

IN THE SOLOMON ISLANDS COURT OF APPEAL

NATURE OF JURISDICTION: Appeal from Judgment of the High Court of Solomon Islands (Izuako J.)

COURT FILE NUMBER: Criminal Appeal Case No. 6 of 2009 (On Appeal from High Court Criminal Case No. 74 of 2004)

DATE OF HEARING: 21 July 2009

DATE OF JUDGMENT:

THE COURT: Goldsbrough, AP
McPherson, JA.
Williams, JA.

PARTIES: THOMPSON KILATU Appellant
-V-
REGINA Respondent

ADVOCATES:

Appellant: E Cade

Respondent: M Coates

KEY WORDS: Criminal law – whether bystander or participant in armed robbery.
Sentence – considerations of parity and delay.

EX TEMPORE/RESERVED:

ALLOWED/DISMISSED:

Appeal against conviction dismissed.

Appeal against sentence allowed.

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JUDGMENT OF THE COURT

The appellant was convicted on 27 May 2009 of one count of armed robbery in company. The events giving rise to the charge occurred on or about 14 July 2000 and the appellant was interviewed and arrested on 12 September 2003.

The appellant appeals against his conviction on the following grounds:

"The conviction cannot be supported having regard to the evidence, as the appellant's presence at the scene of the robbery was not on the evidence only explained by his being an offender within the provisions of s.21 of the Penal Code."

It is clear that to secure a conviction the prosecution had to prove beyond reasonable doubt the appellant did an act constituting the offence (s.21 (a)), or did an act for the purpose of enabling or aiding others to commit the offence (s.21(b)), or aided or abetted others in committing the offence (s.21 (c)). The prosecution relied primarily on s.21 (a).

A number of facts found by the trial judge are not in dispute:

- (1) The appellant arrived at the scene of the robbery with one David Aili who was an active participant in what happened;
- (2) At least one member of the group was armed;
- (3) The appellant stood by observing the abduction of Patrick Hampton and the looting of the warehouse;
- (4) The witness Frank Loea spoke to the appellant and asked him not to remove any of the company's property;
- (5) The appellant left the scene with the robbers, the group travelling in a truck in which the group had arrived and two stolen vehicle, including a Pajero;
- (6) The appellant later drove the stolen Pajero and admitted in his record of interview with police that the Pajero was in his possession after the robbery.

On the occasion in question a number of men arrived at the premises of Red Beach Enterprises Ltd in the Ranadi Industrial Estate, Honiara. A group including David Aili confronted the Manager, Patrick Hampton, and demanded he hand over keys to company vehicles. When he declined to do so he was threatened and he noted that one of the men was armed. In his record of interviews the appellant says he heard "the sound of a rifle being fired." The men, including David Aili, forced Hampton into his vehicle and drove to his house in order to locate keys. On their return they began looting the warehouse. The appellant was present throughout; he was variously described as standing on the road, standing on the back of a truck, and carrying a gun of some sort. Whilst the appellant was standing on the road the witness Frank Loea said to him "not to remove anything from the company."

The appellant did not give evidence, but reliance was placed on statements in his record of interview. Therein the following statements were made:

- (a) He and Aili arrived after a group of men had commenced looting the warehouse;
- (b) When he arrived one of the men was holding Patrick Hampton's neck;
- (c) He did not have a rifle in his possession;
- (d) He was just accompanying David Aili "cruising around with a few beers."
- (e) When asked why did he accompany David Aili to Red Beach, he replied: "I was just cruising around with him."
- (f) He was not drunk at that time.

Statements (a) and (b) were contradicted by overwhelming evidence. It was clearly established that Aili was a principal party to the threats made to Hampton and his subsequent abduction. All that occurred well before the looting began. As the appellant concedes he arrived on the scene with Aili the looting could not then have been taking place. That must weaken the weight that could be given to statements in the record of interviews exculpating the appellant.

In her findings at the end of her reasons the trial judge merely said that "at least one member of the group was armed with a gun"; she did not there expressly find the appellant was armed. But in the passage subsequently quoted herein dealing with the appellant's contention he was a mere bystander she relied on the evidence of Frank Loea that the appellant had a gun. That is a clear finding that the appellant was armed. In evidence both Frank Loea and Margaret Loea referred to the appellant

carrying what looked like a machine gun. Hampton referred to one of the group carrying a machine gun, and one other witness referred to the appellant carrying what looked like a gun. On the whole of the evidence, and given the trial judge's reasoning, it is clear that throughout the lengthy incident the appellant was armed.

The appellant's case at trial was that he was not a party to the robbery but was an innocent bystander. It was accepted at the trial that mere presence at the scene of the robbery was not enough to make the appellant a party to it. There had at least to be knowing encouragement of the offender and some support had actually to be provided: R -v- Corey (1882) 8 QBD 534 especially at 557-8, R -v- Clarkson (1971) 3 All E.R. 344, and R -v- Beck (1989) 43 A Crim. R. 135 at 143. The learned trial judge recognized that and directed her mind to the reason given by the appellant for his presence at the scene and considered that in the light of the other evidence as to the appellant's involvement. She ultimately concluded the appellant's statements in his record of interview as to the reason for his presence should be rejected, and she did so after expressing her reasoning as follows:-

"Why did a leisurely cruising of two friends with some beers take the accused and David Aili to Red Beach Premises? ... Red Beach is not a bar or relaxation spot. It is not located on a highway nor is there evidence to show that the accused and Aili had friends there with whom they would exchange visits there. ... How come a Police Officer David Aili picks up a Prison Officer the accused person in the morning of a working day and they cruise around drinking and then decide to go to the Red Beach Enterprises premises. They arrive there only to meet an on-going armed robbery. Is this a coincidence? ... P.W3 Frank Loea's evidence is that the accused stood on the road at the scene of the robbery with a gun and said nothing throughout. If the accused had accompanied David Aili on a cruise around town with a few beers and they then drove into Red Beach premises only to meet an armed robbery operation in progress which operation was being carried out by persons related to David Aili and which David Aili then joined while accused watched to the very end and before he left the scene with David Aili, could he have been an innocent bystander. To this, my answer is no.

Counsel for the appellant submitted that that passage demonstrated that the learned judge reversed the onus of proof. That is clearly not so. The trial judge was doing no more than pointing to considerations which detracted from the weight which could be given to the untested and self-serving statements in the record of interview. As her reasons show she went on to conclude on the whole of the evidence beyond reasonable doubt that the appellant encouraged the robbers, had "guilty knowledge of the robbery", and was "part and parcel of the whole operation." Though she did not describe him as a "sentry" that was the effect of her findings.

In the light of the facts found, and the reasoning of the learned trial judge, the conclusion that there was no reasonable hypothesis consistent with innocence was not only open but was inevitable.

The appeal against conviction must be dismissed.

We now turn to the appeal against sentence. The trial judge started with a head sentence of 5 years and then reduced it to 4½ years taking into account "mitigating factors". As the appellant had spent 156 days in pre-sentence custody he was sentenced to 4½ years imprisonment calculated from 4 January 2009. The appeal is on the ground that the sentence is manifestly excessive because of the failure "to sufficiently reduce the appellant's sentence to take into account the unusually long delay in dealing with this matter, which delay was not due to delay on his part."

As noted above the offence occurred on 14 July 2000, the appellant was arrested on 12 September 2003, he was convicted on 27 May 2009 and sentenced on 9 June 2009.

In her sentencing remarks the learned judge referred to the seriousness of the offence and that the appellant was involved in law enforcement and betrayed public trust in joining forces with the armed robbers. She did not particularise the matters of mitigation which justified a reduction of 6 months in the sentence.

The offence took place at a time when law and order had broken down in and around Honiara. Armed groups had taken the law into their own hands. That is not a mitigating factor but it puts the offence in context. The appellant had been employed in the police or prison service from 1992 until commission of the offence in question. To the date of the offence he had no previous convictions. Subsequently in 2001 out of another incident which occurred associated with the conflict which still then existed on Guadalcanal he was charged with offences of assault occasioning actual bodily harm, intimidation and grievous harm. He was arrested for those offences on 12 September 2003, the same date on which he was arrested for the offence in question. He pleaded guilty to those other offences on 26 September 2003 and was then sentenced to an effective term of 5 years and 6 months imprisonment. On appeal that sentence was reduced to 30 months. He was eligible for release on 15 May 2005 but was not then released because of the charge of robbery. Eventually he was released on bail on 27 September 2005.

It appears that his trial on the robbery charge was delayed because of a pending application for amnesty.

The appellant has been of good behaviour since released on bail in September 2005. He is married with 4 children, 3 of whom are still dependant. He had attained the rank of inspector in the Prison Service and that employment was terminated on his arrest. He demonstrated valour during the New Guinea border crisis and received official commendation for his conduct at that time. He was unemployed at the time of sentence but has been accepted as a candidate at a Theological College.

Prior to this appellant's trial David Aili had pleaded guilty to the robbery but had not been sentenced. That plea was on the basis of an agreed statement of facts which, as it transpired, put Aili in a better light than did evidence at the appellant's trial. He was sentenced by the Chief Justice on 15 July 2009 and given three years imprisonment. When the fact that he had spent almost 2 years in custody prior to sentence was taken into account, the Chief Justice ordered his immediate release. Aili had no previous convictions and had taken steps to rehabilitate himself. The Chief Justice also mitigated the sentence because of the delay of 9 years in disposing of the case.

There are numerous decisions in the Solomon Islands where judges have taken significant delay into account as a mitigating factor when determining the appropriate sentence. Each case depends on its own facts, and factors such as the seriousness of the offence and evidence of rehabilitation during the delay period will, amongst other factors, govern the extent of the reduction in sentence allowed. Here there was approximately 9 years between offence and sentence, and some 4 years since the appellant was released from custody.

Though the appellant was armed he did not participate as a principal in the abduction of Hampton (as on the evidence did Aili) or did he actively participate in the looting of the warehouse (as on the evidence Aili did).

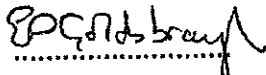
In all the circumstance the learned sentencing judge did not give the appellant sufficient credit for all the mitigating circumstances, including delay, and the sentence imposed is out of line with that imposed on the co-offender Aili, even taking into account the latter pleaded guilty.

The appeal against sentence should be allowed and a sentence of 3 years imprisonment to date from 4 January 2009 substituted.

The orders of the court should be:-

1. Appeal against conviction dismissed.
2. Grant leave to appeal against sentence and allow the appeal.

3. Set aside the sentence imposed and in lieu substitute a sentence of 3 years imprisonment to date from 4 January 2009.



Goldsbrough AP
Acting President



McPherson JA
Member



Williams JA
Member