

THOMPSON KILATU -v- REGINA

HIGH COURT OF SOLOMON ISLANDS.

(KABUI, J.).

Criminal Appeal No. 206 of 2004

Date of Hearing: 20th September 2005.

Date of Judgment: 22nd September 2005.

R. Iomea for the Crown.

K. Awerre for the Appellant.

JUDGMENT

Kabui, J. The appellant is Thompson Kilatu. He is a prisoner, serving a sentence of imprisonment for five and half years, in the Rove Prison. He pleaded guilty to one count of assault causing actual bodily harm, one count of causing grievous harm and one count of intimidation in the Honiara Magistrate Court on 15th April 2004. Another Magistrate sentenced him on 27th May 2004. For intimidation, the Magistrate sentenced him to imprisonment for six months. For assault causing actual bodily harm, the Magistrate sentenced him to imprisonment for two years. For causing grievous harm, the Magistrate sentenced him to imprisonment for three years. Kilatu has appealed these sentences on the grounds set out in his notice of appeal.

The grounds of appeal.

The grounds of appeal are five but they can be condensed into three areas of concern. The first is that the Magistrate did not give sufficient weight to the mitigating factors advanced for Kilatu by his Counsel. Second, the Magistrate did not treat some of the sentences as concurrent and having made them consecutive, failed to consider and apply the totality principle to mitigate the severity of the combined effect of the sentences. Third, the Magistrate imposed a sentence which is disproportionate to the offences and therefore excessive.

The background.

As regards the count of intimidation, the facts recorded by the sentencing Magistrate were rather confusing. The charge sheet however makes it clear that the victim of the intimidation was Gabriel Kemaiki who owned a taxi car. The events seemed to have started on 2nd July 2001 when the driver of the taxi, Alfred Kealau turned up to pick up a taxi fare. Kilatu appeared and took possession of the taxi. It appeared that there was a dispute over the ownership of the taxi. Kemaiki went to

discuss the matter with Kilatu the next day but was threatened by Kilatu saying he would kill Kemaiki and destroy the taxi. As regards the count of assault causing actual bodily harm, the assault took place in the Rove Prison premises. Kilatu was there with other fellow prison officers. He was intoxicated at that time. Prison Officer Paetai offended him and he punched prison officer, Paetai, who suffered injury to his lips and tooth. As regards the count of causing grievous harm, the offence was committed at the victim's residence. Kilatu went to the victim's residence and threatened the victim with violence. Kilatu hit the victim and injured the victim's jaw. The victim was hospitalized for three weeks. The victim was again, Kemaiki.

The mitigating factors.

The Magistrate said that the offence of intimidation was not so serious. The Magistrate was aware that Kilatu had pleaded guilty, was of good character, married with five children, and had lost his job as a prison officer and the offences had been committed whilst he was off duty. However, the Magistrate did not say in his judgment on sentence that he had taken these mitigating factors into account. The Magistrate clearly placed emphasis on retribution and deterrence and so did not take into account the mitigating factors advanced for Kilatu. The Magistrate's attitude can be gleaned from page 2 of his judgment-

"I start off by considering the offences as a whole. They indicate a series of conduct by a man at the time of the tension who is involved in the tension and whose actions contribute to the atmospheric of the tension creating fear among people and a feeling that certain select people cannot be criticized and others or the same people can do what they like with impunity. This man was a man who operated as a Bully using the tension as a cover for his bullying.

Those who contribute to the tension deserve a higher sentence than just in respect of an individual offence. It is an aggravating factor.

Further after the first offence the other offences were committed in the knowledge that the earlier offence was committed I cannot give discount for no conviction or good character.

This is a man who by the third offence believed he was above the law and his fist was the law."

The approach taken by the Magistrate is not necessarily wrong. **R. v. Inwood** (1974) 60 Cr. App. R. 70 cited in **Jimmy Ahi v. Regina**, Criminal Appeal No. 124 of 2005 is the authority for the proposition that the court has a discretion to either take into account mitigating factors or reject them for good reason. Scarman, L.J. in **R. v. Inwood** cited above, expressed the application of that proposition thus-

“But in the balance that the Court has to make between the mitigating factors and society’s interest in marking its disapproval for this type of conduct, we come to the irresistible though unpalatable conclusion that we must not yield to the mitigating factors.”

In that case, the sole ground of appeal was the effect of mitigating factors on the length of the sentence passed. Therefore it can be said that no error had occurred technically on the part of the Magistrate in this respect. I think in applying the totality principle, mitigating factors do play a part in reaching a just conclusion on sentencing. For this reason, I will not reject the mitigating factors outright as the Magistrate did.

Concurrent versus consecutive sentences.

These two types of sentences have been discussed in **Stanley Bade v. R** [1988/89] SILR 121 and **Augustine Laui v. DPP**, Criminal Appeal No. 11 of 1987 (unreported). Concurrent sentencing is applied, on the one hand, where a number of offences were committed on the same victim so that it is regarded as one transaction scenario. Consecutive sentencing, on the other hand, is applied where several offences were committed separately so that they do not connect the same victim so as to be regarded as being one transaction scenario.

The Magistrate committed errors in sentencing.

In this case, Kilatu intimidated Kemaiki on 3rd July 2001 and on 28th March 2002, caused grievous bodily harm to the same victim of his earlier intimidation. In my view, the sentence of imprisonment for six months arising from the intimidation and imprisonment for three years arising from the causing of grievous bodily harm should have been made concurrent so that the effective sentence is three years. Together with the two years sentence for assault causing actual bodily harm, the total sentence would stand at five years imprisonment. Is the combined sentence of five years too harsh? This is where the totality principle comes into play. If it is too harsh, I must look again for a sentence that befits the offences committed. Mitigating factors do play a role in reaching a conclusion on sentence that is just in this case.

The Magistrate gave prominence to the fact that Kilatu attacked Perry Poetai to silence him and others from criticizing the Malaita Eagle Force. The Magistrate regarded that as being an attack on the freedom of speech under the Constitution. Whilst that may be so, it was a kind of provocation if that criticism was said in a demeaning and offending way. Alcohol of course had a role to play. As regards causing grievous bodily harm, the Magistrate gave prominence to violence being meted out to the same victim of previous intimidation and the fact that the victim had spent three weeks in hospital. However, there is no medical evidence to show

the extent of the injuries caused. The Magistrate however said that the injuries were not of the worst kind.

The Magistrate did not feel that mitigating factors would play any useful role in his sentencing for the reasons he stated. I differ from him on this. Pleading guilty, being of good character and loss of his job should have been given the appropriate weight. Kilatu is a married man with five children without a bread-winner. It must have been devastating for him to have lost his job. To go to prison is even worse though he deserved going to prison for his misdeeds. The offences were committed during the period of the breakdown of law and order in Solomon Islands. It is too simple to try and blame any particular individual, much less, Kilatu, for that situation. The Government at that time must bear the responsibility for failing to maintain law and order and taking action at the appropriate time to prevent a downward spiral of law and order.

The appropriate sentences to be passed.

I feel a sentence of twelve months imprisonment is sufficient punishment for assault causing actual bodily harm on Perry Poetai. I quash the sentence of two years imprisonment and substitute it with a sentence of imprisonment for twelve months. I also feel the appropriate sentence for causing grievous bodily harm is imprisonment for eighteen months. The sentence of imprisonment for six months for intimidation remains intact but to run concurrently with eighteen months imprisonment for causing grievous bodily harm. The sentence of imprisonment for twelve months for assault causing actual bodily harm is to be consecutive to the combined sentence of eighteen months. The total sentence to be served is thirty months imprisonment.

The orders of the Court.

1. Sentence of six months imprisonment for intimidation remains intact.
2. Sentence of three years imprisonment for causing grievous harm is quashed and substituted with eighteen months imprisonment to be concurrent with 1 above.
3. Sentence of two years for assault causing actual bodily harm is quashed and a sentence of twelve months is substituted to be consecutive to the effective sentence of eighteen months in 1 and 2 above;
4. Total sentence to be served is thirty months imprisonment.

I order accordingly.

F.O. Kabui
Puisne Judge