ALICK SISIONE AND ZACCHARIAH AVELEA V. REGINAM
AND
FRANK LAUBASI V REGINA

High Court of Solomon Islands
(Palmer CJ.)

Criminal Appeal Case Numbers 385-04 and 394-04

Date of Hearing: 30th August 2004
Date of Judgment: 1st September 2004

K. Averre (Public Solicitor) for the Appellants
C. Ryan (Senior Crown Prosecutor) for the Respondents

Palmer CJ: There are two appeals before me on more or less the same offences, that of making or assisting to make liquor without approval of the Minister contrary to section 50(2)(c) and that of having a still in his premises for distilling liquor contrary to section 50(2)(b) of the Liquor Act (cap. 144). I have decided to deal with those two appeals together in this judgment as the issues raised in their appeals are basically the same.

1. Alick Sisione and Zacchariah Avelea v. Reginam

These two Appellants were charged under section 50(2)(b) of the Liquor Act. The facts disclosed that a search warrant was conducted at the premises of the Appellant Alick Sisione on the night of 8th April 2004 at about 1020 hours. During the search Police discovered a large quantity of brewed liquor and various implements (see details in the "facts" as read to the court) used in the distilling of liquor for the making of the home brew called "kwaso". Both Appellants were arrested, charged and bailed to appear at the Central Magistrates Court on 13th April 2004. On 18th August they were arraigned before Principal Magistrate Makin and entered guilty pleas. They were convicted and sentenced to seven months imprisonment; three months were suspended for two years, four months to be served.

Three grounds of appeal were relied on:

(i) That the learned Magistrate failed to take into sufficient account all the mitigating factors of the Appellants.
(ii) That the learned Magistrate committed an error of law when he sentenced the two Appellants to an immediate term of imprisonment for being involved in the commercial sale of a substantial amount of liquor when there was no evidence before the court that this was so.
(iii) That the sentence in all the circumstances of the case was manifestly excessive or wrong in principle.

Unlawful brewing or distilling of liquor

The brewing of liquor without approval under section 50(2) of the Liquor Act has been described as a regulatory offence. What this means is that if a person wishes to brew or distil liquor he must make application to the Minister responsible for approval first. This means he/she is not permitted

to carry out such activities in the absence of a permit of approval from the Minister. Such activities are controlled or regulated by legislation. Now there is world of difference between a person who genuinely intends to get approval, whether a licence or permit from the Minister to carry out this activity, as opposed to the person who has no intention whatsoever and knowingly and blatantly carries out this activity for commercial or monetary gain. The person who falls into the former may receive some leniency and understanding from the courts and a fine would normally be the type of sentence envisaged, for the reason that the breach or failure may not have been intentional or deliberate. On the other hand, where it is clear on the evidence that the activities being conducted are but a deliberately flouting of the Liquor laws, then unless there are exceptional grounds or reasons given whether in mitigation or in the circumstances of the offence, must expect an immediate custodial sentence to be imposed. To that extent the decisions by the Magistrates Courts to impose a custodial sentence from the beginning is not wrong in principle or in law. That such powers of the courts are envisaged is to be seen in the penalty clause (section 50(2)) which provides for a sentence of imprisonment of up to three years and fine of up to one thousand two hundred dollars.

Application

As correctly put by his Worship Makin in the court below, this was a substantial attempt at making kwaso for commercial or monetary gain, no satisfactory explanation has been provided for the possession of such a large quantity of liquor, where the law was flouted and the men took a gamble at making money, they knew what they were doing and the risks entailed. Clear evidence of this is demonstrated in the substantial quantity of liquor found at the premises and confiscated[1] and distilling implements and ingredients also discovered at the house. It would have been different if there was material before the court which would have required the court to consider other sentencing options that may have been more appropriate than an immediate custodial sentence. The courts do consider alternatives (binding overs, probation orders, fines, suspended sentences) to imprisonment, where circumstances warrant. Unfortunately for these two accuseds, the circumstances as considered by the learned Magistrate do not reveal anything that would incline his Worship to any other alternative sentence than an immediate custodial sentence.

Financial pressures or burdens on the family have always been given as the basis for engaging in such illegal activities. While the court acknowledges that that is a real problem for many families in the country, that is no excuse for breaking the law. Each and every man and woman must find ways of getting involved in lawful ways of earning income or making money. In many instances it will entail hard work, sweat and sometimes tears, but that is the plight of man, that by the sweat of his brow he will make his living[2].

I have considered the submission by learned Counsels whether an error of law had been committed by the learned Magistrate in imposing an immediate custodial sentence in the circumstances of this case. Unfortunately I am not so satisfied that that is the case.

I am satisfied the learned Magistrate took into account the mitigating factors presented, the guilty plea, family circumstances and that they were men of previous good character. After imposing a sentence of 7 months he decided to suspend 3 months for two years leaving 4 months to be served. Unfortunately this is where I must differ from his Worship's sentence. Whilst the sentence

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[1] In my calculation some 200 litres of distilled liquor or the equivalent of a 44 gallon drum of liquor was confiscated – that is a lot of liquor lying around.

[2] Genesis 3:19

of imprisonment was proper, it is my respectful view that the sentence of 7 months imposed was excessive in the circumstances. In my respectful view the starting point for this type of offences where a guilty plea has been entered and the offender has no previous convictions must be the imposition of an immediate sentence of imprisonment of short duration around 3-4 months. It may be less including a fine, depending on the mitigating factors presented before the court; it may be more if there are aggravating features present. If he re-offends then he must expect a longer or stiffer sentence of imprisonment to be imposed.

2. Frank Laubasi v. Regina

This brings me to consider the appeal in **Frank Laubasi v. Regina**[3]. The facts of this case are the same as those in **Mary Kenilaua v. Reginam**[4]. In fact Frank Laubasi was the co-accused with Mary Kenilaua ("**Kenilaua**"). Both had been charged under section 50(2)(c) of the Liquor Act for making liquor without the approval of the Minister. The facts as presented to the court disclosed that on 8th July 2004, at around 1345 hours, a police party raided the place where they were cooking kwaso and caught them red-handed. Various items were seized by the police including 133 bottles of szeba filled with distilled kwaso, a 2 litre bottle of wine also filled with kwaso and another bucket containing the same liquor. They pleaded guilty on arraignment, were convicted and sentenced each to 12 months imprisonment, 5 of which were suspended for two years and 7 to serve.

Kenilaua filed her appeal separately on the basis that the personal circumstances surrounding her sentence deserved an urgent consideration by the court. She was mother of two very young children at the time of commission of offence and sentence; one was four years old, the other 9 months old and still breast feeding. They were sentenced by the Magistrates Court on 30th July 2004. By the time her appeal was considered on 5th August 2004 she had already been in prison with her baby for 6 days. The court considered her extraordinary circumstances and allowed appeal, it not being contested by Prosecution. Her sentence of imprisonment was quashed and a fine of $400.00 payable in two weeks imposed.

Frank Laubasi now appeals against his sentence and asks that his case be considered in the light of the sentence imposed in Kenilaua's case. A clear distinction however must be made in Kenilaua's case. The sentence imposed was more or less personalized/individualised in view of the extraordinary circumstances of her case as a young mother with a breast feeding child, her husband having recently deserted her and also having a four year old child to look after.

Frank Laubasi's personal circumstances do not compare to hers. I have indicated in **Alick Sisione and Zacchariah Avelea's case** (ibid) that the starting point for this type of offence where there has been a deliberate flouting of the Liquor laws, where the risks are known and it is plain that quick monetary gain was the objective, where this was a first offender and has entered a guilty plea, that this must result in the imposition of an immediate custodial sentence of short duration to drive the point home that this type of activity must be stamped out. I also stated that the starting point would be around four months. The facts in this case show that Laubasi and Kenilaua were caught in the act of making kwaso whereas in the former case they were charged with the offence of possession of implements used or intended to be used for the brewing or distilling of liquor, slightly different but more or less similar in nature. In both cases substantial amounts of brewed liquor were confiscated and large amounts already bottled in szeba bottles for sale. The circumstances to that

[3] HCSI-CRAC 397-04
[4] HCSI-CRAC 264-04, 05-Aug-04

extent are very similar and in my respectful view warrant similar sentences. I have considered the submissions on the mitigating circumstances of Laubasi but I am not satisfied it warrants any further intervention by this court.

I am satisfied the appropriate sentence in both cases is one of four months.

Orders of the Court:

1. **Alick Sisione and Zacchariah Avelea v. Reginam**

   (i) **Allow appeal.**

   (ii) **Quash orders of the Magistrates Court dated 18th August 2004 imposing sentence of 7 months with 3 months suspended and 4 to serve.**

   (iii) **Substitute sentence of 4 months.**

2. **Frank Laubasi v. Reginam**

   (i) **Allow appeal.**

   (ii) **Quash orders of the Magistrates Court dated 30th July 2004 imposing sentence of 12 months with 5 months suspended and 7 to serve.**

   (iii) **Substitute sentence of 4 months.**

The Court.