IN THE COURT OF APPEAL OF NEW ZEALAND

C A 291/80

THE QUEEN

v

GEORGE PURIRI SOLOMON

Coram:	Richardson J (presiding) McMullin J Somers J
Hearing:	20 May 1981
Counsel:	K G Stone for Crown M Ring for Applicant
Judgment:	20 May 1981

ORAL JUDGMENT OF THE COURT DELIVERED BY McMULLIN J

George Puriri Solomon seeks leave to appeal against a sentence of four years imprisonment imposed upon him in the High Court on one charge of wounding with intent to cause grievous bodily harm, one charge of injuring with intent to cause grievous bodily harm, and one involving entry of a building with intent to commit a crime therein. He was also convicted and discharged on a charge of common assault. The present application therefore is directed to the sentence of four years imprisonment imposed on the three charges to which we have earlier made reference.

Applicant had been arraigned on an indictment charging him, with one woman and four other men, with these offences and lesser offences charged as alternatives. On arraignment he pleaded guilty to the more serious charges. The other accused pleaded not guilty to all the charges in

the indictment and their trial proceeded over a period of four days. At the end of it they were convicted of various offences which reflected the jury's view of their degree of involvement in the incidents which gave rise to the charges.

The evidence given at the trial revealed that the female accused wished to retrieve some of her property from her husband from whom she was separated. In this she was assisted by another of the accused who was her boyfriend. Three of the other accused, including applicant Solomon, met with them at an hotel in Auckland. There was another man who does not appear to have known them prior to this meeting but he joined them. Then all of them set off by car and called at a house at Avondale, Auckland where the female accused hoped to get some information about her husband and her property. The group entered the house and at this there occurred a number of incidents which formed the subject of the charges on which applicant was found guilty and sentenced.

Before entering the house the five men had armed themselves with some iron bars which had been used to secure a load carried on a truck parked nearby. Two of the men carrying bars demanded certain information of those present in the house and gave them a limited period of time within which to supply it. One of the men in the house was told that his legs would be smashed unless he gave the required

information and two of the men stood over him swinging the bars at his knees. He was struck about the head and body and rendered unconscious. According to the medical evidence given at the trial he suffered large bruises and cuts on his skull, a cut across his jawbone, bleeding from his nose, and blood and spinal fluid escaped from his left ear. He suffered a fracture of the skull, a further fracture of the jawbone, fractures of the nose, and of the ribs. He was treated in hospital for a week. The other plaintiff was also set upon and kicked. He suffered a cut to his lip which required stitching and bruising of his head. But he escaped through a window in the house and he may have escaped the further effects of the assault on this account.

Applicant and four of the other offenders appeared for sentence on the same day. The remaining one, Waller, appeared for sentence about a month later but before the same Judge who had presided at the trial.

It is clear from his remarks on sentencing that the Judge regarded the case as a serious one. He described it as an expedition in which a number of men, including applicant, went along as a stand-over and enforcement gang to help another extract some items of property. In the result they resorted to a great deal of violence in the mistaken belief that an innocent person in the house knew or might have known the whereabouts of a man they sought. He described it as senseless brutality.

Mr Ring, who appears for applicant has drawn our attention to the sentences imposed on the other offenders. These range from probation, imposed on the female offender, to the sentence of four years imprisonment imposed on applicant. Two of the other offenders were each sentenced to imprisonment for three years. One of them, Waller, had been found guilty by the jury of the very offences to which applicant pleaded guilty. Mr Ring submitted that applicant's actions and the circumstances of his involvement in the incidents were comparable with those of Waller. He submitted that the correct approach to be adopted in comparing the relative sentences of co-offenders involves a two stage test. In this, the first enquiry must be whether there are reasonable grounds on which the respective sentences can be reconciled and the second enquiry must be as to whether the degree of discrepancy is such as to raise unease in the mind of the appellate Court. But it follows from the way this test has been put that it is only necessary to embark upon the second enquiry if the first enquiry is answered in the negative.

In short Mr Ring put the question as being whether a 17 year old offender, (applicant was 17 years old at the relevant time) who pleads guilty to offences should receive a greater sentence than a 25 year old man, (that was the age of Waller) who pleads not guilty to the offences and has evidence given by him at his trial in his defence rejected

by the jury. Mr Ring submitted that there was no real ground for distinguishing between the activities of applicant and Waller on the night in question. He said that, if anything, Waller's activities were worse than applicants's but he accepted the Judge's assessment that they were on a par. He said that a review of the notes of evidence taken at the trial showed that the participation of the two men in the assaults which were made on the householders were the same. And he acknowledged that they were the persons who wielded the iron bars. But he drew our attention to the factors which are different in the case of the two men: that of age, the plea of guilty entered by one, and their previous criminal histories. We would accept that generally a youthful offender may expect to receive a lesser sentence from a Court than an older and more mature one. And we would accept that pleas of guilty are often taken into account by Courts on sentencing as intimating that the offenders in question have displayed a degree of contrition. But, making due allowance for these factors in favour of applicant and giving due weight to what Mr Ring has ably urged upon us, we nevertheless must have regard to and place proper weight upon the previous criminal history of each offender. In this connection we observe from the case that when applicant was sentenced by the trial Judge the Judge had before him a comprehensive Probation Officer's report. This showed that applicant had a list of

previous convictions including some for assault and like offences. The present offences were committed on 8 April 1980. On 8 March 1980, having been released in the previous January from a sentence of borstal training, applicant was found in Queen Street, Auckland carrying an offensive weapon. This was a long piece of chain and a piece of wood. According to the Probation Officer his explanation at the time was that he would use the wood to hit persons and use the chain if he had time to get it out. On the charge of carrying an offensive weapon he was convicted on 17 April 1980 in the District Court and sentenced to three months imprisonment. While in custody he was involved in three further incidents of assault. The first was in September 1980. While in prison then he committed an assault and on 15 September 1980 he was sentenced in the District Court to four months imprisonment for this. It seems that while at the District Court on 15 September 1980 he was involved in an incident in the cells with a police constable and on the next day, 16 September 1980, he was sentenced in the District Court to two months imprisonment cumulative on the charge of assaulting the constable on duty. Then in September 1980 while in prison he was involved in an assault on another inmate. According to the Probation Officer's report, on this occasion applicant with some others in the prison beat another inmate on the head with a bar while in his cell. Apparently the incident arose out of some

vendetta against the other inmate. As a result of this, on 24 September 1980, he was sentenced to two years imprisonment on a charge of assault with intent to injure.

Although the Judge in his remarks on sentencing applicant does not make specific reference to these offences in 1980 or the circumstances in which they were committed the offences themselves reveal that applicant was a young man who was given to the use of violence of a serious kind and, even allowing for the stress of prison life which may provoke inmates into actions of this kind, the incidents indicate that violence was part of applicant's character. When the Judge came to sentence Waller some time later he drew a distinction between Waller and the others who had been at the trial whom he described as thugs. In our view, therefore, the seriousness of the assault and the fact that applicant played a leading part in it were factors which the Judge was entitled to have regard in imposing a sentence of four years which is a heavy sentence for a young man of 17 years.

Having referred to applicant's criminal history in some detail, for that was one of the matters to which Mr Ring addressed his remarks, we turn to the criminal history of Waller with whose sentence comparison is sought to be drawn. Waller was some eight years older than applicant. He had a number of previous convictions but the trial Judge

described these as minor. Certainly he had never been sentenced to a custodial sentence previously. He had been before the Court on a charge of common assault in 1974 and five charges of common assault in 1975. But in the 1974 case he was ordered to come up for sentence if called on. And in 1975 he was fined $50 in respect of each of the five charges of common assault. The penalties imposed upon him at that time in the Magistrate's Court do not indicate that the assaults were very serious ones and we think that it is to be said in his favour that some five years had elapsed between the charges of assault to which we have just made reference and the charges of violence on which he stood his trial in 1980. When Waller appeared for sentence the Judge referred to the sentence of four years imposed upon the present applicant and he said that ordinarily speaking he would have imposed the same sentence in respect of Waller. But, for reasons which he discussed in the course of his remarks, he did not do so. It is apparent from what he said, and these were the reasons which caused him to make a differentiation between the two men, that the Judge regarded Waller as a more presentable type and he thought that there was room for the view that he was entitled to more consideration than some of the other offenders. He regarded his conduct on the night in question as not necessarily his normal mode of behaviour and he found that conduct as being somewhat perplexing. The Judge, too, had

had the opportunity of observing Waller at the trial and of listening to all the evidence including that given by Waller, so that it is clear that when he came to impose the lesser sentence of three years on Waller the Judge bore in his mind the need for the imposition of a consistent sentence having regard to the degree of involvement of the two men, but was prepared to mitigate the sentence which he would otherwise have imposed upon Waller because of the somewhat better character which Waller, in his view, had.

Having regard to Waller's previous criminal history we are of the view that the Judge was entitled to make such a differentiation. When therefore the two cases are compared side by side and due weight is given to the younger age of applicant and the fact that he entered a plea of guilty we think that the Judge was entitled on an overall assessment of the situation to make the differentiation in sentence which he did and to sentence applicant to four years imprisonment and Waller to three years imprisonment.

We therefore think that this is a case where reasonable grounds have been shown for the differing sentences which have been imposed. And we make the point that merely because one of two prisoners jointly indicted has received a lesser sentence no ground has been shown for reducing a longer sentence on the other prisoner. What has

to be shown is that the longer sentence is more than is justified taking all the surrounding circumstances into account. R v Rameka (1973) 2 NZLR p 592.

In the circumstances the application for leave to appeal is accordingly dismissed.

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