JIMMY DEKAMANA .V. REGINA

High Court of Solomon Islands
(Palmer CJ)

Criminal Case No. 170 of 2005

Date of Hearing: 8th June 2005
Date of Judgement: 23rd June 2005

M. Ipoh for the Appellant
R. Barry for the Crown

Palmer CJ.: The Appellant was convicted and sentenced to a total of 1 year in prison after pleading guilty to three counts of embezzlement contrary to section 273(a)(ii) of the Penal Code. Three months were suspended for two years leaving 9 months to be served.

He appeals against sentence under two grounds: (i) That no or inadequate consideration had been given to all mitigation factors submitted on behalf of the Appellant; and (ii) that the sentence is out of parity having regard to the overall circumstances and similar cases and therefore manifestly excessive. The use of the word parity in this context is misleading as it relates to the disparity of sentences between or among co-offenders, which is not the case here. What I think was meant was that the sentence was manifestly excessive when compared to the range of sentences imposed for other similar offences (comparative sentence).

Brief facts

The offences occurred on three separate occasions. The first one on 14th June 2004; amount embezzled was $402.00. The second offence occurred on 15th June 2004, amount embezzled was $1,500.00. The third offence occurred on 29th June 2004 with an amount of $4,500.00 embezzled. Total amount embezzled was $6,400.00. Discrepancies were noticed on 1st July 2004 and the matter raised in a meeting of the management of the company on the same date, wherein the theft was admitted by the Appellant. The matter was reported to Police and the Appellant charged thereafter. He admitted the theft to Police. His first appearance before the Magistrates Court on 19th July 2004 was without plea. The case was adjourned to 9th August and then 17th August 2004 when a plea was taken. He pleaded guilty to all three counts. The case was further adjourned to allow the Defendant make arrangements for repayment of the money stolen, which the learned Magistrate indicated could assist him towards mitigation. A total of seven adjournments were made from 17th August 2004 to 2nd March 2005, over a period of 7 months, to enable the Appellant find money to repay the amount taken, but to no avail; any mitigation offered accordingly was lost.

In his sentence the learned Magistrate expressly stated that he did not increase penalty because of the lack of repayment of the money. He took into account the age of the Appellant, his guilty pleas, family circumstances and no previous convictions. The learned Magistrate also took into account the vital part an employee plays in the economy and the fact that these were a series of offences.

Ground 1. In the lower court, a written submission summarizing the mitigation of the Appellant was also presented to the presiding Magistrate. In his submissions before me, learned Counsel Mr. Ipoh for the Appellant, rehearsed the same grounds. Apart from that, no error of law or mistake of fact could be pointed to which would warrant the intervention of this court. In any appeal against sentence, the onus is on the Appellant to point to an error in the exercise of the sentencing discretion.

Whilst the presiding Magistrate did not recount in his sentence all the mitigating factors raised on behalf of the Appellant, that should not necessarily imply he did not take them into account when passing sentence. Having carefully considered submissions of learned Counsel for the Appellant, I am not satisfied it has been demonstrated to my satisfaction that any error has occurred in the sentencing discretion of the presiding Magistrate and accordingly this ground must be dismissed.

Ground 2. It is for the Appellant to demonstrate that the sentence imposed was manifestly excessive or too heavy and warranted the intervention of this court. Even if it may be slightly on the higher side, or a sentence which another Magistrate, or I as a Judge, would not have imposed, this court will not interfere if it falls within the appropriate 'range' or 'bracket' of sentences. It is for the Appellant to show that the way he was dealt with resulted in a sentence imposed which was outside the broad range of penalties which could have been imposed. In **Nuttal**[1], this principle was referred to by Channell J when he said: "*This court will ... be reluctant to interfere with sentences which do not seem to it to be wrong in principle, though they may appear heavy to individual judges*" (emphasis added). Similarly, in **Gumbs**[2], Lord Hewart CJ stated:

> "... *this court never interferes with the discretion of the court below merely on the ground that this court might have passed a somewhat different sentence; for this court to revise a sentence there must be some error in principle.*"

The crucial point to note is that a sentence will not be reduced merely because it was on the severe or heavy side; an appeal will only succeed if the sentence was **excessive** in the sense of being outside the permitted range for the circumstances of the case[3].

Mr. Ipoh referred me to a number of similar cases in which sentences of imprisonment were imposed in support of his client's case. The first case referred to was **R v. Christopher Kobi**[4]. The defendant had been convicted of larceny by a servant of the sum of $65,519.66 from his employer over a period from 23rd December 1991 to 20th July 1993 and sentenced to imprisonment for two and a half years. That offence also carried a maximum of 14 years under the Penal Code.

In R. v. Muliolo Takoa[5] the defendant was convicted on his guilty pleas on 16 counts of embezzlement and sentenced to prison for 2 years. The offences occurred over a period between October 1990 and April 1991. The total amount taken was $42,830.69. In **Rinaldo Lauta v. R**[6] a substantial sum of $70,000.00 was taken. The Appellant in that case was convicted after trial and sentenced to four years in prison. He had previous convictions for

---

[1] (1908) 1 Cr App R 180
[2] (1926) 19 Cr App R 74
[3] White 3.7.72, 1319/C/42; Hughes 1.11.73, 1187/C/73
[4] unreported HCSI-CRC 6-95
[5] unreported HCSI-CRC 115-93
[6] HCSI-CRC 384-04

similar offences. The final case referred to was **Frazer Elima v. R**[7]. The defendant was charged for larceny over a sum of $132,400.00. He was convicted and sent to prison for four and a half years. His appeal to the High Court was dismissed.

In all the cases referred to above, the amounts taken were substantial, ranging from $65,519.66 to $132,400.00 and sentences ranging from two years to four and a half years. Apart from the differences in amounts, there were other factors which were similar. For instance, the Appellant was in a management position of trust and responsibility. He was entrusted with the task of making deposits of substantial amounts of money on a daily basis. Whilst there was some motive given for the commission of the offences, that is, financial difficulties regarding rental payments, that did not justify his actions. Further, as correctly pointed out by Mr. Barry for the Respondent, no reasonable explanation has been provided for his actions in taking a total of $6,402.00 on three separate occasions when the rental payments he complained about came to only $500.00 per month. Also the offences were not a one off thing. He did this on three separate occasions and on each occasion with increasing amounts. He had ample time and opportunity to reflect on his actions and to stop what he was doing. On top of all these, the learned Magistrate bent over backwards to allow him to mitigate his circumstances further, by giving 7 adjournments over a period of 7 months. He did not take advantage of that.

Whilst the sentence of 12 months for each offence can be said to be high, when the totality of the sentences in respect of the three offences is considered, I cannot accede to the submission that the sentence was manifestly excessive and warrants intervention by this court. In **Withers**[8] it was argued that a sentence of 9 months' imprisonment for stealing £1,000.00 from employers was too long by three months. The court held that a sentence of six months would not have been wrong, but to reduce the sentence by such a small amount would have been 'tinkering' with the Crown Court judge's decision and the appeal was dismissed.

The same reasoning applies in this case. Whilst the sentences of 12 months imposed for each offence may have been severe or high, the overall effect achieved by having them made to run concurrent to each other and suspending three months so that the Appellant has merely to serve 9 months cannot be said to be outside the appropriate range for this type of offence, *a fortiori* having regard to the circumstances of the offences. The appeal accordingly must be dismissed.

Order of the Court:

Appeal dismissed.

THE COURT

---

[7] HCSI-CRC 339-04
[8] [1983] Crim LR 339