SC764

IN THE SUPREME COURT
OF PAPUA NEW GUINEA

CORAM: WILSON A.J.
Monday,
17th September, 1973.

REG. v. IKI LIDA

On Sentence

1973
Sep 17
WABAG
Wilson AJ

Iki Lida of Sapundas, has been found guilty on his own plea of guilty to the crime of conspiracy. In March 1973 in New Guinea (near Wapenamanda) he conspired with one Yuna Piaua and one Kamen Piaua to defeat the course of justice upon the prosecution of the said Yuna Piaua and Kamen Piaua and others on a charge that on the 22nd February 1973 at Liamas near Wapenamanda they did each and severally behave in a riotous manner.

The circumstances of the commission of this crime were somewhat unusual. On the 12th and 13th February 1973 at a place called Liamas near Wapenamanda there had been a tribal fight between two tribes, one called the Pindagins and the other called the Yanuns. As a result of that fight one man was killed, many others were injured, and much property damage was caused, including the burning of about 30 houses. Following the cessation of hostilities the District Court at Wapenamanda heard several charges against defendants alleged to have "behaved in a riotous manner". Iki Lida was one of the prosecution witnesses.

It appears that two of the suspects Yuna Piaua and Kamen Piaua had recently come out of gaol following previous convictions for "behaving in a riotous manner". They were apparently reluctant to face the prospect of a further period in gaol. A conspiracy thereupon took place as a result of which Pagau Kongap and Anjoa Piaua, in return for having their Council tax paid for them by their village committee, Tsambai Piaua, and because they felt sorry for the two men who had previously been to gaol, agreed to follow Tsambai's direction that they appear in the District Court in substitution for Yuna and Kamen.

The method by which the deception of the Court was to be achieved was that Pagau Kongap and Anjoa Piaua should step forward when the names "Yuna Piaua" and "Kamen Piaua" respectively were called. Iki Lida was to give evidence to the court that the two men who stepped forward were in fact the men whose names had been called,

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well-knowing that they were not such men. As a result of Iki Lida's deception of the Court, he expected the purpose of the arrangement to be achieved. He misused the Court. He deliberately told a lie to the Court. If many people did what he did, the whole legal system and court system would break down. If Courts are deceived by the sort of selfish and despicable trick he was involved in, then innocent men will be punished, the law will be ridiculed because it will no longer be seen to be doing justice, the rights of individuals, far from being protected, will be suppressed, and there will be a breakdown in law and order.

I am told that this is probably the first prosecution of this type and for this crime in New Guinea. There is certainly no precedent in this district, at least so far as is known to the witness who gave evidence before me. That witness is Mr. Malcolm Lamont McKellar, who is an anthropologist and who is an expert on the Enga people who inhabit this part of New Guinea. He is currently undertaking anthropological research into some aspects of the life of the Enga people, and he was of considerable help to me in trying to understand a people of whom I have had practically no previous experience. I would be happier if the judge who was called upon to fix a penalty appropriate for the defendant, Iki Lida, and in respect of his crime was a New Guinean rather than I. I would have valued the assistance of indigenous assessors if such had been available to me. I have had to content myself in carrying out the unenviable task of sentencing this man in circumstances where I have little or no personal experience of local custom to call on, in circumstances where the British system of law and justice is being superimposed upon a traditional local customary legal system, in circumstances where one type of social control (i.e. the socialisation of primitive New Guinea) is being gradually replaced by another (i.e. the Rule of Law), in circumstances where there is to an extent a conflict between the two systems, in circumstances where, motivated by a desire to serve the best interests of Papua New Guinea, there has been a blending of the brown of an old and unsophisticated native legal system with the white of a long established and proven British legal system to form the fawn of the present legal system in Papua New Guinea today. The very least that I can do is to do what I have done in

this case, viz. (1) to examine the depositions and the antecedent report; (2) to reflect upon the purpose and intent of the relevant section of the Criminal Code (Sec. 132) which makes conduct there characterised as conspiracy a crime; (3) to inform myself by some reading as to what are the relevant customs in this area (see Sec. 7 of the Native Customs (Recognition) Ordinance); (4) to look to counsel for assistance (assistance in this case which was readily and realistically given by two dedicated advocates in the persons of Mr. L. Roberts-Smith for the Crown and Mr. W. Andrew for the Defence; (5) to receive evidence from an expert in anthropology.

It might be said of this case that, as a member of the Supreme Court, I am called upon "to blaze a trail". Regardless of whether that is an appropriate phrase to describe what I am now about to do, I consider that it is not inappropriate for me to examine, albeit briefly, at least the more important principles of sentencing with a view to seeing how they apply to the case at Bar. It is only by means of the application of such principles that a judge can hope to rationalise what he is doing when sentencing. A sentence imposed (or, for that matter, a law passed seeking to regulate human behaviour) without some degree of rationalisation of principles is one imposed (or enacted) by instinct, by dogmatism, or by guess-work, none of which notions have a place in any legal system, least of all in an emerging society where views may be polarised and may vary to the extremes.

The approach to punishment which not only is supported by authority, but which also is finding more and more favour with theorists, involves the maintenance of a balance between the need for public protection and the protection of the rights and liberties of the individual. It has been variously described as "the balance theory" or "the humanitarian theory" of punishment.

Punishment should be proportionate to the offence and the culpability or blameworthiness of the offender.

Prof. J. Hogarth in Sentencing as a Human Process, (1971 Ed.) at p. 13 said: "The problem is one of balancing concern for community protection with individual liberty."

Prof. N. Morris and Mr. M.D. Buckle in Res Judicata (1952-1954) at p. 231 stated:

> "The vital purpose of the criminal law is the protection of the community, always limiting and conditioning its punishments in the light of two other factors, namely, a

determination by its actions never to deny the fundamental humanity of even the most depraved criminal and, secondly, a critical appraisal of the limits of our understanding of the springs of human conduct and our ability to predict its course .... and (thirdly) the limitation imposed by the community's expectations of penal sanctions."

"Punishments are justified when

(1) they are economically preventive of offences;

(2) those individuals punished have voluntarily acted in ways which contravene a known system of offences and penalties;

(3) they are punished as other similar offenders are punished;

(4) their penalties serve to equalise welfare and distress with regard to offenders and non-offenders; and

(5) their penalties do not produce situations of gross inequality of distress" : see Punishment - The Supposed Justifications by Ted Honderich.

This approach, whilst not ignoring the more traditional theories of punishment, i.e. retribution, general deterrence, individual deterrence, incapacitation, and rehabilitation, involves an attempt to rationalise them, or put them into proper perspective.

"The retribution theory" (sometimes called "the punishment theory" or "the punitive theory") is looked upon with less and less favour because, it is said, retribution is barbarous and likely to harden anti-social attitudes. This theory has some relevance to the case of serious premeditated crimes: see R. v. Wilson (1) and R. v. Llewellyn-Jones (2).

Although this theory may receive some support from those who say payback killers should be punished in the context of vengeance, revenge, expiation, or "an eye for an eye", to adopt such a theory without reservation is to encourage the notion of payback and to punish on many occasions out of all proportion to the culpability or blameworthiness of the offender. If retribution is the sole criterion, then there is little point in taking into account the individual characteristics of the offender such as his age, previous offences,

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(1) (1965) 1 Q.B. 402
(2) (1967) 51 Cr. App. R. 204

mental condition, contact with the Administration, extent of tribal influence, etc.

Deterrence as a concept has some, but limited, application in a case like this. So little is known about deterrence than can one safely say that people will be deterred by the knowledge or experience of a particular type of sentence? Such a notion may well have application to that relatively small proportion of criminals whose crimes are carefully planned and premeditated free from the influence of passion, provocation, or overwhelming tribal custom. It may well have application to road traffic offences and regulatory offences where the law punishes those who fail to take care.

Prof. R. Cross in The English Sentencing System, p. 105, said:

> "The idea is that the offender shall be given such an unpleasant time that through fear of a repetition of the punishment, he will never repeat his conduct."

With reference to the matter of general, as opposed to individual, deterrence, where is the justice in the sentence for one man being greater than his predecessors simply on account of the fact that, unless a harsh penalty is imposed, others (unknown, un-named and possibly non-existent) may be minded to commit such a crime? There are dangers in adopting this approach too when there is little or no likelihood of there being any publication of the results of court cases amongst potential offenders.

A sentence designed to keep an offender "out of circulation" ("the incapacitation theory") thereby protecting the public during his sentence is one which is rarely called for and one which judges dislike imposing. Whilst it is depressing to think that prison has no reformative or corrective effect for some offenders and no other forms of treatment can cure criminality until more is known about the causes of crime and the treatment of criminals, there will be occasions, such as in the case of the dangerous offender, where an incapacitative sentence must, in the public interest, be imposed.

"The rehabilitative theory" of punishment is finding more and more favour within criminal justice systems. As Prof. J. Hogarth has stated (at p. 4, supra):

> "There has been a noticeable shift in emphasis in the rationale for sentencing from 'looking backward' to the offence for purposes of punishment, to 'looking

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."

If there is blind adherence to the notion of rehabilitation and reformation, a number of unfortunate consequences can ensue. For instance, the public can lose confidence if criminals seem to be pampered and treated too softly with little or no thought apparently being given to a sufficiently long prison sentence or deprivation of liberty as a punishment for the wickedness of the crime. Furthermore, offenders who, under other systems, would undergo their punishment and then be free may now have to submit to long periods of treatment which may be out of all proportion to what the crime deserved.

The burden of reconciling the competing goals of the criminal justice system as they apply to the present case falls on me as the sentencing judge. I have regard to such notions as retribution, but, in so far as I do, I intend that the punishment shall not be out of proportion to the offence and the culpability of the offender. There is no room for a general deterrent punishment here, although I do not overlook the need to attempt to deter this defendant from repeating this conduct. This defendant does not need to be incapacitated. He does not require a period in prison in order to effect his rehabilitation or reformation, but such may well be a side-effect of the order that I propose to make.

With reference to the defendant's culpability or blameworthiness therefore, I accept that he knew that he was doing wrong and that he ought to have resisted the pressure on him to be selfish. On the other hand, I also accept that, with his tribal background, there was a pressure upon him which was greater than for his wholly-civilised or European counterpart and, bearing in mind the standards of his tribe, he probably did not realise the extent of his own culpability. His moral fault was not great. He could not be expected to have the same degree of self control as if he came from a sophisticated urban environment. On this account I propose substantially to reduce the sentence that I would otherwise have imposed. Custom is relevant to the issue of sentencing here.

Because sentencing is but one aspect of the criminal justice system at work, for this sentence to be effective it must be likely to be accepted by the people. It must reflect the changing customs and values of an emerging community. I intend that the sentence I am about to impose is no more

than fits the circumstances of the crime.

I take into account the fact that the traditional system of social control in New Guinea differs from the system of social control in Australia. Social relationships based on kinship and materialism have had for this dependant a greater importance than questions of universal moral duty. I accept that this defendant has had to think in terms of two radically difference systems. I accept that he may have found it difficult to understand a legal system based on moral obligations and impartial justice emphasising the nature of the wrong rather than the sliding scale system according to the relationships involved. I must therefore be flexible and understanding. I must be sensitive of the fact that a British system of justice is being adapted to the conditions and modes of life of indigenous people. This dependant as an indigenous person should not be punished without the fullest consideration being given to all his circumstances, including his native background, his mode of life and the customs applicable to him.

I take into account the fact that Iki Lida is 40 years old. He has three wives and eight children. His background is comparatively primitive.

He is a respected member of his own community in that he is a councillor and a traditional leader. He was to some extent subject to local customary influences when he committed this otherwise serious crime. I accept that the two men who went to gaol are still alive and that this crime did not involve any threat to human life. I take into account that the defendant has been in custody for almost four months. He has no prior convictions.

I cannot overlook the fact that the defendant sought to avert a social disadvantage for himself and that his crime involved two men, albeit willingly, going to gaol for a crime of which they were innocent. Iki Lida has received some Administration influence. He preferred to put his own re-election as a councillor before obedience to a law of which he had some awareness. His conduct had a significant effect upon the decision of the court which gave effect to the conspiracy.

The sentence of the court is that Iki Lida be imprisoned with hard labour for six calendar months.

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

Solicitor for the Accused: G.R. Keenan, Acting Public Solicitor