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THE QUEEN V EMERE GABUA

Moresby 16-3-60

MANN C.J.

REASONS

In this case the accused pleaded guilty to a charge of breaking entering and stealing from within a shop. He committed the offence three times within the course of a few days. On one occasion he stole a tin of twenty-five cigarettes, on another it was a tin of cigarettes and two bottles of soft drink and on another occasion he stole the sum of £8 out of the till. He came before the Court upon Indictment charging him with the offence committed on the opcasion when he stole the tin of twenty-five cigarettes. This charge stood alone in order to avoid multiplicity. The Accused however asked that the other two offences be taken into account, and desired to plead guilty to all three.

The English practice under which there evolved a means of taking other offences into account without laying additional charges or recording actual convictions in respect of each separate offence, is outlined in three articles appearing in the Criminal Law Review for 1959 appearing at pages, 18, 108 and 197. I have on one or two other occasions followed a similar practice.

With his usual clarity Mr.McLoughlin analyzed the different practices which appear to be open to the Court and in this case, having heard his argument I was able to adopt the submissions which he had made and indicate that in the present case the course which he proposed, that is of filing "ex officio" indictments

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to cover the two additional offences appeared to me to be the most appropriate.

Accordingly upon the accused pleading guilty to each of the offences separately charged, he was sentenced to terms of imprisonment of three months, four months and six months to be served concurrently.

In order to facilitate future reference to the practice adopted, I indicated that I would subsequently deliver a summary of the courses which I think are available.

FIRST: the course of filing "ex Officio" indictments to cover the additional charges. This course is only appropriate in relation to charges the details of which are sufficiently known to enable them to be set out precisely in a formal charge. Where applicable it has the advantage that the accused leaves the Court not only without any further charges hanging over his head, but with the added assurance that since a conviction is recorded in respect of each offence, he cannot again be charged with the same offence. This course also leaves the Court with a wider discretion as to the ultimate punishment imposed, since each offence may be dealt with separately on its merits on the question of punishment, and sentences may be made concurrent or cumulative as the Court may think fit.

Authority for taking this course is derived from Section 561 of the Criminal Code (Queensland) as adopted in Papua, the first part of which enables a Crown Law Officer to file an indictment in all cases, and a Crown Prosecutor to file an indictment within the limits of the particular jurisdiction in which he is authorized to represent the Crown. "Crown Law Officer" for the purposes of the Criminal Code is the subject of express definition in Section 1 but under Section 1 of the Criminal Code Ordinance 1902 of Papua the analagous officer to be found in the Territory is the Secretary for Law.

Similarly in the second paragraph of Section 561 of the Criminal Code the "Officer" referred to may be taken by analogy to be, in Papua, a Prosecutor who has been appointed under the provisions of Section 1 of the Criminal Procedure Ordinance 1909.

The Indictment having been signed by the appropriate officer, may be brought before the Court in a variety of ways. The first; Section 695, an enabling provision, makes the procedure appropriate to private prosecutions applicable to indictments under the hand of the Crown Law Officer. This is appropriate to cases where no committal proceedings have been taken and the accused is not in custody. The procedure, is specified in Section 686. It would not be appropriate in the present case. Section 562 (again an enabling provision) provides an alternative under which the Court may issue a warrant if the accused is not in custody and does not appear. The third method of bringing an indictment before the Court arises I think by necessary implication. When a person is already present in Court and is being dealt with for another offence and an indictment is presented on an additional charge, the accused may be dealt with without the necessity for issuing warrants or placing him in any additional custody. It is for the Court to deal with him, and subject to any remand which may appear to be needed, the Court may proceed forthwith to charge the accused and take his plea, which of course is what he is asking the Court to do.

The practice indicated above is supported by R. v Sutton 1938 St.R.Qd. 285 which shows that the right to present an indictment under Section 561 is quite general, applying to all offences within the jurisdiction and is not to be limited by reference to Section 560 or to anything which may have occurred upon the preliminary proceedings before the Magistrate. Section 560

provides the authority required to indict a person on the offence for which he was committed for trial, but Section 561 applies to all persons whether committed for trial or not and regardless of the offence if any for which he may have been committed for trial. See also R. v Durnin (1945) Q.W.N. 35.

The SECOND procedure which may be adopted in these cases is the normal English practice previously referred to. The main disadvantages are that since other offences are merely "taken into account" at the request of the ~~request of~~ the accused, no actual convictions are recorded in relation to those offences, so that consequential orders for cancellation of licences, disqualification, re-vesting of property etc. cannot be pronounced. The accused if he is charged again cannot raise the plea of "autre-fois convict" and therefore the order pronounced may not be binding on the Crown. The procedure cannot always be adopted as appropriate as a matter of course, for the Court cannot in any event impose more than the maximum penalty for the actual offence charged, and in some cases offences to be taken into account might well call for greater penalties. This does not mean that the maximum penalty may always be imposed, for I would think that principle goes further than this and requires that the accused be punished only for the offences in respect of which he is formally charged and convicted and that it would be contrary to principle for the penalty to be increased as a punishment for committing other offences. It has been clearly laid down in the Court of Criminal Appeal that the prisoner must not be punished for other things apart from the offence charged. For example he cannot be punished for having a bad criminal record. I think that on principle another offence which is admitted can only be taken into account in this way by the Court imposing the penalty appropriate

to the crime charged, without giving the accused the benefit of reductions which might be expected in the case of a person who had not committed the other offences, or had not been engaged in a course of conduct such as produced the series of additional offences which the Court is asked to take into account. Thus it sometimes appears that the offences taken into account do not have a very marked effect upon the sentences being assessed. The effect is somewhat similar to that of prior convictions of the accused when taken into account.

In many cases the offence charged, without any mitigating circumstances, would not attract anything like the maximum sentence. In such cases, in considering whether or not it should accede to the prisoner's request that the other offences be taken into account, the Court must consider whether, if it were to do so, such a course would merely result in the prisoner being given a kind of free pardon which he might not deserve.

This second course has the advantage of flexibility, for although the Crown is not strictly bound as on a plea of "autre fois convict" nevertheless the practice having been established the Crown has abided by it, and even if a Court felt itself bound to record a conviction upon subsequent proceedings being brought it by no means follows that the Court would be bound to impose a further penalty. Thus the element of flexibility arises, for when a whole series of like offences can only be referred to in a fairly generalized description they can still be taken into account in this way, but if the Crown subsequently discovers that some offences of a serious nature or a much larger number of offences were in fact committed, going beyond the fair terms of the description, the Crown would be free to bring fresh proceedings and the Court could

proceed to record such convictions and impose such sentences as might appear to be just in the light of the more accurate information . It is thus in the interests of the accused to make the fullest and fairest disclosure possible if he wants to derive any advantage from having other offences taken into account in this way. It is also necessary, as experience has shown in England, that a list of these offences, identified as accurately as possible, should be presented to the Court and indorsed on the Court records.(See Marquis v R. 33 C.A.R.33).

The THIRD case in which other offences may be taken into account arises in the circumstances discussed in R. v Robertson & Anor. 25 C.A.R.208. Where a whole series of separate offences are committed over a period of time and all of these offences form a course of conduct the proper course is to charge the last of the offences committed and to give evidence upon the trial of the whole course of conduct which includes the earlier offences. The effect of this Course would be the same as in Course 2, except that the Crown having relied on the other cases as part of a course of conduct constituting part of the offence charged, and the whole matter having been placed before the Court and taken into account as to both conviction and sentence, the prisoner is in no fear of subsequent prosecution.