Kaine, J.
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IN THE SUPREME COURT
OF PAPUA NEW GUINEA

CORAM: Prentice, ACJ.
Thursday,
24th April, 1975.

SEBULON WAT v. PETER KARI

Appeal 91 of 1974 (N.G.)

JUDGMENT

1974
21, 22 Nov.
1975
24 Apr.
PORT MORESBY
Prentice, ACJ.

Amendment of Grounds of Appeal

At the outset of the hearing of this appeal it was sought to substitute amended grounds of appeal. Counsel for the respondent opposed the addition of grounds (I) and (J) and consented to the substitution of the other grounds insofar as the Court might have power to allow such substitution. He contended that the Court's only power in respect of such an application derives from s.238 of the District Courts Act. Mr. Griffin for the appellant contended on the contrary that the Court must have inherent jurisdiction to amend Notices of Appeal to allow of justice being done; and that in any event all proceedings in the Court can be amended under the Supreme Court Rules. And further, that inasmuch as the original grounds contained a ground patently defective viz. the allegation that "the decision was wrong in law" - this fact alone would allow of all the amendments sought.

I do not consider that the mere inclusion of a patently defective ground of appeal would of itself allow the subsequent addition of any ground whatsoever. But I am of the opinion that the Court has inherent jurisdiction to ensure that its own procedural rules do not allow an injustice to be worked.

> "The power of each Court over its own process is unlimited; it is a power incident to all Courts, inferior as well as superior; were it not so, the

> Court would be obliged to sit still and see its own process abused for the purpose of injustice. The exercise of the power is certainly a matter for the most careful discretion;"
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> (Alderson, B. in Cocker v. Tempest) (1).

I have deprecated in the past the last minute substitution of new and lengthy points of appeal for those originally taken. This application does not appear to involve the unsatisfactory features of such a substitution. The Court Record as transmitted is not inadequate and there is no question of the respondent being taken by surprise. Considering as I do that the interests of justice require the addition of the grounds now proposed, I allow the substitution of the same as contained in the document handed up and initialled by me.

Introduction

Appeal is brought herein against a conviction in the District Court at Kavieng of an offence under s.15A Public Order Act No. 76 1970, viz. of having encouraged the commission of an offence, to wit, the stealing of copra, coconuts and copra bags. I propose to deal with the grounds of appeal in the order in which argument has been presented.

Ground B - The Information was bad for duplicity in view of the particulars given

Particulars were provided in the following form. - "The defendant encouraged one or more of the following to steal the said coconuts and copra and copra bags (names follow). The defendant encouraged the commission of the offence by his words and presence at a meeting at Kulinus on Sunday, 17th February, 1974 of those who subsequently stole the coconuts from Patio Plantation and further by his words and presence while the stealing was occurring at Patio Plantation on 18th and 19th February, 1974". Further details were given as to proceedings against and conviction of those alleged to have been the thieves.

(1) 151 E.R. 865

Reliance was placed on s.37 of the District Courts Act which states that "an information shall be for one matter only". It is said that a duplicity appears in the Particulars in the phrase "one or more". That the prosecution should have been required to elect whether the appellant encouraged one or encouraged all jointly. Johnson v. Miller (2) is cited in support. That was a case in which the High Court held that the prosecution should identify one of a number of facts relied on where each could have amounted to the commission of the same offence upon which the charge was based.

Matters involving argument as to duplicity are notoriously difficult of decision. As Lord Widgery C.J. pointed out in Jemmison v. Priddle (3) there is a substantial area in between the various landmarks on the subject where the Court must retain a discretion. In that case his Lordship enunciated that "it is legitimate to charge in a single charge one activity even though that activity may involve more than one act". Though it might be argued that the encouragement of each particular person (encouraged) may be taken to be a separate offence; one asks whether insofar as all such as were encouraged were "encouraged" at the same time - all the individual encouragements taken, form components of a single activity. One imagines that if it had been sought to prosecute separately in respect of each person said to have been "encouraged", a defence under s.16 of the Criminal Code would have been availed of.

The offence is that of encouraging the commission of an offence. It does not stipulate "an encouragement of other persons". I think it is correct that the one continuing act of encouragement was being urged, there was one transaction, one activity, and the fact that such encouragement could or did issue in the commission of one or many offences by one or more individuals, does not make for duplicity in the charge.

Even if the matter be viewed as one where two offences (the encouragement of an individual - the

(2) 59 C.L.R. 467
(3) (1972) 1 Q.B. 489 at 495

encouragement of a number of individuals) have been joined in effect by particulars in the one information this would be a defect in substance or form which should not require the magistrate to fail to deal with the matter on its merits. (See Hedberg v. Woodhall) (4). This charge was fully and lengthily canvassed. The occasion of the alleged encouragement was particularised with sufficient detail as to location, time and people present, as to allow the defence to prepare to meet the charge. And it appears to me that no such prejudice could have resulted from a failure by the magistrate to require the prosecutor to elect (I am of the opinion that he was not so required) as to amount to a substantial miscarriage of justice within the meaning of s.236(2) of the District Courts Act, and I would dismiss the appeal on this ground.

Ground C - That the magistrate erred in permitting the information and particulars to be amended during the course of the prosecution case

During the course of the prosecution case leave was sought and granted for the substitution of the words "between 17th and 19th" for the date 17th, and for the addition of the words "coconuts and copra bags" after the word "copra". It is urged that the Court's sole power of amendment lies in ss. 40 and 41 of the District Courts Act. A "variance" is required to justify an amendment there being no general power of amendment. This was not a variance but a substitution of a new offence it is said. And further, by the addition of the words "between the 17th and 19th" a further duplicity was introduced.

In my opinion a variance had been exposed between the information and the evidence and was developing at the time application was made to amend the information. It was proper to amend so as to allege a cognate offence. As was pointed out by Mann, C.J. in Thomson v. Lee (5) the proper course upon a variance appearing is to amend.

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(4) 15 C.L.R. 531 at 535
(5) 1935 V.L.R. 360 at 362

"It is not part of the duty of the Bench to regard the matter as a sporting contest; it must use its powers in the proper way to uphold the law;"

The form "between date x and date y" has been regarded as an appropriate way of charging an offence. It is true that care must be taken that distinct and separate offences are not thereby sought to be lumped together. (Siwi Kurondo v. Kevan Wylde (6) Kelly J); but this does not appear to have been such an attempt. Mr. Griffin further contended under this head of appeal that once the amendment had been made the accused should have been re-arraigned. I am unable to appreciate that s.134 of the District Courts Act relied on for this submission, requires such a procedure. The substance of the information had been put to the accused as required. His plea of not guilty (or cause to show) had been entered. It could not be thought that he would have done other than adhere to this plea to the amended charge. He was treated as doing so. The learned magistrate offered to grant an adjournment if the accused thought the amendment required it, and to recall the first witness for further cross-examination, if required. I do not consider any substantial miscarriage of justice or indeed any prejudice to the accused resulted. I dismiss this ground of appeal.

Ground D - Incorrect Admission of Evidence

The submissions under this heading related to the admission of a letter written on 17th June, 1974 to one Abel Ges. This letter related to the accused's concern apparently about some other land problem and gave practical advice to the recipient as to how attention could be got and land handed over quicker. At page 88 of the deposition the learned magistrate sets out his understanding of the effect of the letter which I agree with; and sets out his reasons for admitting the letter. It is clear that it was not admitted as an admission in relation to this alleged offence or as evidence of the fact of encouragement. In my opinion

(6) Unreported Judgment 720

it was admissible as evidence of the appellant's state of mind shortly before the material date (and it is clear that the Court applied its mind to the possibility of a change of attitude thereafter). It thus can be considered as going to the accused's credit on the question of whether his attitude was one of legal co-operation. And indeed, to his state of mind when considered in relation to a claim of right. Further the magistrate's consideration of the letter comes at the end of the judgment in respect of the accused's evidence, the use he made of the letter is not such in my mind (even if he should have rejected its admission) as to have amounted to a substantial miscarriage of justice. From an analysis of his reasoning and his rejection of Wat as a witness of truth, it appears to me that he would have inevitably come to the same conclusion without the letter being before him; and in this sense too, no substantial miscarriage of justice is revealed. (Compare Reg. v. Kelleher) (7).

Ground E - That part of the trial was held in a building not a Court building

Apparently the Supreme Court arrived on circuit during the conduct of his trial, and it was arranged without objection of the appellant's then counsel, that the hearing should continue in the civic hall during such time as the Courthouse was being used by the Supreme Court. I think it is not necessary to say more than that I agree with the formulation of the District Court's bench note in this matter. Clearly s.25(2)A of the District Courts Act must be read to allow for a variety of possibilities and as meaning " ... there is no (available) courthouse within a convenient distance". Publicity was given here, the parties consented to move, the hearing was continued in a gazetted locality but in a different building. The case is to be distinguished from the appeal of Rumints Woie & Ors. (8) - no miscarriage of justice could have occurred in this instance.

Ground G - That insufficient time was given to obtain substitute counsel

The matter was first brought before the Court on 18th March, 1974. At defendant's request it was then

(7) (1974) N.S.W.L.R. 517
(8) Unreported Judgment 728

stood over for one month to enable the appellant both to pursue his studies and seek legal advice.

The hearing commenced on 2nd July, 1974 when the appellant was represented by Mr. Griffin. The case continued on 3rd, 4th and 5th July at which point counsel was forced to withdraw and apply for adjournment of the case to a set date. The application was opposed as it was said, there had been three adjournments at the defence' request and there was difficulty and expense with witnesses. An adjournment was allowed until the 9th. On that day it was announced that the appellant had been unable to obtain substitute counsel, but had decided to conduct his own defence. No application for further adjournment was made, and the case proceeded.

I am unable to see that any breach of the Human Rights Act s.16(3) has occurred - the magistrate's decision seems to me to have been properly taken and a reasonable one. There appears to have been no unfairness or prejudice to the accused and no miscarriage of justice on this ground.

Ground I - That the trial miscarried because the first witness was charged with perjury during the course of this trial

Ground J - Denial of natural justice in that the magistrate did not debar himself from hearing the matter after this charge of perjury was presented

Under these grounds it is sought to assert a denial of natural justice and such a miscarriage of procedure as calls for a ruling of mis-trial. Undoubtedly this was a most difficult trial to conduct. It is apparent that the subject matter was one that must have generated tension, a number of unusual things happened. One witness was dealt with during the course of the trial for alleged perjury; there were a number of witnesses who were declared hostile; and the accused himself was during the trial bound over to meet an allegation that he had been suborning Crown witnesses in some way during the trial.

I do not find myself persuaded that the magistrate did other than meet the surprising turns in appropriate and fair ways. Once it was alleged that interference was thought to have been caused to witnesses - clearly some action was called for. The proprieties and the security of the proceedings had to be looked to. No evidence was called on this issue and the matter was I think dealt with sensibly by both sides and if I may say so, with respect, by the Court. I cannot see how the charge of perjury brought against one witness could operate to intimidate other witnesses into themselves swearing falsely. The magistrate himself did not become involved. He did not initiate the charge of perjury and it was dealt with by another magistrate. The speed with which this subsidiary matter was handled was certainly most unusual but I do not think that prejudice or unfairness to the accused has resulted. I certainly cannot see that any denial of natural justice has occurred.

Ground A - That the verdict was against the evidence and weight of the evidence

The manner in which an appellate court should approach such a question has been canvassed on a number of occasions by the High Court of Australia since 1953 when Paterson v. Paterson (9) was decided. The judgments in Whitely Muir & Zwanenberg Ltd. v. Kerr (10) and Da Costa v. Cockburn Salvage & Trading Pty Limited (11) are in point; as also are those in Edwards v. Noble (12). Barwick, C.J. in the last-mentioned case explained the test for the appellate court in the words -

> "In any appeal against a finding of fact, whether or not by way of re-hearing, ... the appellate court ought not to reverse a finding of fact unless it is convinced that it is wrong." (at page 304)

And Menzies, J. (at 308) stated -

> "special weight ought to be given to the judgment appealed from if anything turned

(9) 89 C.L.R. 212
(10) 39 A.L.J.R. 505
(11) 124 C.L.R. 192
(12) 125 C.L.R. 296

> upon the credibility of witnesses or any other matters as to which the judge hearing the case would have an advantage over the court of appeal;"

This was a case conducted patiently over a period of many days. For the first three, the accused was represented by Mr. Griffin, but thereafter he acted for himself. The magistrate must have had uncommon opportunities for observing his, the appellant's, demeanour and credibility. I find it difficult to imagine a case in which more could turn on the actual assessment of witnesses in Court - than this. I would find it almost impossible, certainly impertinently improbable, that a Court should set aside the magistrate's findings as to credibility and hence fact, in this case. I decline to do so.

Ground G - Misdirection of a claim of right

It is contended hereunder that it appeared from the evidence that the appellant in doing what he did was asserting an honest claim of right with respect to property - that the offence with which he was charged was "an offence relating to property"; and that therefore the operation of s.22 of the Code would call for his acquittal.

The learned magistrate chose to deal with this issue primarily from the aspect of whether the actual intruders whom the appellant was said to have "encouraged" in stealing were themselves making an honest claim of right in regard to property. He concluded that the evidence of the Crown negatived any such claim in them - that they knew full well Title lay in others - but were engaged in agitation to establish that the original purchase from their forebears had been for an inadequate price, and by publicity to interest the Government in assisting them to buy back the plantation concerned, as it had done apparently in the case of other plantations.

I do not think the magistrate has erred in ruling out a claim of right in the accused on this basis. The nature of the alleged offence precludes, I think, his asserting a claim of right at the next level

so to speak, when it has been ruled out at base. In addition, I think it correct to say that s.22 being exculpatory only, would not avail Wat even if a claim of right lay in those doing the stealing. They would not be criminally responsible but would still have committed an offence and he would have "encouraged an offence".

But it must not be lost sight of that the offence alleged here under the Public Order Act No. 76 of 1970 was that of encouraging the stealing of copra, coconuts and copra bags. If the accused did so encourage the villagers to do, as the magistrate found him to have done; in relation to nuts plainly grown in orderly lines on a European-established plantation in contra distinction to others growing haphazardly in native-garden style on adjoining native-owned land; I do not think any claim of right in relation to the land itself could in any event avail him. The accused was a fourth year law student, obviously aware of the state of the Title of this land, viz. a registered Title under the Torrens system. He had been working both with the Lands Department and the Public Solicitor in regard to this particular land. He of course had to admit his knowledge of the indefeasibility in law for practical purposes of such a Torrens system Title. I cannot conceive that he could be held to have entertained an honest claim of right in the legal sense to exist in the villagers or in himself in relation to the land itself - let alone the produce thereof and articles used to market the same.

I am also of the opinion that the offence with which the appellant is charged is not "an offence relating to property" within the meaning of s.22. He is not charged with an act done by him with respect to property, but that of "encouraging" the commission of a crime. That offence could have been made out even if those encouraged did in fact, nothing in relation to any property - if they failed to act. In this respect the Section of the Public Order Act goes further than s.7 of the Code. I appreciate that it is perhaps anomolous, that if charged under s.7(d) of the Code together with the principals in a stealing charge, such a claim of right could be raised by a counsellor or procurer.

Ground H - Severity

Finally it is submitted that the penalty of a gaol sentence was so severe as to call for correction. On this aspect I consider I may be in a better position to adjudicate than was the learned magistrate. On the hearing of this appeal I allowed further evidence to be called as to character only, upon this issue of severity. Evidence was heard from a number of senior academics and Government officers as to the appellant's character. It appears therefrom that as a student leader at the University of Papua New Guinea the appellant interested himself in providing leadership for the land aspirations of his people in an area of the New Ireland district. It appears that he was able to negotiate on their behalf through the Public Solicitor's Office in which as a law student he was apparently from time to time employed. Also that he came to the scene in the company of a Lands Department officer of the Chief Minister's Department at the Government's request. At that time Mr. Wait the Government Officer concerned (who had known him for only a few days) detected nothing in his views that indicated any illegality of intention. Mr. Roger Dickson, Research Officer with the Ministry of Development apparently had known him well for some years - found him active in the affairs of the United Church, of good character, trustworthy, and an active leader. Professor James his Faculty Dean, found him during 1974, courteous, exemplary in character and a very good student who was doing well in his studies. Mr. Fingleton a legal officer associated with Land Law Reform spoke of the help given to the Government by the appellant in the negotiations which ultimately resulted in the purchase of the disputed land by the Government and its occupation on licence by a number of village groups. He considered Wat's services contributed to the peaceful settlement of the dispute. The United Church Chaplain at the University of Papua New Guinea, Reverend Mr. Tokilala also spoke of his leadership and responsibility as a student counsellor. The Director of the Legal Training Institute also found him a person of integrity and trustworthiness, concerned with the legality of his actions.

Of course some of those whom the magistrate found Wat to have encouraged, were sentenced to serve gaol sentences. No doubt if Wat, whom he in fact found to have led (in reality) the enterprise, does not serve such a sentence; this case will be yet another to which the learned academic criminologists in southern universities will point to establish their thesis that the educated escape punishment, the unlettered suffer it. Perhaps Wat, if he is the responsible leader that so many witnesses have testified, would himself find unease at such a result.

However the Court must take each offender as an individual and seek to reform, punish, and deter in the way most appropriate and fair to his life style. It may be that gaol sentences are the only practicable punishment for some members of the community, having regard to the economy and values among which they live. Others should perhaps be dealt with differently. After considerable thought and some reserve, I have come to the conclusion that in the light of the whole of the evidence now before me the gaol sentence of ten weeks' imprisonment is such a severe punishment in the case of this young man as may allow of my correcting it. To insist on serving it might I consider, work a substantial miscarriage of justice within the meaning of s.236(2) of the District Courts Act. I dismiss all grounds of appeal except that relating to severity. I confirm the conviction. I vacate the sentence imposed by the magistrate and in lieu thereof I postpone passing sentence upon the appellant entering into a Bond in the amount of five hundred dollars to be of good behaviour for two years.

Solicitor for the Appellant: J.A. Griffin Esq.

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