IN THE SUPREME COURT OF WESTERN SAMOA

HELD AT APIA

MISC 15979

BETWEEN: THE POLICE

Informant

A N D: KAPELI LEAFA TEO and JOSEPH LEAFA, both of Malie

Defendants

Counsel: Mr R.S. Toailoa for Appellants
Mr K. Latu for Informant

Date of Hearing: 29 November 1993

Date of Decision: 2 December 1993

DECISION OF SAPOLU, CJ

There are two(2) appeals in this case. The first is by the appellant Kapeli Teo against the sentence of four(4) months imprisonment imposed on him by the Magistrates Court on 30 September 1993. The second is the appeal by Joe Leafa against his conviction on 30 September 1993 by the Magistrates Court and against the sentence imposed on him by the same Court on 15 October 1993. I will deal first with Kapeli Teo's appeal and then with the appeal by Joe Leafa.

Kapeli Teo's Appeal:

This appellant was jointly charged with the appellant Joe Leafa with assault. He pleaded guilty to the charge of assault on 16 March 1993 as shown from the Magistrates Court's file. The matter was then adjourned to 4 June 1993 for a probation report and sentencing. A probation report dated 24 May 1993 was prepared on this appellant. But for some unexplained reason this appellant was not sentenced until 30 September 1993. It is not clear

whether he was represented by counsel at the time of sentencing but it is clear from the record of the lower Court that he was represented by counsel at the time he pleaded guilty to the charge of assault. He is now represented by different counsel on this appeal.

Counsel for the appellant has advanced two main grounds in support of the appeal. The first is that the sentence imposed on this appellant is excessive having regard to all the circumstances of the case. The second ground is that for the purpose of section 140 of the Criminal Procedure Act 1972, the record of the lower Court proceedings which has been submitted to this Court for the hearing of this appeal is incomplete. As a consequence this appellant's right of appeal has been seriously prejudiced.

I will deal first now with the second ground of this appeal. Section 140 of the Criminal Procedure Act 1972 provides for the record of the lower Court's proceedings which shall be sent to this Court on a criminal appeal from the Magistrates Court to the Supreme Court. Amongst the documents which must constitute that record, is the summary of the facts stated by the prosecution where a defendant pleaded guilty to a charge.

In this case there is no summary given to this Court of the facts stated by the prosecution in the lower Court when this appellant pleaded guilty and was sentenced. So the record which is relevant to this appeal is obviously incomplete in terms of Section 140 of the Criminal Procedure Act 1972. As a matter of practice, the prosecution is always required to submit to the Court a summary of facts relating to a criminal charge to which a defendant has pleaded guilty in order to assist the Court in determining the appropriate sentence. This is now an essential requirement for sentencing purposes because the Court must be made aware of the facts of the case in order to arrive at the appropriate sentence to be imposed.

In the absence of a summary of facts in this case, this Court does not know the facts on which the lower Court based the sentence that was imposed.

Not only that this Court is unable to say whether having regard to the facts of this case, the sentence imposed was excessive or not because there are no facts before this Court. The problem is compounded by the fact that the learned Magistrate who sentenced this appellant has left the jurisdiction on the expiry of his appointment and therefore this Court cannot call for a report of this case from him. But even if that could be done, the facts would be based on the recollection of the learned Magistrate and not on a contemporaneous record of the summary of facts presented by the prosecution at the time of sentencing. On a serious matter like this, I am of the view that it is more safe to go on a contemporaneous written record of the summary of facts presented by the prosecution than on one's recollection of what was said more than a month ago.

Perhaps I should add that there is also no record before this Court of what the learned Magistrate said when passing sentence in order to give this Court some indication of the facts he relied on when passing sentence.

I have given anxious consideration to this appeal and given the circumstances I have pointed out, my view is that the appeal should be allowed and the sentence passed on this appellant should be quashed. This matter is remitted back to the Magistrates Court to resentence this appellant and for the respondent to provide a summary for facts.

In view of the decision I have reached on the second ground advanced in support of this appeal, it is unnecessary to deal with the first ground of the appeal, namely, that the sentence is excessive having regard to all the circumstances of the case. In fact in the absence of a summary of facts this court is not in a position to say whether the sentence is excessive or not having regard to all the circumstances of the case.

Joe Leafa's Appeal:

Dealing first with Joe Leafa's appeal against conviction, I must say that there was sufficient evidence before the Magistrates Court on which that

Court could have convicted this appellant of assault. There is the evidence of the complainant himself that he was attacked by both appellants in front of the Beachcomber Club. The complainant also says in his evidence, that the appellants assaulted him by punching him and he tried to fend them off in order to protect himself. There is also the evidence of Afoa Lakisoe that the appellants rushed out of the Beachcomber and engaged the complainant with the appellant Joe Leafa fighting with the complainant. The Magistrates Court must have accepted that evidence in convicting this appellant. It also means that the Magistrates Court must have decided to reject the evidence by this appellant that he did not assault the complainant as he was restrained by his wife.

So there was evidence before the lower Court to warrant the conviction. I also do not accept the submission for this appellant that the conviction was against the weight of the evidence. The only evidence to suggest in clear terms that this appellant did not assault the complainant is the evidence of this appellant himself and his co-defendant. On the other hand there is the evidence of the complainant and Afoa Lakisoe which the Court must have decided to accept as it was entitled to do. The evidence of the witnesses Robertson seems to suggest there was a scuffle but he also says it was all confusing. It should also be remembered that this witness was engaged with duties behind the bar and this incident happened very quickly outside the Beachcomber so that he might not have seen the whole of the incident and its details. There is also the evidence of Magalogo that two men confronted the complainant.

As I have already said, there was sufficient evidence before the lower court to warrant the conviction against the appellant. The appeal against conviction is therefore dismissed.

I turn now to the appeal against sentence. I have given careful consideration to the evidence in this case and the personal circumstances of

this appellant as well as the plea in mitigation that was put forward on his behalf in the lower Court. The medical evidence shows that the complainant sustained a black eye and scratches to the right upper arm, the chest and abdomen. It is not clear from the evidence that the Court must have accepted whether it was this appellant or his co-defendant who caused those injuries. There is also no crystal clear evidence as to the cause of this incident. But one thing which is clear is that the name of this appellant's brother who is the Minister of Works was mentioned in the discussion that took place between the complainant and this appellant before the fight started. So this Court draws the inference that it must have been something in relation to this appellant's brother which caused this incident. So there must be more than meets the eye from the notes of the evidence that might have caused this appellant angry. The Court is therefore placed in a situation where it cannot say whether there was provocation or not which is relevant for the purpose of sentencing.

As to the personal circumstances of this plaintiff, I have considered the probation report prepared on this appellant and the recommendation by the Probation Service for a monetary fine to be imposed in this case. I have also considered the fact that this appellant is now 49 years of age and this is the first time that he has been convicted of a criminal offence. I also considered the fact that this plaintiff is the operations manager of Axis Construction Incorporated which is carrying out the tar sealing work for the country's roads. The Court was advised by counsel for the appellants that this road tar sealing operation will be adversely affected if this appellant is sentenced to prison. It also appears that this appellant is a hardworking and reliable man as evidenced by the fact that he started off with his present company as a labourer up to his present position as operations manager. I have also considered the testimonial that were submitted to the lower Court.

Whilst counsel for the respondent is correct in submitting that due weight should be given to the sentence imposed by the trial Magistrate, there is no record before this Court of the reasons given by the trial Magistrate for the sentence that was imposed. So this Court looks at both the circumstances of this and the personal circumstances of the appellant to see whether the sentence is justified.

This Court has come to the view that given all the relevant circumstances and especially the personal circumstances of this appellant a monetary fine should have been imposed rather than a term of imprisonment.

Accordingly the appeal against sentence is allowed and the sentence of two(2) months imprisonment is quashed and substituted with a fine of $300.00.

T F M Sapolu
.....
CHIEF JUSTICE