SC789

IN THE SUPREME COURT
OF PAPUA NEW GUINEA

CORAM: PRENTICE, J.
Friday,
31st May, 1974.

Appeals 242-249 of 1973 (N.G.)

BUAKI SINGERE v. FRANCIS MUGUGAI

1974
May 24 and 31
PORT MORESBY
Prentice J.

On 23rd November, 1973 the appellant was convicted by Mr. Pritchard, S.M. in the District Court in Lae after pleas of guilty had been entered, to seven charges under s. 41 Police Offences (New Guinea) Ordinance (now Act) 1925-1966, of "passing valueless cheques". Three other charges of a similar character were then stood over generally - the accused having indicated clearly that these charges would be defended. The accused was convicted later the same day, following a trial, by a Mr. Lancaster, R.M., on a charge of "unlawfully striking".

A sentence of six months imprisonment was imposed in respect of each cheque charge, one being made cumulative. A sentence of six months imprisonment was imposed on the unlawful strike charge and made cumulative on the cheque charges. A total of eighteen months imprisonment was thus ordered.

Appeals are brought against all eight convictions, and by consent are being heard together. At the hearing I allowed amendments to the grounds of appeal - there being no submissions by the Crown against my doing so.

In regard to the cheque offences, it is said that: -

(1) A denial of natural justice has occurred in that the appellant sought and was refused an adjournment of the hearing;

(2) The pleas of guilty entered in the first place by the Court, should have been vacated once the appellant's statements on allocutus had been heard;

(3) The seven cheque offences were heard together without the consent of the accused being given, which is such an irregularity as to amount to a substantial injustice;

(4) The sentences are excessive, being in particular grounded wrongly on a view as to the relevance of prior recorded convictions.

In regard to the unlawful strike charge it is said that: -

(a) The refusal of an adjournment amounted to a denial of natural justice;

(b) The sentence was grounded on extraneous matters and was excessive and should not have been made cumulative upon the sentences for cheque offences.

I shall deal with the cheque matters first.

Failure to grant adjournment.

It appears that the cheque charges relate to incidents between 1st and 15th May, 1973 and on 13th September, 1973. Three of those matters were before the Court for the first time on 10th October, 1973. After pleas of guilty were noted, these three matters were adjourned to 23rd October, 1973, as were the three in which the "not guilty" pleas were entered (and which have not yet been heard). This was done at the request of the police prosecutor as further charges were said to be pending. On that date a further four fresh charges were presented, and pleas of guilty therein entered - making up the seven convictions appealed from.

The learned magistrate questioned the appellant, apparently as to all seven cheque charges (one bears in mind that four of them were presented for the first time against the accused that morning), asking whether he was ready to proceed. A dialogue between bench and the accused then ensued: -

"D. No, I have applied for legal aid to assist my case to the Public Solicitor.

S.M. Have you seen a representative of the Public Solicitors Office?

D. Yes. I saw Mr. Tony Cavit. He posted my application to the Public Solicitor. I saw him on Sunday at the Huon Gulf Motel.

S.M. Did you tell him this case was on today?

D. Yes, he said you can ask the Magistrate for an adjournment of your case until your legal adviser is present.

S.M. Are there any other reasons?

D. I have been charged with too many charges and I want legal advice.

S.M. Does this application relate to the charge of striking the Constable from Kabwum?

D. Yes.

S.M. Inspector, what's the position in relation to the case from Kabwum?

Pros. I have all my witnesses here and if an adjournment is granted it will cost the Government money to bring them in again.

S.M. How many witnesses have you and where do they come from?

Pros. 3, the Kiap from Kabwum and the policeman and a villager from Wasu.

S.M. What about the 3 charges relating to cheques which Mr. Singere pleaded not guilty before Mr. Lancaster?

Pros. We are ready to proceed.

S.M. Then I take it the Police are opposing any adjournment.

Pros. That's right your worship.

S.M. Were the police, either you or the investigating officer given any advice that Mr. Singere would be applying for an adjournment, either by him or the Public Solicitor?

Pros. No, Sir.

S.M. Mr. Singere - No application has been made by the Public Solicitor either to this Court or to the Police for an adjournment. If you saw a representative of the Public Solicitor he could have at least notified the police or the Court. You have pleaded guilty to 7 charges of passing valueless cheques before me and

> I am not going to grant an adjournment. I have arranged for another magistrate to be here today in relation to the Kabwum case and I refuse that adjournment. You may renew the application before him. I propose to deal with the seven charges before me to which you have pleaded guilty and will decide the question of the adjournment of the other three when I have disposed of these seven. (See each charge sheet - District Court Cases 4153, 4152, 4151.)"

As is evident from the affidavit of Mr. Cavit before me, the appellant had indeed sought legal advice from that officer, had been informed that an application for legal aid required consideration, and been advised to apply to the magistrate for an adjournment and to inform him that legal aid was being sought. It appears from a letter dated 11th October, 1973 from Messrs. Reynolds Rissen & Company of Lae to the Public Solicitor, that he had earlier sought other professional assistance and had then indicated (10th or 11th October) that it was not his intention to plead guilty to the cheque charges before Mr. Pritchard. It was also stated in that letter (a matter on which the learned magistrate has not had the opportunity to comment) that Mr. Rissen of Lae then informed Mr. Pritchard (of the appellant's intention not to plead guilty) and that the magistrate indicated that he would certainly permit Mr. Singere to alter his plea if he so desired. Assuming this telephone conversation to have been accurately recalled by Mr. Rissen, one imagines that its content must have escaped Mr. Pritchard's recollection, when he was questioning the police as to whether they had been advised of any intention to seek an adjournment. It seems a pity that Mr. Cavit did not himself formally advise the Court and the police when he took instructions on 20th October, that adjournment would be sought. The present difficulties would surely then have been avoided.

Every Court has power to control its own proceedings unless that power is restricted by some competent authority. It has power to adjourn proceedings and to refuse to adjourn (the recent decisions are collected in the judgment of the Full Court of Victoria in R. v. Cox (1)). I take the position to be that "How the power is to be exercised is a matter in the judicial discretion of the (court), a discretion which

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(1) (1960) V.R. 665 at p. 667

will only be disturbed on serious grounds. The judge in exercising his discretion is not confined to regarding the interests of the accused. He is entitled to regard the interests of justice which may well be a very different matter." It was suggested in R. v. Cox (2) (supra) that relevant matters might include the opportunities had of engaging counsel, the state of the court list, the inconvenience and expense which would or might be caused to others in granting the adjournment, and whether the court was of the opinion that the application was really made for the reason advanced.

A differently constituted Full Court of Victoria in 1966, following the decision in R. v. Cox (3) (supra), laid down that - "... whether an adjournment will be granted or not is a matter which rests in the discretion of the trial judge, and that if he exercises his discretion it will not be interfered with by an appellate court unless it is made plain to that court that the learned judge has in some way gone wrong in the exercise of his discretion, or has not really exercised his discretion at all." (R. v. Callaghan (4)).

In deciding that no adjournment should be granted in respect of the seven cheque charges actually proceeded with, it appears to me that the learned magistrate has exercised his discretion upon a wrong basis. Firstly, he has apparently misdirected himself in assuming that pleas of guilty were to be sustained in all seven matters. Secondly, he does not appear to have given any weight to the factor that four of the charges were presented for the first time that morning, and the accused indicated in saying "There are too many charges" that he had not had proper opportunity to consider these fresh charges. Thirdly, there does not seem to have been any reason to think that a reasonable adjournment of the cheque charges would appreciably have embarrassed or inconvenienced the prosecution (indeed there is no suggestion that the necessary witnesses were present to press the charges in the face of pleas of not guilty). Lastly, the magistrate appears not to have given due weight to the matters raised in the allocutus, which should have, in association with the earlier complaint as to the multiplicity of charges (including as they did four fresh ones), and the request for legal advice, alerted him to the situation that unless an adjournment were granted, a situ-

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(2) (1960) V.R. 665 at p. 667
(3) (1960) V.R. 665 at p. 667
(4) (1966) V.R. 17 at p. 18

ation inconsistent with the requirement that justice should appear to have been done would be likely to ensue.

As the learned magistrate has thus in my opinion both based his decision upon irrelevant matters (assumption of intent to plead guilty, wrongly assumed convenience of the court) and failed to consider relevant matters (notification of prior intent to plead not guilty, presentation of additional charges, and necessity that justice visibly appear); it is corrigible. In all the circumstances I feel that the failure to allow an adjournment to investigate and obtain legal advice, in this case amounts to the working of a substantial miscarriage of justice within the meaning of s. 226 of the District Courts Act. I would allow the appeals on this ground.

Plea of guilty wrongly entered.

In Jensen v. McGrath (5) Mann C.J. indicated the desirability, once an accused had raised in mitigation matter which would amount to a defence, of pointing out to him the actual elements of an offence under s. 41, so that should he wish, he may plead not guilty (while being careful not to force him into the witness box against his will). Should an accused give an explanation inconsistent with his plea on questions of fact, then they should normally be regarded as being in issue (Boas-Tito v. Konzib (6); Nawe Kebe v. Yagima (7); Laeka Ivarabou v. Nanau (8); Pukari Flabu v. Hambakon Sma (9)). Though I would wish to leave open a possible exception of the case of an accused of notorious dishonesty and criminal record making a perhaps rambling, incoherent and inherently incredible statement - I should think such a case an extremely rare possibility. And this is not such a one. Mr. Singere's statements and public behaviour may have given rise to an impatience with his utterances, and a disinclination to accept his words; but if that were so, it would be a dangerous basis on which to refuse to follow the accepted practice of allowing his plea to be changed. In fact no conviction for dishonesty was disclosed against him. I would therefore allow the appeals on this ground also.

Hearing of charges together.

A decision of the U. K. Divisional Court, Brangwynne v. Evans (10), was cited to me as authority for the proposition

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(5) (1965-66) P. & N.G.L.R. 91
(6) (1965-66) P. & N.G.L.R. 279
(7) (1967-68) P. & N.G.L.R. 420
(8) (1967-68) P. & N.G.L.R.12
(9) (1966) 9 F.L.R. 180
(10) (1962) 1 All E.R. 446

that the hearing of two or more informations against a defendant at the one time, without his consent, is an irregularity - invalidating conviction. In that case three charges of stealing to which pleas of not guilty were entered, were heard together over the objection of accused's counsel. The state of affairs, the nature and multiplicity of charges, the urgency of situations, the court conditions, of this country, are such, that I take leave to doubt whether the proposition that nobody should be called on to answer to more than one charge at a time in a magistrate's court should be considered suitable and capable of application to the circumstances of New Guinea. However, had there been pleas of not guilty entered in the case of these cheque offences being heard as they were, in the city of Lae; I should have thought it highly desirable that they be heard separately, unless the defendant or his counsel agreed to the contrary.

But the plain answer to this head of appeal lies I think in the fact that the record appears to show that pleas of guilty were taken and recorded seriatim to a number of charges; matters going to sentence in all of them being taken once only - a procedure which appears to me unexceptionable. I would therefore have disallowed the appeals on this ground.

Excessive sentence.

As I am of the opinion that the seven cheque charges should be referred for a rehearing, I should express some opinion on the argument advanced as to excessive sentence which may be considered of guidance to the magistrate or magistrates on a rehearing, if convictions ensue.

I am of the opinion that the court took into account extraneous matter in paying any other than small regard to the defendant's prior convictions. One post-dated these alleged offences. The other three related to drunken and - or disorderly behaviour and did not relate to dishonesty. Having regard to the maximum punishment of twelve months prescribed by the section, and to the possible needs of personal and public deterrent of a multiple offender, sentences of six months imprisonment, one of many being made cumulative, do not appear to me to be so unreasonable as to call for this Court's interference. But I say this, without in any way intending to bind or insure any court which might deal with these and other charges against the accused. Any rehearings or new hearings

that might result in conviction would call for sentence upon the material (possibly different) then placed before that court, of course.

I turn now to the appeal against conviction for unlawfully striking.

Refusal of adjournment.

Mr. Pritchard initially on 23rd October, 1973, indicated that an adjournment would be refused in this matter - saying that he had arranged for another magistrate than himself to be present especially to hear the matter, that three witnesses had been brought from Kabwum and were present and that no advice had been received of intention to apply for an adjournment. (After plea of not guilty was taken on 10th October, the matter had apparently been set down for hearing for 23rd October, of which Mr. Singere was aware.) The magistrate then referred the matter into Mr. Lancaster's court. This magistrate then canvassed again the question of plea - but there is no indication that at this stage the accused renewed his application for an adjournment, though he had been told by Mr. Pritchard that he might so renew his application before Mr. Lancaster. In my opinion there is nothing on the record that indicates a substantial prejudice to the accused in relation to this charge. Indeed, had an application for an adjournment been renewed, I think the magistrate might well in the proper exercise of his discretion and after full consideration of all relevant matters, have refused it. He could, I consider, have had regard to the comparatively simple nature of the offence alleged (one of illegally striking - involving a question principally of fact); the ability and standing of the accused as a representative of the people from which might be inferred a capacity beyond that of simple villagers to represent himself in a court of law; and the questions of expense and convenience to the court; the practicality of attendance of witnesses on another occasion from a fairly remote locality; and the interests of justice generally. I would therefore disallow the appeal on this ground.

Excessive sentence.

Mr. Cavit submitted that the learned magistrate misled himself, in regarding the fact that the assault was made on a policeman as one calling for severity of punishment. He states that inasmuch as the policeman was not on duty, his

standing as a policeman was irrelevant to a consideration of the gravity of the offence and the severity of punishment required. I am unable to agree with this submission. The fact that the person assaulted was a policeman may constitute a very serious element of a charge of assault, in a community which may have no structure of village peace-keeping machinery, and may rely heavily on the character, status and presence of a solitary policeman, kiap, committee man or councillor, as a visible reminder of "government". That the assault was a public one, in a remote post, upon a constable of police, was I consider, an element the magistrate could properly take into account.

Mr. Cavit has also taken exception to the magistrate's reference to the witnessing of the incident by many people, and that the accused waited till a number of persons were present. I am satisfied that the matters adverted to could have been of legitimate inference from the evidence. And I do not consider the magistrate to have misdirected himself by having recourse to these considerations, or by attempting to address some corrective and monitory remarks to the accused.

However, I find that the maximum imprisonment under s. 30(a) Police Offences (New Guinea) Act 1925-1966 has been imposed in this case. I note that the accused has been convicted of a somewhat similar offence of unlawfully laying hold, under this section in April, 1973. In that case a fine of ten dollars was imposed. It does seem to me that a jump from a fine of ten dollars to a sentence of six months imprisonment indicates an excessive punishment for this offence. I have no doubt that if Mr. Singere were to offend in this way again, the maximum of perhaps a fine and imprisonment might well be called for. That the punishment for this separate distinct offence, at another period of time, should have been made cumulative upon that ordered the same day in regard to the cheque matters, would not I think have been so out of proportion as to have called for the interference of this Court.

On my view as to the adequacy of punishment, I consider this appeal should be allowed on the ground of severity alone.

I should like to comment on what appears to be a growing practice - that of entering an appeal on minimal grounds, and after the reasons for judgment of the magistrate

have been submitted to the Supreme Court, applying to the Court, as late as at the hearing, for the addition of further grounds, some of which prove to be the main grounds ultimately relied on. I consider the full grounds of appeal should normally be presented and made clear to the magistrate before his report is called for. If this sequence cannot always be followed (and I note that in this case some of the appeals initially were prepared in the Corrective Institution), it may be necessary to refer a matter back to the magistrate for report ~~before entering~~ upon the hearing of an appeal.

In appeal 249/73 (N.G.) - the charge of unlawfully strike, I allow the appeal. In substitution for the sentence of six months imprisonment with hard labour made cumulative upon others, I substitute sentence of imprisonment with hard labour for four months. I note that the appellant has served this amount of imprisonment and shall not be returned to gaol on this offence.

In each of the appeals 242, 243, 244, 245, 246, 247 and 248 of 1973 (N.G.) - I allow the appeal, quash the conviction, and remit the charges for a rehearing before the District Court in Lae.

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

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