SC 782

IN THE SUPREME COURT
OF PAPUA NEW GUINEA

CORAM : RAINE, J.
Friday,
1st December 1972

MARTIN KORE v. ALAN CARLING (APP.185 of 1972(N.G.))
JACKSON IAVOI v. ALAN CARLING (APP.186 of 1972(N.G.))

1972
Nov.24
RABAUL

Dec.1
PORT MORESBY

Raine, J.

By consent, these two appeals were heard together. The appellants were charged under s.3 of The Criminal Law (Escapes) Ordinance 1968 with escaping from lawful custody while they were serving sentences at Kerevat Corrective Institution.

The only real distinction between the two men is in their prior records. Martin was first convicted on 27th April, 1972 and sentenced to two months for using violence. While serving that sentence he escaped and on 15th May was sentenced to two months for the escape and two months cumulative for a stealing offence apparently committed before his recapture. The record suggests another conviction and sentence on 31st June, but I cannot follow this entry, the offence is not described, and at that time he would have still been in custody.

Jackson's convictions go back to 1968, being unlawfully laying hold, false pretences, five stealings, being unlawfully adjacent to a dwelling house, vagrancy, and on 19th June, 1972, unlawfully escaping from custody, for which he was sentenced to two months cumulative upon a six months sentence awarded three days before.

The appellants were each sentenced to six months imprisonment with hard labour by the learned and experienced Stipendiary Magistrate, and in the case of Jackson this was made cumulative upon a sentence already being served.

The appeals are on the grounds of severity of the sentences only.

1972

Martin Kore v. Carling; Jackson Iavoi v. Carling.

Raine, J.

S.3 of the Criminal Law (Escapes) Ordinance provides for a penalty of Two hundred dollars ($200.00) or imprisonment for six months. Thus maximum penalties were imposed.

I would not have thought it necessary to circulate this judgment had it not been that Mr. Baulch of counsel for the appellants urged me to adopt the reasons of Wickham, J. in Cameron v. Josey (1) where His Honour said:-

"The imposition of a maximum sentence requires careful scrutiny. E.A. Thomas, in his article 'Theories of Punishment', 27 M.L.R. 546, at p.548, points out that 'The part played in the policy of the court by the second aspect of the retributive theory, the negative aspect, is more easily identified for this aspect of the theory requires that the sentence should not be excessive in relation to the offence for which it is imposed, whatever useful purpose, such as the protection of society from a dangerous or persistent offender, might be achieved by a longer sentence. In relation to sentences of imprisonment, the insistence of the court on just proportion appears in a large number of instances. Perhaps the clearest examples are those cases in which the trial court has wished to impose a sentence of preventive detention but for some reason has been unable to do so, and has imposed a sentence of imprisonment of equivalent length instead, although such a sentence could not be justified on the basis of the offence for which it is imposed. The court has frequently held such a sentence to be wrong in principle.'

And the learned author remarks at p.550: 'In determining what sentence satisfies the concept of proportion in a particular case, the court has regard to the nature of the offence itself and the circumstances immediately surrounding it, but not the previous history of the offender ..... The result is a maximum figure, which will not normally bear any relationship to the statutory maximum for the offence except that the sentence in a case which is not a particularly bad example of the particular kind of offence must be

(1) (1970) W.A.R. 66 at 67

sufficiently lower than the statutory maximum to allow for more serious examples of the same offence to be adequately distinguished. This maximum figure may not be exceeded because of the previous convictions of the offender, even though there is an apparent need to protect society from him, except by using a sentence of preventive detention (for which of course the offender must be eligible) .....'.

While of course these views express only one aspect of the matter, I respectfully agree with them as far as they go. In particular the increase of a sentence because of the accused's bad record involves the danger of punishing him again for something for which he has been punished before, and cannot be too strongly deprecated. It is best then to begin with a punishment which fits the crime without regard to the accused's antecedents and only to look at these to see if there are mitigating circumstances (e.g. a first offender) such as would justify a reduction in the 'just maximum', this being a sentence appropriate to the circumstances and itself being less than the statutory maximum except in the very bad case."

With great respect to Wickham, J. I would find it difficult to deal with sentences in this way, as it were putting the various major considerations into separate compartments. To my mind this would be a difficult intellectual exercise.

I prefer to look at the various matters that fall to be considered as a whole. I try and keep in mind the three major aims of the law, retribution, deterrence and reform, and to look at them in the light of the particular offence and all the circumstances surrounding it. Often reform, and deterrence of the offender, as opposed to deterrence of the public at large, can be ignored, as many of the crimes committed here are fairly unlikely to be committed again by the particular offender. At the same time I weigh, or try to weigh, previous good, bad or indifferent character, the offender's environment and his degree of sophistication or lack of it, the nature and seriousness of the crime, its prevalence, whether it was planned or impulsive, and whether it was provoked by need, or natural anger, time spent in custody awaiting trial, and so on. But, as I have said, I like to keep all these matters before me, and then, examining them broadly, I establish a range of possible punishment. Having established a range I am then often assisted by sentences passed

by my brothers, as the members of this Court circulate within the Court all sentences handed down, with a short explanation of the nature of each case. By this time one begins to give more weight to one or more of the significant factors governing the case, and the range narrows.

As I found the judgment of Wickham, J. of great interest to me, I have read a very large number of judgments of appellate courts in cases where there have been appeals against sentence.

If I understand these judgments correctly the various judges who wrote them adopt the same general approach that I have indicated is my own. Thus in Reg. v. Herring (2) Street, C.J. said, "This Court has on more than one occasion recently taken the opportunity of quoting from a passage of the judgment of the Court of Appeal in New Zealand in the case of The Queen v. Radich ((1954) N.Z.L.R. 86) and more than once has given express approval to the principles laid down in that passage. The New Zealand Court was concerned also to consider quantam of sentence and to stress the various elements to which regard must be had when imposing sentence. After dealing in that case with the element of retribution and the element of reformation, both of which must have their place, the Court continued:

'We should say at once that this last argument' (which limited the consideration of the Court to these two aspects only) 'omits one of the main purposes of punishment, which is to protect the public from the commission of such crimes by making it clear to the offender and to other persons with similar impulses that, if they yield to them, they will meet with severe punishment. In all civilized countries, in all ages, that has been the main purpose of punishment, and it still continues so. The fact that punishment does not entirely prevent all similar crimes should not obscure the cogent fact that the fear of severe punishment does, and will, prevent the commission of many that would have been committed if it was thought that the offender could escape without punishment, or with only a light punishment. If a court is weakly merciful, and does not impose a sentence commensurate with the seriousness of the crime, it fails in its duty to see that the sentences are such as to operate as a powerful factor to prevent the commission of such offences. On the other hand, justice and humanity both require that the previous character and conduct, and probable future life and conduct of

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(2) (1956) 73 W.N. (N.S.W.) 203 at 205

the individual offender, and the effect of the sentence on these, should also be given the most careful consideration, although this factor is necessarily subsidiary to the main considerations that determine the appropriate amount of punishment.'" (The underlining is mine). And, again, in Reg. v. Cooke and Woolmington (3) Street, C.J. again quoted from The Queen v. Radich (4) (supra) and at 136 His Honour continued, "I think the courts must accept the burden imposed upon them, not a burden pleasantly undertaken, of seeing that sentences are imposed of such a character as will deter others from embarking on similar exploits. Young people, when they reach years which they claim entitle them to adult treatment in all other ways, cannot expect to be permitted to claim also that their youth entitles them to special clemency if they commit crimes. They cannot take the rights of adult status without accepting also its burdens and obligations, and the youth of this community, when they go out to work and form a portion of the adult members of the community must realize that they will not be dealt with as children if they commit crimes of violence. This was a crime of violence and a crime of a type that needs to be stamped out, and I think that the sentence which was imposed was insufficient to meet that aspect of the case. At the same time, the other factors must be taken into account - that their self-control had been lowered by the drink which they had taken, and that they were previously youths of good character who apparently worked regularly, but that does not entitle them to set at naught their other obligations and to escape punishment if they commit assaults of the nature of that described in the present proceedings."(The underlining is mine). In Reg. v. Simpson (5) an extremely experienced Court of Criminal Appeal said, "The question now arises, what is the proper punishment to impose upon the prisoner for the crime of which he was found guilty? The general principles on which the courts act are well known. There are three aspects of the punishment to which consideration has to be given, namely, the punitive, the deterrent, and the reformatory. So far as the last-mentioned aspect is concerned, this can be disregarded in the present case. The prisoner was a man of the highest character in all other respects than those which have been disclosed in these proceedings, and it can safely be assumed that he will not be likely to offend in this regard again.

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(3) (1955) 72 W.N. (N.S.W.) 132 at 135
(4) (1954) N.Z.L.R. 86
(5) (1959) 76 W.N. (N.S.W.) 589 at 593

The deterrent aspect has two branches, one of which is concerned with deterring the prisoner himself from offending again, and the other that of deterring other persons from committing like offences, they knowing that, if they do, punishment of a serious nature will be imposed upon them. It is unnecessary to have regard to the first branch, namely, that of deterring the prisoner, because as has been indicated, it can be assumed that he will not commit a crime of this nature in the future. But it is necessary that this act of killing should be marked by a sentence which will make it clear to others that matrimonial unfaithfulness will afford no justification for the taking of life. The law provides other remedies for matrimonial disharmony and this Court must ensure, so far as it can, that all persons are made aware of the fact that if they take the law into their own hands they will receive no leniency merely because of matrimonial discord.

The punitive aspect is one which it is quite obvious gave his Honour cause for anxious thought. It is clear from what his Honour said before he sentenced the accused, and from his report to this Court, that he was well aware of the various matters with which we have been dealing and which arise for consideration when a sentence is to be imposed. This case, in considering what is the proper punishment for the accused, presents certain special features. The prisoner has thrown away a lifetime of honourable service to the community. His decorations, including the M.B.E. and the Long Service and Meritorious Conduct Medal will be taken from him. He loses his pay in lieu of furlough, amounting to about £650, and he loses the pension which he has now earned of £312 per annum and which would have amounted to £345 per annum if he had completed his present engagement in 1962. He has lost his honour, he has suffered this financial loss, and the whole benefit of his long and faithful service has been swept away. Those are matters which must receive careful consideration at the hands of the Court when considering what is the appropriate punishment." (The underlining is mine.) Their Honours, in their joint judgment, then went on to apply The Queen v. Radich (6) (supra).

There are many other extracts from jdugments that I could quote which also seem to approach the question of sentence along the same broad lines that I have indicated as being my

(6) (1954) N.Z.L.R. 86.

own method. Until better instructed I propose to continue using the method I have now used for over two years.

Counsel in these appeals also raised the question of the effect of a particular crime being a prevalent one. There seems to be some doubt in counsels' minds whether it was proper for the Magistrate to take this matter into account, as he did. There is not the slightest doubt that consideration should be given to the prevalence of the crime in respect of which the prisoner has been convicted. R. v. Ragen (7), Hargreaves v. Chakley (8), R. v. Cuthbert (9), and R. v. Flaherty (10).

Mr. Baulch submits that these escapes are not the worst sort of escapes from custody that one can envisage, and I agree. There was, so it seems, no mass break-out. It is not a case where warders were knocked around or tied up. Yet maximum penalites were awarded. In Philip Passingan v. Beaton (11) I said "Maximum punishment should be reserved for only the worst sort of cases. See R. v. Harrison ((1909) 2 C.A.R. 94), Tabi Maima v. Ben Hambakon Sma (Unreported judgment, Prentice,J., 14th April 1971)".

But while it is true to say that the escapes are not the worst in the calendar, each of these men had made good his escape from custody on a previous occasion. The learned Magistrate also drew attention in his two reports to the need for a deterrent to others, because he points out, in effect, that the offence is prevalent in his area. In my opinion His Worship was quite entitled to give these matters due weight.

These appellants are building up quite formidable records, Jackson in particular. It is true that they have yet to be convicted of an indictable offence, and cannot presently be regarded as senior criminals, but they have established a bad pattern. However, I do believe that although His Worship made no error in applying the principles that he did, that nevertheless these offences did not merit maximum sentences. In my opinion a s.236(2) situation has been revealed and I therefore allow both appeals against sentence.

In the case of Jackson Iavoi I affirm the learned Magistrate's decision to make the sentence cumulative but vary it by substituting a sentence of four and a half months.

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(7) (1916) 33 W.N.(N.S.W.) 106
(8) (1903) 24 A.L.T. 184
(9) (1967) 86 W.N. (Pt.I) (N.S.W) 272
(10)(1968) 89 W.N. (Pt.I) (N.S.W.) 141 at 160
(11)(Unreported judgment 637 - Raine, J. - 4 Jun 71)

In the case of Martin Kore I substitutefor the sentence awarded a sentence of four months.

The appellants should be warned that if they keep up this sort of behaviour they will soon qualify for maximum or near maximum sentences.

Solicitor for the Appellants - W.A. Lalor, Public Solicitor.

Solicitor for the Respondent - P.J. Clay, Crown Solicitor.