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IN THE COURT OF APPEAL OF NEW ZEALAND C.A.328/92

R#1953F
18/12

THE QUEEN

v

JERRY ANDREW NGAHERE PIRA

Coram: Casey J
Gault J
McKay J

Hearing: 9 December 1992

Counsel: J C Pike for Crown
R J Laybourn for Respondent

Judgment: 9 December 1992

JUDGMENT OF THE COURT DELIVERED BY GAULT J

The respondent was sentenced in the High Court at Hamilton on 11 September 1992 to concurrent sentences of five year's imprisonment for aggravated robbery, seven years seven months for sexual violation by rape and six years for sexual violation by unlawful sexual connection. The sentence to be served effectively was eight years taking account for the period of five months remand custody.

The Solicitor-General seeks leave to appeal against the sentences as inadequate and not reflecting the total criminality involved.

The circumstances of the offending were that on 27 November 1990, while an accomplice waited outside as a lookout, Pira and another man, wearing balaclavas and each armed with an iron bar, smashed their way into the home of the proprietors of a general store in suburban Hamilton. Pira was the leader and did all the talking. He pushed the male complainant in the chest and demanded repeatedly to know the whereabouts of the safe although told there was not one. The telephone connection was ripped from the wall.

The male complainant was taken to the bedroom where they located his wife who had earlier gone to bed but was hiding. Both intruders made the husband sit in the bedroom doorway where they used masking tape to bind his hands and feet. They also wrapped tape around his head and face allowing only a small gap for him to breathe. They then taped the wife's hands behind her back.

The husband was dragged into the hallway. Remarks were made to the effect that he had been talking to Social Welfare suggesting that there was some element of retribution involved. He was kicked and struck on the thigh with an iron bar.

The intruders then returned to the wife. Tape was wrapped around her head covering her eyes. A money bag was pushed into her mouth which was taped over. The bedroom was searched and some $5,000 in cash was found. They went back to the husband demanding to know whether there was more. They then dragged him into the toilet. He was struck on the face with a bar and punched. A tooth was chipped.

Pira went back to the bedroom where he ripped the wife's night clothes off. Then he and his associate whom he was instructing tied her right wrist and right ankle together and her left ankle to a set of drawers forcing her legs apart. Pira

digitally penetrated her vagina with violent movements then put his fingers against her face telling her to "smell that". She was then left while the two men further searched the house. Ornaments and clothing were thrown, furniture was tipped over. A camera valued at $1,600, compact discs and liquor were taken.

Pira returned and again digitally penetrated the wife, and invited his associate to have intercourse with a cynical reference to skin colour. He then left her to resume the search. He went back however and raped her during which she was bitten on the breast and he threatened to kill her. She suffered severe bruising to the breasts and thighs.

At an early stage of the police enquiry Pira and several other Black Power associates were interviewed. He denied involvement and refused to supply a blood sample. Eventually some 12 months later he agreed to permit a sample to be taken. DNA profiling demonstrated matching bands with samples of semen taken from the female complainant's night gown and a vaginal swab.

Pira subsequently pleaded guilty on arraignment to the three offences charged.

The victim impact reports describe the consequences of this terrorising raid on the two complainants. Both have been deeply affected. The impact upon their lives has been extensive. They have been left with fear and anger. The female complainant needed extensive counselling for post traumatic stress and their relationships and attitudes remain seriously disturbed.

The sentencing Judge referred to the aggravating features of the offending - premeditation, invasion of the privacy of a dwelling, violence, gross indecencies and the impact on the victims. To those may be added the callous arrogance which

clearly accompanied perpetration of the crimes. The Judge referred to Pira's background of gang involvement and repeated offending over many years including convictions on two occasions for robbery, on 14 occasions for burglary, for assault and numerous other offences of dishonesty. After noting the need to reflect in the sentence the total criminality of the offending, and referring to the decision of this Court in ***R v Morris*** (1991) 7 CRNZ 26, he adopted a starting point for sentencing of imprisonment for nine years. After making an allowance for the guilty pleas and a period of five months in remand custody he arrived at the sentence of seven years seven months which he imposed for the most serious offence.

In support of the appeal Mr Pike for the Crown submitted that for the sexual violations alone, without considering the aggravated robbery, the appropriate sentence would be in the seven to nine year range and that the minimum sentence for the aggravated robbery without the sexual offending would be five years - that would indeed be a minimum. It was submitted that to reflect the total criminality a sentence of 11 years should be imposed. It was accepted that some allowance should be made for the guilty pleas but that this should reflect the inevitability of conviction in view of the DNA evidence.

On the other hand Mr Laybourn for the respondent submitted that the sentencing Judge expressly referred to the need to reflect in the sentence for the most serious offence the totality of offending and cannot be said to have arrived at a sentence inconsistent with similar cases and in particular ***R v Edwards*** CA310/86 judgment 26 May 1987.

On its face that is a similar case although the facts are not set out in great detail in the judgment. Edwards was one of two persons who entered premises in a Hamilton rural district occupied by the female complainant, a male person and his 12 year old son. The intruders were disguised and carried a shot gun. Money was

taken from the complainant's hand bag. She was subjected to a series of gross and brutal sexual assaults. The male occupant and the boy were tied up. The woman was taken to the bedroom, tied hand and foot, gagged, sexually assaulted and repeatedly raped by both men. She was also forced to have oral intercourse with one of them. A further sum of money was taken.

Edwards was convicted of sexual violation by rape, sexual violation by unlawful sexual connection and aggravated robbery. This Court said that the least sentence that could be imposed to meet the seriousness of the totality of offending was nine year's imprisonment. The judgment indicates that the matter was approached primarily as a case of sexual offending. There is no indication that there was, as in this case, a premeditated plan to carry out a robbery to obtain the cash takings of a business. An objective in ***Edwards*** seems to have been to obtain cannabis known to have been in the house.

Edwards was not referred to by the sentencing Judge in this case, but he does appear to have adopted a somewhat similar approach in that he referred to ***R v Morris*** which was a sexual violation case without the further offence of aggravated robbery. The starting point of nine years adopted by the Judge may have been suggested by ***Morris*** and the cases referred to in that judgment. However in this case, for the sexual violations alone, that sentence would be at the very low end of the range having regard to the degrading and offensive circumstances of the offending.

The sentencing principle requiring sentences for multiple offending to reflect the totality of the criminality involved is well established. This Court said in ***R v Bradley*** [1979] 2 NZLR 262, 263 and repeated in ***R v Strickland*** [1989] 3 NZLR 47, 50:

> Where the sentence is wrong in principle is in its apparent disregard or minimising of what is described in ***11 Halsbury's Laws of England*** (4th ed) para 495, as the general rule that consecutive sentences should not be such as to result in an aggregate term wholly out of proportion to the gravity of the offences, viewed as a whole. The authority cited in support in that work is a decision of the Court of Appeal in England, ***R v Bocskei*** (1970) 54 Cr App R 519. Numerous other cases in which the principle has been applied are collected by Mr D A Thomas in his book on ***Principles of Sentencing*** (2nd ed, 1979) pp 56-61. That author suggests (at pp 57-58) that a cumulative sentence may offend the totality principle if the aggregate sentence is substantially above the normal level of sentences for the most serious of the individual offences involved, or if its effect is to impose on the offender a crushing sentence not in keeping with his record and prospects. We would hesitate to attempt to refine the principle or to evolve rules of thumb for its application. For our purposes it is sufficient to say that undoubtedly it is crucial in arriving at a sentence for several offences, after considering them individually, to stand back and look in a broad way at the totality of the criminal behaviour. This stage is not mentioned in the reasons given by the learned Judge on sentencing here. The tenor of the reasons makes it at least doubtful whether he accepted its importance.

While purporting to reflect that principle, the Judge's sentencing remarks give no indication that he considered the several offences individually before standing back to look in a broad way to ensure that the aggregate term was not out of proportion to the gravity of the offences viewed as a whole. We cannot escape the conclusion that had he proceeded in this way a higher sentence would have resulted in this case. The impression given by the sentencing remarks is that the Judge may have inadvertently focussed on the appropriate level of sentencing only for the sexual offences.

In this case the criminality involved serious offending of different kinds. There was a premeditated aggravated robbery with the exacerbating features of planning, multiple offenders, violence and the element of retribution. There was also a violent and degrading sexual attack aggravated by the entry of a private dwelling at night by more than one intruder acting together, perhaps an element of

retribution, the use of weapons and repeated offending of a callous and degrading nature over a period.

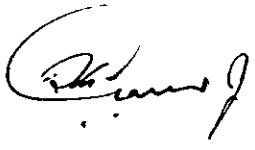
It is of course necessary to ensure that the features of culpability and aggravation are not punished more than once. Although from the viewpoint of the victims they would have impacted on them in relation to both types of offence. It is therefore necessary to stand back and look in a broad way at the total criminal behaviour.

In this case mere aggregation of the appropriate sentences for the offences separately, as we have already indicated, would result in too long a sentence.

However the gravity of the offending calls for a sentence clearly greater than that imposed. We think the correct starting point for what the Judge rightly described as "these horrific crimes" was imprisonment for 12 years.

The plea of guilty, although late, justifies some reduction as the complainants did not have to give evidence. It was of course necessary for them to prepare themselves to do so. Taking that into account and the period of five month's remand custody we consider the appropriate sentence for the most serious offence must be increased to ten years seven months.

Leave to appeal is granted. The appeal is allowed and the sentence for the offence of sexual violation by rape is increased accordingly.



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