstances.

The third charge related to a separate incident in December 1993. Another charge under section 57 of the Criminal Offences Act. It related to the same town officer, a separate incident. He was drunk. He swore at the town officer using a similar, or the same, word as previously. He was dealt with on this occasion by the Magistrate by 3 months imprisonment, cumulative on the 6 months on the first 2 charges.

Again I find imprisonment inappropriate in the circumstances.

The fourth charge, brought under section 178 of the Criminal Offences Act, related to an incident that occurred between the appellant and some relatives, I think an uncle and cousin. There was some sort of contretemps between the family members. The result was that, the appellant again drunk, hit with a piece of wood a louvre window and broke the louvres. I am told the damage, $30, has been paid. The complainants expressed their satisfaction with the apology that had been made, and they expressed that to the Magistrate at the time. They were, as I have said, all related.

That offence, given the amount of damage involve ($30) carried a penalty of 6 months imprisonment, maximum. On that charge, he was given 4 months imprisonment, cumulative upon all the others, so making up to the total of 13 months, I have mentioned. To give 4 months imprisonment for such damage in such circumstances, where the maximum is only 6 months, again not only excessive as submitted to me, but I find inapropriate to have sentenced him to imprisonment at all.

It may be that the learned Magistrate was influenced by some of the things that were said to him by the prosecution, which were far from objective and, in my view, went too far.

I should add that last offence was in January 1994. It seems to me that the learned Magistrate may well have over reacted somewhat, himself, in view of the remarks made to him by the prosecution, when one looks at his remarks on sentence, the serious way with which he characterised them all and his view that, for what I consider to be relatively minor behavioural matters, the appellant should be removed from the rest of society.

So in my view, overall, I have reached the view that a sentence of imprisonment was inappropriate.

I should add that another feature that occurs to me that, perhaps, was not, or does not seem to have been, given consideration by the learned Magistrate was the time lapse that had occurred. These were behavioural offences back in '92 and '93 and the very start of 1994.

If the charges brought under section 57 of the Criminal Offences Act had been brought under the Order in Public Places Act, then they would have been dealt with by, could only have been dealt with by, way of fine and in default imprisonment terms. It seems to me that was indeed the appropriate way to deal with these 4 matters, as the other 5 matters were dealt with, which was by imposition of various fines between $20 and $50 on each and in default certain terms of imprisonment.

I intend to quash the sentences of imprisonment on each of those 4 charges and in lieu thereof, substitution for those terms of imprisonment, intend to impose on each of the section 57 charges fines of $50 in default of payment, on each 1 months imprisonment. So on each of those 3 charges, Mr Vaipulu so you are clear $50 on each and on each in default of payment of $50 , 1 months imprisonment.

On the 4th charge under section 178 of the Criminal Offences Act, I take the view that not only was the imprisonment inappropriate and should be quashed, but that in the

circumstances, no further penalty should be imposed. It should be a conviction only, without any penalty on that charge. And I take account of the payment of compensation and the apology expressed and the acceptance of that, in the context that this was a family matter.

As to the 1997 charges, they relate to one incident in October '96 where the appellant was charged with drunkenness under section 3(j) of the Order in Public Places Act and with, again, an offence under section 57 of the Criminal Offences Act. Again, language directed at a town officer (a different town officer as I understand it) but language to the same effect as in the previous charges.

The Magistrate dealt with those charges together. They arose out of the same incident but imposed, as I see it, the same penalty on each and, as I read the notes, it would seem to be 8 months imprisonment concurrent on each charge.

First then to the drunkenness charge. That penalty cannot stand as a matter of law. It was a penalty unable to be imposed under section 3 of the Order in Public Places Act for all that can be done under that Act, is impose a fine not exceeding $100 and in default of payment to imprisonment for any term not exceeding 4 months.

So to send a man to jail for 8 months for drunkenness is something that is unable to be done. That sentence has to be quashed, and is.

The second charge under section 57 related to the use of language to the town officer. An apology had been given and had been accepted, the town officer I think being present at the hearing and expressing his acceptance of the apology to the learned Magistrate.

The Magistrate on sentencing there seemed concerned, as I understand he would be, as to the failure of this Court to deal with the outstanding appeals from 1995. I am also concerned with that, as to how such a delay occurred when, indeed, this Court sat in Niuatoputapu in early 1996 and could easily have dealt with the matter then; let alone the fact that there have been several circuits to Vava'u between March '95 and the present time when the matters could have been dealt with.

Those matters may well have affected the view of the Magistrate on this occasion. It seems to me that given the overall situation, the passage of time, the maturing, the marriage, the expression of apology and the acceptance of apology, a sentence of imprisonment was inappropriate on the second charges as well.

I intend to quash that sentence of imprisonment of 8 months. On the charge of drunkenness, I substitute a penalty rather more in keeping with the offence. He has been arrested, convicted and dealt with on drunkenness before. I intend to impose a fine of $30 on that charge and in default 3 weeks imprisonment. On the other language charge, I impose a further fine of $50 in default 1 months imprisonment.

Mr Vaipulu, the Court on appeal has put a degree of reliance and trust on what it has been told about his maturing, his taking wife and family and the responsibilities which go with that. Some might see that he has been dealt with quite leniently by this Court and I would hope that you would convey to him that, living in a small community in an isolated island such as Niuatoputapu, it is difficult for those who exercise authority and try to keep order to do that if they have people, such as your client, running around getting drunk, being disorderly, being abusive. If he keeps on doing it, it will keep getting worse for him.

In each of the cases where I have ordered fines to be paid and, in lieu of payment, imprisonment (and I think on my calculations the fines total $230) I order that the appellant should have a period of 8 weeks in which to make payment of all the fines. If

he makes default on all or any of the fines then those sentences of imprisonment which attach to those particular fines take force and effect.