TINARIA SOSOPU .V. REGINA

High Court of Solomon Islands
(Palmer CJ)

Criminal Appeal Case No. 288 of 2003

Date of Hearing: 17th June 2005
Date of Judgement: 9th August 2005

E. Garo (Ms) for the Appellant
S. Balea for the Respondent

Palmer CJ.: This is an appeal by Tinaria Sosopu ("**the Appellant**") against a decision of the Magistrates Court on 27th October 2003 imposing sentences of 12 months and 6 months imprisonment for going armed in public and common assault contrary to sections 83 and 244 of the Penal Code, following a plea of guilty on both charges. The charges relate to an incident on 10th May 2002 at a school compound at Buri village, Ranogga Island. The victim was a 10 year old child. The facts as read in court revealed that the Appellant was angry with the victim for assaulting his son a day earlier. The facts read as follows:

> "*On the 10th May 2002 at about 0800 hrs in the morning, the victim was in the classroom when he saw the other students running to and fro around the school building, so he asked the students what was happen but they didn't told him, so he got up and went outside to find out was happening as he came to the door, he saw the defendant standing outside holding a long bush knife in his right hand, and accusing the victim for punching his son. The defendant approached the victim and pulled his right side ear and slapped his head with his right open palm, he also kicked his buttock with his right leg, and pressed his mouth with his right hand so strong then he dragged the victim under a mango tree behind the school building.*
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> *When they were under the mango tree, the defendant hold the victim two hands with left hand, and swing the knife in the air several times, with his right hand and told the victim "bae me killim you dis taem and bae me burrem you long here." The victim was so afraid and cried of what the defendant did to him*"

The learned Magistrate in passing sentence gave credit for the guilty plea and that the Appellant had no previous convictions. The learned Magistrate however took a firm view and rightly so based on the facts before him, that the circumstances were so serious as to justify an immediate custodial sentence. In particular his Worship took into account, the age difference, the presence of a weapon (a bush knife), that the child was physically assaulted and threatened by the Appellant, that he had little respect for the rule of law and for the school authorities and that the offence occurred at school in the presence of other students.

On appeal, three grounds of appeal were presented, basically that the learned Magistrate failed to take into account the fact that reconciliation had taken place between the parties and the delay factor, secondly, that the sentence was manifestly excessive and thirdly, out of proportion to the overall circumstances of the case.

The Appellant relies on an affidavit sworn 22nd January 2004 in which he sets out what he alleges actually occurred that day, deposing that the facts given and read out in court were inaccurate. At paragraph 7 – 9 he states what happened:

> "7. *On the day of the alleged incident, I had been working with my brother clearing grass around trees that were being prepared for felling. To do this job were using our bush knives. Following our work I was returning home with my bush knife when I came across the two boys again squabbling and fighting.*

8. *I grabbed the two boys and told them that I was tired of their fighting and arguments and that I had again been recently called up to the school about their behaviour. I told them that it had to stop misbehaving and "hit them each three times or so on their arse with my hand and twisted their ears."*

9. *However, I understand, that when Jenta went to the Police at Ghizo she told them I had hit them with my bush knife and threatened to kill them. This is what the Police told me when they arrested me in Ghizo in October last year."*

At paragraph 10 of his affidavit, he denies what was alleged in the facts before the Court.

"10. *I deny that I did any of the things the police said I did in Court. At the time of the incident, a member of my village, Dixie Paeome was passing the boys and me when the incident occurred and was a witness to the events that took place. He can testify to my account of the events."*

This same affidavit was relied on by the Appellant in an application for bail made before Kabui J. sitting at Gizo on 13th February 2004 and in which his Lordship granted bail with conditions. Sometime in June 2004, his bail conditions were varied to allow him to reside at his home village pending determination of his appeal. The matter did not come before this court until 17th June 2005 sitting at Gizo.

Delay

It is not disputed that the Appellant was arrested some 16 or so months after the incident. The alleged incident occurred in May 2002 and he was not arrested until September 2003. In his affidavit filed in support at paragraph 12, the Appellant deposed that he informed the learned Magistrate about what actually happened but that this was not taken into account when the presiding Magistrate imposed sentence.

Having perused the court proceedings, there being no mention of the fact I accept that the delay in proceedings was not taken into account by the learned Magistrate when considering sentence. It has long been held by the courts that delay will generally have the effect of reducing sentence. In *R v Fred Gwali & John Morrison* (Unrep. Criminal Case Nos. 21 of 1997 & 1 of 1998) Kabui J stated at page 3:

> '[A] long delay in prosecuting criminal cases may have the effect of reducing a custodial sentence imposed by the Court.'

In *Patterson Rumikera v Director of Public Prosecutions* (Unrep. Criminal Appeal Case No. 14 of 1987) Ward CJ commented at page 2:

> 'Delay generally affects the sentence in three way. It increases the anxiety of the accused man who has it "hanging over him" for that time. This will obviously only apply from the time of discovery of the offence – any delay before that is entirely in the hands of the offender. The second factor relates to the plea because any person must realise that, the greater the delay, the more chance the prosecution will be unable to prove their case. Thus, a plea of guilty entered with that knowledge becomes a strong mitigating factor. Finally, it gives the offender a chance, denied to many accused, of showing that he really does intend to reform and stop offending.'

A court *must* consider whatever the cause whether the delay was '*unreasonable*', see *R v Fakatoru* [1990] SILR 97 at page 100.

In this particular case there is no evidence to suggest that the delay was entirely the fault of the Appellant other than that that period was when law and order was at its lowest in the country and so to a certain extent, some delay was to be expected. The delay in this instance can only run in favour of the Appellant.

Reconciliation

The second ground relied on in this appeal was that insufficient or no consideration was given to the fact of reconciliation. Section 35(1) of the *Magistrates' Courts Act* (Ch. 20) states:

> *'In criminal cases a Magistrates' Court may promote reconciliation and encourage and facilitate the settlement in an amicable way of proceedings for common assault, or for any offence of a personal or private nature not amounting to felony and not aggravated in degree, on terms of payment of compensation or other terms approved by such Court, and may thereupon order the proceedings to be stayed or terminated.'* (emphasis added)

It is important to bear in mind that when a Magistrate considers *'reconciliation'*, he/she should comply with *Practice Direction No. 1 of 1989* issued by Ward CJ as follows:

Reconciliation under section 35(1) Magistrates' Courts Act

> *'When a magistrate is considering reconciliation of a criminal case under section 38(1) [now section 35] of the Magistrates' Courts Act, it is essential that he satisfies himself the reconciliation is genuine and has been freely accepted by the complainant. In order to do this, it will usually be necessary for the complainant to attend and to be questioned by the court. It is only in the most exceptional circumstances that reconciliation should be accepted without the attendance of the complainant and then only where there is clear evidence from the complainant of his agreement.*
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> *The scope of reconciliation is limited by the section to cases of common assault and "any offence of a personal or private nature not amounting to felony and not aggravated in degree." The practice of allowing reconciliation in aggravated cases must stop. Examples of cases where reconciliation should not be accepted include assaults causing actual bodily harm by more than one person or involving the use of weapons. Criminal trespass by night should not be reconciled where there is any evidence of an intention to steal and simple larceny is, of course, excluded because it is a felony.*
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> *Reconciliation should never be allowed automatically on the application of the complainant or the prosecution and should only follow a consideration of the relevant facts.*
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> *In cases where compensation is requested or offered, the decision is entirely one for the court. This it must hear sufficient facts to decide whether it is a suitable case and, if so, the sum that would be appropriate. Equally, when a sum has already been paid, the court must still decide whether it is sufficient or proper and act accordingly.*
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> *It should not agree to reconciliation until it has clear evidence of the payment. The fact compensation has been paid and accepted by the complainant does not make that case suitable for reconciliation if it was otherwise unsuitable although it may, of course, still be a matter of mitigation.*
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> *In cases where compensation is ordered, payment should be made to the complainant in open court or there should be clear evidence of payment and receipt. No order of reconciliation should be made until this is done and this may frequently require a short adjournment. The fact of payment in court must be recorded in the court file and no receipt is then necessary.*
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> *In every case where reconciliation is allowed, the court must state whether the proceedings are terminated or stayed. Where it is satisfied the reconciliation has finally settled the matter, the case should be terminated but, if there is any concern that bad feeling may continue, it may be wise to consider ordering a stay only. In this case, a period must be set (usually a period of up to 12 months would be appropriate) and it must be explained to the defendant that he is liable to arrest and trial for the offence should he continue or repeat his misconduct within that period.*
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> *Whilst many cases of matrimonial violence are suitable for reconciliation, the court should be especially careful before it is satisfied the victim has really agreed. In the majority of such cases, the appropriate order would be to stay proceedings. The court may also consider in such cases whether to bind over one or both parties under section 32(2) of the Penal Code subject, of course, to the complainant's right to be heard first.*

All the matters referred to in this direction must be noted in the record of proceedings.' (emphasis added) [words in brackets added]

In this instance, the learned Magistrate was entitled to disregard the application of section 35(1) of the Magistrate's Court Act on the grounds that as far as the facts of the case were concerned the offence pertained to an assault that was committed in public and that a weapon was involved. In spite of this, reconciliation does play a role in so far as it demonstrates genuine contrition and remorse on the part of a defendant and that it can assist the defendant in so far as mitigation goes with the possibility of reduction in a sentence imposed.

I have only the records of the presiding magistrate as opposed to the affidavit of the Appellant in which he deposes he raised the issue of reconciliation but that this was not taken into account. In the absence of anything mentioned in the records of proceedings the statements of the Appellant must be given the benefit of the doubt. It is a duty of the magistrates court to ensure that where there is conflict of facts presented before him, either he must accept the statement of the defendant or hold a trial on the disputed facts and allow witnesses to be called and cross examined.

When the matters submitted before this court as contained in the affidavit of the Appellant are considered, they present a very different picture to that presented to the learned Magistrate. I would not have hesitated in upholding the orders of the presiding Magistrate based on the facts before him when the Appellant appeared before him. The same cannot be said though when the new set of facts as outlined in the affidavit of the Appellant is considered. They paint a very different picture.

In the light of those new set of facts and circumstances, the sentence imposed by the learned Magistrate respectfully cannot be sustained. In the light of the fact that the Appellant had already served time in prison of 3 months and 16 days, that I consider to be more than adequate punishment for the charges of going armed in public and common assault.

The appeal is allowed, the order of the learned Magistrate quashed and substituted with a sentence of 3 months for each count and to be made concurrent to each other.

ORDERS OF THE COURT:

1. **Appeal allowed.**
2. **Order of the Magistrates Court Gizo dated 27th October 2003 quashed.**
3. **Substitute sentence of 3 months on each count, concurrent.**
4. **The Appellant having served 3 months and 16 days in prison is not required to serve any further term of imprisonment.**

THE COURT.