Kesino Apo v. The State

Supreme Court
Kapi Dep. C.J.; Woods and Los J.J.
15 September 1988

Customary law and custom—whereas killing of non-relative brings risk of payback killing or payment of compensation, killing of relative involves no such risk—whether killing a relative involves intrinsic loss, already suffered, to be taken into account upon sentencing.

Criminal law—sentence—killing of relative not risking payback, tribal war, or compensation—killing of relative involving inherent loss to killer—whether such loss should be taken into account in mitigation of sentence.

Criminal law—sentence—whether intoxication should be taken into account in mitigation of sentence.

The appellant killed a cousin brother while intoxicated. He was convicted of manslaughter and sentenced to six years' imprisonment. The appellant suggested that the sentencing court should have given favourable consideration to the factors of intoxication and the consanguinity of the victim.

HELD:

The sentence of six years should not be disturbed: Kapi Dep. C.J., Woods J. (Los J. dissenting).

(1) Voluntary intoxication should not mitigate sentence.

(2) The appellant will suffer a self-imposed punishment the remainder of his life; the killing of a relative should be treated as mitigation, but the sentence in all the circumstances remained appropriate.

Other cases referred to in judgment:

Acting Public Prosecutor v. *Nitak Mangilonde Tagonis* [1982] P.N.G.L.R. 299
Joseph Maino v. *State* [1977] P.N.G.L.R. 404
Norris v. *State* [1979] P.N.G.L.R. 605
Public Prosecutor v. *Tardrew* [1986] P.N.G.L.R. 91
R. v. *Bradley* (1980) 2 Cr. App. R. 12
R. v. *Spence* (1982) 4 Cr. App. R. 175

Legislation referred to in judgment:

Criminal Code (Ch. No. 262), section 302

Counsel:

S. Lupulrea for the appellant
V. Noka for the respondent State

KAPI Dep. C.J.

Judgment:

The facts of the case are set out in the judgments of Woods and Los J.J. There are two matters of principle I wish to discuss.

I. Intoxication

The relevance of intoxication goes to the question of culpability. The rationale is that if an offender offends while under the influence of alcohol, his self-control is affected and therefore his culpability may be diminished. There is no clear statement of the Supreme Court on this question. It would appear that it has been treated as a mitigating factor as in *Joseph Maino* v. *The State* [1977] P.N.G.L.R. 404. In the National Court, different judges have rejected intoxication as a mitigating factor.

In England, intoxication is not a mitigating factor in cases in which the offender was risking a breach of the law by being under the effects of alcohol, as in the case of dangerous driving. In practice, that is the position in our jurisdiction and should be maintained.

However, apart from this, the position is not clear with other offences. In England, the Court of Appeal has not made the position clear either. The Court in *R.* v. *Bradley* (1980) 2 Cr. App. R. 12 rejects the influence of alcohol as a reason for reducing sentence. However, in *R.* v. *Spence* (1982) 4 Cr. App. R. 175 the sentence was influenced by the presence of alcohol. These cases are not included in the reports. I am therefore not assisted by any reasons for either view.

I hold the opinion that anyone who voluntarily gets himself drunk, must know that his capacity to control himself will be impaired and it is no reasonable explanation by him after the event that his self-control was affected. On its own, it ought not to be taken as a mitigating factor.

It may have some bearing if considered together with other circumstances, such as provocation in fact for the purposes of sentence. In the end result, the influence of alcohol cannot be a significant factor in mitigation of sentence.

II. Killing of a Relative

Whether a person killed is a relative or an enemy has special significance in Papua New Guinea. The notion of payback is still practised in many parts of the Highlands. The significance is that, where a person other than a relative is killed, the victim's relatives would pay back by seeking to kill a member of the offender's family. This brings upon the killer and his line the risk of tribal war, death, or destruction of property. There are also high compensation demands which would involve the whole clan.

Compared to this is the killing of a relative which can rarely result in such tribal warfare and animosity. In a sense, a killing of a relative is self-inflicting, in that a killer may lose a warrior, worker, or contributor to bride price, or even a helper. This may be regarded as a punitive aspect of the killing which he has brought upon himself. It should not be taken into account as a factor against him but in his favour. The trial judge was wrong in holding this against the appellant.

It does not follow that I ought to reduce the sentence of six years. We cannot approach sentence in such a piecemeal manner. The Court cannot take individual considerations and allocate a period. I adopt what I said in *Acting Public Prosecutor* v. *Nitak Mangilonde Taganis* [1982] P.N.G.L.R. 299 at 303. The whole of the

circumstances have to be looked at when considering whether the sentence of six years is the appropriate sentence.

In view of the fact that there has been an increase in violent crimes in the community and taking into account all the considerations, I do not consider that six years is an excessive sentence.

I would dismiss the appeal.

WOODS J.:

90 This is an appeal against a sentence of six years' imprisonment with hard labour following a conviction for manslaughter. The appellant had pleaded guilty to the charge of unlawfully killing one Enock Ipon Norokoip.

The facts are that the appellant had been drinking and then went to the house where the victim was to play cards, but the victim was lying down trying to sleep and abused him for coming at that time, whereupon a fight started and the victim knocked the appellant down, so the appellant went and got a knife and came back and stabbed the victim. The victim died two days later at the Kavieng Hospital.

It is submitted that the trial judge erred in how he considered certain factors in considering the penalty that he imposed. The trial judge, in his decision on sentence, 100 clearly listed points in the appellant's favour and points not in his favour. However, with reference to the evidence about intoxication it is submitted that whilst intoxication is not an excuse at law it can still be considered as a mitigating factor on penalty and the appellant's lawyer referred to Raine J. in the case of *Joseph Maino v. The State* [1977] P.N.G.L.R. 404. However, the judge in that case was reducing a penalty of six years for murder to an appropriate penalty on a change of conviction for manslaughter. The reason therefore for the reduction from six years was because of the conviction for a lesser crime. Whilst intoxication may be a factor when proof of a specific intent is required, there is no authority that it is a mitigating factor on punishment.

110 The trial judge noted that the fact that the deceased was a close relative was a factor not in the appellant's favour. It is submitted that this should have been a factor to be taken into account to reduce the actual term of imprisonment because this was not the death of a stranger to the accused which itself could lead to further problems of payback, but was rather a killing of a relative where no long-term problems would arise and no compensation had been demanded. It is quite clear that judges have given consideration to the fact that a killing within the family will usually mean that the perpetrator will suffer shame and the other burdens for the rest of his life for the killing of a relative and therefore a long-term of imprisonment is not really necessary or appropriate as a punishment. I therefore find that the trial judge erred in 120 considering this factor. However, there is no hard and fast rule that a greatly reduced sentence is mandatory.

The punishment for manslaughter is life imprisonment under section 302 of the Criminal Code (Ch. No. 262). However, the practice is to impose a term of years. It was open to the judge to give a sentence of six years and this term is not out of all disparity with other sentences where killings result from arguments when a knife is resorted to deliberately by the perpetrator.

Whilst I find there has been an error in applying sentencing principles, I find that

the sentence was one that the trial judge could impose and in the circumstances is appropriate.

130 I would dismiss the appeal.

LOS J.:

This is an appeal against a sentence of six years' imprisonment with hard labour for the unlawful killing of another person, Enock Ipon Norokoip.

I have on rare occasions ordered partly suspended sentences for unlawful killing. As a rule, however, a custodial sentence is a starting-point, for the fundamental reason that all human lives must be protected. The sentence of life imprisonment as the maximum penalty for all categories of homicidal offences is evident of the value placed on human lives. In each category, however, the sentences may vary.

In the unlawful killing area, generally speaking the sentences have varied from 140 two years to nine years. I have noticed that in some instances a charge of manslaughter is laid as a result of plea bargaining. In this type of case any further reduction of sentences would be irrational. But in my respectful view, where a manslaughter charge against an offender is laid on the merit of the case, all mitigating factors must be applied in favour of the offender. The appellant's case is, in my view, a good example.

The sentencing judge while applying numerous factors in favour of the appellant made an error in applying against the appellant certain factors which should have been applied otherwise. The apparent one relates to the relationship between the appellant and the deceased. The appellant was a fool. But apart from undergoing the 150 punishment imposed by the Court, he would be suffering for the rest of his life from self-imposed punishment. The self-imposed punishment is that he had lost a cousin brother whose assistance he would need in difficult times. While there is therefore a need for general deterrence, in terms of personal punishment, he would be suffering twice.

Further, with respect, while the trial judge purported to take into account factors such as de facto provocation and self-defence, the sentence of six years does not seem to reflect those factors. If these errors are not serious, then in my view the six years' sentence itself, in view of the tariffs, is apparently excessive. It can therefore by varied by the Supreme Court: see *Norris* v. *the State* [1979] P.N.G.L.R. 605 and 160 *Public Prosecutor* v. *Tardrew* [1986] P.N.G.L.R. 91. For the foregoing, I would allow the appeal and quash the sentence of six years. Instead I would impose a sentence of four years' imprisonment with hard labour.

By majority: appeal dismissed.