SIRELI LILO v STATE (AAU0083 of 2005)

COURT OF APPEAL — CIVIL JURISDICTION

WARD P, EICHELBAUM and PENLINGTON JJA

8, 10 November 2006

Criminal law — sentencing — Appellant committed violence and theft — whether Appellant as involved as his co-accused in actual violence — whether judge placed too much weight on Appellant's previous conviction and too little on plea of guilty — whether sentence of four-and-a-half years harsh or excessive.

After a night of celebration, the victim was walking alone late at night. The Appellant and his co-accused pounced and dragged the victim into an alleyway. They grabbed him by the throat, punched him in the face and held his mouth to stop him from shouting for help. The Appellant also stole the victim's mobile phone, wristwatch and money. They fled after the police saw the attack but were later arrested. The Appellant had given the wristwatch to his de facto wife from whom it was recovered later. The other property was not recovered. The Appellant pleaded guilty to a charge of robbery in the High Court and was sentenced to four-and-a-half years and his co-accused to 3 years' imprisonment. The Appellant appealed against his sentence and presented the following issues: (1) that he was not as involved in the actual violence, was intoxicated and assisted in the later recovery of the watch; (2) the judge placed too much weight on the Appellant's previous convictions and too little on his plea of guilty; (3) that there was a great disparity between his sentence and that of his co-accused making the sentence harsh and excessive.

Held — (1) The attack was a joint enterprise since both the Appellant and co-accused, as equal participants, were involved in the violence and theft. Self-induced intoxication was no mitigation of criminal conduct since anyone who chooses to drink to the extent that he is intoxicated is responsible for the consequences. The learned judge was correct to place no mitigating value on this aspect and would have been justified in treating it as an aggravating factor.

(2) The judge did not add anything for the previous convictions because the additional 3 years for the aggravating circumstances as a whole was the same for both Accused. The evidence established that the Appellant had been previously convicted and sent to prison for 8 years for robbery and rape. The judge reduced the sentence on the Appellant's co-accused since he was a first offender. The offence was also committed while the Appellant was on bail for another offence which could have been treated by the judge as a serious aggravating feature.

(3) The Appellant pleaded not guilty when he first appeared in the Magistrates Court. At a later hearing, he elected to be tried in the High Court and, once there, changed his plea to guilty. The learned judge was clearly aware of his plea but pointed out that, as it was a late plea, it did not give him as much credit as one entered from the outset.

Appeal dismissed.

No cases referred to.

Appellant in person

A. Driu for the Respondent

[1] Ward P, Eichelbaum and Penlington JJA. The Appellant and another man, Henry Hoyt, appeared before the High Court in Lautoka on 6 June 2005 and both pleaded guilty to a charge of robbery. The Appellant was sentenced to four-and-a-half years' imprisonment and his co-accused was sentenced to 3 years. This is an appeal against that sentence of four-and-a-half years.

[2] The facts were summarised in the sentencing judgment of Winter J:

> This was an opportunist street mugging. You found your victim late at night, he was walking home alone after a night of celebration. You pounced on him. You dragged him into an alleyway. You grabbed him by the throat. You punched him in the face and held his mouth to stop him shouting for help. You stole his mobile phone, his wristwatch and his money… this was a cowardly, mean, violent and shameful act.

[3] It appears the police saw the attack and the attackers fled but were arrested later. The Appellant had given the wristwatch to his de facto wife from whom it was recovered later. It would appear the other property was not recovered.

[4] The grounds of appeal can be summarised. It is suggested that the judge did not sufficiently consider the circumstances of the offence or the mitigation, that he placed too much weight on the Appellant's previous convictions and too little on his plea of guilty and that there was too great a disparity between the sentences of the Appellant and his co-accused and between this and other similar cases and that, in any event, the sentence was harsh and excessive.

[5] The Appellant's complaint about the circumstances of the offence is that the judge did not attach sufficient weight to the fact that he had not been as involved in the actual violence as had his co-accused, he was intoxicated and he had assisted in the recovery of the watch. We can deal with them shortly.

[6] This was plainly a joint enterprise. Both accused were involved both in the violence and in the theft and we can see no reason why the judge should not have treated them, as he did, as equal participants.

[7] It has been stated many times that self-induced intoxication is no mitigation of criminal conduct. The Appellant told the police that he had been drinking before going to the town. He had been with about 10 friends and, between them, they had consumed four cartons of beer. Anyone who chooses to drink to the extent that he is intoxicated is responsible for the consequences. The learned judge was correct to place no mitigating value on this aspect. He would, in fact, have been justified in treating it as an aggravating factor.

[8] The evidence was that the Appellant had been previously convicted and sent to prison for 2 years for robbery and rape. In his sentencing judgment, the learned judge listed the aggravating factors of the offence and then referred to the Appellant's previous conviction. Following that he continued, "For these features I would add three years". That was an unfortunate reference and clearly included the Appellant's previous convictions with the other features considered as aggravating the offence. Had that affected the Appellant's sentence it would have required correction. However, it is clear the judge did not in fact add anything for the previous convictions because the additional 3 years for the aggravating circumstances as a whole was the same for both accused.

[9] His later comments showed that he reduced the sentence imposed on Hoyt because he was a first offender. That was the correct approach. We would add that this offence was also committed while the Appellant was on bail for another offence which could have been treated by the judge a serious aggravating feature.

[10] When he first appeared in the Magistrates Court, the Appellant had pleaded not guilty. At a later hearing, he elected to be tried in the High Court and, once there, changed his plea to guilty. The learned judge was clearly aware of his plea but pointed out that, as it was a late plea, it did not give him as much credit as one entered from the outset. That was the correct approach.

[11] The disparity in sentence between the Appellant and his co-accused was carefully explained by the learned judge. He took a starting point of 5 years. Having stated the aggravating factors, he added 3 years to the starting point for them and then continued:

> Against those features, I take into account however the mitigating circumstances which I find to be these. You are both relatively young. You are both in your early twenties. Mr Hoyt you have a clear criminal record. There was some degree of co-operation with the police by the two of you. Time served for you Mr Lilo, 3 months on remand. Your guilty plea, but a late one not enabling you to the usual discount associated with an early guilty plea. I therefore deduct three years from the aggravated penalty and settle a general sentence for you both of five years imprisonment.
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> However, I see a need to differentiate the penalty further for you, Mr Hoyt, because this is your first offence and you, Mr Lilo, because of the three months you spent on remand.

[12] We consider the calculation upon which the judge reached these sentences was based on sound sentencing practice.

[13] The Appellant has also referred the court to some other cases in which shorter sentences were passed. Every case depends on its own facts and it is not helpful to try and compare figures in this way. What an appellate court must ask is whether on the particular facts of the case before it, the sentence is correct. It is not helpful to try and discuss whether those passed in other cases of which we do not know the full facts were correct. We have considered the facts in this case and are satisfied there is no reason to interfere.

[14] This was a nasty offence, a cowardly attack by two men on a man who was alone in the street at night waiting for a bus. This type of conduct prevents the public from feeling safe in the streets and thus reduces the quality of life of everyone. The violence was not extreme but it was unpleasant and left the victim, as the judge mentioned, distressed and frightened.

[15] The sentence of four-and-a-half years was neither harsh nor excessive.

Result

The appeal against sentence is dismissed and the sentence of four-and-a-half years confirmed.

Appeal dismissed.