

LEONAITASI FUKOFUKA

-v-

POLICE

BEFORE THE HON. JUSTICE CATO

J U D G M E N T

Appeal against sentence

The appellant was convicted it seems during an altercation with his wife whom he was living apart from, of assault and assault causing actual bodily harm. Mr Sisifa assisted me with this appeal there being no appearance by the appellant or his former counsel who has extensive obligations in Parliament.

Having heard from Mr Sisifa who advanced the appellant's argument fully and fairly, I determined I should hear and determine this appeal without further adjournment. In my view, it had merit and the sentence of effectively three months imprisonment was manifestly excessive or inappropriate in the circumstances of this case.

It would seem that the appellant had become annoyed with his wife when she had not arrived with clothing for the children on time after he had requested clothing. They were living apart and he had the children whilst she was visiting her sister. An argument followed on her arrival and during the argument the appellant punched his wife occasioning a small laceration to her head. There is some suggestion he had been drinking. The marriage had broken down with both parties having had affairs. The complainant was living with her parents and did not want to reconcile although it seems the appellant talked of resuming their marriage.

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He pleaded guilty to assault and assault occasioning actual bodily harm, although it would seem a conviction for assault would have been sufficient. In fact, I have some doubt as to whether two convictions should have been entered here, but there is no appeal against conviction. From the record and facts, it does not seem there were two incidents which were separate and justified separate charges.

The Magistrate sentenced the appellant to one year imprisonment suspended for 9 months with the balance being further suspended for two years for the assault occasioning bodily harm charge and that on the assault charge he be bound over for two years on good behaviour. Effectively, he ordered the appellant to spend three actual months imprisonment.

Mr Sisifa essentially put the argument for the appellant. He informed me that the appellant was a first time offender aged about 31 years. The marriage had broken up and he shared responsibilities for the children. There was little provided to the Magistrate by way of background of the offender. I am grateful to Mr Sisifa for his candid approach.

It is with regret that before determining to sentence the appellant to imprisonment, more was not found about his circumstances. The Magistrate seems to have focused almost exclusively on the domestic violence issues. There was very little else in the sentencing of any substance in his judgment and nothing about the personal circumstances of the appellant. The Magistrate was not altogether to blame for this, as I have pointed out below.

His sentencing notes read;

“If you ever go and take the children, do not call on your wife to bring over the clothes. You go to their home and bring the clothes. Women are badly treated these days. Assault on women overseas ends in a prison sentence. On the day of the marriage, you make her your wife but now you call her your little drum.”

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He was then sentenced.

This felt short of what I would call a proper sentencing exercise particularly whereas here the defendant is a first time offender, has domestic obligations, and is himself no doubt going through the emotional trauma that inevitably accompanies a breakdown in a marriage.

It is incumbent upon a sentencing officer to ensure either through a defendant's counsel or if unrepresented, the defendant himself, that he is aware of the defendant's circumstances and any possible mitigating matters associated with the offending. This will involve an inquiry as to the defendant's age, marital or relationship status, dependents, whether he or she is in employment, the amount of income derived, social or cultural interests such as membership of a church or social organisations, and any other factors relevant to his or her personal circumstances. Other issues relate to whether the accused has pleaded guilty and whether he or she is remorseful for his or her offending, and whether there has been any apology. The latter factors are particularly important. The Court must always consider particularly with a first time offender whether a non custodial sentence is appropriate, and can only do so after an inquiry as to a defendant's personal circumstances.

Nor is domestic violence necessarily a one way street with the male always being the perpetrator of the violence or derision although very often they may be. Often arguments escalate with reprisals and comments that may excite and or provoke anger. They can be complex human situations which merit some scrutiny, and this is not made any easier when young children are involved.

Whilst it is true that imprisonment now may more frequently accompany domestic violence than in the past, domestic violence must be taken seriously and is by the Courts, which does not remove the need for a sensible case of case approach to sentencing. Each case must be carefully considered on a fact specific basis. The mere categorization of

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the offending as domestic with sentences of imprisonment being imposed without careful consideration of the circumstances of both the offending and the offender may well cause a miscarriage of justice to occur, and indeed may lead to a worse domestic situation where a spouse is imprisoned without very good reason.

The circumstances of each case may vary greatly. Even in those jurisdictions which have adopted legislation relating to sexual violence, a first time offender can be expected to be treated to a non-custodial sentence for a first time offence unless the assault causes serious injury. In many cases, a warning and reference to an anger management or a course on alcohol abuse will be more constructive than an immediate sentence of imprisonment.

The fact that an assault arises in a domestic situation should not mean that a sentence of imprisonment must inevitably follow or even that it should be considered a serious possibility, at least where the case involves first time offending and falls short of serious injury. In cases of serious injury or in cases that follow a long history of abuse or cruelty, periods of imprisonment may well however be justified even in the case of a first time offender.

It is right that domestic violence is reported and prosecuted in a transparent manner. It is an area of concern in many communities and it is rightly receiving greater attention today in society and in the courts in Tonga. But that does not mean that there is any less need to scrutinize with care the circumstances of the offending and circumstances of the family and the offender with care before a sentence of imprisonment is imposed to ensure that the sentence is fair, just and appropriate.

In this case, the injury was not serious. This is not a case of a severe beating nor one over a prolonged period or where there has been a long history of cruelty and violence. The appellant pleaded guilty to two counts when one would seem to have encapsulated the offending. He showed remorse and apologized although this was not accepted by the complainant. He was a first time offender. The marriage had something

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of an unhappy history with both parties having affairs. The appellant seemed to want to resume the marriage and the complainant did not. There is some suggestion the appellant had been drinking.

The facts upon which the Magistrate sentenced lack any real detail as to the circumstances of the offending, the marriage or the offender.

Defence counsel should make every effort to secure relevant information concerning the background of the client and forward this on to the Magistrate. This is particularly so where first time offenders are concerned. Counsel here in his short submissions was perhaps rather blinkered by the fact that this was a domestic violence case. He suggested a sentence of imprisonment if imposed should be fully suspended in terms that may have led the Magistrate to consider that he had little alternative but to impose a sentence of imprisonment when that was not the case. A much less restrictive sentence than imprisonment was available.

The Court of Appeal has emphasized for many years that first time offenders should not be imprisoned unless there is very good reason for it. Mafi and Latu [1991] Tonga LR 53 simply reflects sensible and well recognized sentencing practice. Likewise, a Court should think very carefully before imposing what are effectively very short sentences of imprisonment. Very short sentences of imprisonment can be dislocating and may serve no good purpose. They can also increase the prison population, tax administration, and place a strain on resources that should be reserved for the most part to those committing serious crimes, and recidivists where medium or long terms are required. If a less restrictive sentence can be imposed than a short sentence of imprisonment, then serious consideration should be given to choosing the non custodial option particularly in the case of a youthful or first time offender. There are since the Mafi case several useful options available for non custodial sentencing in Tonga.

None of these considerations seems to have been considered at all by the Magistrate in this case. This is possibly because counsel seemed to

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place undue emphasis on a possible sentence of imprisonment and did not sufficiently draw the Magistrate's attention to other alternatives. It is also because perhaps Magistrates have a good deal of sentencing work to do and long lists to get through. Even so, care has to be taken over the sentencing process, and this is particularly so where young or first time offenders are exposed to the possibility of a term of imprisonment.

Counsel said;

'It has been explained and we are fully aware that an imprisonment sentence is possible for this kind of offending. There is truth about the effort to reduce domestic violence especially against women. We admit the facts of the matter as presented by the prosecution for the accused's part, it is maintained that attempt has been made to go and apologise to the complainant. It is accepted that the wife is aggrieved as well as the parents of the complainant. The accused has pleaded guilty. There is no sufficient income earned. I will leave it to your Honour for a penalty that would teach this person. It is clear from the actions of the accused that he is truly remorseful. He knows very well that to cause injury is penalized by imprisonment. If there is an imprisonment term contemplated then has it suspended. Whatever your decision we will be content with it. It is the wish that the problem is solved so that the accused can live harmoniously with his family.'

The prosecution did not submit that a sentence of imprisonment be imposed. The prosecutor ended his submissions by saying;

"There is no previous conviction record of the accused here, whatever is your learned decision to aid the complainant and the future of his family, the prosecution will accept."

That was a sensible approach.

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The appellant in his appeal grounds raised the following additional matters. He acknowledged he had an obligation to maintain his two young children. He was the eldest in his family and he looked after his grandmother who was aged 70 and his parents. His counsel had informed the Court he had little income.

Whilst he did not concede that the sentence was manifestly excessive or inappropriate, Mr Sisifa who appeared for the respondent did not oppose my suggestion that it appeared to be and appeared to agree that the sentence was too severe on a first time offender. In my view appropriately, he accepted that a sentence falling short of imprisonment and in this case a fine was mooted to be appropriate. I indicated that I was minded to impose a fine. He had suggested a sum in compensation.

It is plain to me however on reflection that a fine may well cause more hardship to this family unit struggling as it is. I consider in any event that there are options which may be better tailored to deal with this case, that are more constructive and will better meet the ends of justice.

In the circumstances, I am going to quash the existing sentences and on CR 55/2012, I am going to instead impose a sentence of a bond and probation under sections 198-199 of the Criminal Offences Act, the orders being that;

The appellant is discharged on his entering into a recognizance (bond) to be of good behaviour and to appear for sentence when called upon at any time for a period of two years from today's date;

As a further requirement, that he is under the supervision of a probation officer (under s 199) with the following additional requirements;

1. The appellant attend the Salvation Army for a anger management course;
2. The appellant attend the Salvation Army's course on Drugs and Alcohol awareness;

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For the purpose of clarification, the appellant is to attend the Magistrate's Court to sign a recognizance bond no later than 24 hours after publication and receipt of this judgment.

He is to attend the probation office no later than Monday the 30th July 2012 at 9am where he will be given further directions on the courses he is to attend.

On the count of assault, on file CR54/2012- he is convicted and discharged.

The appellant is warned that should he fail to attend courses or commit any further offences within a period of two years he may be called up for sentence.

He is also warned not to commit any further act of assault upon his wife because should he do so he is at serious risk of being sentenced to a term of imprisonment.

Accordingly, I allow the appeal on the above terms.

DATED: 20 JULY 2012

J U D G E