IN THE SUPREME COURT
OF PAPUA NEW GUINEA

CORAM: PRENTICE, J.
Thursday,
19th July, 1973.

PUIS EMBARI v. S/CONST. WANGIWA

Appeals 89, 90, 91/1973 (N.G.)

1973

July 11
WEWAK

July 19
PORT MORESBY

Prentice J.

The accused was arraigned before Mr. Germain S.M. at Madang on forty-three charges of stealing. His conduct was said to be akin to that of Pele Cargo Cult leaders. He obtained money from associates and promised them a growth thereof, to be found later in suitcases.

Sentences totalling two years four months imprisonment were imposed. On an initial six months sentence, three others each of six months and one of four months, were made cumulative.

It was submitted that the learned magistrate had erred in two ways. Firstly, it was said, he had imposed the maximum punishment allowable to him in four cases - and they were not cases of the worst description of their class. Secondly, it was said the rules as to cumulative sentences laid down by the courts had been flouted.

The magistrate's reasons for sentence were stated very briefly; as follows:

> "The appellant admitted to forty-three counts of stealing money, from plantation labourers over a period of a month. The labourers were induced to part with their savings by deliberate and fraudulent cargo cult type promises similar to those attributed to the PELE Association of the East Sepik District.
>
> This course of conduct was proceeded with despite prior police warnings that such would be illegal, and none of the monies were subsequently recovered.
>
> I accordingly imposed a total sentence that I considered appropriate to the whole of the circumstances of the appellant's case viz. two years and four months."

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Defence counsel contends that insufficient material appears to justify a conclusion that any of the thefts were of the worst kind of offence of stealing. The magistrate does not state so, in so many words.... It is not shown that the offence was prevalent in the area.... It is irrelevant, he submits, to speak of "fraudulent" practices - if they were so, the accused should have been charged with obtaining property by false pretences.

My mind has wavered on a consideration of the magistrate's reasons; but I have come to the conclusion that the magistrate could have been entitled to, and did, entertain the view that these offences come within the worst category of stealing - involving as they did, stealing from primitive natives, deliberately, in a course of conduct, after warnings of illegality - with no monies being recovered. Under Sec. 236 of the District Courts Ordinance I may allow an appeal only when satisfied a substantial miscarriage of justice has occurred.

The matter of cumulative penalties has caused me more concern. This branch of law was dealt with by my brother Raine in 1971 (Philip Passingan v. Beaton (1)). He pointed out therein that where no question of a denunciatory sentence (such as a Supreme Court might wish to impose) is involved; normally not more than two sentences ought to be made cumulative upon another. Such may however be done in exceptional circumstances. I myself adopted this judgment, in Naime Vade v. Stuckey (2), a decision with which the learned magistrate herein should be familiar. The latter was a decision which clearly called for some exception to the normal rule. The question was again considered by the Full Court in a reference by the Secretary for Law (3) where the Court imposed two sentences on two others then being served. This was a case where young men serving cumulative sentences, escaped from custody (for which they were given a further cumulative sentence, on recapture) and then were dealt with for two offences (others being taken into account also) committed while at large. Clearly

(1) Unreported judgment No. 637 of 4/6/1971
(2) Unreported judgment No. 638 of 31/8/1971
(3) Unreported Full Court judgment No. FC44 of 6/4/73.

such cases can be met only by the addition of further penalties to the sentences being served. I think it must be that it was implicit incidentally in the reasons of the Full Court, of which I was a member, that the considerations as to accumulations of more than two sentences upon another sentence, should be borne in mind not only by a court itself dealing with multiple charges; but by a second court dealing with multiple charges following upon earlier sentences by another court.

The magistrate here appears to have considered that the imprisonment he could award under summary jurisdiction was inadequate. One notes that Sec. 443 in allowing of summary conviction for otherwise indictable offences, provides that "the justices may deal with the charge summarily". Section 444 enunciates that "(3) If for any reason the justices are of opinion that the charge is a fit subject for prosecution by indictment; - the justices are required to abstain from dealing with the case summarily" (underlining mine). If the magistrate is of opinion that the punishment he can impose properly, is insufficient, that is surely a very good reason for refusing to deal summarily with charges that can be dealt with on indictment.

The appellant was a first offender who pleaded guilty to all charges. In many cases twelve months is considered a heavy sentence for a first offender. These offences seem to have been a "congeries of offences in prosecution of a single purpose" (Tremellan v. The Queen (4)). I consider the Supreme Court would not have been disposed to award two years four months if there had been a plea of guilty to one, and forty-two other similar charges had been taken into account (particularly if, as appears to be the case, the accused was not a sophisticated person). I think it may truly be said as counsel submitted, that the learned magistrate has purported to exercise sentencing powers statutorily reserved to the Supreme Court.

I am satisfied that the totality of sentences is manifestly harsh and excessive, and that there are no exceptional circumstances that warrant the imposition of more than two sentences cumulatively upon the first. A substantial miscarriage of justice, to my mind, has been disclosed.

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(4) Unreported Full Court judgment No. FC39 of 10/11/1972.

I propose to allow Appeal No. 89 of 1973 (N.G.) against sentence of six months imprisonment with hard labour for stealing $55, made cumulative upon three other sentences. I confirm the conviction and vary the sentence by ordering that it be served concurrently with that of six months imposed on 18th July, 1972 as a third sentence.

Appeal No. 90 of 1973 (N.G.) against conviction for stealing $55, on which sentence of six months imprisonment with hard labour was made cumulative upon two other sentences each of six months imposed on 13th and 18th July, 1972; will be dismissed.

I allow Appeal No. 91 of 1973 (N.G.) against conviction for stealing $45, on which sentence of four months imprisonment with hard labour was made cumulative upon sentences of six months of 13th July, 1972 and three sentences each of six months of 18th July, 1972. I confirm the conviction and vary the sentence by ordering that it be served concurrently with that of six months imposed on 18th July, 1972 as a third sentence.

The result will be that the accused will serve eighteen months in all in lieu of the two years four months ordered in the District Court.

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Solicitor for the Appellant: S.H. Pape, Acting Public Solicitor

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