IN THE SUPREME COURT OF THE
TERRITORY OF PAPUA AND NEW GUINEA } No. 11 of 1956.

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On Appeal from the Court of Petty Sessions,
PORT MORESBY.

PATRICIA ROBERTSON

Appellant

-v-

JOHN FISHER

Respondent

JUDGMENT READ BY CHIEF JUSTICE ON 25TH SEPTEMBER, 1956.

In the Court of Petty Sessions, at Port Moresby, on the 31st of August, 1956, the appellant, Patricia Robertson, pleaded "Guilty" to a charge of having committed an offence against Section 167 of the Queensland Criminal Code (adopted), in its application to the Territory of Papua. That section, which is headed "Violation of Secrecy," provides that "any person who, being employed in a telegraph office, publishes or communicates the contents or substance of a telegram, except to some person to whom he is authorised to deliver the telegram, is guilty of an offence, and is liable on summary conviction to imprisonment with hard labour for six months, or to a fine of £100." The appellant's offence was, that on the 21st of August last she, being employed in a telegraph office, the Post Office at Konedobu, did communicate other than to a person to whom she was authorised to deliver the telegram, to wit, to the employees and agents at Sydney of the proprietors of the "Sun" newspaper, the substance of a telegram that had been received at the Konedobu Post Office at 9.49 o'clock in the forenoon of that day, that was addressed to the Department of Native Affairs, and that related to the murder of natives by other natives committed thirty miles below the junction of the Yellow and Sepik Rivers.

The Magistrate sentenced the appellant to three months' imprisonment with light labour; and it is against that sentence that she is now appealing.

As the appellant pleaded "Guilty" at the lower Court, the material before me, concerning the facts of this case, is not of great volume. I have a certified copy of the record of the proceedings at the lower Court and that co[illegible]ord includes

copies of formal documents such as the charge; it also includes a copy of a document labelled "Statement of Facts," which is accompanied by copies of papers and telegrams referred to in that Statement; it finally includes a copy of the Magistrate's written reasons for awarding the penalty he did award. But the copy of the record of the proceedings at the lower Court contains no record of the submissions made there by learned counsel for the Prosecution and for the Defence, although the Magistrate did note, in his reasons for penalty, that those submissions had been "somewhat lengthy."

At this Court, learned counsel for the appellant and for the respondent have informed me that the "Statement of Facts," just referred to, was a document that was produced at the lower Court by counsel for the Prosecution and that it was there assented to by counsel for the defendant, (the present appellant).

The "Statement of Facts" recited that the appellant, at the time of her offence, was employed with the Department of Posts and Telegraphs and had been so employed since the 23rd of January, 1956: from about the 28th of January, 1956, she had been employed at the Konedobu Post Office on "teleprinter duties" which included "the receiving, sending and recording of all telegraph traffic passing through the Konedobu Post Office." On the 24th of January, 1956, she had made the solemn declaration required from officers, pursuant to the Post and Telegraph Ordinance, before taking up duty; and a copy of that declaration accompanied the "Statement of Facts." That declaration included the following passages:-

> "And I further declare that I will be true and faithful in the execution of the telegraph duties entrusted to me and that I will hold strictly secret all telegraphic or other communications that may pass through my hands in the performance of my duties. I also further declare that I will not give any information directly or indirectly respecting any telegrams or despatches transmitted or intended to be transmitted by telegraph except to the persons to whom such telegrams or despatches may be addressed or to their recognised agents."

The "Statement of Facts" also referred to and exhibited copies of certain telegrams that had been addressed to the Department of Native Affairs and to other Government Departments and that had been received at the Konedobu Post Office, - among them the one mentioned in the charge against the appellant. The "Statement of Facts" also referred to and

exhibited copies of certain "collect" telegrams signed "Robertson" and addressed to the "Sun" in Sydney: and it was obvious (and the Defence did not dispute) that the contents of those telegrams had been culled from the inward telegrams I have referred to. In relaying to the "Sun" newspaper the substance of the telegram to the Native Affairs Department that is referred to in the charge, the appellant included some gruesome details, such as the cutting-off of heads, that the Administration had not released for general publication. The other "Robertson" telegrams referred to in the "Statement of Facts" showed that the appellant had made disclosures of telegraphic information to the "Sun" in June and July, as well as in August: presumably prosecuting counsel had meant to use these earlier messages as evidence of "similar acts" that might rebut, if necessary, possible defences. Another copy telegram referred to in the "Statement of Facts" is one, dated the 10th of May, 1956, addressed to Overseas Telecommunications, Port Moresby: it advised:- "Miss Pat Robertson Konedobu Post Office is authorised lodge all classes collect (telegrams) to Sun Sydney." The "Statement of Facts" also referred to and exhibited a copy of appellant's letter of 23rd August, 1956, to the News Editor of the "Sun" in Sydney, tendering her "resignation as 'Sun' correspondent for the 'Sun' in Papua New Guinea."

The Magistrate's written reasons for penalty run to two pages but may be summarised as follows:- He conceded that the appellant had committed her offence openly and without any attempt at concealment and that she had previously been of good character. But on her own admission she had, he said, "flagrantly breached Section 187 of the Criminal Code", and must have done this knowingly because she had signed a solemn declaration of secrecy. He regarded her offence as a "deliberate and serious breach of the secrecy of the Post Office" and added that he had "never seen a more serious one or even heard of one." He considered a deterrent punishment was called for and said:- "I must impose a proper penalty primarily because other people in the Post and Telegraphs Department must be made to realise the consequences of any misconduct in relation to the due security and secrecy of the Department. As I see it, if I were to be lenient with the defendant, allow her previous good character to unduly sway me and so treat her as an ordinary first offender, the discipline of the Post Office would be absolutely ruined. Surely everyone would think that if you had the bad luck to be caught passing on the valuable information you have gleaned there, nothing much would happen anyway, you would only get a talking-to from the Bench, lose your job, sign a piece of paper and then forget about it. Well of course clearly people

in the Post Office must realise differently. It is a necessary, valuable and sensitive part of the Government." The Magistrate quoted as applicable to this case, the remark of Channell, J., in R. v. Noble, 1 Cr.A.R., 30, that "it was the recognized practice that" (Post Office officials) "could not claim the benefit of their good character in the same way as that of other prisoners." The Magistrate also said that "the only thing that really" (worried him) was that "the defendant is a woman"; however, as he considered this a "very bad case indeed," he felt that "to punish her and deter others," he could not "give her a bond or a fine" and he "accordingly" sentenced her to imprisonment with light labour for three months.

The appellant promptly took steps to challenge that sentence. On the 5th of September, last she applied to my brother Kelly, J. for an order nisi calling on the respondents to show cause why the sentence should not be quashed. Her application was made under Section 173 of the Papuan Justices Ordinance 1912-1952, which has since been amended. The former Section 173 permitted any person aggrieved by a "conviction or order" of justices to seek such an order nisi. As to the phrase - "conviction or order";- "order" was defined in the Ordinance as an order on a civil complaint and "conviction" was defined as "a conviction by justices for a simple offence." The headings of Forms 31 to 35 in the Second Schedule to the Ordinance use the word "conviction" to describe forms relating not only to the conviction (in its strict sense) but also to the ensuing penalty or punishment. In Queensland, where there was, until 1949, a similar section, there was a difference of judicial opinion as to whether "conviction" was to be read as including, or was to be read as excluding, "sentence." Philp, J. gravely doubted whether an appeal lay against sentences imposed by justices, but other Judges, and finally the Full Court of Queensland entertained such appeals: see Donovan v. McKillop, 1949, Q.W.N., 47. Mr. Justice Kelly thought an appeal against the sentence did not lie under the corresponding Papuan section, and he consequently refused the appellant's application for an order nisi.

I am in no way called upon, in these proceedings, to say whether I would agree with my brother Kelly's decision on that application or not: but I feel that I do have to consider whether his decision debars the appellant from further appealing, in this Court, against her sentence. In Grierson v. The King, (1938) 60 C.L.R. 431, it was held that when a court had heard an appeal on its merits and given its decision the appeal cannot be re-opened: compare the Victorian case of Adler v. Stewart,

1956 A.L.R., p. 415. But it seems clear from the file in the Registry, and Mr. Kirke (counsel for appellant) has assured this Court, that Mr. Justice Kelly's refusal of the application for an order nisi was solely on the technical ground that he did not think an appeal lay against the Magistrate's sentence, and that Mr. Justice Kelly did not go into the merits of the case at all. In those circumstances, I am of the opinion that my brother Kelly's refusal of the appellant's application for an order nisi did not have the effect of debarring her from making such further efforts to appeal against her sentence as might be open to her.

On the 6th of September, 1956, the day after the appellant's application for an order nisi had been refused, the Justices (Papua) Ordinance 1956 came into operation. That Ordinance repealed Part IX of the Papuan Justices Ordinance 1912-1952, a Part entitled "Appeals from Decisions of Justices," and substituted a new Part IX, entitled "Appeal to the Supreme Court." The amending Ordinance replaced the former definition of "order" by a new and wider one that defined "order" as including "any order, adjudication, grant or refusal of any application, and also any determination of whatsoever kind made by justices," but as not including orders "committing a person for trial for an indictable offence, or dismissing a charge of an indictable offence or granting or refusing to grant bail." The new Section 173 was as follows:-

> "(1) When any person feels aggrieved by any conviction or order made by any justices he may appeal to the Supreme Court as in this Part provided.
>
> (2) Except where the sole ground of appeal is that the fine, penalty, forfeiture or punishment is excessive or inadequate, as the case may be, no appeal shall lie under this section where the defendant pleaded guilty or admitted the truth of the complaint."

The new Section 184 set out the powers of the Supreme Court on appeal and these were more extensive and flexible than the former power to quash: thus, e.g., the Supreme Court may now "increase or reduce any penalty or fine," or "affirm, quash or vary the conviction" of the justices, or "remit the case" for re-hearing. By the new Sections 174 and 175, an appeal has to be instituted within a month of the pronouncement of the decision appealed against, and has to be instituted by a notice of appeal which has to state the nature of the grounds of the appeal and must be served on the respondents.

On the 7th day of September, the day after the amending

Justices (Papua) Ordinance 1956 came into operation, the present appeal against sentence was instituted by the filing of a notice of appeal on the appellant's behalf. Mr. Kirke has told this Court that that was done pursuant to the new provision about appeals from the decisions of justices that had just been introduced by the amending Ordinance; and Mr. Quinlivan, learned counsel for the respondent, made no objection on that score.

Nevertheless, and because even the consent of parties does not confer jurisdiction on a Court, this Court has to consider whether it has jurisdiction to entertain and determine the present appeal or not. In other words, this Court has to look at the language used in the amending Ordinance to ascertain whether it shows that it was the intention of the Legislature that the new provisions should be read prospectively or retrospectively:- that is to say, whether the Legislature intended that the new provisions should relate only to appeals against decisions given by justices after the new provisions became operative on the 6th of September, 1956 or whether the Legislature intended that they should also relate to appeals against decisions made by the magistrates before the new provisions came into operation. That question, as the authorities show, is not an easy one to answer: see, for example, Coleman v. The Shell Company of Australia Ltd., (45 St.R. (N.S.W.) p. 27), and the cases there discussed by Jordan, C.J. In Maxwell's "Interpretation of Statutes," (9th Ed.) at p. 221, it is said:- "(Statutes) are construed as operating only in cases or on facts which come into existence after the statutes were passed, unless a retrospective effect be clearly intended. It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication." In In re Athlumney : ex parte Wilson, (1898) 2 Q.B. 551, 552, it was said by Wright, J., in a passage approved by the High Court of Australia in Kraljevich v. Lake View & Star Ltd. (1946) 19 A.L.J. 325, at 326:- "Perhaps no rule of construction is more firmly established than this - that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matter of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment." In Gardner v. Lucas (1878) 3 A.C. 582, at 601, Lord O'Hagan said:- "There are cases .... which take a clear distinction between matters of procedure and matters of right, as to the operation of a statute prospectively or retrospectively": and Lord Blackburn said, at p.603:- "I think it is perfectly settled that if the Legislature intended to frame a new procedure, that instead of proceeding in this form or that, you should proceed in another

and a different way; clearly, there, bygone transactions are to be sued for and enforced according to the new form of procedure." In practice, of course, it may be very difficult at times to decide whether the retrospective operation of a statute affects accrued rights or merely affects procedure. Section 44 of the Ordinances Interpretation Ordinance 1949-1955 provides that a repealing ordinance shall not, unless the contrary intention appears, affect accrued rights. But it does not necessarily follow, from the fact that a person has, say, an accrued right of action, that he also has a vested right in the procedure by which his right of action may be enforced. The amending Justices (Papua) Ordinance 1956, was, in my opinion, a procedural measure, its object being, - not the taking away of any right of appeal, - but the provision of a new procedure that would, where proper, give persons aggrieved by the decisions of justices more effective relief than was available before that Ordinance came into operation. That Ordinance, I consider, has the normal prospective operation; but I also consider that it has a limited retrospective operation. Its retro-active effect is limited by the fact that it prescribes that a notice of appeal must be lodged within one month of the day when the decision appealed against was pronounced (or, of course, such further time as the Court or a Judge may see fit to allow under the new Section 185). The present appeal was instituted well within the time prescribed by the new provisions (and, for that matter, within the time prescribed for appeal in the former provisions) and I consider this Court has jurisdiction to hear and determine it.

The appellant has asked this Court to review, on certain grounds, the sentence imposed on her by the Magistrate. This Court must first remind itself that when a magistrate or justice is considering the question of penalty or punishment for an offence, he is permitted, within the limits prescribed by law in regard to that offence, to use his discretion: that discretion must, of course, be a "judicial discretion," one based on principle, justice and reason, not one based on mere caprice or an arbitrary mood. As to the principles on which an appellate Court should act, when reviewing a sentence imposed by a magistrate or justice, the Papuan Justices Ordinance, as amended, is silent. Guidance has to be sought elsewhere and is to be found in decisions of the House of Lords and the High Court of Australia. In Storie v. Storie, 1950 A.L.R., 470, at 472, Latham, C.J., referred to three House of Lords cases - Evans v. Bartlam, (1937) A.C. 473; Charles Osenton & Co. v. Johnston, (1942) A.C. 130; and Blunt v. Blunt, (1943) A.C. 517: and he summarised the principles established by those decisions as follows:- "(Where) an appellate Court is reviewing an order made

in the execution of a discretion conferred by law, the appellate court may reverse the order either if it is satisfied that no weight, or that no sufficient weight, has been given to relevant considerations, or if it is satisfied that an injustice has been done by the order appealed against." In Cranssen v. The King, (an appeal from New Guinea) (1936) 55 C.L.R. 509, at ps. 519, 520, Dixon, Evatt and McTiernan, JJ., said:- "(The) appeal is from a discretionary act of the court responsible for the sentence. The jurisdiction to revise such a discretion must be exercised in accordance with recognized principles. It is not enough that the members of the Court would themselves have imposed a less or different sentence, or that they think the sentence over-severe. There must be some reason for regarding the discretion confided to the court of first instance as improperly exercised. This may appear from the circumstances which that court has taken into account. They may include some considerations which ought not to have affected the discretion, or may include others which ought to have done so. The court may have mistaken or been misled as to the facts, or an error of law may have been made. Effect may have been given to views or opinions which are extreme or misguided. But it is not necessary that some definite or specific error should be assigned. The nature of the sentence itself, when considered in relation to the offence and the circumstances of the case, may be such as to afford convincing evidence that in some way the exercise of the discretion has been unsound. In short, the principles which guide courts of appeal in dealing with matters resting in the discretion of the court of first instance restrain the intervention of this court, to cases where the sentence appears unreasonable, or has not been fixed in the due and proper exercise of the court's authority. Moreover, this court has always recognized that, in appeals from courts of the territories, there may be many matters upon which the court appealed from is in a better position to judge than we can be. It is familiar with the special conditions which obtain in the territory and thus should be better able to estimate the importance of considerations arising out of them, or the significance of facts associated with them." In Harris v. The Queen, (1954) 90 C.L.R., 652, at ps. 655, 656, an appeal from Papua, the High Court quoted the passage I have just read from Cranssen v. The King, and the High Court re-affirmed the principles stated therein.

The grounds of appeal set out in appellant's Notice of Appeal are four and are as follows:-

1. That the sentence was excessive and unreasonable.

2. That the Magistrate was in error when he [illegible]ected

himself that he should take into account that (appellant) had broken the Oath of Secrecy.

3. That the offence was not as serious as the Magistrate apparently believed it to be.

4. That the Magistrate was in error in failing to treat (the appellant) as an ordinary first offender.

I propose to consider the second, third and fourth grounds of appeal first, and then to consider the first ground.

As to the second ground of appeal, namely, - that the Magistrate was in error when he directed himself that he should take into account that (appellant) had broken the Oath of Secrecy, - (which, by the way, should have been described as "solemn statutory declaration of secrecy"):-

Mr. Kirke did not discuss this ground at all in his main address, but he did refer to it in his address in reply. He then suggested that the Magistrate's reference to the appellant's breach of her solemn statutory declaration of secrecy may have influenced his mind when he was considering what penalty he would impose for the offence actually charged against, and admitted by the appellant, namely, the unlawful disclosure of the substance of a telegram. But the Magistrate clearly and expressly stated, in his written reasons for penalty, that he was not taking the breach of her solemn statutory declaration into account at all as a factor affecting punishment, but was taking the declaration she had signed into account as something that showed that it must have been "forcibly brought to her attention that secrecy is required in the Post Office", - obviously, he meant that she had committed her offence knowingly. I see no reason to doubt that statement of the Magistrate's, and consider the second ground of appeal unsustained.

As to the third ground of appeal, namely:- That the offence was not as serious as the Magistrate apparently believed it to be:-

Mr. Kirke quoted, from the Magistrate's written reasons for penalty, the following observations made by the Magistrate:- "As I see it this was a deliberate and serious breach of the secrecy of the Post Office. I have never seen a more serious one or even heard of one ... As I see it, if I were to be lenient with the defendant, allow her previous good character to unduly sway me and so treat her as an ordinary first offender, the discipline of the Post Office would be absolutely ruined ... people in the Post Office must realise differently. It is a necessary, valuable and sensitive part of the Government. This indeed has always been the attitude of the law to breaches of the Post Office Regulations. ... R. v. Noble ... is ... applicable in this case ... it is a very bad case indeed ..." Mr. Kirke submitted that the character of these remarks showed

that the Magistrate exaggerated the seriousness of appellant's offence; R. v. Noble was a case of the stealing of postal parcels by a postal official and should not be considered applicable to the circumstances of the present case. After all, Mr. Kirke said, the maximum penalty under the Criminal Code, as adopted in Papua, for the offence committed by appellant, was "only" six months' imprisonment with hard labour or a fine of £100. As to that, Mr. Quinlivan said that the Magistrate had awarded only half the prison term he could have awarded under Section 187 of the Code and Mr. Quinliven remarked that the maximum punishment for precisely the same offence in Australia is two years' imprisonment with hard labour or a fine of £100. I wish to say at once that there is nothing before me to show that the Australian maximum was ever mentioned to, or in any way considered by, the Magistrate: the Australian maximum is, in my opinion, something wholly irrelevant to the proper consideration of the question before, - it is the local maximum - that is relevant.

Mr. Kirke suggested that a mitigating factor was the fact that the telegram, which was mentioned in the charge and the substance of which the appellant had disclosed to a Sydney newspaper, was the third of a series of telegrams about a native ambush, the general nature of which - though not all the details - had already been released by the Administration for general publication. But even if the appellant thought that that partial release gave her some excuse for failing in her duty of secrecy in regard to telegrams, it affords her no excuse for disclosing to the press certain gruesome details that had appeared in the telegram but which the Administration had not released for publication: that telegram was the property of the Administration and it was for the Administration, not for the appellant, to decide how much of it was to be released for publication or to the press.

Mr. Quinlivan submitted that the Post Office was a "public service of the highest importance" and that "the entire structure of commerce and civilized life" depended on trust in the Post Office and reliance on its channels of communication: he further submitted that the "position of trust" occupied by a postal officer and the harm that could ensue if that trust were not maintained were "the true criterion" of the offence and sentence in this case.

Mr. Kirke endeavoured to palliate or play-down the "breach-of-trust aspect" of appellant's offence in several ways. I have already referred to his submission that the appellant only disclosed information the general nature of which (though not all the details) had been released to the public: but that submission bypassed the point in issue, namely, that she should have made no

such disclosure at all. Another argument advanced by Mr. Kirke was that an offence, such as the appellant's, could only be committed by a breach of trust and could only be committed by a person employed, as appellant was, in a Post Office: but that argument does not seem to me to get anywhere, or at least no further than would a plea by a clerk or servant, charged in England with embezzlement, that only a clerk or servant could commit that crime. Mr. Kirke asserted that there was no evidence that appellant's offence had embarrassed anyone: no damage to anyone had been proved. It could equally truly be said that there was no evidence that damage was not done. But Section 187 of the Code does not require the Prosecution to prove damage or embarrassment caused: that section does make it necessary for the Prosecution to establish, beyond all reasonable doubt, that the person charged has committed a violation of secrecy; and that, the appellant has already admitted. It may be inferred that the discovery of what the appellant had done stirred someone in the Administration sufficiently enough to launch a prosecution against her. Any violation of secrecy tends to sap confidence in some degree. The Post Office, a Government instrumentality that serves everyone in the land, runs on the trust it reposes in its employees and on the trust and confidence the public confides in the Post Office and in its operations and in the efficiency and secrecy of its telegraphic communications. When it comes out that that trust has been abused by a postal employee in the way the appellant abused it, it is probably impossible ever to measure the extent of the harm that may result. It is hardly to be supposed that people who had entrusted telegrams to the Post Office for transmission would be exhilarated to learn that the substance of such telegrams had, at times, been disclosed to the press; or that news of that kind would encourage them to send telegrams as freely as before.

For the reasons I have indicated, I consider that, although the Magistrate used a hyperbolic phrase or two in describing the appellant's offence, his description of it as a "deliberate and serious breach of the secrecy of the Post Office" was wholly correct; and I therefore find that the third ground of appeal has not been sustained.

As to the fourth ground of appeal, namely, that the Magistrate was in error in failing to treat the appellant as an ordinary first offender:-

Mr. Kirke referred to an observation made by Hilbery, J. in R. v. Bell, (1952) 35 Cr.A.R., 165, that "in deciding the appropriate sentence a Court should always be guided by certain considerations," one of which was this:- "Not only in regard to each crime, but in regard to each criminal, the Court has the right and the duty to decide whether to be lenient or severe."

Mr. Kirke submitted that, in the present case, the Magistrate had given too much consideration to the offence and had paid no regard to the offender herself: the Magistrate should, he said, have treated the appellant as a first offender and given her a suspended sentence, pursuant to Section 656 of the Code, because of her previous good character and because she had committed her offence "openly." The appellant's previous good character was mentioned by the Magistrate in his reasons for penalty and he also said that she had sent her telegrams openly, in her own name, and with no attempt at concealment. It would appear, from the "Statement of Facts" and its accompanying papers, that the appellant's telegrams to her Sydney newspaper were transmitted through the Overseas Telecommunications Office in Port Moresby and that that Office had been advised from Sydney that she was authorized to send "collect" messages to her Sydney newspaper. But it would also appear from the "Statement of Facts," and from what counsel have said at this Court, that her immediate employer, the Post Office, was not aware of those facts and did not "discover" them until after inquiries were set on foot about the leakage of telegraphic information that led to the charge against the appellant.

Section 656 of the Code is the section which gives a Court the discretionary power, in certain cases, to pass sentence on a first offender and then, if the Court thinks fit, to suspend that sentence and discharge the offender upon his entering into a recognizance to be of good behaviour for a fixed period: but the offender had to report periodically to the police and if, during the period specified in the recognizance, he indulges in certain specified misbehaviour or is convicted of any indictable offence, he may be committed to prison to serve his originally suspended sentence. There is nothing in Section 656 to prevent an offender who has, in Papua, entered into a recognizance under the section from leaving Papua forthwith. If such an offender does leave Papua for parts known or unknown - as does from time to time happen - the efficacy of his suspended sentence obviously becomes problematical, because it may become impracticable to check whether he is abiding by the conditions of his recognizance or to do anything about it if it is discovered that he is not.

Conditionally suspended sentences under Section 656 are commonly given to youthful first offenders and to offenders of previously good character who have yielded to sudden criminal temptation. In the case of the appellant, and in view of the solemn statutory declaration she made that she would hold strictly secret, and make no unauthorized disclosure, directly or indirectly, of, any telegraphic or other communications that might, in the performance of her official duties, pass through her hands, it seems inconceivable that she did not know, full well, that she was

bound to secrecy about such matters. In spite of that, she chose to add to her postal duties the duties of local press correspondent for a Sydney newspaper: and if, in her role of press correspondent, she was tempted to use information that came her way as a postal official, it was she herself who had created the opportunity for such temptation. As the "Statement of Facts," admitted by her counsel, shows, she did send, to her Sydney newspaper, "collect" telegrams containing information that had come to her in her official capacity at the Post Office and she did this in June and in July, as well as in August: also, her sending of the telegram of the 21st of August to her newspaper in Sydney (the telegram that led to the charge) was an incident in an already-established and deliberate course of conduct. The plain unvarnished facts are, that while holding a position of trust at the Konedobu Post Office and while bound to secrecy in her duties, she used that very position of trust to violate the secrecy she was bound to observe and to disclose telegraphic information unlawfully to a Sydney newspaper. The salary she would receive from the Post Office would be for the performance of duties that included the duty of maintaining secrecy. Whether she also received money or money's worth for violating that secrecy, I do not know. But, in any case, the offence she has admitted was one that disclosed a sad lack of a sense of honour and moral scruple: it was deliberate and was a clear breach of the provisions of Section 187 of the Code.

In all the circumstances, and remembering that the question I am concerned with at this moment is not, whether this Court might have awarded a different punishment from that awarded by the Magistrate, but is, whether the Magistrate erred in not giving the appellant a conditionally suspended sentence under Section 656, I feel unable to hold that, when he used his discretion in that way, he proceeded on a wrong principle, or capriciously, unreasonably, or unjustly. I therefore consider that the fourth ground of appeal has not been sustained.

Turning now to the <u>first ground</u> of appeal, - that the sentence was excessive and unreasonable:-

At the lower Court, the Magistrate stated that he felt he should not give the appellant a bond or a fine but must sentence her to imprisonment with light labour for three months. Mr. Kirke has submitted that that sentence should be quashed as excessive and unreasonable. As already mentioned, Mr. Kirke had contended that the Magistrate erred in not giving the appellant a suspended sentence, but this Court has rejected that contention. Mr. Kirke did not discuss the Magistrate's decision not to fine the appellant, but I think this Court should refer to it. The Magistrate's expressed reason for deciding not to fine the

ellant was, that he thought a fine would be inadequate to
h her and deter others. Because of the serious nature
offence, it does not seem to me that the Magistrate,
ding against imposing the penalty of a fine, used his
retion in a wrongful, capricious, unjust or unreasonable
. If a fine had been imposed and if the Sydney newspaper
loped its correspondent, the appellant, to meet it - as
not seem improbable - the effectiveness of a fine as a
might have become negligible. So I come back to the
ion:- Should the appellant's sentence of three months'
sonment with light labour be quashed as excessive and
sonable. Mr. Kirke has made various submissions as to why
ould be quashed. He stated that this is the first
ecution, for an offence against Section 187 of the Code, in
, - at any rate, since the War, which showed that there
no prevalence of the offence: he referred to Rex v. Shadforth
ilson, 14 Cr.A.R., 77, in which the Court of Criminal
had been impressed by the fact that that case related to
t prosecution under an amending Statute and had for that
on reduced sentence. Mr. Kirke again pointed out that
Noble, the case on which the Magistrate had relied, was
of theft of postal articles by postal officials and so
nguishable from this case. Punishments for postal offences
not so severe nowadays as they were in the time of R. v. Noble:
Quinlivan, citing Reg. v. Mutch, 1955 Cr. Law Review,
greed that this was so, though postal offences involving
of a position of trust still ranked for punishment with
other offences involving the abuse of a position of trust.
Kirke reiterated that the Magistrate, in this case, had paid
regard to the offence than to the offender; the Magistrate
llowed himself to become obsessed by what he regarded as the
ousness of the offence and the necessity for deterring other
l officers from committing it and, because of that obsession,
mposed a sentence on the appellant that made it really an
nment of policy" intended to deter others and that made her
pegoat for that purpose. Mr. Kirke agreed that the
trate had noted and had seemed worried by the fact that the
llant was a woman: but he claimed that the Magistrate had
ken sufficiently into account the appellant's previous good
cter, the fact that she had lost her job, and the fact that
was, Mr. Kirke believed, the first prosecution for such an
nce, - at least since the War.

Mr. Quinlivan, on the other hand, said that the appellant's
nce was "one of the utmost gravity" and he submitted that,
the term of imprisonment imposed on the appellant by the
trate was only half the term the Magistrate could have
sed, it could not truly be said that the sentence imposed

excessive and unreasonable.

In coming to my decision in regard to the first ground of the appeal - which has been dealt with last - I have carefully considered the material that has been put before me and all that learned counsel have said about it. I have already said that I think the Magistrate was correct in describing the appellant's offence as a "deliberate and serious breach of the secrecy of the Post Office." I have also said that the Post Office runs on the trust it gives its employees and the trust the public has in the Post Office: yet the appellant, while holding a position of trust at the Konedobu Post Office and while bound to secrecy, deliberately and without scruple used her position of trust to violate that secrecy and unlawfully disclose telegraphic information to the Sydney newspaper for which she had chosen to become "local correspondent."

The question is, - Was the penalty imposed upon her for that offence excessive and unreasonable? The Magistrate himself leaves us in no doubt about why he awarded it: as he said in his written reasons for penalty, he awarded it "primarily because other people in the Post and Telegraphs Department must be made to realise the consequences of any misconduct in relation to the security and secrecy of the Department," and he reiterated that reason throughout his written reasons for penalty. Thus his attitude towards the offence and his resolution that others should be deterred from committing it were clear. What was his attitude towards the offender and as to her position? That is less easy to ascertain from his written reasons: there is little more than the passage:- "So there was no attempt of concealment, her zeal obviously outran her discretion, but that is about the only thing that can be said in her favour except of course that she had previously been of good character." Mr. Kirke has informed this Court that the appellant has "lost her job" - and that, of course, can sometimes be a considerable punishment in itself, especially when the loss of the job is due to a conviction and the conviction proves an obstacle in the getting of fresh employment. Whether the appellant has also lost superannuation rights, passage money home, and so on, I do not know, for the material before me does not tell me. Mr. Kirke says that the Magistrate was told that the appellant had "lost her job." But the Magistrate did not make any express reference to that in his written reasons; unless, perhaps, there is an indirect reference to it in the passage in which he rejects the suitability of a bond, - the passage in which he says - "nothing much would happen anyhow, you would only get a talking to from the Bench, lose your job, sign a piece of paper and then forget about it." That passage would seem to classify "losing your job"

given event that amounts to "nothing much",- surely a lightly-considered assessment with which not everyone would agree.

The Magistrate said, in his written reasons, that in "fixing the penalty in this case" he had "found many difficulties. The main one of course is that the defendant is a woman." It is understandable that the Magistrate found the task of fixing the penalty in this case a distasteful and difficult one: for he would fully appreciate that a woman can violate the secrecy prescribed by Section 167 of the Code as effectively as any man can, and that that section did not provide one penalty for a male offender and another penalty for a female offender.

It is usually helpful, when considering a sentence, to know something of the background of an offender: in this case I have heard virtually nothing about that and possibly the Magistrate did not either, for the papers say little or nothing about the appellant's background.

In these days, Courts, when sentencing offenders, think much less of the punitive aspect than they used to: the emphasis now is on the preventative or deterrent and the reformative aspects. In regard to prevention or deterrence, the Court may properly impose a sentence that will both deter the offender and others who might think of following his example, provided it preserves a due balance between those objectives. Thus it would not, in my opinion, be correct in principle to impose upon an offender a penalty of a severity which his offence did not warrant, and the real object of which was to deter others.

Now the expressions used by the Magistrate himself, in his written reasons for penalty, leave no doubt that his primary purpose, in inflicting the sentence he imposed on the appellant, was to make "other people in the Post and Telegraph Department" (as he called them) ..."realise the consequences of any misconduct in relation to the due security and secrecy of the Department." Any leniency, he considered, would mean that "the discipline of the Post Office would be absolutely ruined." Accordingly, he imposed the three months' prison sentence (with light labour) to "punish her" and, as he again said, to "deter others."

It seems to me that the Magistrate's desire, "primarily" to deter "other people in the Post Office" from doing what the appellant had done, so dominated his mind that, when her penalty came to be determined, that desire tipped the scales against her unduly and led him to give her a sentence that was, in my view, somewhat excessive in her case and one that erred against the principle of preserving a due balance, that I referred to just now: moreover, I think that he did not, for the same reason, sufficiently take into account the appellant's previous unblemished character or the fact, that, though admittedly by her own fault, she has lost her employment and will have to start again.

For these reasons, I consider that the present sentence should not stand. I do not propose to quash it, however, because appellant's offence was a serious one: I propose to reduce it to six weeks' imprisonment with light labour - the term of that imprisonment to run from the date of her conviction.

CHIEF JUSTICE.