Regina v. Stanley Bade

High Court
Ward C.J.
21 December 1988

Appeal against conviction—charges whether bad for duplicity—whether there was miscarriage of justice.
Sentencing—burglary of dwelling-houses—observations on proper approach to sentencing—repeated offences—whether sentences consecutive or concurrent.

Facts:

The appellant appeared with others before the Central Magistrates' Court and pleaded guilty to two charges of simple larceny, four charges of burglary, and one of malicious damage. He was sentenced to a total of six years' imprisonment. He appealed against conviction on the burglary charges on the basis that they were bad for duplicity. The statement of offence in the burglary charge stated as follows: "Burglary and Theft contrary to section 292(a) and 254(1) of the Penal Code" and the particulars of the offence included the words "by night did break and enter the house of . . . with intent to steal therein and did steal therein goods".

The respondent objected to the appeal on the ground that, as the appellant had pleaded guilty, he could only appeal against sentence under section 293(1) of the Criminal Procedure Code.

HELD:

(1) There are circumstances in which the Court may entertain an appeal against conviction following a plea of guilty in particular where the plea was equivocal: *Yaneo* v. *Director of Public Prosecutions* High Court Criminal Case No. 31 of 1988 followed.

(2) It is a fundamental part of counsel's duty to ensure the charge his client is admitting is proper and, if it is not, to take the point. If the Court refuses to consider this on appeal it may well be perpetuating an injustice: *Thompson* v. *R.* (1913) 9 Cr. App. R 252 at page 259 per Lord Isaacs C.J. and *Wilmot* v. *R.* (1933) 24 Cr. App. R. 62 per Lord Hewart C.J. at page 68 cited with approval.

(3) The charge should not be double in the sense of charging the accused with more than one offence.

(4) The charges were bad for duplicity but the facts outlined by the prosecution clearly demonstrated burglary to which the appellant pleaded guilty. Applying the proviso to section 292 of the Criminal Procedure Code, there was no substantial miscarriage of justice and the appeal against conviction was accordingly dismissed.

(5) When considering sentence for a number of offences, the general rule must be that separate and consecutive sentences should be passed for the separate offences. However, there are two modifications, namely:

(a) where a number of offences arise out of the same single transaction and

cause harm to the same person there may be grounds for concurrent sentences; and

(b) where the aggregate of the sentences would, if they are consecutive, amount to a total that is inappropriate in the particular case.

(6) For a normal burglary case the only appropriate penalty must be an immediate custodial sentence. Where the burglary is not aggravated in any way, the starting-point for an adult first offender should be two years' imprisonment.

(7) Where the accused has committed the offence as part of a clear series committed by a gang, the protection of the public becomes even more important. Here such aggravating features existed and six years' imprisonment was a minimum appropriate sentence.

Appeal against conviction and sentence dismissed.

Other cases referred to in judgment:
Nicholls v. *R.* (1960) 44 Cr. App. R. 188
Smith v. *R.* [1972] Crim. L.R. 124
Thompson v. *R.* [1914] 2 K.B. 99; [1913] 9 Cr. App. R. 252; 110 L.T. 272; 30 T.L.R. 223; 24 Cox 43
Wilmot v. *R.* (1933) 24 Cr. App. R. 62; (1933) 149 L.T. 407; 49 T.L.R. 427; 29 Cox 652
Yaneo v. *Director of Public Prosecutions* [1985/86] S.I.L.R. 199

Counsel:
J. Muria for the appellant
F. Mwanesalua, Director of Public Prosecutions, for the respondent

WARD C.J.

Judgment:
The appellant appeared with others before the Central Magistrates' Court on 3 October 1988 and pleaded guilty to two charges of simply larceny, four charges of burglary, and one of malicious damage.

He was sentenced to a total of six years' imprisonment.

Despite his plea of guilty he now appeals against conviction on the burglary charges on the basis that they were bad for duplicity. The point is simply stated. In each of the burglary charges, the statement of offence reads: "Burglary and Theft contrary to section 292(a) and 254(1) of the Penal Code". The particulars include the words "by night did break and enter the house of . . . with intent to steal therein and did steal therein goods".

The respondent first objects to the appeal on the ground that as the appellant pleaded guilty he can now only appeal against sentence under section 283(1) of the Criminal Procedure Code.

I have explained in *Yaneo* v. *Director of Public Prosecutions* [1985\86] S.I.L.R. 199 the circumstances in which this Court may entertain an appeal against conviction following a plea of guilty. If there is anything in the record that suggests the plea was equivocal, such an appeal will be considered. In this case, Mr. Muria suggests the charge is bad for duplicity and, if he is correct, that must show a clear equivocation

for, when the accused pleaded guilty, it is uncertain which of the limbs of the charge he was admitting.

The learned Director also takes the point that this objection to the charge should have been taken at the trial in the lower court. He points out, with justification, that this appellant was represented and so the technicality should have been raised at the time thus allowing the prosecution to correct it if possible. He suggests that counsel has a duty to the Court to ensure the due administration of justice and if, having failed to raise such a matter at the proper time, he is to be allowed to raise it on appeal, it is an abuse of the court process.

I have considerable sympathy with Mr. Mwanesalua's view. It is a fundamental part of counsel's duty to ensure the charge his client is admitting is proper and, if it is not, to take the point. By failing to do so and only raising it later on appeal, he may place the prosecution in a very difficult position as the time may have passed when it is possible to try the issue as a contested case. However, if this Court were to refuse to consider the matter at this stage it may well be perpetuating an injustice. If the charge itself is bad, it should be corrected. It would be a very unfair burden on an accused man if, through a failure of his counsel, he was denied a fair trial.

In this jurisdiction, many accused men are unrepresented in the Magistrates' Court. They are unlikely to appreciate the legal niceties of the wording of a charge. Frequently the magistrate will pick up the point but, if he does not (and on a busy court day he may miss it), is the accused to be forever barred from taking it? I think not and I am supported by authority of earlier cases.

I cite only two. In *Thompson* v. *R.* (1913) 9 Cr. App. R. 252 at page 259 per Lord Isaacs C.J.:

> We are of opinion that there being a defect on the face of the indictment, the objection should in strictness be taken before plea, and therefore the technicality raised by the defence could be met by a technicality raised by the Crown, but this Court will always be very reluctant to lay down any hard and fast rule which would prevent the defence raising any objection based on an irregularity or defect in the proceedings at any time. We do not, therefore decide that the objection may not be taken at a later period and even after verdict.

In *Wilmot* v. *R.* (1933) 24 Cr. App. R. 62 at page 68, Lord Hewart C.J. said:

> . . . it is enough to refer to the judgment of this Court in *Molloy* (15 Cr. App. R. 170; [1921] 2 K.B. 364, at p. 369), where it is said: "In these circumstances, although the point was not taken by the appellant at the trial, we must, now that the point is taken, decide it according to law, and in our opinion the appeal must be allowed and the conviction quashed." It is to be observed that the words are not "we may," but "we must"; the matter is there stated as being a duty on this Court in the interests of justice. Although in the present case the appellant was represented by counsel, there are many cases in which an accused person has had no counsel, and nevertheless this Court may have the duty of taking a point of law which, if it had been present to the minds of those in the Court below, could have been, but was in fact not, taken.

That passage has been cited with approval in numerous cases since and is clearly correct.

I pass, therefore, to the point raised by the appellant that the charges of burglary were bad for duplicity.

Whilst the English authorities on this point have tended recently to present a rather inconsistent approach, I feel the general principle has not been questioned, namely, that a charge should not be double in the sense of charging the accused with more than one offence. This is a matter to be taken on the wording of the charge itself although in some circumstances, the duplicity may only be revealed by reference to the evidence as well in order to show the significance of the suggested duplicity.

In this case, the two offences are apparent on the charge itself. The statement of offence refers to burglary contrary to section 292(a) and theft contrary to section 254(1).

English authorities tend to have arisen from the difficulty in such cases of deciding the true meaning of the verdict from the jury. Such was the case in *Nicholls* v. *R.* (1960) 44 Cr. App. R. 188 in which the jury convicted an accused man of warehouse breaking where the single count alleged two offences under different sections. At page 189, Byrne J. pointed out:

> It is quite plain, on looking at this record, that no one could ascertain whether the jury had in fact convicted the appellant of an offence which would carry a maximum punishment of fourteen years or an offence which would carry a maximum punishment of seven years. These sections, 26(1) and 27(2), are separate and distinct sections of the Larceny Act, 1916, and it seems to this court that this is obviously a case of duplicity. If this charge had in fact been dealt with in this indictment in two separate counts, the matter would have been plain and the verdict returned would have indicated quite plainly the finding of the jury, but as it is, these two sections of the statute have been linked together and the appellant was in one count of this indictment charged with two separate offences.

In a magistrates' court, this problem may not arise. The magistrate has considerable powers of correction of the charge under section 200 of the Criminal Procedure Code or of alternative verdicts under sections 159 to 177. His written judgment should, after plea of not guilty, make clear exactly the offence he has found proved. However, the difficulty is not so easily resolved when there is a plea of guilty to a double charge.

The present case is on all fours with *Nicholls*'s case. The penalty for burglary is life imprisonment and for theft five years' imprisonment. When the accused pleaded guilty, was he admitting only one or both of these offences? Clearly these charges were bad and should have been amended before plea was taken.

The question now arises whether they should be quashed. I am not satisfied they should be. A perusal of the record shows that the prosecution outlined facts for each offence that clearly demonstrated burglary. In each case, the facts were admitted by counsel on behalf of the appellant.

By the proviso to section 292 of the Criminal Procedure Code, this Court may "notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers no substantial miscarriage of justice has actually occurred".

I am satisfied no miscarriage has occurred here. The facts clearly disclosed an offence of burglary. Whether or not a theft actually occurred does not alter the fact

although it may be relevant to sentence. I am sure the pleas entered by the appellant were to the burglary and so, applying the proviso, I dismiss the appeal against conviction on charges 3, 4, 6, and 7.

I now pass to the appeal against sentence.

The sentences passed were six months' imprisonment each on two counts of larceny, twelve months each on two of the counts of burglary, eighteen months each on the other two counts of burglary, and three months on one count of malicious damage. The three months sentence was concurrent but the remainder were consecutive making a total of six years' imprisonment. This was to be followed by a two-year residence order. Mr. Muria urges that, although the sentences are appropriate to each offences, the total is excessive.

The accused is a young man of twenty-two years, married, with one child, and in work. He had one previous conviction for dishonesty which resulted in a sentence of imprisonment of nine months in March 1987.

In a carefully reasoned sentencing judgment, the learned trial magistrate referred to the matters for which he would give the accused credit and continued to point out the seriousness of burglary, particularly in Honiara. I do not repeat them but I agree with all the points made.

He then dealt with each accused in turn. In the case of this appellant, he had this to say:

> Stanley Bade is not a first offender. He has been to prison for dishonesty only last year. Clearly that sentence had little deterrent effect upon him. He is now before the court for 7 offences. While I have considered carefully all that Mr Muria has said on his behalf I cannot accept that anything other than a custodial sentence is appropriate for this accused. He is a menace to the public and there is no non-custodial option available to me which would adequately reflect the gravity of these offences. Taking into account his age and antecedents I find that the minimum sentences I can pass are as follows . . .

and he then he sets out the sentences described.

When considering sentence for a number of offences, the general rule must be that separate and consecutive sentences should be passed for the separate offences. It is trite to point out that a man who commits, say, five offences should receive a heavier sentence than a man who only commits one of them.

However, there are two situations where this rule must be modified. The first, that where a number of offences arise out of the same single transaction and cause harm to the same person there may be grounds for concurrent sentences, does not concern this appeal save to say that the learned magistrate correctly applied this principle in ordering a concurrent term for the malicious damage caused to Solo Lae's house during the burglary.

The second occasion for modifying the general rule arises where the aggregate of sentences would, if they are consecutive, amount to a total that is inappropriate in the particular case. Thus, once the Court has decided what is the appropriate sentence for each offence, it should stand back and look at the total. If that is substantially over the normal level of sentence appropriate to the most serious offence for which the accused is being sentenced, the total should be reduced to a level that is "just and appropriate" to use the test suggested in *Smith* v. *R.* [1972] Crim. L.R. 124. Equally, if the total sentence, although not offending that test, would

still in the particular circumstances of the person being sentenced, be a crushing penalty, the Court should also consider a reduction of the total.

Having decided the proper penalty for each individual offence but feeling the total is too high, it is better to achieve a reduction by making some or all concurrent rather than to reduce the length of the individual sentences whilst leaving them consecutive. The former course results in sentences that still reflect the gravity of each individual charge.

It appears that the learned magistrate has possibly in this case taken his decision in the reverse order. He has decided an overall sentence appropriate to the offender, the public interest and the offences as a whole and then adjusted the sentences to fit.

The sentences of six months' imprisonment for each case of simple larceny and three months for malicious damage are correct and appropriate but the sentences for burglary are inadequate.

Burglary is an extremely serious offence. Anyone who breaks into a private house at night, however careful he may be to try and do it when the house is empty, runs the risk that there is someone inside. The effect on anyone who has been in a house when it is burgled can be extreme and may frequently have the same effect as an offence of violence. Even where the house was unoccupied at the time of the burglary, the sense of violation felt by the owners when they return can have very long-term effects. The general rise in the incidence of burglaries in Honiara is causing a restriction on the style of life of many people.

When sentencing offences of violence, a court will always consider the effect on the victim in deciding the appropriate sentence. In burglary, also, that is an important consideration.

For a normal burglary case, the only appropriate penalty must be an immediate custodial sentence. Where the burglary is not aggravated in any way, the starting-point for an adult first offender should be two years' imprisonment. From that point, this Court should consider any aggravating factors such as committing the offence with the support of others, theft of personal items that can be little or no value to the thief, general ransacking of the house, wanton damage, pre-planning, and the degree of breaking necessary to gain entry. If such matters are present they should add to the penalty. Where masks are used, weapons are carried, threats are made, or similar escalations in the seriousness of the offence are present, the penalty should be further increased and it would rarely be appropriate to pass a sentence of less than four years.

I have studied the facts of the burglaries charged here and can see no reason why the burglary in charge 3 has a higher penalty than the burglaries in charges 4 and 6. Charge 7 shows the additional factor that the house was ransacked.

All burglaries were committed in company with others, there was evidence of pre-planning, and they were clearly part of a series.

Against those matters are weighed the appellant's plea of guilty, his relative youth, and his single previous conviction.

I feel the appropriate sentence for charges 3, 4, and 6 is two years and six months' imprisonment on each. In the case of charge 7 the sentence should be one of three years and six months' imprisonment.

Sentence is at large in the appeal and I increase those sentences accordingly.

I now pass to the question of the total sentence. If all were consecutive, the total would be twelve years and six months. That is clearly far too long and should be reduced well below that level.

The learned magistrate described the appellant as a menace to the public and I agree. This was an intensive series of offences over a period of less than three months. It was not a case of a man who was driven to these offences through unemployment or the demands of a large family. He had a job that yielded $160 per month and was married with one small child.

I feel the magistrate's assessment that a total of six years is just and appropriate in this case is correct. Thus I quash the sentences for burglary and substitute the following:

charges 3, 4, and 6: two years six months' imprisonment on each;

charge 7: three years and six months' imprisonment;

charges 1, 2, 3, 4, 5, and 6 to be concurrent with each other but consecutive to charge 7, making a total of six years' imprisonment.

The basis of the appeal against this sentence was that the totality would have the effect of crushing the appellant.

In view of his age and marriage, I accept that may be the effect to some extent. However, in offences of this nature, protection of the public is an important consideration. Where the accused has committed the offences as part of a clear series committed by a gang, the protection of the public becomes even more important. It can never totally override matters of mitigation but in cases as serious as this it may become a dominant factor.

Thus, although I have considered the possible crushing effect of the total sentence on the appellant and reduced it accordingly, I accept that an element may still remain.

The need to protect the public, however, is sufficiently great that a sentence of six years is the minimum appropriate to this case.

Appeal against sentence dismissed.

Facts:

Following the dismissal of the appeal against sentence, the same defendant fell to be sentenced for a further burglary and an escape from lawful custody. This latter burglary included an assault upon the person of the occupant of the dwelling-house.

HELD:

Because of the element of violence, it was appropriate to impose a sentence of four years and six months' imprisonment, concurrent with the longest burglary sentence, supra, but consecutive upon the other sentences, making a total of seven years. A further sentence of three months' imprisonment was imposed for the escape, to be served consecutively to the others, for a final total sentence of seven years three months' imprisonment.

Sentence:

I have just considered an appeal by this accused against the sentences passed for seven offences including four burglaries.

In my judgment I explained the basis on which burglaries should be sentenced.

This burglary predates those offences by a few weeks and is a far more serious case. Here the burglars wore masks. That shows they either knew the house was occupied or thought it highly likely for, otherwise, the mask would not have been necessary. When the occupant was woken, she was punched.

The accused tells the Court he did not go into the house and I accept that, but,

even so, he not only stayed in support of those who did enter but did so after he saw one of his accomplices wearing a mask. It is equally clear that he was sufficiently unconcerned about the nature of this offence to embark, within a month, on the series of offences that were the subject of the appeal.

I allow for his plea of guilty and the mitigating factors I have heard both here and in the appeal. I also note that at the time of this offence he had only one previous conviction.

However, the minimum sentence I can properly pass on the facts of this case is one of four years and six months' imprisonment.

The escape was a separate matter entirely. It occurred after he was arrested for this burglary and shows a disregard for the situation in which he found himself. I sentence him to three months' imprisonment on that count, consecutive to the burglary.

I take the view that this burglary was part of the same series of offences as the cases considered on appeal. At the appeal I felt a total sentence of six years in his personal circumstances was appropriate.

In the circumstances, I make the sentence on this burglary concurrent with the sentence of three years and six months' imprisonment on charge 7 of the appeal case and consecutive to the remainder. The three months for escape is to be consecutive to them all.

Sentences to commence on the date of the original sentence in the appeal case, i.e., 3 October 1988.

This makes a total of seven years and three months' imprisonment. I have taken into account the possible crushing effect of that sentence, but the comments I made in the appeal apply here also.