

CHONG WONG (AMOS) v POLICE

Court of Appeal Apia
Dillon, Morling, Wylie JJ
4 November, 7 November 1991

CRIMINAL LAW - Grievous bodily harm

CRIMINAL LAW - sentence - grievous bodily harm - aims and objectives of sentencing process - general principles of an Appellate Court when reviewing the exercise of discretionary power by a Judge.

HELD: Injury to the victim; the Appellants age of 18 years; the fact he was a first offender; the delay in the hearing of the appeal, were critical issues in reviewing sentence. 12 months probation imposed in lieu of 12 months imprisonment.

CASES CITED:

- Crawley v R (1981) 36 ALR 241 (FCA)

LEGISLATION:

- Crimes Ordinance 1961; S 79
- Police Offences Ordinance 1961; S 26
- Criminal Procedure Act 1972; S 144
- Offenders Probation Act 1971; S 8

E F Puni for Appellant
M B Edwards and F J Amoa for Respondent

Cur adv vult

Early in the evening of the 11th day of September 1990 the Appellant went to play billiards in the compound where he lived. He paid the 20s fee to play but was then accused of having stolen some of the previous days takings. This he denied. Nevertheless an argument developed and on two occasions he was ejected from the lean-to where the billiard table was set up. Later in the same evening the Appellant went to assist his brother who was involved in a fight. His brother was being beaten up and

initially the Appellant's attempts at rescuing his brother were repulsed and he was chased from the scene. The Appellant returned to try again to rescue his brother. Eventually the fighting stopped.

It was a person called Falagisisi Eric Hamilton who was fighting with the Appellant's brother and as this person walked away from where the fighting took place, the Appellant threw a rock, striking him on the forehead. An X-ray disclosed that Falagisisi suffered a depressed fracture of the skull. As a result the Appellant was charged under Section 79 of the Crimes Ordinance 1961 with wilfully and without lawful justification causing grievous harm to Mr Hamilton. The maximum penalty for an offence under this Section is seven years imprisonment. To this charge the Appellant pleaded guilty.

On the 22nd day of October 1990 he appeared before the Chief Justice and was sentenced to 12 months imprisonment. This appeal is against the sentence that has been imposed.

The Appellant at the date of sentencing was aged 18 years; he was a first offender; he had left school the previous year but had not been able to obtain employment; it was acknowledged that the offence was out of character; the Chief Probation Officer recommended probation; the Appellant and Mr Hamilton are related; and their respective families have resolved their differences in accordance with Samoan custom.

With this background we now turn to consider the submissions presented by Counsel in support of this appeal. The Chief Justice in exercising his discretion on sentencing has addressed matters which are important and relevant in determining the form of punishment appropriate to the nature of the charge and the gravity of the offence. An Appeal Court should not lightly interfere with this discretion available to a sentencing Judge. In considering whether a sentence that has been imposed is appropriate in the circumstances of any given case, an Appeal Court must of necessity examine all relevant facts and circumstances to enable it fairly and justly to review the sentence imposed, and if considered appropriate to reverse, vary or confirm the sentence appealed against.

In this context it is necessary to consider not only the aims but also the objectives associated with the sentencing process. The primary function, of course, is to protect the community while at the same time acting with an appropriate measure of mercy that the circumstances would justify. Just as important, however, in this sentencing process is the applicability of those principles associated with retribution relative to the gravity of the criminal conduct; the degree of culpability of the Appellant;

the impact of deterrence both on the Appellant and as well on the community; and finally whether considerations of reparation and rehabilitation should be factors to be applied in the sentencing process.

Having taken into account those principles, a sentencing Judge is then confronted with the penalty to be imposed appropriate to the nature and gravity of the offence; the perceived need for a deterrent penalty; the circumstances of the offender and his background; and whether the offence disclosed factors involving premeditation; violence; or provocation. While protection of the community is a primary function in the sentencing process, the circumstances of the offender must never be overlooked.

Accordingly, with that glossary of the aims and objectives of sentencing, we turn now to consider the general principles upon which an Appellate Court should act when an appeal, such as the one before us, relates to the exercise by a Judge of a discretionary power.

The Supreme Court hears and determines appeals in accordance with S.144 of the Criminal Procedure Act 1972 i.e. If the sentence appealed against:

"... is one which is clearly excessive or inadequate or inappropriate or if the Supreme Court is satisfied that substantial facts relating to the offence or to the offender's character or personal history were not before the Court imposing sentence or that those facts were not substantially as placed before or found by that Court..."

This approach we believe should be adopted by this Court.

It is evident that the Chief Justice imposed the 12 months' prison term because of what he perceived as the "grievous injury" received. That injury assessment was based on a medical report notable not only for its brevity -- "X-ray skull showed depressed fracture of the skull" -- but also for its lack of background information on which the Court could assess the injury sustained. We have been told that Mr Hamilton was in hospital for two days only, it being suggested that the injury was therefore not as serious as one might initially have thought.

Although the Chief Justice was not informed of Mr Hamilton's brief stay in hospital, he was obviously concerned with stone throwing and the potential for serious injury. Defence Counsel by way of mitigation had submitted that stone throwing was a common occurrence in Western Samoa. In fact this is a specific offence pursuant to section 26 of the Police Offences Ordinance 1961 which provides a penalty of imprisonment for a term not exceeding one year. Another important aspect of this case which was not considered on sentencing (because it was not referred to)

was the size of the stone and the distance it was thrown. We have been told that the stone was about 6cm round and the distance thrown was about 10 metres.

Having reviewed the factors and circumstances presented to the Supreme Court on sentencing; and having considered the additional information contained in the helpful submissions of counsel on this appeal we believe that the injury to the victim and the fact that the Appellant was only 18 years of age and a first offender, are critical issues in the review we must undertake. The mitigating factor of a first offender was referred to in Crawley v R (1981) 36 A.L.R. 241 (FCA), as follows:

"... that as a general principle of sentencing it takes a very serious offence to warrant a custodial sentence for a man with an unblemished record."

An added factor is the delay in the hearing of this appeal (over 12 months); and that the Appellant had already spent 7 days in custody prior to sentencing and 29 days in custody since sentencing.

These are the circumstances which in our opinion justify the review we have undertaken. In allowing the Appeal we do not want to detract from the Chief Justice's warning about the likely consequences of this kind of offending and the community generally should take careful note, if it has not already done so, of that warning. In the present case however it does not appear that any such warning had been given on previous occasions. Certainly counsel were unable to tell us that it had been done. We think there is a risk of unfairness to the Appellant if in what we assume to be the absence of prior warning he should have visited upon him a sentence which is equivalent to the maximum for which he would have been liable under the Police Offences Ordinance and when the grievous harm caused may have been the result of the chance accuracy of a throw, from a distance, rather than the almost inevitable consequences of a much closer encounter.

Accordingly the sentence of 12 months imprisonment is quashed; and the Appellant is placed on probation for a term of 12 months upon the usual conditions as to release as set out in Section 8 of the Offenders Probation Act 1971.