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IN THE SUPREME COURT)
)
OF THE TERRITORY OF)
)
PAPUA AND NEW GUINEA)

CORAM : OLLERENSHAW, J.

BETWEEN MAMES-WEVIONG

Appellant

AND CONSTABLE ZANIA

Respondent

J U D G M E N T

1967,
Jun. 20
Pt. Moresby.

Ollerenshaw, J.

In these four appeals from the decisions of a Local Court Mr. Pratt has argued six grounds with clarity and force, enlightened by some industrious research. Notwithstanding his careful efforts my mind has not been disturbed to the extent of leaving it in doubt as to how I should hold upon each ground and I do not find it necessary to trouble Mr. Smith.

GROUND (1) : That the Local Court had no jurisdiction.

I am not at all sure that the points taken go to jurisdiction; however, I find that I can dispose of them without considering that question.

Mr. Pratt relies upon both section 15 and section 38(c) of the Local Courts Ordinance, No. 65 of 1963. Section 15 required the Local Court to certify that it was expedient that the matters should be heard and determined in the Local Court because jurisdiction in respect of the offences charged was vested also in the District Court, and section 38(c) required the Local Court to explain to the appellant that he was

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entitled to have the matters dealt with by a District Court and to give him the opportunity to elect between that Court and the Local Court.

There is no evidence before me whether the magistrate who heard the matters did or did not comply with either or both of these sections. I think that the onus here is upon the appellant, who is endeavouring to upset the judicial decisions against him, decisions in favour of which I consider, consistently with the maxim, that I should assume, until the contrary is shown, that the Court did comply with these statutory requirements.

There is before me what appears to be a copy of the record of the proceedings in the Local Court in which there is no reference to the Court's compliance with the sections. However, there is nothing in the Local Courts Ordinance that requires a record of these things to be kept and I do not consider that I should base any assumption upon the absence of such a record.

I would take this opportunity of saying for the guidance of magistrates who sit in Local Courts that it would be wise indeed for them to include in their court records of cases with which they deal their certificate of expediency and a record of their explanation to, and the election of defendants. Perhaps this is a fit subject, in the circumstances existing in this Territory for a regulation when Regulations come to be made under the Ordinance.

Mr. Pratt also submitted under this ground that the Local Court should not have dealt summarily with the charges. In each case the appellant, having taken objection to the tattoos worn by the women of his village, had rubbed their arms with kerosene and set light to it so that they were left with the scars of burning. He was charged with common assault and Mr. Pratt submits that because of the serious nature of these assaults the magistrate should have refrained from dealing with the matters summarily under sections 343 or 344 of the Code and should have committed the appellant for trial in the Supreme Court. I do not think

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that this submission goes to jurisdiction. It was a matter for the magistrate's discretion and I do not consider that it is open to the appellant, who pleaded guilty to the charges, to complain that he has been punished by a court that was restricted to the imposition of a maximum punishment of six months imprisonment upon each charge and not sent up to the Supreme Court, in which imprisonment to a maximum of twelve months could have been imposed upon each charge. I consider that the judgment of Mack, J. in Clark v. Ratnik (1), cited by Mr. Pratt, supports my conclusion upon this point.

GROUND (2) : That the sentences were excessive.

Bearing in mind his last submission under Ground (1), it is not surprising that Mr. Pratt does not press this ground over-strongly. Upon each of the four convictions the appellant was sentenced to imprisonment with hard labour for a term of five months and these sentences were directed to be served cumulatively. In all he treated twenty one women in the manner I have mentioned and I can see no reason for the intervention of this Court to disturb either the sentences or the orders that they be served cumulatively.

In Pabe-Uwi v. Sergeant Ehau, 28th November, 1966, I referred to the principles which usually govern appeals against sentence : see also the judgment of my brother Frost, J. In Laeka-Ivarabou v. Constable Nanau, 14th February, 1967. Since delivering my judgment in Pabe-Uwi and Others v. Sergeant Ehau (supra) it has occurred to me that the powers of this Court in reviewing sentences of a Local Court may be wider than indicated by those principles. Section 43(5)(d) of the Local Courts Ordinance empowers this Court to substitute for the decision of a Local Court any decision which might have been given by the Local Court if the justice of the case so requires. It may be argued, therefore, that this Court may substitute for the sentence of the Local Court such sentence as it considers fitting although there is nothing manifestly wrong, within the principles to which I have referred, with the sentence

(1) (1956) St.R.Qd. 10.

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imposed by the Local Court: See R. v. Gosper (2), where it was held that the Court of Criminal Appeal of New South Wales in the exercise of its powers under the Criminal Appeal Act, 1912, had an unfettered judicial discretion to review sentences without the necessity of considering whether, in imposing any sentence under review, the trial Judge, e.g., proceeded upon any wrong principle, or upon any misapprehension of the facts.

Whatever is the true position I see no reason for interference with the sentences imposed in the Local Court. In my view of the facts before me they were not at all too severe and, indeed, I can well imagine that had the appellant come before this Court for sentences upon these charges he may have suffered even more severe punishment, certainly not less severe.

GROUND (3) : That three of the complaints were bad in law.

This ground is based upon the joinder in three of the complaints of charges of assaults upon several women. It is not clear from the material before me whether or not joinder of these distinct offences in one complaint was permissible by virtue of sections 567 and 574 of The Criminal Code. However, it is clear to me that this joinder did not render these complaints nullities and, if objection had been taken at the hearing, the Local Court - assuming that it was not a proper case for the joinder of the offences - would have been required to do no more than put the prosecutor to his election as to what charge he would proceed upon.

It is my understanding of the law that an appellate court does not intervene on this ground, where no objection has been taken at the hearing, unless there has been a miscarriage of justice : see, e.g. Dearnley v. Rex (3). The appellant pleaded guilty to all the complaints and there is nothing before me to suggest that in fact he was not guilty and Mr. Pratt, in all his close attention to this appeal, has

(2) (1928) 28 S.R. (N.S.W.) 568; 45 W.N. (N.S.W.) 165.
(3) (1947) St.R.Qd. 51.

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not been able to point to anything that might suggest a miscarriage of justice.

GROUNDS (4) & (5) : That the Warrant of Commitment issued by the Local Court was wrong in form.

Section 43 of the Local Courts Ordinance gives to a person aggrieved by a decision of a Local Court a right of appeal to this Court. In my opinion a warrant of commitment is not a "decision" of the Court and an appeal does not lie against the form in which it is expressed, whatever other proceedings may be available to a person wrongly detained in a Corrective Institution because of an inaccurate or informal warrant.

However, for the guidance of Local Courts I should say something about the Warrant that was issued by the Local Court in this case. It does recite the four convictions and sentences of five months imprisonment upon each to be served cumulatively and then it commanded that the appellant be kept imprisoned for a total period of twenty months.

In my view there should be a separate warrant in respect of each conviction and this is so whether the sentences are to be served concurrently or cumulatively, more particularly when they are to be served cumulatively. The need for this is emphasized by the consideration, e.g., that one of the convictions may be set aside on appeal and then the warrant would be left unsupported.

It is not necessary, as is suggested in the Notice of Appeal, that the warrant should state the date of the expiry of each sentence, something that depends upon the exercise of the power of remission. It is necessary, however, that a warrant should provide when the sentence is to commence, e.g., from the date of the conviction or from the time when the convicted person is taken into custody to serve the sentence. When sentences are imposed to be served cumulatively each sentence, which is cumulative upon another or others, should be directed to take effect from the expiration of the deprivation of the liberty of the offender pursuant to the sentence or sentences - stating particulars necessary for identification - upon which it is ordered to be cumulative. Perhaps it may be considered that these are also matters to be included in Regulations for the assistance of the magistrates who sit in Local Courts.

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GROUND (6) : That a Local Court has no power to order more than one sentence to be served cumulatively upon another.

There is no provision for cumulative sentences in the Local Courts Ordinance nor, indeed, in the District Courts Ordinance and Mr. Pratt submits, firstly, that section 20 of The Criminal Code empowers only the Supreme Court to impose cumulative sentences and, secondly, and this is the submission that he presses most strongly upon me, that it authorises one and only one sentence to be ordered to be cumulative upon another.

It seems clear to my mind that section 20 and, indeed, the whole of Chapter IV - PUNISHMENTS - of The Criminal Code applies to all courts in the case of offences under the Code such as common assault, including District and Local Courts when dealing summarily with such offences. Section 20, itself, in its second paragraph expressly mentions a sentence upon a summary conviction and section 19 expressly confers powers upon Justices as well as Judges.

Coming to the stronger submission under this ground : that only one sentence to be served cumulatively upon another is authorised by section 20, it is necessary to set out the first paragraph of that section, which is in these terms :

> "When a person who is convicted of an offence is undergoing, or has been sentenced to undergo, for another offence, a sentence involving deprivation of liberty, the punishment to be inflicted upon him for the first-mentioned offence may be directed to take effect from the expiration of the deprivation of liberty for the last-mentioned offence."

Mr. Pratt has cited a number of decisions of English and Australian courts upon statutory provisions relating to the sentences that may be imposed by courts :

Reg. v. Cutbush (4) and Rex v. Martin (5) upon the construction of the provision in the English Summary Jurisdiction

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(4) 1867 L.R. 2 Q.B. 379.
(5) 1911 (2) K.B. 450.

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Act, 1848, and Turner v. Chilman (6), Laird v. Mitchell (7) and Rex v. Lovell (8) upon the provisions in the comparative legislation of South Australia, Queensland and New South Wales respectively.

Although these authorities, speaking broadly, may appear to favour Mr. Pratt's submission and although they do reveal a reluctance to read into statutory provisions of this nature what is not plainly stated, I do not find them of much assistance in the construction of section 20 worded differently, as it is, from any of the provisions construed in them.

It is to be observed that section 20 expressly authorises a cumulative sentence in two different instances. One is when the offender already is, at the time of conviction, undergoing for another offence a sentence involving deprivation of liberty. The other instance is when the offender has been sentenced to undergo for another offence a sentence involving deprivation of liberty, this is to say, in its context, where the offender has been sentenced to undergo deprivation of his liberty but has not commenced to undergo or suffer that deprivation.

.. .. ..

This plainly applies to a person who has once been sentenced to undergo deprivation of his liberty and at one and the same time, or otherwise before he has commenced to undergo his first sentence, e.g., on the same day, he is to be sentenced once again for another offence. To my mind he clearly remains a person who has been sentenced to undergo a sentence involving deprivation of his liberty notwithstanding that he has already been so sentenced more than once. It seems to me that this is the crux of the matter, that he is a person who has been sentenced to undergo a sentence involving deprivation of his liberty although, e.g., he is doubly or trebly qualified. His description as a person sentenced to undergo a sentence involving deprivation of liberty still accurately applies to him notwithstanding that this has been inflicted upon him once, twice, thrice or so on. I consider that it would require express words, e.g., in a proviso to avoid such a consequence of the present wording of section 20.

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(6) (1928) S.A.R. 58
(7) (1930) St.R.Qd. 38
(8) (1939) 56 W.N. (N.S.W.) 75

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If counsel's submission were sound it may well be that a sentence could not be made cumulative upon a sentence which an offender is already serving if he happened to be serving more than one sentence.

Furthermore I do not see anything to the contrary in section 20 that would avoid the application of section 9(b) of the Ordinances Interpretation Ordinance, 1949, amended, providing that words in the singular include the plural and this also supports the effect which I give to section 20.

I cannot see anything in the section that would preclude a Supreme Court Judge from imposing more than one cumulative sentence and I consider that it plainly empowers several such sentences. I have already held that all courts, including Local Courts, have such powers as are conferred by this section when dealing with offences under the Code.

Mr.Pratt, quite properly, also referred me to Beaton and Another v. McGinty (9), the report of which was not available to him. From a note of it in 40 Q.J.P. Journal at p. 40 he thought that it might be against him. It involved the construction of section 150 of the Western Australian Justices Act, 1902-1936, and it was held by the Full Court of that state that justices were empowered thereby to order that several terms of imprisonment imposed on various charges should be served cumulatively. Here again the wording of the empowering section is different from the terms of section 20 but it is much closer to them than the verbiage of the sections construed in the cases I have already mentioned as relied upon by Mr. Pratt. Reference to the judgment itself discloses a dictum by Dwyer, J., in whose judgment Northmore, C.J. and Wolff, J. concurred, to the effect that section 20 of The Western Australian Criminal Code authorises cumulative sentences in respect of any number of offences and that this had been acted upon in the practice of the Criminal Courts of that State for a very long time. In its present form section 20 of The Western Australian Criminal Code has in place of the words : "for another offence", the not insignificant words : "for one or more other offences". The statutes of Western Australia are not available in Port

(9) (1939) 42 W.A.L.R. 2.

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Moresby and I have not been able to check if those words were in section 20 of The Western Australian Criminal Code when Beaton and Another v. McGinty (supra) was decided or have been inserted since then. The manner in which Dwyer, J. expressed himself in the dictum I have mentioned suggests to me that they were not then in section 20. In either event this judgment of the Supreme Court of Western Australia does not cause me to doubt the construction I have placed upon section 20 of The Criminal Code of this Territory.

For the reasons I have expressed I consider that these appeals fail. I order that they be dismissed and that the decisions of the Local Court be upheld.

Solicitor for the appellant : W. A. Lalor, Public Solicitor.

Solicitor for the respondent : S. H. Johnson, Crown Solicitor.