CASES AND COMMENTS

THREE APPROACHES TO SENTENCING

Like most common law principles operating in Papua New Guinea, the *Criminal Code* is a "received law" introduced to regulate the behaviour of Papua New Guineans, and Papua New Guineans are frequently confused by the conflicts they encounter between the *Code* and their customary practices. Even more difficult for Papua New Guineans to understand is the general organisation, structure and administration of the criminal process. However, no matter how illogical, irrational or unjust it may seem in the eyes of most Papua New Guineans, the *Criminal Code* has always been enforced by the legal bureaucrats in their own style of court proceedings, implementing their philosophy of justice.

Unless and until Papua New Guinea enacts an indigenous criminal code, the principal means of lessening the harshness and foreigness of the present *Criminal Code's* impact will be through the sentencing process. When a person is convicted of an offence under the *Criminal Code* a judge frequently has considerable discretion in his sentencing. The options available include (1) terms of imprisonment, (2) fines, (3) a suspended sentence, or (4) probation. Recently three cases from the Highlands came before the Supreme Court in which Mr. Justice Wilson explored the theories of sentencing and their application to Papua New Guinea.

I. *A Review of the Cases*

In *Tsauname Kilapeo and Alouya Palina* both defendants pleaded guilty to a charge of wilful murder.[1] The motive behind the killing was traditional payback. Kilapeo believed that the deceased, having killed his sister, failed to pay the compensation required by custom. It was the custom of the tribe that a brother avenges his sister's death. Kilapeo then asked Palina to help him in the killing, which Palina reluctantly agreed to do. Both defendants hid beside the road and ambushed the deceased. Each shot an arrow into the deceased's back. They then chased the wounded man and pulled off their spears. Kilapeo then jabbed the deceased several times and then stood back and shot him three times. The defendants then ran

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1 (1973) Sup. Ct. No. 763.

off, Kilapeo feeling a sense of pride as he performed the clan duty.

The law proscribes wilful murder and says the commission of such a crime is punishable with the severest of methods. However the judge after considering the special circumstances of the case sentenced Kilapeo and Palina to nine and six years respectively. Judge Wilson imposed these sentences on the grounds that:

> (a) both men were primitive with little western influence;
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> (b) neither had any previous convictions;
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> (c) the motive behind the killing provided a partial cultural justification;
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> (d) neither man fully appreciated the law so their culpability was relatively low;
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> (e) the men had been in custody for eight and a half months and seven months respectively.

The Judge then ventured to explore general theories of sentencing. He seems to have held general deterrence and rehabilation theories as the most appropriate in a case like this:

> The solution in a case such as this is to be found in the application of accepted principles of sentencing . . . with emphasis being placed upon the notions of general deterrence (associated with a desire to eliminate cult and traditional payback killings) and rehabilitation.

The judge also advocated the theory of reformation in this case, citing:

> ... the deprivation of liberty for a long or short time, depending upon the severity of the punishment, where there is a desire to help men to leave prison better men than when they entered the prison.

In *Iki Lika* the defendant pleaded guilty to the crime of conspiracy with two others to defeat the course of justice.[2]

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2 (1973) Sup. Ct. No. 764.

Two men were charged with riotous behaviour resulting from a tribal clash. The defendant acting as a witness brought two innocent men before the court stating that they were the two men charged with the offence. The reasons behind conspiracy in this case were, first, two innocent men, namely Pagan and Anjoa, had their council tax paid by the village committee in return for replacing the two charged men; second, all the villagers agreed that the two men charged with riotous behaviour had just come out of gaol therefore the villagers sympathised with them and did not want them to go back to goal again. Under section 132 of the *Criminal Code*, a person convicted of conspiracy can receive seven years imprisonment with hard labour. The judge sentenced Iki to gaol for six calendar months with hard labour on the grounds that:

(a) Iki had little European contact;

(b) aged 40 he had three wives and eight children;

(c) he was a councillor and traditional leader;

(d) his act has some customary merits;

(e) he had no prior convictions;

(f) he had been in custody for almost four months.

The judge held that reformation and general deterrence theories of punishment were most applicable in a case like this as well as to the whole of Papua New Guinea and quoted Hagorth:

> ... [a trend]... now is to look forward to the likely impact of a sentence on the future behaviour of the offender, and, in some instances on potential offenders in the community at large.

In *Jim Kaupa*[3] the defendant was found guilty upon his own confession of dangerous driving causing death. The defendant, while under the influence of liquor, drove in such a way that his vehicle ran off the road crashing into a tree and killing one man. From the evidence it was found that the defendant had been drinking for some time with some men, one of whom was the deceased. It was also found that a company director, a councillor and an important man in the society, Kamp, were also drinking with him and that the defendant was compelled to drive the vehicle by Kamp. The deceased and others took a ride with the defendant knowing full well that he was intoxicated. After

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3 (1973) Sup. Ct. No. 765.

considering the special circumstances surrounding the case the judge released the defendant upon his entering his own recognizance for the sum of $150. Grounds for the release were that:

(a) the defendant had spent four months in gaol waiting for trial;

(b) his act was influenced by another man;

(c) he was penitent and unlikely to offend again;

(d) he had an excellent record and desired to re-establish himself as a good citizen;

(e) he promised to pay compensation for the dead man;

(f) the bond put the defendant to some inconvenience and his freedom was restricted in the interest of of the public.

While the judge again raised general deterrence, rehabilitation and reformation, theories as the most suitable principles of sentencing, he also advocated another approach to sentencing -- reparation:

> ... reparation is when the wrong-doer and those close to him should pay compensation in goods or money for the crime committed.

The judge said that reparation is both an old and a new aim of punishment.

II. *The Rehabilitation Theory of Punishment*

The judge seems to favour rehabilitation in all three cases. This theory involves the education of the defendant while in the corrective institution so that when he leaves, he will be of some use to himself and to the community at large.

The success of this theory depends on a number of factors--the length of the sentence, the organisation and administration of corrective institutions, and the trade taught. Although language is a problem in achieving rehabilitation, it should not prevent culprits from learning a trade, since one can learn by mere practical imitation of an instructor.

In *Kilapeo's* case the defendants sentenced to nine and six years respectively should be taught some trade to enable them to work in urban areas, as the length of time in goal and away from their society may make it difficult for them to return to the village. In cases such as *Iki's* case where the defendant

was sentenced to short term imprisonment, educational, agricultural or technical courses would provide the best means of accomplishing rehabilitation.

The implementation of the theory of rehabilitation can go far to soften the impact of the *Criminal Code* on Papua New Guineans. Persons will see that the code is not designed, introduced and enforced solely to punish people but also to cause them to change their behaviour in a desired direction. Papua New Guineans will then see the law not as a social weapon biting culprits, but rather as helping those who fail to live up to the required standard.

III. *The Reformation Theory of Punishment*

Under this theory, it has been reasoned that a person is punished with the hope that when he leaves the prison he is a better man than when he entered and will not commit crimes again. The reformation theory of punishment is of little practical effect in so far as most Papua New Guinean culprits are concerned, because when a Papua New Guinean man is sentenced to gaol he sees his sentence as punishment under a foreign law rather than as a just punishment for what he actually did. He is torn between two systems of law. In *Kilapeo's* case kinship and tribal obligations led the defendant to avenge his sister's death, yet the criminal code punishes regardless of the social reasons behind the killing.

In order to implement the reformation theory effectively, there is a need for compulsory basic legal education in the corrective institutions. Another alternative is a nation-wide basic legal education programme. Law students are most eager to help in this regard.

Thus, in the sentence imposed in the *Kilapeo* case, I think with respect that the theory is not applicable as the defendant is not subject to any punishment or pressure to reform his personality. The judge released the defendant on probation. However, with regard to reformation theory, he said:

> ... you have already, even prior to me sentencing you, learnt your lesson.

Does the judge suggest that the defendant by showing either the desire to remedy the wrong or by taking constructive steps to reform himself falls under the theory of reformation? This is questionable because, like most criminals, the defendant took constructive steps to remedy the crime. That *per se* does not indicate that he reformed himself. I think reformation theory is only effective if the culprit reforms his

character. The peripheral desire to remedy the act instantly is irrelevant. The judge went on to say that the defendant would be in some inconvenience to pay compensation and that was sufficient to compel him to reform. But surely his *wantoks* would help him so I don't think he would suffer greatly or be subject to much pressure. In fact he would feel that he commited the crime at the expense of his *wantoks*. I therefore see *Kilapeo's* case as a dangerous precedent to support the reformation theory of sentencing.

IV. *General Deterrence Theory of Punishment*

According to this theory, the general public will see that the law does not allow people to act in the way in which the defendant did, and will be deterred from committing the same crime.

This general deterrence theory of punishment is having little effect, especially in most Highlands tribes. People still kill for payback in spite of the fact that the courts have been dealing harshly with similar cases. However as time passes and when people learn that payback killing is harshly treated, then the general deterrence theory may begin to take effect.

The sentence in *Kilapeo's* case is rather unfortunate, in so far as this theory of punishment is concerned, because people can now say that even if you kill driving under the influence of liquor, you can't go to gaol. All you've got to do is pay compensation. People won't be deterred as compensation can be paid easily depending on the sum. *Wantoks* will surely help in this regard.

Only basic legal education at the grass-roots level can make the implementation of this theory effective, by making people aware of the functions of the law and the courts, the implications of the law and its general procedures and administration. Unless people are aware and fully understand the law and its implications, they will never appreciate the results of its enforcement.

V. *Conclusion*

Papua New Guinea judges, lawyers and magistrates of today are shaping what the law will be tomorrow. Most of their contentions, comments and decisions will form our common law. Therefore they should in that capacity be considerate and take into the law the traditional virtues of our customs. It is a pity that most of our legal administrators are Europeans who are trained to administer English and Australian common law. It is also unfortunate that Papua New Guinean lawyers

are being trained along the same lines. However, knowing what the common law is in other countries will surely help them in moulding the type of law best suited for Papua New Guinean social conditions. The making of Papua New Guinean common law will not come overnight, and judges' decisions today are the most effective steps in this direction. The *Criminal Code* as adopted from Queensland is surely the most rigid form of any introduced law, therefore the judges through the sentencing process should usually try to make it less harsh and foreign. The best theories of sentencing should be promoted.

I agree with Mr Justice Wilson that rehabilitation and general deterrence, which are also traditional theories of punishment in most Papua New Guinean societies, are appropriate theories of punishment for our new nation. However, with great respect, I fail to see the theory of reformation as applicable to Papua New Guinea as suggested by Mr Justice Wilson. Papua New Guineans are too frightened of the law, its courts and administrators to ever really reform their behaviour even after being to gaol. Further, they do not understand the received law, and since their customary practices clash with the law, their concept of justice is quite different. Caught between two legal systems, they do not know in which direction to act in order to be safe within both their customary law and the introduced law.

A man cannot reform himself unless he knows the pros and cons of the law. In this respect I believe that there is an urgent need for basic legal education at a national level.

- Hubert Auki