635

IN THE SUPREME COURT
OF THE TERRITORY OF
PAPUA AND NEW GUINEA

CORAM: PRENTICE, J.

Friday,

20th August, 1971.

ELAVERA MAFOA v. J.M. BLACKWELL	68/1971 (P)
ERI KARIKU v. D.J. MITCHELL & ORS.	69/1971 (P)
EARA DRAGO v. JOHN MARU & ANOR.	70/1971 (P)
LEVI KAIPU v. P.R. GIDDINGS	71/1971 (P)
JOB ORA v. P.R. GIDDINGS & ANOR.	72/1971 (P)
KILA IGA v. ILA GENO	73/1971 (P)
VABURI JACK v. D.J. MITCHELL & ANOR.	74/1971 (P)
MAIU OVISA v. A.W. STUCKEY & ORS.	75/1971 (P)
SASAI IVORO v. A.J. HODDER & ANOR.	76/1971 (P)
ORI EVARA v. A.W. STUCKEY	77/1971 (P)
JOHN MALARE v. P.E. CANTRELL & ORS.	78/1971 (P)

1971

Aug 12, 13 and 20.

PORT MORESBY

Prentice, J.

The appeals of eleven accused who were dealt with by the Children's Court in Port Moresby have been heard by me. As a matter of what was euphemistically described as "convenience" the appeals were heard in one hearing, at which evidence has been called from Twain Pongi a welfare officer, Mrs. Thelma Price, and some parents of some of the boys.

Three main grounds of appeal were laid: -

(1) that pleas of guilty were wrongly entered;

(2) that the sentences were manifestly excessive;

(3) that in the case of Job and Kila, declarations of uncontrollability and incorrigibility were made without jurisdiction.

A further ground, though never formally sought to be added, was argued, namely; that no allocutus was administered, and that therefore (following Raine, J.'s decision in Moses Aikaba v. Ephraim Tami (1)) the sentences were a nullity.

I have found enormous difficulty in dealing with the arguments, because of the way the appeals have been prepared and presented. Since taking evidence on 12th and 13th August, I have been engaged almost constantly in chambers for two and a half days,

(1) Unreported judgment No. 626 of 31st May 1971.

trying to verify the record and the convictions.

Each appeal file contains a number of separate files relating to separate charges. Usually the record in relation to several boys is bound together. The copy records presented to this Court, are in the form of a photostat reproduction of many pages of the Magistrate's writing - much of which is barely legible, and then only after long tedious sorting, scrutiny and study. In his report the Magistrate has made reference to some other appeals, without actually incorporating the relevant matter, leaving it to this Court to research to find out what his reasoning was. The files dealing with multiple accused are put up in such order that it is well-nigh impossible to sort out to which offences the scrawled notes apply. Some files on inspection, contained the wrong papers. The notice of appeal in Maiu's case in its second paragraph refers to a conviction on 6th May, 1971 and sentence 5th May, 1971 therefor! Inaccurate information has been given in Court and it has been necessary for me to dredge backwards and forwards through the files, making continual cross references from court notes to the notices of appeal, and the tortuous Children's Court records, - even to come to a clear picture of what convictions were recorded in each case. The preparation and presentation of the appeals has been quite unsatisfactory.

Clearly, where a number of accused have been incharged together, a sufficient number of copies of the information should be made to allow a separate file to be set up for each individual. There should be a separate action sheet, and notes kept separately, so as to constitute one file for each accused.

The judges of this Court, when their decisions become the subject of appeal, are required to spend many hours reading their own writing, so as to create a transcript for the benefit of the appellant. It would be regarded as insulting, and of course, quite inadequate, to present to the Full Court photostat copies of the contents of judicial note books. I consider the procedures followed, at least in Port Moresby (I realise the exigencies under which Local Court Magistrates operate elsewhere, in the preparation of a copy record), are quite unsatisfactory; and derogatory from the dignity and efficiency of the Supreme Court. I turn to the grounds of appeal.

Pleas wrongly entered.

It is contended that no satisfactory evidence was received as to the age of the accused, and the Magistrate did not properly satisfy himself as to those possibly under fourteen years of age, in accordance with Sec. 29's requirement as to knowledge of wrong-doing. I have considered the Magistrate's reasons for conviction and sentence and his report. I have considered the circumstances under which the various offences were committed, as appears from the statements of facts and the questioning of the accused prior to entry of plea. I find that the Magistrate did in fact satisfy himself, not only as to his jurisdiction under the Child Welfare Ordinance, but also as to criminal capacity under Sec. 29 of the Code, in regard to all the accused who are possibly under fourteen years of age. Nothing is pointed to or appears from the actual records to suggest the Magistrate's recollection in drawing up his report was faulty. I am of the opinion that the pleas were correctly entered. I would dismiss the appeals on this ground.

Administration of "allocutus".

This ground was not raised in the notice of appeal and is not therefore the subject of the Magistrate's report. He does report that the written record does not purport to be a complete transcript. It is clear that the Magistrate went to great trouble over the matter of remands to determine what could or should be done with these offenders. I note that there being so many charges against most of the individuals, in these cases one would not expect the accused to have much to say. In the catena of cases, there is much internal evidence to suggest the allocutus was administered, though no special note is made to the effect that it was. I give some examples. Ori Evara discussed whether he would stay in his parents' village. It is noted Eri gave some talk, and on one matter said, "I have nothing to say." Eara made some comments. Levi entered a plea of not guilty and was acquitted on one charge, and the same day said, "I have nothing to say" to other charges. Job was formally charged with another boy, who addressed the Court, and he himself spoke disclaiming initiative. Kila spoke to the Court. Vaburi entered a plea of not guilty to one matter. A short statement by Sasai is noted. Ori is noted as giving two lots of talk as to what should be done with him. John Malare gave some talk in one matter, and on another said,

"I have nothing to say"; a co-accused (Maita) also spoke to the Court.

There being no indicia to the contrary in the records, I consider I should apply the presumption that the Magistrate correctly followed the necessary procedures including that of asking each accused on each count did he have anything to say in regard to sentence. I would disallow all the appeals on this ground. I would suggest that all magistrates should always note on their paper whether the accused was invited to address on sentence.

The "declarations" of Job and Kila.

No procedure was followed under Sec. 46 of the Child Welfare Ordinance, so that the Magistrate's powers must lie under Sec. 36(2). This section does not give power to "declare" a child incorrigible or uncontrollable; but to make an order as if he had been so declared. To the extent that the Magistrate has purported to make such an order, he has I consider, acted with power. I am in some doubt whether in going further and "making a declaration", the Magistrate has worked "a substantial miscarriage of justice" as is required by Sec. 236(2) of the District Courts Ordinance so as to give this Court jurisdiction on appeal. However, I do so find, and am prepared to allow these two appeals on this ground and to substitute a slightly different order. I am satisfied that the material before the Magistrate, viz (in Kila's case) the previous convictions in 1969, 1970 and 1971 and Kila's refusal to stay at his village when sent there by his father; and (in Job's case) the statement of the thirteen year old accused that he liked to drink, in association with the circumstances of his offences; would justify an additional order under Sec. 36(2)(a).

The sentences were manifestly excessive.

I do not propose to review the law found by my brother Raine in Passingan v. Beaton (2). I agree with his judgment.

A number of points were argued under this head of appeal. It was urged that the heavy cumulative sentences worked a change of policy, and that this should not have been effected without consultation within the Bench of Magistrates, at least. I may say there is no indication that this did not happen. It may be however

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(2) Unreported judgment of 4th June, 1971.

that this Magistrate is the first to have to deal with a new problem - that juvenile delinquency in such proportions has only risen to prominence in the last twelve months - and is not yet a problem in most other parts of Papua New Guinea. In view of the considerations outlined in appeals numbered 124 and 125 (of 1970 (P)) which were said to be incorporated by the Magistrate into his report and reasons in these cases; I come to the conclusion that it was appropriate and not manifestly excessive to impose up to two cumulative sentences in some of the cases.

I have endeavoured to bear in mind the matters properly urged for the appellants, viz: -

(a) that the maximum sentence should be reserved for the worst cases in the particular category;

(b) that an accused must not be punished for a trivial offence "on his previous record", though no doubt his record may be looked at on the question of deterrence and reformation;

(c) that regard in the prisoners' favour must be paid to admissions of guilt being made by them.

I have also had regard to what appears to be the fact that these offences were committed in bursts of group behaviour. Most of the cases I do not consider to be in the worst of their category. The totality of some of the cumulative sentences I regard as crushing and manifestly excessive. I have had regard to the sentences which have been imposed on adults and on expatriates for thefts of quite large sums of money, by way of comparison.

Elavera Mafoa

Being of opinion his sentence is manifestly excessive, I allow the appeal. I substitute a sentence of one month's imprisonment with hard labour on each charge, to be served concurrently. I recommend that the Director arrange for his repatriation to Isapeape in consultation with his parents and Soi Kaba his uncle of Porebada.

Eri Kariku

Being of the opinion that the totality of the cumulative sentences is manifestly excessive, I allow the appeal. I confirm the sentences of six months on each of the charges. I vary the Magistrate's order by directing

that the sentence of six months for breaking, entering and stealing from Chapman's Pharmacy be cumulative upon that of six months for breaking, entering and stealing at Tutt Bryants, to the intent that he serve in all twelve months imprisonment. The other sentences to be concurrent. In addition I order that the child on release be committed to the care of Ere Ere his uncle on condition that he be repatriated to and remain at the village in Orikolo where his true father and mother are living.

Para Drago

Being of opinion the sentences are manifestly excessive, I allow the appeal. I substitute three months with hard labour in each case, the second sentence to be cumulative on the first - the other two concurrent - to the intent that he serve six months with hard labour in all. In addition I order that on release he be committed to the care of his mother Gou Paru on condition that the child be taken to and remain at Madabari village in Kairuku Sub-district. I recommend the balance of his sentence be served at Boys Town, Wewak.

Levi Kaipu

Being satisfied the sentences are manifestly excessive, I allow the appeal. I substitute imprisonment with hard labour for three months on each charge, they to be cumulative. In addition I order that on his release he be committed to custody of his uncle Baimuru on condition he be returned to and remain at Kwikila.

Job Ora

Being satisfied the sentences are manifestly excessive, I allow the appeal. I substitute sentences of three months imprisonment with hard labour on each count, and order that the sentence for breaking, entering Kaugere School be cumulative on that of breaking, entering and stealing from Port Moresby Golf Club, and that the other two sentences be concurrent, to the intent that he should serve six months imprisonment with hard labour in all. I vary the balance of the Magistrate's order by omitting the words "be declared uncontrollable and ..." but confirm it in other respects.

Kila Iga

I allow the appeal. I confirm the conviction and sentence of imprisonment. I vary the Magistrate's further order by deleting the words "declared incorrigible

and ..." but confirm it in other respects.

Vaburi Jack

Being satisfied the sentences are manifestly excessive, I allow the appeal. I confirm the two sentences of 31st March, 1971. I substitute for the two sentences of 7th April, 1971 sentences of imprisonment with hard labour for three months, to be served concurrently with that of the second sentence imposed on 31st March, 1971, to the intent that twelve months be served in all. In addition I order that on release he be committed to the care of Kilagi his father's brother, on condition that he go to and remain at Wiga village in Rigo Sub-district.

Maiu Ovisa

Being satisfied the sentences are manifestly excessive, I allow the appeal. I substitute sentences of four months imprisonment with hard labour for each of the four break and enter offences, the subject of the notice of appeal, and two months imprisonment with hard labour for the illegal use of the car. I direct that the sentence of four months for breaking and entering Waigani Cash and Carry and the two months for illegally using a car be cumulative on that of four months for breaking and entering the Town Shop - the other two sentences to be concurrent - to the intent that ten months in hard labour in all be served. In addition I order that on release he be committed to the custody of his mother's brother Kapa Alogi on condition that he go to and remain at Hula.

Sasai Ivoro

Being satisfied the sentences are manifestly excessive, I allow the appeal. For the five sentences each of six months imposed on 6th May, 1971 I substitute sentences of three months imprisonment with hard labour in each case. I direct that the second and third of these be made cumulative upon the first, and that the fourth and fifth be concurrent - to the intent that he serve nine months in hard labour in all. I recommend that the Director consider continuing wardship and placing prisoner on release, with his maternal uncle Avara Weka at Hamu Hamu village on condition that the prisoner go to and remain at that village.

Ori Evara

Being satisfied the sentence is manifestly excessive, I allow the appeal. I substitute a sentence of

imprisonment with hard labour two months. In addition I order that on release he be committed to the custody of his uncle Meaoa Morea, on condition that he go to and remain at Lelefiru village.

John Malare

Being satisfied the sentences are manifestly excessive, I allow the appeal. I substitute sentences of four months imprisonment with hard labour on each charge, the second and third to be cumulative on the first, to the intent that twelve months in all be served. In addition I order that on release he be committed to the custody of his uncle Kariko Laki, on condition he return to and remain at Mei village in Kerema district.

The above orders of committal are made in accordance with and to the extent allowed by the Child Welfare Ordinance.

I warn each of the accused that should be come before the Courts again he can expect to be charged perhaps before the Supreme Court and that any similar offence could bring a penalty of much more than six months imprisonment.

Solicitor for the Appellants : W.A. Lalor, Public Solicitor

Solicitor for the Respondents: P.J. Clay, Crown Solicitor