ASST. SECRETARY (EXECUTIVE)

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IN THE SUPREME COURT) CORAM: RAINE, J.

OF PAPUA NEW GUINEA)

Thursday,
17th February, 1972.

AKAI YAMA v. I.H. McCOMBE

AKAI YAMA v. C. DREHI

(Appeals 102 and 103 of 1971 (N.G.))

1972

Feb. 11,
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MT. HAGEN

RAINE, J.

By consent these two appeals are heard together. They are appeals from seven convictions for stealing or being unlawfully adjacent to premises. The seven matters were all dealt with at the same time by the same Local Court Magistrate, who has provided me with the fullest and best reports I have had from any Magistrate during the period of nearly eighteen months that I have been a Judge of the Supreme Court.

It is important to note that the three charges under s.70(1)(m) of the Police Offences Ordinance, 1925-1966 (N.G.), namely, being unlawfully adjacent to premises, refer to the same incident in respect of which stealing charges were laid and convictions recorded. The appellant's Counsel complains about this, and I think rightly. To steal from premises, where, as here, one is a principal offender, and actually enters the premises and takes the goods, it is necessary that one should be unlawfully adjacent to the premises at some earlier point of time. One only has to utter this truism to appreciate that where, as here, the being unlawfully adjacent was immediately followed by the theft, it is unjust to punish the offender for both offences. It is double punishment. The cases where the two offences are so disjunctive as to deserve two sentences must be very rare.

I hasten to add that I see no objection to charging an offender with the two offences. It is often difficult to prove stealing, and, where in difficulty, the prosecution, in a proper case, can at least fall back on the lesser charge under s.70(1)(m).

In these cases the learned Magistrate purported to make one of the s.70(1)(m) sentences of

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imprisonment cumulative on a similar earlier conviction and sentence. A stealing charge was made cumulative on another s.70(1)(m) sentence. I set out hereunder a summary of the seven sentences.

Complaint No.	Offence	Sentence
293	stealing	2 months
294	s.70(1)(m)	2 months (concurrent)
295	s.70(1)(m)	3 months (cumulative)
296	s.70(1)(m)	2 months (concurrent)
297	stealing	4 months (cumulative)
298	stealing	4 months (cumulative)
299	stealing	5 months (cumulative)

As I have said, it is double punishment to give a sentence for stealing and a separate sentence for being unlawfully adjacent where, as here, the one offence immediately follows the other and involves the same premises. At the very least the two sentences should be made concurrent. To make one cumulative is quite wrong in my view.

Where a conviction for stealing is obtained no conviction should be recorded on the charge of being unlawfully adjacent. This charge could be stood over for a few months, when, if there was no appeal on the stealing charge, or where an appeal was unsuccessful, it could be dismissed by consent.

The sum total of the sentences was eighteen months imprisonment with hard labour. There were four cumulative sentences. For the reasons I have given above the cumulative sentence in relation to complaint No. 295 must go. But that still leaves three cumulative sentences out of the remaining six charges. In Philip Passingham v. Beaton (1) I discussed the question of cumulative sentences and referred to a number of authorities. I came to the

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(1) Unreported, Raine, J., Folio 637, 4th June, 1971

conclusion that it was only in special cases that more than two cumulative sentences should be passed. I do not regard the cases before me now, bad though they are, as being special.

The above matters were not all that Counsel for the appellant argued. To all of the seven charges the appellant pleaded guilty. Counsel submits that the learned Magistrate did not satisfy himself that the young appellant was above the age of sixteen years, and that accordingly there was no jurisdiction. See ss. 5, 33, 35, 36 and 37(1) of the Child Welfare Ordinance, 1961-1968.

In his report His Worship said "At the time of the defendant's trial the question of his age was not raised; however it was considered by me after I had noticed that the Police Informations stated his age as 16 years. After seeing the defendant in Court on this occasion I was satisfied that he would be at least 16 years. This I am entitled to do in my judicial capacity under the provisions of Section 20B of the Evidence (New Guinea) Ordinance, 1934-1964. I then proceeded to hear the charges against the defendant, thinking that I had jurisdiction after satisfying myself of his age".

A perusal of Form 2 in the record of proceedings, and also of the information, supports the learned Magistrate. I believe that His Worship did direct his mind to the question of age and I have nothing before me to suggest that he was mistaken.

Section 20B reads as follows:-

> "If in any proceedings, the Court, Judge, Magistrate, Justice, Justices or person or persons acting judicially does or do not consider that there is evidence or sufficient evidence to determine the age of a person, that Court, Judge, Magistrate, Justice, Justices or person or persons acting judicially, having seen the person, may determine the question".

The use of the word "evidence" makes me a little doubtful whether this section is not directed to the establishing of the age of a person, where age is an issue

in the trial, rather than an issue when the question of jurisdiction falls for decision. However, evidence is often led when problems arise as to jurisdiction. On balance I conclude that His Worship was not in error in relying on s.20B.

Be that as it may the appellant should have been aware that the information described him as being sixteen years of age and further to this the point was never taken. This ground of appeal fails.

The final ground of appeal, which was not contained in the Notice of Appeal, was added thereto by consent. This ground was that in relation to the stealing charges the Magistrate was wrong in law in dealing summarily with an offence which could only be dealt with by the Supreme Court, it being an indictable offence.

It was submitted that s. 443(a) of the Code precluded the charges here, in the circumstances that existed, from being dealt with in the Local Court. The section, so far as is relevant, reads as follows:-

> "443. Indictable offences which may be dealt with summarily - When a person is charged before two justices with any of the indictable offences following, that is to say, -
>
> (a) Stealing anything of such a kind and under such circumstances that the greatest punishment to which an offender convicted of the offence is liable does not exceed imprisonment for three years with hard labour;
>
> then, if the age of the accused person at the time of the alleged commission of the offence was in the opinion of the justices greater than twelve years, and if -
>
> (3) The accused person admits that he is guilty of the offence, and it appears to the justices that the nature of the offence is such, whatever may be the value of the property in question, that the offender may be adequately punished upon summary conviction;

the justices may deal with the charge summarily".

Here Counsel agree that the greatest punishment for stealing in these circumstances is imprisonment for three years with hard labour. It was not alleged that the stealings were within the Special Cases provisions contained in s.398. As we have seen, the age of the appellant exceeded twelve years, and he pleaded guilty to the offences. In view of the appellant's age it was expedient for His Worship to hear the charges, and he recorded this in Form 2 of the record of proceedings. I cannot see any error in principle. The value of the property was not great, and the offences, although quite serious, were run-of-the-mill. It is also clear that this young offender was able to be adequately punished upon summary conviction.

In view of this I fail to see how the learned Magistrate erred when he embarked on a hearing at the summary level, and in my opinion His Worship did not err in law when he decided to cloak himself with jurisdiction.

There is one other matter worth mentioning, which I raised myself during argument. It is not enough for the sentence to be merely expressed as "cumulative". Section 20 must be strictly followed, and reference specifically made to the previous offence upon which the instant offence is to be made cumulative.

The appeals therefore fail so far as the age and the s. 443 submissions are concerned, but succeed so far as questions of cumulative sentences and sentences generally are concerned.

In my opinion, bearing in mind the youth of the appellant but not forgetting that he had five similar convictions between 1966 and March, 1971, I feel that the justice of the case requires that I substitute for the sentences imposed by the Magistrate in respect of the stealing charges, the following sentences.

Complaint No. 293	-	4 months imprisonment with hard labour.
Complaints Nos. 297, 298	-	Each 5 months imprisonment with hard labour.

Complaint No. 299 - 6 months imprisonment with hard labour, being a cumulative sentence to be served so as to take effect from the expiration of the sentence imposed in relation to Complaint No. 298.

Sentences as above not expressed to be cumulative sentences are to be served concurrently.

In relation to the convictions and sentences on Complaints Nos. 294, 295 and 296 I have decided not to take any action on the convictions, as the three convictions were only appealed against on grounds that have failed. However, appeals were lodged against the sentences, and I substitute for the sentences awarded an order that in respect of the sentences awarded, no penalty be recorded. However, the fact that I have let the convictions stand should not be taken as an indication that I approve of the practice of convicting on both charges of stealing and being unlawfully adjacent, where, as here, the wrongdoer is unlawfully adjacent to premises one minute, and in the next minute, or fraction of a minute, as part of one continuing transaction, enters the premises and steals therefrom.

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

Solicitor for the respondents: P.J. Clay, Crown Solicitor.