



IN THE SUPREME COURT OF NAURU
AT YAREN
CRIMINAL JURISDICTION

Criminal Case No. 17 of 2018

BETWEEN

The Republic

And:

Olsson Israel Olsson

First Accused

And

Kakson Timothy

Second Accused

Before: Khan, J
Date of Sentencing Submissions: 11 April 2019
Date of Sentence: 25 April 2019

Case is to be known as: *Republic v Olsson and Timothy*

CATCHWORDS:

Where two accused charged with the offence of aggravated burglary and theft contrary to section 161 of the Crimes Act 2016- Where first accused has previous history and second accused is a first offender- Whether the same sentence should be imposed.

Sentence of imprisonment- Whether totality principle of sentencing applies- whether the aggregate sentence is just and appropriate.

Held: Accused with previous will be sentenced differently.

APPEARANCES:

Counsel for the Republic: F Lacanivalu
Counsel for the Accused: R Tagivakatini

SENTENCE

1. You are both charged with aggravated burglary and theft. The charges read as follows:

First Count

Statement of Offence

Aggravated burglary contrary to s.161(1)(c) of the Crimes Act 2016.

Particulars of offence

That Olsson Israel Olsson and Kakson Timothy on 9 December 2017 at Nauru, entered the OD-Niuaiwo Hotel, in particular, the casino area at night without any right to do so, with intent to commit theft of property from the said hotel.

Second Count

Statement of Offence

Theft contrary to s.154(1)(a), (b)(i) of the Crimes Act 2016.

Particulars of offence

Olsson Israel Olsson and Kakson Timothy on 9 December 2017 at Nauru, dishonestly took an Acer Laptop and \$6,293.20 worth of cash, the approximate value stolen was \$7,000 which belonged to OD-N Aiwo Hotel with intention of permanently depriving the proprietors of the hotel of the said property.

2. You both pleaded guilty to the charges. Although the incident took place on 9 December 2017 it appears that you were not charged until 9 October 2018 when you produced before the District Court and have been appearing in this court since 11 October 2018.
3. The information in this matter was filed on 29 November 2018 and both of you pleaded guilty to the charges on 28 January 2019. For the purposes of sentencing, I accept that both of you plead guilty at the very first opportunity.
4. Both of you broke into OD-N Aiwo Hotel Casino on the night of 9 December 2017 and stole cash in the sum of \$6,293.20 by forcibly opening the cash register and also stole an Acer Laptop. Having stolen the cash and the laptop you fled the scene and walked towards Denig District. At the boat harbor you were intercepted by Mr Ray Ika, a security officer at the Boat Harbor and at that time your faces were covered by clothing. When Mr Ika intercepted you, Olsson told him that both of you stole money from OD-N Aiwo Hotel and showed him the cash. You offered to give some money to him but he refused to accept it and let you both go away.
5. Both of you were arrested 2 or 3 days after the incident.
6. None of the property has been recovered and the laptop has been sold.

7. Olsson you have 3 previous convictions whilst Timothy you are a first offender. You are 19 and 20 years old respectively.
8. Olsson you are currently serving a prison term of 26 months imprisonment imposed by the District Court on 18 January 2019 in respect of the following matters:
 - a) Criminal Case No. 34 of 2018 – you were sentenced to a term of 14 months imprisonment. The circumstances of this offending are that you broke the front door of a lady’s house at night while she was asleep and stole Samsung 6 mobile phone and cash of \$545. There was no recovery.
 - b) Criminal Case No. 74 of 2018 – you were convicted of one count of burglary and one count of theft and one count of damaging property. This incident took place on 29 December 2017 when you broke into Cappelle and Partners Supermarket at night and stole \$1,437 in cash. For count 1 you were sentenced to a term of 12 months imprisonment, for counts 2 and 3 you were sentenced to a term of 6- and 4-months imprisonment respectively to be served concurrently with count 1.
 - c) Case No. 75 of 2018 – you were sentenced to 3 months of imprisonment for the offence of escaping from lawful custody.

PREVALENCE OF THESE KINDS OF OFFENCES

9. Miss Tabuakuro submitted that this kind of offence has been quite prevalent and there has been a sharp increase since mid-2017 and your counsel accepted those submissions. In the case of Olsson out of the three previous convictions, two are for the offences of burglary.
10. Your counsels in the sentencing submission admitted on behalf of both of you that this offence involved planning. The burglary was very well planned and executed and if it was not for the information provided by Mr Ika to the police, then you may not have been arrested.
11. I also accept that both of you co-operated with the police when arrested and made admissions and subsequently entered pleas of guilty.
12. Obviously, Olsson you have previous convictions and under s.279 of the Crimes Act 2016 I am required to take into consideration amongst other factors your previous history. Your counsel has submitted that notwithstanding your previous convictions, I should impose the same sentence on you and Timothy. He has provided no case authorities for those submissions. Counsels have a duty to assist the Court in providing case authorities but invariably I find that they leave it to the Court to do its own research. In *Veen [No 2]*¹ the High Court discussed the relationship between the principle of proportionality and an offender’s antecedent criminal history. Mason CJ, Brennan, Dawson and Toohey JJ said, at [477] that:

¹ [1987] 164 CLR 465

The antecedent criminal history of an offender is a factor which may be taken into account in determining the sentence to be imposed, but it cannot be given such weight as to lead to the imposition of a penalty which is disproportionate to the gravity of the instant offence. To do so would be to impose a fresh penalty for the past offences...

The majority went to discuss some of the relevant issues of antecedent criminal history during the sentencing process. They continued at [477-78]:

The antecedent history is relevant, however, to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing attitude of disobedience of the law. In the latter case, retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted. It is legitimate to take account of the antecedent criminal history when it illuminates the moral culpability of the offender in the instant case, or shows his dangerous propensity or shows a need to impose condign punishment to deter the offender and other offenders from committing further offences of a like kind. Counsel for the applicant submitted that antecedent history was relevant only to the prisoner's claim for leniency. That has not and has never been the approach of the courts in this country and it would be at odds with the community's understanding of what is relevant to the assessment of criminal penalties.

13. Olsson, you committed this offence on 9 December 2017 and further committed offences of burglary in Criminal Case No. 34 of 2018 and 17 of 2018 on 30 March 2018 and 29 December 2017 respectively. You committed two offences in December 2017 and one in March 2018 and by committing the same kind of offence within such a small period of time, you have manifested 'a continuing attitude in disobedience of the law'.
14. Olsson the other thing which I find very disturbing is that you able to dispose of the Samsung Phone in Criminal Case No. 34 of 2018 and both of you were again able to dispose of the laptop and nobody has been arrested to date. I do not know whether you gave any information to the police, but what is concern is that there is a ready market for stolen properties – as the saying goes 'someone's loss is someone's gain'. And because you were able to dispose of the stolen property with such ease probably encourages you to commit further offences.
15. The other factor which I find very alarming and disturbing is that between December 2017 and March 2018 you stole a sum of \$7,275 with Timothy, leaving aside what you got for the mobile phone and the laptop. But that is a very significant amount of money. Even making allowance for the fact that you probably shared \$6,293 with Timothy, your share would still be in excess of \$4,500 in cash plus the sale of the laptop and the mobile phone. That is still a significant amount of money.
16. Your counsel has rightly conceded that this case calls for a deterrence both general and specific to send out a clear message that this court will not condone this type of offending.

17. People work hard to make their living and people like you make an easy living by committing these types of offences. The community needs to be protected from people like you.

MAXIMUM SENTENCE

18. The maximum sentence for Count 1 is 12 years imprisonment and for Count 2 is 7 years imprisonment.
19. Between the two of you I will have to impose different sentences as you Olsson, have a criminal history. Taking into account all the matters into consideration – Olsson you are sentenced to a term of 4 years imprisonment and Timothy to a term of 3 years imprisonment on Count 1 and on Count 2 a term of 12 months imprisonment each to be served concurrently with Count 1.

TOTALITY PRINCIPLE

20. Olsson you are currently serving a prison term of 26 months imposed by the District Court on 15 January 2019 and I have sentenced you for a period of 4 years today in this matter. Timothy was also sentenced today in this matter for a term of 3 years and I also imposed a sentence of 4 years imprisonment in Case No. 3 of 2019. I am required to observe the totality principle and ensure that the total sentence remains ‘just and appropriate’ for the whole of the offending.
21. In *Mill v The Queen*² the High Court described the totality principle by quoting from DA Thomas, *Principles of Sentencing* 2nd Edition (1979) at pages 56 and 57 as follows:

“The effect of a totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate is ‘just and appropriate’. The principle has been stated many times in various forms: ‘when a number of offences are dealt with and specific punishments in respect of them are being totted up to make a total, it always necessary for the court to take a last look at the total just to see whether it looks wrong’; ‘when cases of multiplicity of offences come before the Court, the court must not content itself by doing the arithmetic in passing the sentence which the arithmetic produces. It must look at the totality of the criminal behaviour and ask itself what is the appropriate sentences for all the offences.’

This principle has a wider application than the case specified in the passage quoted above. Thomas points out at 57:

“The principle applies to all situations in which an offender may become subject to more than one sentence: where sentences are passed on different counts in an indictment or on different indictments, where the offender is subject to a suspended sentence or probation order, where he is already serving a prison term or makes an

² (1988) 166 CLR 59

appearance in different courts within a short space of time. In all such cases 'the final duty of the sentencer is to make sure that the totality of the consecutive sentences is not excessive'.

22. Olsson, you are serving a prison term of 26 months and your sentence was imposed on 15 January 2019, so, you have served approximately 3 months of that term leaving a term of 23 months imprisonment to be served. I have imposed a sentence of 4 years today and if the two sentences are to be served consecutively you will end up serving a term of 5 years and 11 months imprisonment which may not be 'just and appropriate', so I order that out of the sentence imposed today 11 months is to be served concurrently with your present term, which effectively reduces your present term of sentences by 11 months leaving a balance of 3 years 1 month. I order that this term is to be served consecutively with the term of 23 months (the total term you will serve is 3 years 1 month plus the balance of the 26 months imposed by the District Court on 15 January 2019 and the total being 3 years 1 month plus 23 months equals 5 years).
23. For Timothy I order that 2 years of the sentence in this matter is to be served concurrently with the sentence imposed in Case No. 3 of 2019 and the balance of 1 year is to be served consecutively with Case No. 3 of 2019 (so that your term of imprisonment will be 1 year from this sentence plus 4 years from Case No. 3 of 2019 making a total of 5 years imprisonment).

DATED this 25 day of April 2019


Mohammed Shafiullah Khan
Judge

