Mr Justice Kearney

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IN THE SUPREME COURT
OF PAPUA NEW GUINEA

CORAM: WILSON, A.J.

Tuesday,
25th September, 1973

REG. v. JIM KAUPA

Sentence

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Sep 25
MINJ
Wilson AJ

Jim Kaupa, of Doman, you have been found guilty on your own confession of "dangerous driving causing death". On 29th May 1973 at Dombuga near Kundiawa after a day of working, driving and drinking you drove a vehicle at a fast speed and, owing to the fact that you were drunk at the time, ran your vehicle off the road and crashed into a tree. One of the passengers in your vehicle, one Degembe Temene, fell out of the vehicle upon impact and struck his head on the road. Two days later Degembe died in hospital without regaining consciousness.

Your conduct on that day and your manner of driving could be described as highly irresponsible and constituting a serious crime of this type. If what I have just stated was the whole story of what happened on that sad day, then my duty would require me to imprison you, even as a first offender, so that your stay in gaol would be for about eight months (in addition to your time in custody prior to the date from which your sentence would take effect). I believe that you are sorry for what happened. I hope that you never forget that your manner of driving caused a man to die.

However, as I have just suggested, this was not the whole story. Special and unusual circumstances surround your crime. Although you drank a large quantity of beer during the period of several hours prior to the accident to the point that even you knew that you were drunk, it appears that one of those that had accompanied you was one Councillor Kamp, who, amongst other things, is a director of the company for which you were working at the time and a Councillor (and therefore a powerful man in the district). He had an influence over you, and it was he that was encouraging you to drink and almost compelling you to drive, when it was plain that you were reluctant to do so on account of your state of intoxication. The deceased and the other passengers knew of your condition and were willing to drive with you. The deceased had been drinking too. I note that drink is not really a problem in your life, and that you had not been in the

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habit of mixing driving and drinking.

I also take into account in your favour the fact that you have been in custody for almost four months, that you pleaded "guilty", that you are a first offender, that you were frank with the police, that you are genuinely sorry for what happened, that you are prepared to pay compensation, and, all in all, that you have already, even prior to me sentencing you, learnt your lesson. In my view, it is unlikely that you will offend again. It also goes well in your favour that you have a good background, that you are married with children, that you hitherto have had an excellent work record as a driver, that you are an industrious man, and that you have discharged your responsibilities as an employee and as a family man.

Bearing in mind the special circumstances referred to above and notwithstanding the fact that crimes of this kind where excessive drinking is involved normally can be expected in this Court to result in imprisonment, I propose in this instance not to send you to gaol. As may have already appeared in what I have stated previously in these remarks, the important actions which have influenced me against making an order of imprisonment are: -

1. You have already spent nearly 4 months in gaol and so, to that extent, have been punished.
2. You were largely influenced by another man to drink the quantity of liquor you had that day.
3. You are penitent and have convinced me that you are unlikely to offend again.
4. You are a first offender with excellent antecedence, and are desirous of having an opportunity to re-establish yourself as a useful citizen, preferably in the type of work you are experienced at.
5. You have promised to pay compensation to the victim's clan, something which not only is customary in this country but also is a reasonable responsibility for you to discharge. I think you do realise that crimes of this kind not only have their victims but also cause losses (economic, social and customary) which you should be prepared to meet.
6. The public interest can be protected by me attaching certain conditions to a bond, which, in their obser-

vance, will cause some inconvenience to you and restrict some of your freedoms.

I intend to give you a chance to prove to this Court, to prove to your fellow citizens, to prove to the kinsmen of the man whom you killed, and to prove to yourself that you have learnt your lesson, that you can be trusted, and that you have a sense of responsibility. I consider that the public interest will be better served by the implementation of the plan I have for you than by your being further imprisoned.

Having regard to some material and copies of authorities submitted to me by counsel for the Crown, Mr. L. Roberts-Smith, I should say something as to my approach to the task of sentencing in this case.

Firstly, it is proper that I should take into account in your favour factors 1 and 5 above. In criminal courts generally it is appropriate to take into account the punitive effect of such matters as apprehension, arrest, appearing in Court, the length of time in custody before sentence, the shame associated with disclosure to family and kinsmen, publicity, loss of employment and the like: Austin v. R. (1).

It is no less important in an emerging country such as Papua New Guinea, where there are strong traditional pressures upon a person responsible for the death of another man to pay compensation to the deceased's kinsmen whatever the Court's decision might be, to take into account other punishment which an offender has received such as the liability to pay compensation. Indeed, if a Court feels at the time of sentencing that there has already been adequate punishment, no order of a punitive aspect is normally desirable: Hollis v. R. (2).

Secondly, in the matter of sentencing each case must depend on its own circumstances. As was stated in R. v. Watson (3) punishment for crime arising from criminal negligence cannot be standardised. In so far as I may have departed from any practice built up in this Court, there is good reason for so doing in this case.

I agree with Gore J. when he said in 1930:

"When the system (of punishment used in civilised communities is applied to Papua and New Guinea) in addition to the varying theories of punishment found in the white community there are the numerous problems which arise out

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(1) (1964) Cr. L. Rev. 730
(2) (1964) Cr. L. Rev. 378
(3) (1960) Qd. R. 332

> of the application of the system of civilisation to a primitive people. Just as in a white community there is the need for uniformity as far as it can be had from the wide powers of the judges and their varying mental attitudes, a congruity of application of the criminal sanctions to the native races is to be sought."

Whilst I agree with Gore J. in his plea for "congruity of application" a distinction must be drawn between uniformity of sentence and uniformity of approach to sentencing. There is no need for the former, there is a great need for the latter.

Where I differ from the traditional theorists including Gore J. about punishment is in the definition of the paramount object of punishment. In my view it is the protection of the community. I cannot agree with those who assert that the paramount object is the prevention of crime. Advocates of this latter objective place too much weight upon the importance of retribution and deterrence, and too little importance upon reformation or rehabilitation. Whilst I can appreciate that deterrent sentences amongst native people may be more effective and that therefore they may play a more vital role in a primitive or semi-primitive society than amongst civilised and urbanised peoples, the risk that is run when the goal of crime prevention is too strenuously sought after is that individual liberties are sacrificed. If a balance is sought to be achieved between community protection and individual liberty, crime prevention will often be a by-product. World-wide experience has shown that punishment alone does not prevent crime. Why is it that notwithstanding deterrent penalties crimes are still committed? In no society, let alone in an emerging society, can the Court afford to act to the detriment or prejudice of the preservation and advancement of individual liberty. If crime prevention rather than community protection is the objective than the desire for uniformity of sentences and penalties fixed according to the seriousness of the crime over-rides notions of justice, fair proportion, and humanity.

Punishment should not be proportionate only to the seriousness of the offence; it should be proportionate to the offence and the culpability or blameworthiness of the offender. The community is entitled to expect the Courts to reflect its own disapproval of the crime, and to punish accordingly in proportion to the individual responsibility of the offender taking into account various factors such as his age, previous offences, mental condition, tribal customs, degree of contact with civilisation, etc. To this extent only does retribution form part

of a rational sentencing policy.

Thirdly, I have been referred to The Queen v. Radich (4). That case was a decision of the Court of Appeal in New Zealand and is one of the relatively few cases in which there is discussion and an authoritative statement on the subject of punishment and sentencing. I follow the general principles laid down in that case and, in particular, the principle referred to at p. 87 which is stated in the following terms:

> "... One of the main purposes of punishment .... is to protect the public from the commission of .... 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 civilised 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 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 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."

In so far as this statement is a general statement of principle it is helpful. However, it should not be overlooked that the case itself was one of manslaughter where the need for a deterrent penalty is often greater than in the case of dangerous driving causing death. Furthermore, crimes requiring penalties to be determined with an emphasis on the notion of general deterrence are not as common as are sometimes thought. I refer to what I said about deterrent penalties in the case of Reg. v. Tsauname Kilape and Abiya Palina (5) and about the approach to sentencing generally in that case and the case cited in that judgment of Reg. v. Iki Lida (6). Although the notion of de-

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(4) (1954) N.Z.L.R. 86
(5) Unreported judgment No. 763 of September 1973
(6) Unreported judgment No. 764 of September 1973

terrence of others who may be subjected to the temptation to act as the offender did or who may be as lacking in care, as this offender was, figures prominently in the law, it is losing some of its force; see the judgments of Bray C.J. and Hogarth J. in Power v. French (7).

The sentencing judge ought not to deceive himself into believing that his role as sentencer is crucial to the question of deterrence. Particularly in the case of first offenders, it is the arresting police officer or even the investigating police officer on the job promptly after the crime has been committed (or, in a case of this kind, the angry kinsmen of the deceased who may be minded to take reprisals) who often have a greater deterring influence upon the offender. Deterrence is but one element to be taken into account in sentencing; it should not be the only or even the paramount element.

Fourthly, I have not overlooked, in my approach to the task of sentencing this defendant, the case of Reg. v. Bartlett (8). I agree with Hart J. in that case that "there is a fundamental difference between a man who intends to do a wicked act and one who offends against the law through negligence" and that "every driver of a car involved in a fatal accident should not be sent to gaol merely because the car has been involved in a fatal accident". I would add also that every driver involved in a fatal accident who is intoxicated should not be sent to gaol merely because of the co-existence of the two factors, fatal accident and intoxication. Realistic as the reasoning of Hart J. was, his judgment in that case does not assist very much in deciding where to draw the line between "imprisonment" or "no imprisonment" in border-line cases. I also agree with Hart J. to the extent that he recognises the trend of the legislature towards affording offenders, especially first offenders, an opportunity to bring about their own reformation without being committed to prison - see Sec. 19 and especially Subsecs. (3), (6), (7), (8) and (9) of the Criminal Code, and see Sec. 656 of the Criminal Code. Just because Sec. 656 is limited to crimes punishable by imprisonment not exceeding 3 years it does not follow that imprisonment must always be imposed for crimes that are punishable by imprisonment exceeding 3 years. Section 19(9) in particular is cast in the widest possible terms. If the trend to which Hart J. has referred continues in Papua New Guinea in the same manner as has been seen in most enlightened criminal justice systems

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(7) (S.A. Full Court, 13/8/73 - as yet unreported)
(8) (1966) Q.L.R. 49

throughout the world, it is not unreasonable to suppose that, before very long in this country's emergence, there will be enacted legislation providing for "suspended sentences" in the widest possible range of situations, providing for the discharge of offenders on probation with dedicated and trained probation officers supervising offenders conditionally released in this way, and also providing for the release of prisoners on parole after they have served a part of their sentence provided, of course, that release of those prisoners selected for parole does not jeopardise the interests of public protection.

Fifthly, the rehabilitative approach to sentencing is finding more and more acceptability amongst sentencers. This approach involves an attempt to change the offender through treatment or corrective measures or, indeed, by force of circumstances as they occur after sentence or occasionally (as here) prior to sentence. Few would dispute that reform of the offender is the surest way of protecting the community from crime. Closely linked with this approach is another known as reparation. There are occasions (and the instant case is one) when the wrong-doer and those close to him should pay compensation in goods or money for the crime committed. This is both an old and a new aim of punishment. It is of particular relevance in a case such as this where there is a traditional obligation to pay compensation. My decision to introduce into the Court's order a certain amount of compulsion as to compensation is both consistent with native custom and in line with modern penologists who argue that it contributes to the reform of the offender and the reduction of crime if the offender is made to pay compensation.

Sixthly, the tendency over recent years has been for there to be a growing recognition by the Courts of the principle of individualisation. To the extent that this defendant may be made subject to an order that is somewhat different to others convicted of this crime, it is because of my desire to consider the defendant as an individual who has needs as well as guilt. The enactment of Sec. 19(9) is but one example of a general movement towards individualisation.

It is significant that the growing acceptance of individualisation has not meant the disappearance of the tariff. The tariff principle, which has an important place in the sentencing system, proceeds from the concept that a crime deserves a particular punishment. This has been my dilemma in the instant case.

The result of both principles (tariff and individualisation) co-existing is that we have a dual system of sentencing. The primary decision of the sentence in a particular case is to determine according to which of these two principles the case is to be decided. Is an individualised measure to be used, or is the case to be dealt with on a tariff basis? In other words, which of the two conflicting penal objectives is to be pursued? I answer these questions in the special circumstances of this case by preferring an individualised approach. The individualised measure found in Sec. 19(9) is to be used. The complexities involved in this decision are succinctly described by D.A. Thomas in his recent book Principles of Sentencing. In answer to any critics of the approach which I am adopting in this case and especially to those who might say that this is the "soft" approach, I suggest that in one sense this is a tougher penalty for the defendant, in that he has quite a heavy burden of responsibility to carry for quite a long time, albeit whilst not being deprived of his liberty. It certainly would have been simpler for me as the sentencing judge to fix a sentence (and it would have been a prison sentence) according to the tariff system and proportionate to the seriousness of the crime and the defendant's culpability. It could have been justified easily upon the basis that the defendant would receive the punishment he deserved, that he would be deterred from offending again (as would be others like him), and that society would be protected. The more difficult approach I have adopted has involved a problem of diagnosis and assessment; I have tried to reach a decision so as to protect both the interests of the public and the interests of the defendant himself.

Seventhly, my earlier reference to a sentence of eight months imprisonment may be taken as an indication of what I would consider the defendant could expect to receive by way of a prison sentence should he abuse the trust that I intend to place in him, i.e. should he indicate that he is not desirous of having the factors which I have referred to mitigate against the sentence which his crime otherwise calls for. To this extent, the manner in which I have exercised the discretion I have under Sec. 19(9) is akin to what is elsewhere described as a "suspended sentence". The essential difference, of course, is that, if the defendant in this instance breaches the conditions of his recognizance or any of them, it does not automatically follow that he will receive the prison sentence to which I have referred, whereas in the case of "suspended sentences" breach of the conditions of suspension leads

almost invariably and, in some jurisdictions, mandatorily to the prison sentence as previously announced being served.

Jim Kaupa, the sentence of the Court is that you be discharged upon your entering into your own recognizance in the sum of $150 upon the conditions following:

(1) That you appear and receive judgment at some future sittings of the Court or when called upon within a period of two years from the date of entering into the recognizance.

(2) That you, in the meantime, shall keep the peace and be of good behaviour.

(3) That, in the event of your not regaining employment as a driver, you shall not drive a motor vehicle at all during the period of the bond, except for the purpose of travelling to and from your place of employment or in the course of your employment as a driver.

(4) That, in the event of your regaining employment as a driver, you shall not drive a motor vehicle during the period of the bond except for the purpose of travelling to and from your place of employment or in the course of your employment as a driver.

(5) That you shall not during the period of the bond consume intoxicating liquor upon any day that you are required to work as a driver.

(6) That you shall pay or cause to be paid to the kinsmen of the deceased before the expiration of one year from the date of entering into this recognizance the sum of at least $300, part of which sum, i.e. $200, you have already paid to your Councillor and the balance of which sum, i.e. $100, you have volunteered to pay, and that you shall notify the officer in charge of the Police Station at Kundiawa the date or dates of such payment or payments of compensation and the amount or amounts thereof.

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

Solicitor for the Accused : G.R. Keenan, Acting Public Solicitor