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VISUA (ROBERT)

v.

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REGINAM

[COURT OF APPEAL, 1971 (Gould V.P., Marsack J.A., Spring J.A.), 1st, 15th December]

Criminal Jurisdiction

C *Criminal law—sentence—matter for court—position of Crown—practice—necessity for allocutus—Penal Code (No. 12 of 1963) (British Solomon Islands Protectorate) ss. 271, 301—Criminal Procedure Code (No. 10 of 1961) (British Solomon Islands Protectorate) s.263.*

Criminal law—practice and procedure—misdemeanour—necessity for allocutus—effect of omission— Penal Code (No. 12 of 1963) (British Solomon Islands Protectorate) ss. 271, 301—Criminal Procedure Code (No. 10 of 1961) (British Solomon Islands Protectorate) s.263.

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The matter of sentence is entirely one for the court though the Crown must put before the court all circumstances and facts within its knowledge relative to the question. It is therefore a departure from correct practice for counsel for the Crown to intimate that the Crown took a serious view of the offences of which the accused had been convicted.

E The common law requirements as to allocutus in the case of felonies are applied to all offences by section 263 of the Criminal Procedure Code of the British Solomon Islands Protectorate, but it is provided that the omission to put the question to an accused person shall have no effect on the validity of the proceedings.

Cases referred to :

F *R. v. Donovan* (1928) 21 Cr. App. R. 20.

R. v. Ling [1960] Crim. L.R. 434.

R. v. Ferenc Gombos (1964) 49 Cr. App. R. 59; [1965] 1 All E.R. 229.

Appeal against a sentence imposed by the High Court of the Western Pacific at Honiara.

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K. C. Ramrakha for the appellant.

R. Davies for the respondent.

15th December 1971

H Judgment of the Court (read by Gould V.P.) :

The Appellant was convicted before the Chief Justice in the High Court at Honiara on two counts of false pretences and one of conversion. To these he had pleaded guilty and he asked that no less than thirteen further offences of conversion and false pretences be taken into account

All of the offences contained elements of fraud and in passing sentence the learned Chief Justice said that the offender was an incorrigible cheat who played on the credulity of his simpler brothers. He had served since 1964 four sentences of twelve months imprisonment for similar offences. He has now appealed to this Court against the sentence of three years imprisonment passed upon him by the learned Chief Justice.

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At the outset his counsel very fairly stated that he could not present any argument that this sentence was either manifestly excessive or erred in principle. He did however urge the Court to reconsider the sentence as if it were a Court of first instance. His basis for this submssion was that two irregularities had occurred in the High Court before sentence had been passed. The first of these was that counsel who appeared for the Crown had departed from his traditional position by saying that the "Crown takes a serious view of these offences committed on simple people." The second was that the accused had not been given the opportunity of a final reply. Counsel freely admitited that the accused had had full opportunity to say whatever he desired but submitted that nevertheless there should have been an allocutus giving the accused a final opportunity of addressing the Court.

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As to the first of these submissions Counsel referred to words used by Lord Denning in his book "The Road to Justice" where, on page 37 he said "Furthermore no counsel is allowed to suggest to the judge what the sentence should be. That is for the judge alone. No counsel must attempt by advocacy to influence the court towards a more severe sentence: though he may, and often does, draw the attention of the judge to any mitigating circumstances which may induce a lesser sentence." Reference was also made to the opinion expressed by Mr. Christmas Humphreys in an article in [1955] Crim. L.R. at p. 747 where he said that Crown Counsel will exercise no grain of pressure towards severity of sentence. This Court agrees that the matter of sentence is entirely one for the Court though the Crown must put before the Court all circumstances and facts within its knowledge relative to the question of sentence. This is not of course to say that the Crown is not an interested party, as is shown by the fact that in some jurisdictions there is a right of appeal by the Crown against the inadequacy of penalties imposed by lower courts. Nevertheless, we agree with counsel that in the present case the use of the words complained of in the passage quoted above, was a departure from correct practice; at the same time we are of opinion that it was not one in the least likely to have prejudiced the accused, or to have resulted in a miscarriage of justice.

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As to the second point, on the question of the allocutus, the Court was referred to the cases of *R. v. Donovan* (1928) 21 Cr. App. R. 20 and *R. v. Ling* [1960] Crim. L.R. 434, but these cases are sufficiently dealt with in the later case of *R. v. Ferenc Gombos* (1964) 49 Cr. App. R. 59 at p. 61. We need quote only the following passage:—

> "The appellant's counsel made a plea in mitigation, but it is correct that the applicant was not asked if he had anything to say why the court should not proceed to judgment against him. This court has previously considered what is the effect of failing to put the allocutus. In *Ling*, reported in the The Times, April 5, 1960, the matter was

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raised. It appears that Ling, convicted of a felony, was not called upon. It was argued that the failure to put the allocutus might vitiate the trial or at any rate the sentence. The court expressed the view that the proper course might well be to send back the prisoner to the court of trial to be sentenced afresh. It was at this point that learned counsel appearing for Ling decided not to persist in his submission. During the hearing of *Ling* (supra) reference was made to the case of *Donovan* (1928) 21 Cr. App. R. 20, where Lord Hewart C.J. accepted the argument of counsel for the Crown that the only reason for calling upon a convicted prisoner in felony was to give him an opportunity of moving in arrest of judgment on a point of law."

The Court of Criminal Appeal went on to say that the appellant before them did not have a point of law to raise, and in the present case the appellant does not complain that he was deprived of an opportunity to raise a point of law or indeed that he wished to make any further submission whatever. The offences with which we are concerned are by sections 271 and 301 of the Penal Code (No. 12 of 1963) misdemeanours and not felonies. Therefore the common law requirements as to allocutus do not apply. However, by section 263 of the Criminal Procedure Code (No. 10 of 1961) similar requirements are imposed in respect of all offences, but the section concludes with the words "but the omission so to ask him shall have no effect on the validity of the proceedings." Either at common law or under this section it is clear that such an omission is not a fatal defect.

We find therefore that neither of the irregularities relied upon have, in the circumstances of the case, any materiality, nor could they possibly have caused any miscarriage of justice.

The appeal is accordingly dismissed.

Appeal dismissed.