IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY CRI 2003-485-35 & CIV 2003-485-13

BETWEEN **MAAUGA FOLASA & SONNY PHILLIP STRICKLAND**

Appellant

A N D **NEW ZEALAND POLICE**

Respondent

Hearing: 2 September 2003

Counsel: V C Nisbet for Appellant Folasa
R M Lithgow for Appellant Strickland
I R Murray for Respondent

Judgment: 3 September 2003

JUDGMENT OF HAMMOND J

Solicitors:

V C Nisbet, Wellington for Appellant Folasa
R M Lithgow, Wellington for Appellant Strickland
Crown Solicitors Office, Wellington for Respondent

Introduction

[1] These are appeals against sentences of imprisonment imposed upon the two appellants; and against the declinature of leave to apply for home detention in the case of Mr Strickland.

Background

[2] In October 2000 Mr Folasa, Mr Strickland and a Mr Tuitama were in a street in Porirua. These three young men discussed obtaining cannabis and cash from an occupant in Miranda Street, whom I designate as X. X is a known drug dealer. Mr Folasa had a softball bat concealed in the back of his jersey; Mr Tuitama was in possession of a kitchen knife.

[3] Mr Tuitama knocked on the door of X's house. It was answered by X. Mr Tuitama presented the kitchen knife and began demanding cannabis. X attempted to shut the door of his house. Mr Tuitama flicked the knife at X's wrist, causing a small cut. Mr Tuitama then ordered X to hand over whatever money he had. X handed over approximately $300 cash.

[4] At this point Mr Folasa moved towards X and swung his softball bat at him, hitting him on the shoulder. X fell to the ground. Mr Folasa stood over him and demanded that he empty his pockets. While Mr Folasa stood over X, Messrs Tuitama and Strickland searched X's house. They appropriated a cellphone and charger, a cigarette lighter and cigarette case, a black FM radio, and a small quantity of cannabis.

[5] All three defendants then ran from X's address to the grounds of a nearby school. There they divided the cash up amongst themselves before going to a liquor store.

[6] When apprehended by the police, all three defendants readily enough admitted their culpability. They were charged with robbery under s.234 of the

Crimes Act 1961. That offence carries a maximum term of imprisonment of ten years.

The Sentencing in the District Court

[7] The sentencing Judge sentenced each of Mr Folasa and Mr Tuitama to two and a half years imprisonment.

[8] Mr Strickland was sentenced to two years imprisonment on the footing that his culpability (principally the lack of a weapon and resort thereto) was less than that of his co-offenders. The Judge refused leave for Mr Strickland to apply for home detention.

The Basis of the Appeals

[9] There has been no appeal from Mr Tuitama.

[10] Mr Folasa appeals against his sentence on the footing that it was manifestly excessive. It is contended that he should not have been sentenced to imprisonment; it is said that even if imprisonment was the appropriate mode of sentence, the term should have been substantially shorter. And it is said that he should have leave to apply for home detention.

[11] Mr Strickland's appeal, as lodged, is formally against the declinature of leave to apply for home detention. At the hearing before me, I allowed Mr Lithgow, without any objection from the Crown, to advance an argument that Mr Strickland too, should not have been sentenced to imprisonment.

Sentence Manifestly Excessive?

[12] Broadly speaking, the consideration of appeals under this head routinely turns on a review of the maximum sentence for the offence in question; sentences in

cases involving like culpability; and most particularly, where the conduct in question fits on the overall scale of culpability.

[13] In the normal run of cases involving, as here, resort to a private home (even of a drug dealer), the presence and use of weapons, the use of violence, the inequality in numbers, and the stand over tactics actually employed, a sentence of imprisonment (even to the extent actually imposed), might well be unexceptional.

[14] The problem in this case however, is that apart from an excess breath alcohol conviction in Mr Folasa's case, these twenty year old young men were first offenders. This immediately raises the problem whether it was appropriate, in the particular circumstances, to send them to prison straight off, and with stern sentences.

[15] I take first Mr Folasa's circumstances. Mr Folasa grew up with a supportive family in Porirua. He attended Aotea College for four years, leaving in 1998 without qualifications. He was not particularly academically gifted, but was a fine sportsman. While still at college he was selected into the 1996 New Zealand Junior Kiwi League team. After leaving school he worked with a fish wholesale company. The following year he was in the New Zealand National Handball Team at international tournaments. The following year he also went to Korea for a like event.

[16] It was after he returned from the world championship in Korea that Mr Folasa went to a party at which some friends introduced him to cannabis use, and he began to experiment with it. Foolishly, he began taking cannabis on a regular basis and alcohol somewhat to a lesser degree.

[17] Mr Folasa fathered a child. At the time of his offending he was in receipt of the unemployment benefit.

[18] As to how the offending happened, he acknowledged that he and his mates had been smoking cannabis early in the day. They then had wanted money and drugs to continue this activity. This was a "spree" offence. X was picked on

foolishly because this group of young men thought he was a drug dealer, with gang connections, who had been known to "rip people off".

[19] The crimeinogenic factors assessed by the department indicate little, if any, propensity for violence. Mr Folasa was deemed to be a suitable candidate for assessment with a view to undertaking the criminogenic programme as part of a lengthy supervision sentence.

[20] In the result, Folasa received a recommendation of a sentence of 12 months supervision with special conditions; community work; and an order to pay reparation.

[21] Mr Strickland is 21, of Samoan descent. He too went to Aotea College. He went back to Samoa for a time, and he then progressed as far as the 6th form at St Patrick's College in Wellington (although he did not finish that year). He then worked at the Warehouse, and undertook a course with the Prince of Wales Trust. He was employed with Displayways New Zealand Limited in Petone. He then started taking courses at Whitireria Polytechnic in Porirua, in film and television. Mr Strickland continued to live with his family and was in receipt of the unemployment benefit at the time of this offending. He too has a distinct interest in sport and plays touch rugby with his mates on Sundays.

[22] As to his involvement, Mr Strickland was telephoned, and asked to meet his associates in the yard near his neighbour. It was there that it was suggested to him that they do a robbery. He claims to have been quite unaware that Folasa had a softball bat under his jersey and that Tuitama had a knife. On any view of the matter, he was a distinctly lesser offender.

[23] The Departmental assessment found Strickland to be in a low risk category for reoffending. Since the offending, he has made some positive changes in that he has abstained from alcohol and drugs, and he has appeared motivated to undertake the 100 hour crimeinogenic programme. Again, a community based sentence was recommended with supervision and counselling.

[24] It is now appropriate to consider the District Court sentencing in more detail. The first point to be made is that extensive efforts were made on behalf of these three young men to achieve a restorative justice option. That did not work out, as I had it from Mr Lithgow this morning, because the victim and the police were not enthusiastic.

[25] The District Court Judge emphasised the effect on the victim. He said that what had happened here "cries out for a deterrent response principally in terms of general deterrence", and that "a quite inappropriate signal" would be cast to the community at large if these young men were not sent to prison.

[26] The Judge indicated that there is no tariff, although the Crown apparently suggested a starting point in the range of four and a half to five years imprisonment.

[27] The Judge adopted a starting of four years imprisonment. He allowed one year for guilty pleas, and he arrived at the individual sentences (after allowing for mitigation in the terms I have already noted).

[28] Leave to apply for home detention was denied Mr Strickland, on the footing that "the issue of general deterrence is pre-eminent …".

Resolution

[29] These cases involving young men in this age range who go out, and under the influence of alcohol or cannabis, commit something like this offending as first offenders are amongst the most vexing to come before sentencing Judges. There can be no question that this incident was a "nasty" one, as the Judge said. And if the defendants had prior records, and a failure to come to terms with the lifestyle issues involved, these appellants could have expected short shrift.

[30] That said, this is not such a case. These two young men come from good and supportive families. They foolishly allowed themselves to get into the predicament in which they find themselves. Fortunately, as incidents of this kind go, this one was not too bad. It is also easy to be drawn into the pejorative "home invasion", or the

suggestion (which was entertained to a real degree by the sentencing Judge) that this was something like an aggravated robbery in drag.

[31] The fact remains that these were young men who took this one wrong turning, whilst just setting out in life, and upon whom the mantra of "general deterrence" fell very heavily. It does not follow that imprisonment is inevitable in these cases, and serious consideration needs to be given to community based sentences. To a distinct extent, the sentencing court has to take a forward looking approach. In so doing, there is an element of risk on the part of the sentencer. However, in this case I am satisfied on all that is before me, and in particular Mr Lithgow's helpful submissions as to the family environment in which these two young men can find support, that there is a very respectable chance that they will not again reoffend, and can yet lead productive and worthwhile lives. They have already served close to two months imprisonment, which will doubtless be a salutatory reminder to them of what life will be like if they do not adopt a forward looking life, with the support of their families.

[32] In Mr Folasa's case I allow the appeal. I set aside the sentence of imprisonment. I substitute in his case a sentence of 12 months supervision with the special condition that he undertake and complete such programmes as are directed by his Probation Officer. Mr Folasa is to undertake 300 hours community work. He is to make reparation in the sum of $150 to Mr X, as the rate of $10 per week. First payment 8 September 2003.

[33] In Mr Strickland's case, I set aside the sentence of two years imprisonment. He is to be placed on supervision for nine months. He is to attend such programmes as are directed by his Probation Officer. Mr Strickland is to undertake 100 hours community work. He too is to make reparation in the sum of $150 per week to Mr X, at the rate of $10 per week. First payment to be 8 September 2003.

[34] I record that, even if I had not set aside the terms of the sentences of imprisonment in their entirety, I would have substantially reduced the length of the terms.

Leave to Apply for Home Detention

[35] Strictly speaking, this makes it unnecessary for this Court to deal with the question of home detention. I add only short remarks.

[36] This question is governed by s.97 of the Sentencing Act 2002. The Court is required to consider granting an offender leave to apply for home detention where amongst other things a term of imprisonment is imposed for not more than two years (s.97(1)(a)). The leading authority is still *R v Barton* [2000] 2 NZLR 459. There is a presumption in favour of granting home leave, and the bar should not be raised too high.

[37] The Judge dealt with this issue in a cursory way. In my view it was not sufficient to say that it was inappropriate for someone who stands as a robber to receive the benefit of home detention. That ignores the appropriate weighing of the relevant factors, in terms of the legislation.

[38] In this case, if the appeal against the sentence of imprisonment had been upheld, I would have allowed Mr Strickland's appeal against the declinature to apply for home detention. And in Folasa's case, the term of imprisonment would I think, have been such as to also afford him that opportunity.

[39] I record here, Mr Lithgow's interesting (and I think correct) second argument, that care has to be experienced with co-offenders where there are differing terms of imprisonment.

[40] On the sentences as imposed, Mr Folasa and Mr Tuitama would have served between 10 months minimum, and 30 months maximum. Mr Strickland would have served 12 months (maximum and minimum). Mr Folasa and Mr Tuitama would have had a long term sentence, being a determinate sentence of more than 24 months. Therefore eligibility would have been arrived at by consideration of s.20 of the Parole Act 2002, along with s.84. Mr Strickland's parole eligibility would have been the date on which the non-parole period ends.

[41] In the result, because Mr Folasa and Mr Tuitama were subject to long term determinate sentences they could apply to the Board for home detention five months before their parole eligibility. That may have been a long bow, but as Mr Lithgow says, in principle, a person serving a long term sentence could be released on home detention prior to their parole eligibility date. In a case like the present, this creates the anomaly that Messrs Folasa and Tuitama could apply for home detention for actual release on home detention after seven months imprisonment; whereas Mr Strickland could not apply for home detention at all, and could not be released before the 12 month cut off point.

[42] In the result, I do not have to grapple with this anomaly. But I do record that the prospect of increasing Mr Strickland's sentence, solely to give him the benefit of being able to apply for home detention, is not a technique which would hold any appeal at all for this Court.

Mr Tuitama

[43] Nothing that is said in this decision should be taken as affecting the position of Mr Tuitama. It does seem to be the case that he was the ringleader, and he resorted to a knife. I do not have the assistance of a probation report, as to his background. His case would have to be determined strictly on its own merits, were there to be an appeal in that instance.

Appeals allowed;
sentences of imprisonment set aside;
sentences of supervision and community service substituted.

Delivered at 11.45 am/~~pm~~ this 3rd day of September 2003.

R G Hammond J