Polutele v R

Court of Appeal
Burchett, Tompkins JJ
Appeal 15/94

3 March 1995

Criminal law - sentencing - rape - maximum
Sentencing - rape - maximum term.

The appellant was sentenced to the maximum of 15 years imprisonment on a charge of rape together with a cumulative 2 years for a related indecent assault. On appeal against sentence.

Held:

1. It could not be said to be the very worst type of rape.
2. The totality principle should be applied and the total criminality involved assessed.
3. A combined period of 17 years was excessive; such a sentence could only be justtified for the very worst example of rape.
4. Sentences quashed and concurrent terms of 11 years (rape) and 1 and 1.2 years (indecent assault) imposed.

Counsel for appellant : Mr Edwards
Counsel for respondent : Ms Weigall

Judgment

For this appeal, the Court was constituted by two judges pursuant to an order made by the Chief Justice under the Court of Appeal (Sickness of Members) Rules 1995, which are authorised by section 9 of the Court of Appeal Act. The circumstance triggering the operation of those rules was the illness of a member of the Court of Appeal.

The Appellant, who is aged 40 years, was sentenced by Chief Justice Ward to 15 years of imprisonment, the maximum, for rape, plus a consecutive sentence of 2 years for indecent assault, a total of 17 years. Counsel for the Crown was unable to cite any other maximum sentence for rape in Tonga during the past 10 years. Although the notice of appeal related both to conviction and to sentence, the appeal was pursued at the hearing only in respect of sentence.

These were cowardly and monstrously selfish crimes by which a young school teacher, a virgin aged 21 years, was forced to endure degradation, horror, and very great personal suffering and loss. The Appellant, whose history reveals him as somewhat unstable emotionally, and perhaps mentally, and committed offences of rape twice before, attracting sentences of 2 years and 7 years, those previous offences having occurred during the period of about the last 10 years. On this occasion, he betrayed the trust of a young girl who was a relative and had believed herself to be safe in accepting a lift home, at 5.00 o'clock in the afternoon, in his van.

When the van became bogged at a spot where he was able to do so without interference, the Appellant seized the girl, threatened her with a sharp instrument, and forcibly subjected her to a long series of indecencies, to rape, and later to further indecencies.

However, it cannot be said to be the very worst type of rape, since no serious physical injuries were inflicted, grave though the mental and the emotional harm he did to the girl must have been. Nor were the indecencies of a kind to suggest the sadistic infliction of pain and humiliation, as sometimes occur in rapes. Nor was it a gang or multiple rape offence.

Also, the evidence gives room for the view that what happened was, at least partly, the unpremeditated consequence of chance happenings. On the way towards the girl's home, the van was blocked by a fallen tree, and then became completely stuck or bogged. The Appellant was drinking, and may have been unable to resist temptation arising out of these events. It was while they were trying to free the van that he started touching the girl's legs, being in close physical proximity to her in the course of their joint attempt to drive the van out of its bogged position.

After the rape and assaults, the Appellant did drive the girl to her home. There is evidence that, at least, she was not at that time in a state of visible distress. However, she was found to have sustained a number of minor injuries not consistent with consensual sexual intercourse.

In our opinion, the events of that evening are so much all part of one continuous piece of criminal conduct that it is necessary to apply the totality principle, and to assess what period of imprisonment is proper for the total criminality involved. Looked at in that way, the conduct is very serious, but a combined period of 17 years of imprisonment for the two convictions seems to us to be excessive. Such a sentence could only be justified for the very worst example of rape. To say that is not to fail to recognise the seriousness of these offences, which do call for condign punishment, though not for a sentence which is

actually the maximum permissible for rape, plus a further severe sentence for indecent assault.

The Court must also recognise the part that mental and emotional instability may have played in these offences, and the Appellant's apparent need for psychiatric treatment, which we would, if it were useful, recommend should be provided so far as appropriately qualified medical practitioners think helpful. Counsel for the Crown, however, said that such treatment would not be available. That is important, as counsel for the Appellant submitted, because some day this man must return to society, and from every humane point of view, and for the protection of the community, his return must be provided for. However, it would not be appropriate to see this case as other than a case where deterrence in general, and the deterrence of this man in particular, are matters of great importance.

Having regard to all these considerations, we would reduce the sentences to a sentence of 11 years of imprisonment for rape, and 1 and 1/2 years of imprisonment for indecent assault, to be served concurrently.

The order of the Court is that the sentences which have been passed be quashed; and this Court passes sentence as we have indicated, that is, a sentence of 11 years of imprisonment in respect of the offence of rape, and 1 and 1/2 years of imprisonment in respect of the offence of indecent assault, to be served concurrently.