

Raine, J.

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IN THE SUPREME COURT
OF PAPUA NEW GUINEA

CORAM: PRENTICE, J.

Appeal No.46 of 1972.

BENJOL TOL v. KEN LAO

J U D G M E N T

Madang
1972
June 14,
Port Moresby
July 3,
Prentice, J.

This is an appeal on the grounds of severity from a conviction in the Local Court for adultery under Sec.84 (2) Native Administration Regulations of New Guinea. The learned magistrate imposed a maximum sentence of 6 months imprisonment with hard labour, of which some 3 weeks had been served when an appeal was lodged. I was informed by counsel that the appellant by his imprisonment had incurred some \$21.00 loss of wages. It is to be noted that the maximum punishment under the Section alternative to imprisonment is a \$12 fine. I was informed that the appellant was a first offender who is highly regarded by his employer.

An affidavit has been filed by Mr. Andrew of the Public Solicitor's Office to which is annexed a photostat copy of what purported to be the Local Court record in the matter as it stood on 21st April, 1972. With reasons for judgment forwarded to this Court is a photostat of the Statement of Facts as now held in the Local Court. It appears that since the 21st April, the following material has been added to the Statement of Facts:-

"Therefore the accused would (sic) be punished harshly for stealing and pregnanted my wife beside me. We are brothers in relation to our mothers and that it is bad thing for same stock to do such thing, the Complainant says."

The words "agreed by the defendant" are on this copy scored through.

Similarly additional words appear on the copy of the action sheet. The words "the woman is my brother's wife" appear at the end of remarks and plea. And at the foot of the page appears "Note. Remarks the Complainant in this matter seriously requested the Court to punish the accused harshly because they are very close relatives."

No explanation for the differences in the respective photostat copies is given - but it appears that the Court record has been added to since 21st April, 1972.

Madang

1972

June 14,

despite what appears in the Local Court notes; and that the accused and the Complainant are not true brothers, that they have different mothers and are from the villages of MAPUS and SANGAIO respectively.

Port Moresby

July 3,

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Crown Counsel on the appeal agreed in these remarks as to pregnancy. It is also pointed out that though the magistrate in his reasons for judgment referred to the woman concerned having 3 children - neither version of the Court record contains any reference to this. I am also informed that of some 7 convictions for adultery in the month concerned in the same district, a number had been dealt with by fines. No prevalence of this particular offence appears. Nor does it appear that the Court had given warning at any appropriate time of an intention to be more firm in future in regard to adultery offences.

As I pointed out in TABIMAIMA v. BEN HAMBAKON SMA (1) following an English decision R v. Harrison (2) the maximum punishment prescribed by a law should usually be preserved only for the worst cases. This decision of mine was followed by my brother Raine in Philip Passingan v. Beeton (3). I see no reason why this principle should not be applied to cases of adultery. I am satisfied that the learned magistrate has misdirected himself as to severity of sentence. In view of the lapse of 6 weeks between the initial photocopying of the Court record and the second photocopying of it, material has been added which could have its origin (such is the lapse of time) in a confusion of the facts of many cases. The only reliable Court record is that made at the time of hearing - even if material added later can be said to constitute part of the record at all.

I am satisfied this offence was not such as to call for a denunciatory sentence. In my opinion there has been a miscarriage of justice within Sec.44 of the Local Courts Ordinance.

I allow the appeal and confirm the conviction. I substitute a sentence of imprisonment with hard labour for 17 days (I bear in mind the actual effect of this on this man including the loss of pay). I note that the sentence has already been served. The appellant is to be suffered to go at large therefore.

Solicitor for the Appellant: W.A.Lalor, Public Solicitor.
Solicitor for the Respondent: P.J.Clay, Crown Solicitor.

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- (1) (unreported series No. 616).
(2) (2 C.A.R. 94)
(3) (unreported Series No.637).