IN THE SUPREME COURT OF PAPUA NEW GUINEA

CORAM: LALOR, J.
Monday,
18th November, 1974.

Appeals Nos. 129, 131, 132 & 133

MEK YAMBE — Appellant
and
ALBERT FARAPO ORAKA — Respondent

NOMBRI KONIGL — Appellant
and
ALBERT FARAPO ORAKA — Respondent

TORI KONDEL — Appellant
and
ALBERT FARAPO ORAKA — Respondent

WAI PAKI — Appellant
and
ALBERT FARAPO ORAKA — Respondent

REASONS FOR DECISION

1974
18 Nov.
MOUNT HAGEN
Lalor, J.

These appeals originate from an incident which occurred at the Minj police station on 4th August, 1974. On the previous day 3rd August, one Kints Obe had alleged that he was assaulted by two policemen. He was asked to come to the station the following day to identify the policemen which he did and the policemen were charged and were being escorted by the respondent to the cells. They were assaulted by Kints Obe and three other men. A large number of other men joined in the attack upon the police as a result of which a number of police were assaulted and one rendered unconscious. As a result of the incident four men were charged with unlawfully striking one of the police, Korem: he was not the policeman rendered unconscious, who was Bagaga, and no specific action appears to have been taken in respect of this assault. The four men were convicted and fined $20 in default twenty days' imprisonment.

On the same day 24 men including the four who had been charged with striking were charged with behaving in a riotous manner.

Five of these, including the four who had been convicted earlier of assault, pleaded guilty. They were fined $40 each in default two months' imprisonment cumulative, where applicable, to the earlier sentence that day.

Nineteen pleaded not guilty and of these the present appellants have appealed against both conviction and sentence.

A number of grounds of appeal against conviction were raised but there was only one of any substance. It was argued that the evidence before the Court was insufficient to convict because of the general nature of the police evidence of identification and, in three cases, the denial by the accused in statements to the Court of any participation in the riotous behaviour.

It is true that the identification by the police witnesses was general - "I recognise the defendants" - and that no evidence was given of what the appellants individually were alleged to have done.

The Local Courts Act gives the Court power to recall any witness if necessary, and I think in circumstances such as this where only general evidence is given of persons acting collectively, and their identification is also of a general nature, that the Court should use its power to obtain more particularised evidence where the defendants deny being involved.

The Court could then satisfy itself as to the sufficiency of the identification. It may well be the police witnesses were well acquainted with the appellants: on the other hand they may never have seen them before in which case the Court would require more detail of how they were identified before it could be satisfied there was not a case of mistaken identity.

As to the appellants' denial of involvement, the Court should keep in mind that mere presence when an offence is committed does not make a person guilty of that offence.

Some participation or encouragement of the offenders should be shown.

On the whole I think the cases should be remitted for rehearing to clarify the question of identification and participation.

But there is also an appeal against sentence on the ground that the sentence of three months' imprisonment is manifestly excessive; and it is argued that since the appellants have already served five and a half weeks they have been adequately punished, and accordingly the cases should not be sent back for rehearing but the convictions simply quashed.

The only basis on which it is argued that the sentences are excessive arises out of the disparity in sentence between that given to the five men who pleaded guilty - a $40 fine - and the sentence of three months' imprisonment given those convicted on a plea of not guilty.

Unfortunately the notice of appeal did not specify disparity of sentences as a ground of appeal and accordingly the magistrate in his report did not give reasons for the disparity. There may have been good reasons but, in default of them, I would regard a $40 fine as grossly inadequate to the circumstances of the offence. It covered the assaults which rendered a policeman unconscious. It was a flagrant taking of the law into their own hands despite the fact that the policemen accused of the earlier assaults against one of the defendants had been charged and were in custody. Obviously the defendants could have been charged with much more serious offences. I regard the three months' sentence imposed as far from being excessive.

Nevertheless, the disparity between the two sets of sentences remains and the question which this Court must answer is, what attitude should the Court take to this disparity.

With respect, I adopt the view of the Court of Appeal in Coe (1) in which Lord Parker L.C.J. said:

(1) (1969) 53 C.A.R. 66 at 71

> "The Court does in general seek to ensure that sentences as far as possible favourably compare one with another, but they are not bound to do so and when one finds, as one does in the present case, that the sentence imposed on the co-accused is a wholly inadequate sentence, this Court can see no ground whatever for making the larger sentence strictly compare with the lower one;"

I note that this statement of the law was adopted by the Supreme Court (in Banco) of South Australia in The Queen v. Evans (2).

Accordingly I quash the convictions and sentences and remit the cases to the Local Court for rehearing. The appellants' bail will continue until the date of the rehearing.

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(2) 5 S.A.S.R. 183

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

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