DANIEL FA'AFUNUA -V- REGINA

High Court of Solomon Islands
(Palmer CJ)

Criminal Appeal Case No. 296 of 2004

Date of Hearing: 1st September 2004
Date of Judgment: 10th September 2004

K. Averre (Public Solicitor) for the Appellant
C. Ryan (Chief Legal Officer) for the Respondent

Palmer CJ: The Appellant was convicted in the Magistrates Court on the 3rd February 2004 on a charge of demanding money with menaces contrary to section 295 of the Penal Code (cap. 26) and sentenced to 3 years imprisonment. On the 24th February 2004 he was further convicted of four offences, (i) drunk and disorderly contrary to section 175 (d) of the Penal Code, (ii) resisting arrest contrary to section 125 of the Penal Code, (iii) assaulting a police officer contrary to section 247 (b) of the Penal Code, and (iv) another charge of assaulting a police officer contrary to section 247(b) of the Penal Code. He was given custodial sentences as follows: (i) 2 weeks, (ii) 10 months concurrent to first count, (iii) 10 months concurrent and (iv) 10 months consecutive. At the time those offences were committed (18th November 2003), the Appellant was under a suspended sentence of 4 months for an earlier traffic offence[1]. He had been warned that if he re-offended the suspended sentence may be activated. The learned Magistrate held that the circumstances of the subsequent offence warranted the activation of the suspended sentence bringing the total of the sentence imposed to 24 months. His Worship then held that the sentence was to be served consecutive to the previous sentence of 3 years resulting in a total period of 5 years.

The Appellant lodged an appeal against his conviction and sentence of three years on or about 16th February 2004, and his appeal against conviction and sentence of 24 months, on or about 2nd March 2004. Those sets of appeals have been consolidated into this appeal and heard together. At the hearing of this appeal the Appellant withdrew his appeals against convictions in both cases and decided to proceed only with the appeals against sentence only.

Demanding with Menaces

Three grounds of appeal were relied on:

(i) The learned Magistrate erred in law in not taking into sufficient consideration the mitigating factors which favoured the accused, namely the fact that the appellant was a Minister of the Crown who would lose his Ministerial portfolio as well as his parliamentary constituency, the previous record of the petitioner and other extenuating circumstances leading up to the commission of the offences which clearly came from

[1] Imposed on 29th October 2003 only some 20 days earlier.

the evidence which the learned Magistrate had heard in the course of the trial.

(ii) The learned magistrate imposed a sentence which were manifestly unjust the mitigating circumstances surrounding the commission of the offences. The sentence is excessive given that the maximum penalty is 5 years imprisonment and given sentencing principles generally.

(iii) The sentence imposed is manifestly unjust when considering the concept of comparative sentencing.

Did the presiding magistrate fail to take into sufficient account the mitigating circumstances of the Appellant when passing sentence in particular that he would lose his ministerial portfolio as well as his parliamentary constituency seat?

In his submissions learned Counsel Mr. Averre drew to my attention the case of **Ngina v. Reginam**[2] in which his Lordship Ward CJ commented regarding the effects of imprisonment on a parliamentary career. I quote:

> *"... the effect on his Parliamentary career is considered in two stages. First the court must consider whether it could properly keep the sentence below the critical six months. If it does not, it must then consider whether the sentence might still be reduced because of his position as a Member of Parliament. It seems to me that, once he has committed an offence that so clearly merits a sentence of more than six months, the mitigating effect of the loss of his seat is already gone and will not be helped by any further reduction."*

If this two stage test is applied to the facts of this case, the answer to the question whether the court below could properly keep the sentence below the critical six months, must be no. The facts revealed that this was a particularly bad case of demanding money with menaces. There were aggravating features present throughout. These included the use of a group of men sent by the Appellant, were armed and the use of threats accompanying the demand. Those features were accentuated by the lack of an effective police force on the ground at that time. Not only did the public have limited confidence in the ability of the police force to curtail and realistically prevent this type of activity from happening, they did not have confidence that they can be protected sufficiently from such armed gangs and men. The place, a Ranadi Workshop belonging to a well known Malaita Eagles Force militant leader, at which Mr. Lamani, owner of the Solomon Star Newspaper was told to go and see the Appellant was entirely inappropriate, oppressive and intimidating. There were other lawful alternatives open to this Appellant which he did not take up. Although Mr. Lamani was a man from Malaita himself, the evidence indicates that he was clearly intimidated by the presence of the same group of men and felt obliged to pay up the sum of $5,000.00.

The circumstances in which this offence had been committed clearly place it in the higher scale of seriousness and was correctly reflected in the sentence imposed. In a similar case, **Regina v. Peter Kaimanisi**[3], though the circumstances and charges were different, the accused Kaimanisi was sentenced by this court to 5 years imprisonment. The accused had been charged with robbery carrying a maximum sentence of life imprisonment. The facts however would equally satisfy a charge for demanding under the current section 295. The facts in that case[4] which I take judicial notice of related to a demanding of money with

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[2] SILR (1987) 35
[3] (1985/1986) SILR 260
[4] Regina v. Peter Kaimanisi CRC N42-86

menaces on two occasions accompanied with threats and being armed with a bush knife. On the second occasion the accused was accompanied by a group of men.

When imposing sentence, his Lordship said at page 260[5]:

> *"There are far too many cases of this nature being committed. Members of the public are being terrorized by bogus demands for compensation or real claims being demanded at knife point frequently by gangs of thugs.*
>
> *I make it clear that anyone who accompanies a demand for compensation, whether genuine or not, with threats or actual violence is committing a criminal offence and will be dealt with severely by the courts.*
>
> *Anyone subjected to threats or violence should report it to the police and all people convicted of such offences must expect immediate custodial imprisonment. Where weapons are used or the threats are by a gang the sentences will be particularly severe.*
>
> *Genuine requests for compensation must be settled by proper customary means through the chiefs or elders."*

The comments of his Lordship are also relevant in the circumstances of this case, a fortiori where it involves a former Minister of the Crown and a prominent leader in the community. Bearing in mind that after this new section (s. 295) was inserted into our Penal Code to cater specifically for such cases, it was decided by Parliament to limit maximum sentences to 5 years. Accordingly whilst a sentence of 5 years may have been imposed in an earlier case where the facts were very similar but on a less serious note, the sentence of 3 years imposed by the lower court in this Appellant's case cannot in anyway be regarded as excessive.

I am satisfied the learned Magistrate took into account the facts pertaining to this Appellants Ministerial position, his personal circumstances and customary practices. I quote:

> *"I am urged to accept that demands for compensation are the way of life in the Defendants home area. I am conscious of the fact that custom is an integral and important part of the law of this land. I seriously question if this is true custom. As I understand the nature of custom it is a process which allows members of society in conflict to reach a state of reconciliation. I accept I do not know all there is to know about custom but I believe I know enough about custom to see that extortionate demands backed up by threats of serious harm if not met are a perversion of all that is good in custom.*
>
> *A request for 1 or 2 shell money and some hint of reconciliation ceremony of feast can be seen as custom. A demand for huge sums of money as a way to personal enrichment backed up by threats made by armed thugs of due consequences if the demand is unmet is not, I believe, part of custom.*
>
> *The Defendant as a leader of society a man with Ministerial obligations can have no part in such activity. He should have lead by example. Instead he tried to muzzle the press in the guise of seeking a custom solution.*

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[5] (Ibid)

By his actions that day the Defendant encouraged all those others who wanted to pervert custom by purely selfish reasons and solely for personal gain to continue their wicked activity."

The learned Magistrate gave credit for his previous good character before imposing a sentence of imprisonment of 3 years.

On the issue of comparative sentencing I fail to find anything that would convince me otherwise that the sentence imposed was disproportionate to any other sentence which might have been considered by the learned Magistrate. I find nothing wrong or unlawful about the sentence imposed and dismiss this appeal.

The offences of drunk and disorderly (Count 1), Resisting Police Officer (Count 2), Assaulting Police Officer x 2 (Counts 3 and 4).

The circumstances of these offences relate to a domestic incident where the Appellant was involved in an argument with his wife a brawl occurred it seems. The police were called and when they attempted to effect an arrest on him he resisted, following which he punched a female police officer from the Participating Police Force. He was eventually restrained but sometime later whilst still under lawful restraint lashed out with his foot and kicked the same female police officer again. He was convicted by the Magistrates court and sentenced as follows:

Count 1. Drunk and disorderly:	two weeks imprisonment	concurrent
Count 2. Resisting arrest:	10 months "	"
Count 3. Assaulting Police Officer:	10 months "	"
Count 4. Assaulting Police Officer:	10 months "	consecutive.

The total period of sentence imposed was 20 months. On top of that a suspended sentence of four months on an earlier conviction was activated and made consecutive, bringing the overall total to 24 months or two years. Both those sentences were then ordered to run consecutive to the existing sentence of 3 years resulting in a new sentence of five years being imposed on the Appellant. He now appeals against this sentence on the grounds that insufficient consideration was given to his mitigating circumstances; secondly, by failing to take adequate account of the totality principle, making the sentence of 24 months consecutive was manifestly excessive and amounts to a crushing penalty.

The totality principle

The totality principle can arise from two situations. (i) Where a number of offences arise from the same transaction; and (ii) where an offender currently serving a term of imprisonment is being sentenced for other separate offences. In both instances the court is required to look at the totality of the sentence to be imposed and to ensure that an appropriate sentence is imposed for the criminality of the offender.

This principle is widely accepted in other jurisdictions. In **R v. Griffiths**[6], the High Court of Australia said:

[6] (1989) 167 CLR 372; 87 ALR 392, per Gaudron and McHugh JJat 393.

> *"It is well established that in sentencing a person in respect of multiple offences regard must be had to the total effects of the sentence on the offender ... This may be done through the imposition of consecutive sentences of reduced length with or without other sentences to be served concurrently or through the imposition of a head sentence appropriate to the total criminality with all other sentences to be served concurrently."*

See also **R v. Williams**[7] where the court observed that when cumulative sentences are being imposed even in relation to offences committed years apart, it is necessary to consider whether the total term which a prisoner may serve under the sentences is excessive. The court also pointed out the cumulative effect of such sentences, that it can have an extremely onerous effect on the offender. In **Regina v. Clements**[8] the court observed that the question must always be **whether the total is appropriate.**

The totality principle has been applied in this jurisdiction in **Stanley Bade v. Regina**[9]. At page 125 his Lordship Ward CJ states:

> *"When considering sentence for a number of sentences, the general rule must be that separate and consecutive sentences should be passed of the separate offences. It is trite to point out that a man who commits, say, five offences should receive a heavier sentence than a man who only commits one of them.*
>
> *However there are two situations where this rule must be modified. The first, that where a number of offences arise out of the same single transaction and cause harm to the same person there may be grounds for concurrent sentences, does not concern this appeal save to say that the learned magistrate correctly applied this principle in ordering a concurrent term for the malicious damage caused to Solo Lae's house during the burglary. The second occasion for modifying the general rule arises where the aggregate of sentences would, if they are consecutive, amount to a total that is inappropriate in the particular case. Thus, once the court has decided what is the appropriate sentence for each offence, it should stand back and look at the total. If that is substantially over the normal level of sentence appropriate to the most serious offence for which the accused is being sentenced, the total should be reduced to a level that is "just and appropriate" to use the test suggested in Smith v. R. [1972] Crim. L. R. 124. Equally, if the total sentence, although not offending that test, would still in the particular circumstances of the person being sentenced, be a crushing penalty, the court should also consider a reduction of the total.*
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> *Having decided the proper penalty for each individual offence but feeling the total is too high, it is better to achieve a reduction by making some or all concurrent rather than to reduce the length of the individual sentences whilst leaving them consecutive. The former results in sentences that still reflect the gravity of each individual charge."*

In Augustine Laui v. Director of Public Prosecutions[10], Ward CJ reiterated:

> *"The so – called totality principle referred to by counsel applies in two ways. Where concurrent sentences have been passed because of the single transaction principle, the court must ensure that the gravity of the offence is properly represented by the sentence for the principle offence. Where consecutive sentences are passed for a number of offences, the court must not just consider whether*

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[7] (CA(Qld), no. 362 of 1995, 28 November 1995 unreported, BC9502136)
[8] (1993) 68 A Crim R 167 at 174 Pincus JA
[9] (1988/1989) SILR 121 at 125
[10] HCSI-CRAC N11-87 (unreported)

each sentence is appropriate for each offence but look also at the total to ensure it is not out of proportion too the overall circumstances. Where it does appear to be too great, the court should reduce the total term of imprisonment by making some or all the sentences concurrent and not by reducing the individual sentences below an appropriate level for the particular offence for, by so doing, the impression give on the subsequent record of conviction is of a series of relatively minor offences."

The issues raised in this appeal for determination?

The first issue for determination relates to the question whether the subsequent offences (of drunk and disorderly, resisting arrest and assault of a police officer) should be made concurrent with each other on the single transaction test.

The drunk and disorderly offence was the initial offence for which the police had been called out to attend at the residence of the Appellant. The offences of resisting arrest and two counts of assaulting a police officer arose thereafter. When imposing sentence the learned Magistrate made the first three counts concurrent; the second assault charge (count 4) was made consecutive, producing a total of 20 months. He then made the suspended sentence consecutive as well giving an overall sentence of 24 months or 2 years. This was then made consecutive to the earlier sentence of 3 years.

When applying the totality principle to the single transaction test, it is incumbent upon the court to ensure that the gravity of the offence is properly represented by the sentence for the principle offence[11]. In making counts two and three concurrent, the learned Magistrate quite correctly applied this principle for those offences. The sentence of 10 months concurrent for the second and third counts in my respectful view correctly reflects not only the gravity of the third count (assault of a police officer) but also the overall circumstances of those two counts. The first offence however was not related to the subsequent offences and therefore should have been made consecutive. It had already been committed by the time the police arrived at the scene.

In making the sentence for count 4 consecutive to the other two sentences that was a decision which the sentencing Magistrate was entitled to impose as that assault occurred after a lapse of time. However it could easily have also been made concurrent applying the single transaction test. On this point, what Ward CJ said in **Augustine Laui v. Director of Public Prosecutions,** (ibid) pertinent:

"The test of a single transaction is not a matter of time but whether the offences really form part of a single attack on some other person's right. Thus, two separate offences even if occurring close together in time, for example, taking a vehicle without consent and then driving it dangerously, would merit consecutive sentences. On the other hand, the sentences for a series of assaults against the same person even though spread over a lengthy period of time should properly be made concurrent."

His action though in making the fourth count consecutive cannot be said to be wrong in principle or in law.

At this point of time though, the sentencing magistrate ought to stand back and look at the total sentence imposed to determine if it is appropriate. If it is substantially over the normal level of sentence appropriate to the most serious offence for which the accused is being

[11] Augustine Laui v. Director of Public Prosecutions (Unreported) CRAC N11-87 per Ward CJ at pages 2-3

sentenced, the total should be reduced to a level that is just and appropriate to use the test suggested in **Smith v. R**[12]. In this instance, the most serious offence was assaulting a police officer carrying a maximum sentence of two years. The normal range for this type of sentence would easily fall between 6 - 12 months. The total of 20 months imposed therefore for the overall criminality of the Appellant in the circumstances was obviously above the range of sentences appropriate for such assaults. In terms of seriousness however, the second assault in my respectful view was more serious and warranted a stiffer sentence (12 -14 months) than the 10 months imposed. The attack was completely unwarranted. Police Officers are representatives of the State in the administration of the rule of law and should be respected when they arrive at any scene of crime. They must be allowed to perform their duty in ensuring that peace and normality is restored whether it be in a public place or in a private home. They are mediators of peace, under strict duty and discipline, and are extensions of the arm of the People in so far as law and order is concerned. They have no personal agenda or interest to fulfill when attending a crime scene and therefore should never be treated with hostility. They are there to keep the peace and protect life, limb and property. They can only use such force as is reasonable to diffuse any volatile situation, to disarm an offender or to protect property. When attacked in the manner that the Appellant has done, they cannot retaliate, this is why it is so unfair and the courts take a very strong view against attacks against police officers. **An immediate custodial sentence must be expected when any police officer is attacked.** The length of sentence will depend on the existence of any aggravating features or the lack of it.

The sentencing magistrate is then required to consider whether the sentence of 20 months appropriate for the overall criminality of those set of offences or whether he should consider a reduction by making that sentence concurrent instead of consecutive. Even if he is satisfied that the total sentence does not offend against such test, whether in the particular circumstances of the Appellant, it would be a crushing penalty. If so, then the court should also consider a reduction in the total.

The sentencing process however does not stop there in the circumstances of this Appellant as the Appellant was already serving a sentence of three years when convicted and sentenced. I do not think much can be said against the order of the learned Magistrate in making the new sentence to run consecutive to the existing sentence - see **R. v. Davies**[13], **R. v. Singh (Dara)**[14]. The effect of which is to produce an overall sentence of five years.

The sentencing magistrate is again required at this stage, to consider whether the whole sentence of five years appropriate and reflects the overall criminality of the Appellant in those offences. Is the sentence of five years excessive? Could it be further reduced or whether in the circumstances of the Appellant it would have a crushing penalty on him?

When that sentence is considered in the light of his age, that of a young man of thirty years, that he still has prospects of rehabilitation, that the fall from a position of great height to where he is now has brought much embarrassment and disgrace, apart from the fact that he has automatically suffered the loss of his parliamentary seat and his future career is in tatters, that prior to all these happenings he had no previous records, a sentence of five years is not only excessive but would be a crushing penalty. After serving his sentence he should still be

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[12] [1972] Crim LR 124
[13] [1998] 1 Cr. App. R. (S.) 252, CA
[14] [1999] 1 Cr. App. R. (S.) 445, CA.

able to see the light at the end of the tunnel. In the circumstances, I am satisfied the appeal should be allowed to the following extent.

The sentence of two weeks for drunk and disorderly as the original sentence for which the Police had been called to attend at his residence should be made consecutive. It was a separate offence to the subsequent offences that were committed. The sentences imposed for counts 2 and 3 on the other hand on the single transaction test should remain undisturbed. The orders imposed for count 4 making it consecutive should be overturned. Although it is not manifestly lenient on its own nor manifestly excessive when considered in the light of the sentences imposed for the other 3 counts, when it is considered in the light of the whole sentence of five years and balanced with the criminality to be attached to the circumstances of those offences, it should remain undisturbed but made concurrent.

This brings me to the order in which the suspended sentence of four months earlier made was activated and made to run consecutive. I find nothing unlawful about this action by the learned Magistrate – see **R. v. Ithell**[15]. On the other hand ordering the sentence to take effect concurrently with such a sentence should be regarded as exceptional – R. v. May[16]. The reference to section 44(5) of the Penal Code does not apply to the facts of this case as that subsection relates to the imposition of a suspended sentence whereas in this case it is the activation of a suspended sentence. The two are not the same.

On the issue of comparative sentencing I do not think I need say anything else as the matters canvassed above would in one way or another have dealt with this matter to a certain extent.

Decision: The overall effect is to allow appeal so that the total sentence which the Appellant will be required to serve is 3 years plus 10 months plus 4 months plus two weeks (4 years 2 months and 2 weeks).

Orders of the Court:

1. **Dismiss appeal against sentence of 3 years imposed for demanding money with menaces.**

2. **Allow appeal in relation to the second set of offences as follows:**

    (i) **Quash orders of the learned Magistrate to have the sentence of two weeks imposed in respect of count 1 made concurrent;**

    (ii) **Quash orders of the learned Magistrate in making the sentence of 10 months imposed in respect of count 4 consecutive; and**

    (iii) **Substitute Orders as follows:**

        a. **That the sentence of two weeks in respect of Count 1 to be consecutive.**

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[15] 53 Cr. App. R. 210 CA
[16] 1 Cr. App. R. (S.) 124 CA.

b. That the sentence of 10 months in respect of Count 4 to be concurrent.

c. The total sentence of 10 months and two weeks to run consecutive to the existing sentence of three years.

(iv) Dismiss appeal against the order of the Magistrates Court to have the suspended sentence of 4 months to run consecutive to the new sentence of 10 months two weeks.

(v) That the new sentence to be served is 3 years plus 10 months plus 4 months plus two weeks (4 years 2 months and 2 weeks).

(vi) That the period spent in custody be taken into account (to be deducted from the total sentence of imprisonment).

THE COURT