IN THE HIGH COURT OF)
THE SOLOMON ISLANDS) ***CRC.36 of 2004***

IN THE MATTER OF: An Appeal from the Magistrate's Court

And

IN THE MATTER OF: DAVID ANGITALO, KENNETH ONGAINAO, HENRY SATINI and PATRICK BASIFAKO

Appellants

And REGINA

Respondent

Criminal Law - *Appeal against conviction and sentence – Appeal from Magistrates Court – Powers of High Court on appeal – proviso to s.293(1) which requires exercise of discretion on appeal where "no substantial miscarriage of justice has actually occurred."*
Criminal Procedure Code (cap.7) s.293(1)

Criminal Law - *Appeal against sentence – mitigating factors – apparent refusal to allow matters in mitigation – sentence imposed reduced from maximum available – whether Magistrate sufficiently took account of such factors of mitigation – discretion in this court on appeal.*

Criminal Law - *Appeal against sentence – sentences made cumulative on each other – appropriate tariff in cases where court proceedings disrupted – principles applying when considering whether sentences should be made cumulative on each other.*

These various appellants were convicted of offences arising out of an affray at Malu'u, North Malaita when the Local Court justices delivery of the courts decision was interrupted and the court members dispersed by violence. The convictions were in fact convictions on simple offences of going armed, theft and assault. The Magistrate, after conviction proceeded to sentence on the basis that the circumstances surrounding

the offences gave rise to the worst case scenario. The facts appear from the judgment.

Held

(1) The convictions were supported by the evidence. The part absence of representation during the course of the trial of one defendant did not amount to an error of type or magnitude sufficient to make the verdict unfair.

(2) Where the Magistrate has said "no mitigation can have effect in this case" but sentences in fact illustrated a disparity reflecting a factual acknowledgment of the changed circumstances of the particular offenders, and fell short of the maximum permitted by law, then the totality principle is acknowledged.

(3) The principles affecting the imposition of cumulative sentences admits of exception when the offences are so different in character or in relation to different victims. The facts clearly show that difference and notwithstanding a concession by the Crown, the approach adopted by the Magistrate has not been shown to be wrong in principle.

Cases cited

R v-Dillion (1983) 5 C.App. R 439
In Public Prosecutor v-Sidney Kerua and Billy Kerua (1985) PNGLR 85
R v-Lauta (HC crc384 of 2004)
Stanley Badev v-R.(1988/89) SILR121
R v-Lency Wanefalea (HC crc130 of 1992)
Fefele v-DPP (HC crc5 of 1987)
Ibb v-The Queen (1987) 163 CLR 447
Veen v-The Queen (no2) (1988) 164 CLR 465
Baumer v-The Queen (1988) 166 CLR 51

K. Averre for the Appellant
C. Ryan for the Crown

At Honiara: 24 August, 10 November 2004

Appeal

Brown J. The appellants seek to overturn their convictions on the grounds that they were unsafe and unsatisfactory having regard to the state of the witnesses evidence for such witnesses evidence conflicted. The convictions for assault, going armed and larceny arose out of a riot during the delivery of a decision of the Gome land case dispute, given by the Local Court at Malu'u, North Malaita on 15 June 2000 when these appellants' behaviour caused the Court to flee from the Court building. The Magistrates Court for the North Malaita District heard the matter in December, 2003 and proceeded to convict on various of the charges and sentenced on the 5 December.

The 2nd ground alleged that the Magistrate had prejudged the cases against the appellants for he appeared to have read his judgment immediately following defense counsel's address, and that the fact of such written reasons gave rise to an apparent failure to fully consider the defense case and properly weigh the evidence. The 3rd ground of appeal, in so far as it concerns Kenneth Ongainao, was the Magistrates' failure to afford him adequate opportunity to seek alternate legal representation when his original representative withdrew and further that the Magistrates' practice in court effectively failed to sufficiently to protect the interests of the appellant and his right to a fair trial was thus affected.

The powers of this court on appeal .

The Criminal Procedure Code (cap 7) provides;

*"**s.293.**-(1) At the hearing of an appeal the High court shall hear the appellant or his advocate, if he appears, and the respondent or his advocate, if he appears, and the High court may thereupon confirm, reverse or vary the decision of the Magistrate's Court, or may remit the matter with the opinion of the High Court thereon to the Magistrate's Court, or may make such other order in the matter as to it may seem just, and may by such order exercise any power which the Magistrate's Court might have exercised:*

Provided that the High Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

By virtue of s.283(3) an appeal to the High Court may be on a matter of fact as well as on a mater of law.
Part of the Magistrates reasons for decision are reproduced for it will help in understanding the appeal and basis of my decision.

Magistrates Reasons

This case has taken 2 days. Originally there were 27 charges or amended charges against these & a substantial number of other defendants. As a result of comments made by me after I heard the facts that I insisted on being given but which the prosecution found difficult to give but not written; and remarks made at the close of prosecution evidence were withdraw by the prosecution as untenable.

I heard the evidence of the court clerk and court President. I will not recite it here. They were at the center of the incident and like anyone facing danger and retreating from it they formed impressions of what was happening but it was difficult for them to be accurate. I have used their evidence as corroboration rather than primary as I appreciate fully the difficulty of recall. Where they have corroborated each other I have used their evidence as primary; likewise with the other court practice.

I found the evidence of John Wanesila who was witnessing the incident from outside the court and therefore not directly effected by what was going on as both truthful and compelling. I have seen his demeanour and manner of giving evidence. I have no doubt as to his accuracy and where there has been conflict I unreservedly accept what he says.
Kelly Suku also witnessed the incident from outside court as did Daniel Konai.
The 15 June court hearing (the time of the offences) was the end of a week of hearings with the Defendants present in court so instant identification evidence does not arise and most defendants were known to the prosecution witness before the trial all were known to some prosecution witness before the trial so identification by the witness was not as problematic as in a lot of cases and I have no doubt in my findings that these parties found guilty of the respective offences did those offences.
I have reconstructed the events from the several versions in doing so whenever there was ***no*** *doubt in my mind as to the correct version of events even if a slight doubt I have interpreted the events in the best light favoring the respective defendants.*
David was the only def. to give evidence and his evidence was unbelievable for reasons given see next page. The prosecution allegation I found proved remained unanswered. No Def has shown on the balance of Probability they had lawful exercise for carrying arms. I take `arms' to

mean something that can be used as a weapon to harm someone and that can include a chain.

David Angitalo

His evidence for moving forward doesn't explain why he was seen going back into court by other witnesses, it is not believable that he doesn't know if anyone followed him when he says he frightened, he would have been pushed or shoved from behind if court was full and .....

He says did not see knife, when all prosecution witness say knife draw and used before President and thus he left. Says doesn't know which way judgment was going. "I am not sure if I saw a chair thrown at the court president." This statement and the manner in which it was given shows the lie. This incident happened while he was in court and either he did or didn't see it. "I have never discussed how the disturbance in court happened". Unbelievable."

So far as the question of "weight" to be given the evidence heard by the Magistrate is concerned, this Court must be mindful of the warning not to seek to substitute this courts subjective view of what weight to place on the evidence of witnesses recorded, when this court has not had the opportunity available to the trial judge to listen to, watch the demeanor of nor assess that evidence, first hand, for what weight to place on witnesses evidence is the concern of the trial judge according to his impressions, and not this court. That is the warning implicit in s.293, and precedent authorities binding on the court.

The various appellant convictions and sentences are listed:

Appellant	Offence	Section of Code	Sentence
1. David Angitalo	Going armed Theft	s.83 s.261	18 months 2 years
2. Kenneth Onganinao	Assault court officer Theft	s.247(e) s.261	2 years 2 years
3. Henry Satini	Theft	s.261	2 years
4. Patrick Basifako	Going armed Theft Assault court officer	s.83 s.261 s.247	2 years 2 years 2 years

Some sentences were ordered to be served cumulatively.

I should say that the Crown has conceded the appeal against conviction for theft in Patrick Basifako's case.

It is appropriate therefore to allow that part of his appeal.

I am not prepared to accede to counsels' argument that those other convictions should be set aside as against the weight of evidence. The Magistrate pointed to the evidence on which he relied when convicting and clearly those findings were open to him on the facts. Nor am I minded to place much credence on Mr. Averre's argument over the Magistrate proceeding to give his reasons and findings at the conclusion of counsels submissions, as if that fact somehow took from the Magistrate the ability to impartially assess the evidence. Mr. Averre says the Magistrate read from his notes of the reasons, which suggests his reasons were prepared before counsels submissions. It may be so, but I cannot see any error (or methodology as described) in the Magistrates hand written notes which cause one concern. The insertion of the word "no" in one part, for instance, may relate to the Magistrates wish for cogent expression. As a matter of practice, I would prefer the reasons to be typed and certified by the Magistrate, afterwards for it often happens that oral reasons but slightly follow the notes and the Magistrates certification of his record of proceedings should become adopted practice. Often a judge will write in his notes of his reasons something which does not form part of his delivered address and which may be relied upon by counsel on appeal by error. I am not saying this has happened here, for the Magistrate has not certified the transcript nor given this appeal court a report on the proceedings before him. I believe the practice of photocopying the Magistrates notes of his reasons may give rise to difficulties in these appeals, without him having an opportunity of reporting to this court where, for instance, his delivered reasons have some gloss not apparent from his notes, or he digressed from such notes. To criticize the Magistrate for proceeding immediately following counsels address, however, does not in my view, amount to an appeal point especially where no evidence is adduced of any particular part of counsels address which should have been alluded to in the Magistrates summing up, a part which shows the error into which the Magistrate should be at pains to avoid and into which he had fallen in this case. Rather the appellants claim the weight of evidence was against them.

The reasons read;

I have reconstructed the events from the several versions in doing so whenever there was No doubt in my mind as to the correct version of events even if a slight doubt I have interpreted the events in the best light favoring the respective defendants.

The Magistrate asserts the benefit of doubt going to the respective defendants so even allowing for the after-though, the latter part of the sentence predicated the effect of doubt or no doubt. Photocopies of typed notes then merely give rise to arguments over the lower courts

written expression in its notes and may not reflect the mellifluous oral delivery in Court. Before this Court condemns the notes, it should seek perhaps, a memorandum from the lower Court Magistrate to ascertain whether his notes were delivered verbatim or if in the course of delivery, he spoke *extempore* during delivery of his decision, for experience shows that often to be the case.

Hence to use these handwritten notes in this fashion, to attempt to illustrate a failure to fully consider the evidence (perhaps by omitting to acknowledge the arguments of counsel) can have value where they clearly misapprehend the argument or relevant evidence. Neither has been shown here.

The Magistrate relied upon the evidence of John Wanesilia;

The witness identified Patrick and Kenneth. "Patrick had a bush knife. He came to the Court Clerk with the bush knife. Kenneth grabbed a file from ..... at the same time the justices ran away. Kenneth had a chain and threw it at justice. Henry and David chased the President out of the Court and grabbed papers. Henry had a chain in his trousers. I saw the chain" so the evidence unfolded.

The Magistrate accepted this evidence as truthful and compelling. He also heard the evidence of the Court Clerk and President of the Justices. He was at pains to say; *They were at the center of the incident and like anyone facing danger and retreating from it they formed impressions of what was happening but it was difficult for them to be accurate. I have used there evidence as corroboration rather than primary as I appreciate fully the difficulty of recall. Where they have corroborated each other I have used there evidence as primary*

The Court Clerk's evidence identified one "Patrick Basifako as holding a knife, the Clerk was frightened by the mans actions with the knife when he struck the desk and the Clerk ran out the back but had files taken from him. He recognized David Angitalo with a small knife. He also saw Jeffrey Wanelaluia get a book of civil cases inside the office and take it outside. The President said someone threw a chain at him, a constable helped him up and he left the Court. Jared Ramataba said Patrick held a bush knife, pulling it from his trousers.

So the various witnesses named the various accused whom they knew after so long in Court, and described the accused's actions in the melee.

The Magistrate was entitled to rely on the witnesses and his comments in relation to the evidence of the only accused to take the box show that the accused's evidence was to be disbelieved for the reasons he gave. When one reads the testimony of David Angitalo it is clearly exculpatory and self serving and seeks to contradict the other accepted evidence which inculpates him. The Magistrate is entitled to make up his own mind on whom he believes in these circumstances.

The last ground relates to the fact that part-way through the trial Kenneth Ongainao was left without representation. How this occurred is not clear but the Magistrate addressed the duty to afford the accused procedural fairness in the circumstances but having regard to the public interest in finalizing what was undoubtedly a costly trial of a most serious nature and allowed the trial to proceed. While he may be criticized for questioning the accused, his involvement to that extent cannot be said to be error of such type or magnitude to make the verdict unfair.

Kenneth did not give evidence in his defence and the appellant has not shown specific questions of witnesses by the Magistrate who could be said to be unfairly treating Kenneth by such questioning. A blanket allegation is not enough.

These short extracts of the evidence given by these two witnesses illustrate the difficulty of verbatim recording the whole oral record, but the Magistrate or Judges notes are to be accorded certainty as the record of the proceedings (in so far as evidence given is concerned).

I have read the whole of the record of proceedings and list the witnesses whose evidence was taken by the Magistrate.

A. Lucia Kebai
Local Court Clerk
1. Implicates Patrick Basifako and his bush knife (knows him personally)
2. Frightened by threatened violence by David Angitalo who held a small knife.
3. Jeffrey Wanelaluia
Took civil case book from office

B. Vincent Joe Banelongi
Chairman of Chief and President of Local Courts
1. Had a chain thrown at him by someone, and fell as a result
2. Lift the Court with the help of a Constable.

C. Jared Ramataba - Justice of Local Court
1. Implicates Patrick Basifako with a bush knife taken from trousers, know him from his time in Court
2. Threatened by Patrick
3. Left Court with Court Clerk

D. John Wanesilia
1. Implicates Patrick with his bush knife
2. Implicates Kenneth with a chain which Kenneth wielded about a justice
3. Henry and David chased the President from the Court
4. Both Henry and David took Court papers and Henry a file
5. Patrick tried to cut at Court Clerk
6. Patrick had a big knife
7. David had a small knife
8. David had a chain inside his trousers
9. Knew Kenneth from before
10. Demonstrated use of chain
11. Kenneth threw chain at Justice running away

E. Kelly Suku
Spectator
1. Implicates Basifako's use of bush knife at Clerk
2. Kenneth used chain at President
3. David held knife behind justice
4. Henry and David had files
5. Henry had small knife

F. Daniel Konai
Spectator
1. Patrick had a bush knife
2. Kenneth held a record book
3. Kenneth wielded chain at Justices
4. Henry and David had files
5. Henry had a padlock chain
6. David had a small knife
7. Justices ran from the Court

G. David Angitalo
(Accused)
1. Went out of side door of Court when frightened (by the troubles)
2. Didn't have a knife
3. Had a 10kg rice bag with him

4. Only held the book inside the office
5. Didn't see Court documents taken when President left (the Court)

These types of cases are notoriously difficult. There is serious affray and people are concerned for their own safety. It is to be expected that subjective views of what took place will not necessary clear a cloudy picture for each witness is recounting event which immediately concerned him. The Presidents' evidence for instance illustrates the narrow focus of concern for events happening around him for his fear drove him to escape once the chain wielding had been avoided. His recollection was focused on the fear generated by the violence.

But nevertheless, some witnesses were able to place these various accused in the melee and recount their particular involvement. Certainly any cross-examination had not thrown doubt in the witness' mind as to their recollection.

Convictions

Henry Satini
1. Going armed in public contra s.83 of Penal Code
2. Theft of court documents contra s.263

As I have summarized, there is evidence of John Wanesilia, Kelly Suku and Daniel (Daivid) Konai to support both convictions.

David Angitalo
1. Going armed in public contra s.83 of Penal Code
2. Theft of court document contra s.261

In this appellants case, there is evidence against him by Lucian Kebai (in relation to the "going armed"), John Wanesilia, Kelly Suku and Daniel (David) Konai.

Patrick Basifako
1. Going armed in public
2. Theft of court documents
3. Assault Court clerk contra s.247(e) of Penal Code

The evidence against him is that of Lucia Kebai (going armed and assault Jared Ramataba (going armed and assault) John Wanesilia (going armed and assault) but the theft charge is unsupported by those witnesses, although Patrick was in company with others guilty of the theft.

(He in fact, had no case to answer in relation to damage to court property and was acquitted).

Kenneth Ongainao
1. Assault of Court Clerk
2. Theft of Court documents.

The evidence relied on can be found in that of John Wanesilia (assault with a chain which he wielded about a justice) and Kelly Suku (used chain against the President); Daniel Konai (wielded chain against justices and had a record book);

There is evidence set out above, pointed to by the Crown which supports these convictions, except for that of "theft" by Patrick Basifako.

There is in the Chief Justice's judgment the exposition of principle which should guide an appeal court considering the argument that conviction proceeded on an unsafe and unsatisfactory basis and against the weight of evidence.
He reiterated a number of statements of principle, both in this jurisdiction and overseas, including that succinct statement in *Gouwadi v-Regina* (1990) SILR 168

"An appellate court would only interfere in a case that depended on the Magistrates assessment of witnesses and evidence where it was satisfied there was a real likelihood he reached the wrong conclusion."

In these cases, I am not so satisfied the magistrate has reached the wrong conclusion, except for that conviction of Patrick Basifako for theft.

I cannot find error in the Magistrates immediate delivery of judgment at the conclusion of the trial, especially when it is apparent on the record that he had written notes in relation to his reasons, chronologically before submissions, so that submissions may simply have left the Magistrate unmoved from his findings on the facts. Clearly the evidence on the oral testimony was sparse and basic, but from the Magistrates point of view sufficiently reliable to satisfy him on the onus of proof.

I dismiss the appeals against conviction apart from that conceded in respect to theft in Patrick Basifako's case.

Appeal against sentence

The appellants raised a number of grounds of appeal in relation to sentence which may be summarised:

1. The Magistrate failed to take into sufficient consideration mitigating factors, including good character, age, personal circumstances and the background of the offending. (two offenders were in their 50's).
2. Failed to properly consider the maximum penalties under Part XII of the Penal Code (s.115).
3. Excessive sentences having regard to maximum prescribed by law
4. The sentences wee manifestly excessive when regard is had to comparative sentencing principles.
5. Imposed sentences disparate in nature considering the roles played by the individuals.
6. Imposed sentence which, in all the circumstances was manifestly excessive.

The Magistrate prefaced his sentencing with the following remarks.

These are serious offences involving violence to the court at a time of ethnic tension. It was on attempt by one community or a section of it, to demonstrate they were above the law and if the law did not do what they want they could take the law into heir own hands. It was a direct challenge to law and order it was a challenge to justice at its extreme. It is the absolute worst case of its type I have seen. It could and indeed did contribute to anarchy and the break down of law and order. Nothing graphically illustrates this more than the fact that the Local Court never sat again.

These defendants not only did the act; they have failed to accept what they did they pleaded not guilty and fought the allegations through; not just putting the prosecution to poof but lying to the court in David's case and cross-examining witnesses hoping to escape justice in all cases I have not increased the sentence for the not guilty pleas but give no discount for continuation which there is none, not one word of sorry heard in mitigation.
An example has to be made of each of these defendants and substantial prison sentence has to be given to each. I do not believe the action were spontaneous, I believe they were organized and pre-arranged; how else do 3 of the defendants end up armed and in court Patrick concealing a bush knife in his trousers and all standing up straight after a cry of "we are going to lose." That makes the offence even worse.

Mitigating factors

Mr. Averre pointed to the Magistrates reasons for sentence and quoted a particular part as supportive of his argument that the Magistrate failed to accept mitigation. The Magistrates opening remarks have also been reproduced, for in fairness to the Magistrate, he was dealing with a concerted attack on a bench of local court justices. It follows that I do not accept Mr. Averre's assertion that there was no evidence of concerted action, for bush knives from trousers, chains in trousers and a call to disrupt during the course of delivery of judgment must suggested to a reasonable mind, a degree of concert.

Mr. Averre says the Magistrate has appeared to have increased the punishment by virtue of their "not guilty" plea and trial. Clearly there has been no contrition on the record. But putting aside that mater, can the Magistrate be seen to have actually increased sentences? I cannot see on the face of the record, any increase of appropriate head sentence, perhaps but rather an openly expressed attempt to impose the maximum available sentence.

Henry C/S 261 *2 year*
2 years total

I have given two years for this theft because of all the circumstances given above and because it was as close to robbery as you can get. Robbery was not charged so I have sentenced as theft but take into account the theft was only possible because of the violence and the theft may have deprived not only the winning party whoever that might be of the judgment and their land but also of the evidence on which to bring further claims as this judgment was not promulgated so it is not the court file that I sentence on but what that file represented and could represent in the future –

David	*C/S 261*	*2 yrs*
	C/S 83	*18 years*
	Total	***3 yr 6 months***
Kenneth	*C/S 247e*	*2 yrs*
	C/S 261	*2 yrs*
	Total	***4 yrs***
Patrick	*C/S 83*	*2 yrs*
	C/S 261	*2 yrs*
	C/S 247	*2 yrs*
	Total	***6 yrs***

All sentences are consecutive

In the circumstances of this each I consider any assault on a court officer serious as this is the highest end of the scale short of ABH the assaults could not be more serious in these intent and effect. In Patricks case going armed with a bush knife concealed in trouser with intend if necessary to use it and using it in the circumstances that he did is also at the highest end of the scale.

I have intended to set an example I may still be criticized for being too lenient but the law except on theft allows no more and there is a difference between Henry and David on the one had and Kenneth and Patrick on the other which I have had to make. Had the defendants been charged with Robbery they would have received a higher sentence than theft I have been compelled to sentence on the actual as opposed to the appropriate charge.

No mitigation can have effect in this case public disapproved of their action has to be shown regardless of personal circumstances.

When I read those remarks of the Magistrate I am satisfied there has been no error in principle in sentencing to the extent necessary under the legislation. He has consistently indicated the offences, in the circumstances, called for such an approach and he has not fallen into the error of increasing, for instance a sentence which he sees as appropriate but rather plainly states the appropriate sentence to be that awarded at the highest of the scale.

"In Baumer V-The Queen (1988) 166 CLR 51; 83 ALR 8; 35 A Crim R 340, it was held (at 57; 345):

We have already referred to his Honour's observation that `the literally appalling record' of the applicant increased the seriousness of the offence. If this means no more than that such a record would make it difficult to view the circumstances of the offence or of the offender with any degree of leniency then, of course, such a remark would be understandable and unobjectionable. It would clearly be wrong if, because of the record, his Honour was intending to increase the sentence beyond what he considered to be an appropriate sentence for the instant offence." (*David Ross* - Crime - Law Book Co 2002 at para. (19.1150))

Frankly I cannot see any intention by the Magistrate to increase the sentence beyond that appropriate, although he refused to view the offenders as such entitled to any degree of leniency.

Question of allowance for mitigating factors:

The remaining question is whether the Magistrate, allowing for matters in mitigation by acknowledging their existence in his comments, should have applied a discount in sentence. For his imposition of the maximum penalty cannot in my view be criticized for the offences of going armed and larceny in these circumstances (going to the very foundations of the judicial process by contemptible actions in the face of the court causing such fear and apprehension that the rule of law about Malu'u ceased as the Magistrate put it, "to this day") should invoke such penalty. (see Ibb V-The Queen (1987) 163 CLR 447 and Veen V-The Queen (No2) (1988) 164 CLR 465 where the majority said at 478: "*the maximum penalty prescribed for an offence is intended for cases falling within the worst category of cases for which that penalty is prescribed: Ibbs V-The Queen. That does not mean that a lesser penalty must be imposed if it be possible to envisage a worse case: ingenuity can always conjure up a case of greater heinousness. A sentence which imposes the maximum penalty offends this principle only if the case is recognizable outside the worst category.*"

Those offences in the circumstances of this case do fall within the worst category and the principle espoused in *Veen's case* is one appropriate and may be followed in this jurisdiction.

So far as age is a mitigating factor, it should be given weight in the magistrates discretion (for old age is a material matter when sentencing) but he seems to have chosen to place greater emphasis on the parity principle; Whitebury Satini was 50 at the time of sentencing (although later noted at 60 with 4 children at school) only David Angitalo could be said to be "aged" in the sense commonly understood, for he gave his age as 66. (Later the medical report has his age as 70 perhaps an age given by David to the medical orderly).
Mr. Averre correctly points to the Magistrates error in asserting that "no mitigation can have effect in this case, public disapproval of their action has to be shown regardless of personal circumstances." That assertion is plainly wrong but reflects the Magistrates recognition of "a direct challenge to law and order, it was a challenge to justice at its extreme" and reflects perhaps the Governments recognition in the wider sense in seeking the regional assistance to the Solomon Islands.
In fact the Magistrate sentenced David to 1½ years for "going armed in public", a lesser sentence to that sentence of 2 years given Patrick for the same offence.
To that extent, then an allowance has been given for ill-health or age.

Clearly the Magistrate was anxious to make the point that the acts in court, accompanied by violence as they were, deserved recognition by heavy punishment. In fact, the sentences given for theft of 2 years each, is well below the 5 years prescribed by s.261. (It does accord however, with s.115 – "destroying evidence" – which attracts a penalty of 2 years). It would therefore seem somewhat trite, to complain of a sentence of two years for theft in these circumstances, when such sentences are less than ½ that allowed by law. Mr. Averre says that, even so, 2 years is excessive when one looks at comparative sentences handed down in *R v-Lency Wanefalea* (HC-CC 13 of 1992 - 2½ years for robbery) and *Fefele v-DDP* (HC-CC 5 of 1987) – 4 years for robbery, a convict with prior convictions.
The facts of those cases can clearly be distinguished and bear no relation to this court affray. The fact is the Magistrate has clearly discounted the sentence available to 2 years for theft (having regard to his comments about robbery), so as to have proper regard to the totality principle and bring the various sentences to a term of imprisonment which he considered appropriate.

The principles to be applied on cumulative sentence awards

But unfortunately as Mr. Ryan for the Crown says, he has made such sentences cumulative upon each other, when the offences occurred as part of one affray, so that the "totality" arose from an apparent breach of sentencing principle. That principal was referred to by Mr. Averre and was applied by Ward CJ in *Stanley Badev v-R* (1988-1989) SILR 121.

In R v-Lauta (HC – cc384 of 2004) I suggested this elucidated principle should firstly take account of the proper head sentences for each offence, and then look to the totality of sentences if cumulative sentences are to be imposed to ensure such total sentence is fair.

In *Public Prosecutor v- Sidney Kerua and Billy Kerua (1985) PNGLR 85,* the PNG Supreme Court referred to Thomas *Principles of Sentencing* (2nd edit.) at 53-6 where Thomas dealt with the "one – transaction rule" and it is that rule which gave rise to Mr. Ryan's concession. I do not necessarily agree, for while the court must follow the principle or rule, the second rule allows a court discretion to sentence cumulatively **when the offences are so different in character or in relation to different victims**. Examples given by Thomas are burglary and violence to the householder. That exception allowing cumulative sentences may well find an echo in this case, for the theft related to court files and documents, while the "going armed" and "assault" convictions are different in character.

Clearly the Public Solicitor has argued that cumulative sentences are inappropriate in such a case as this because of the "one set of circumstances" rule. If I was to accept the concession by the Crown, the concession given in this case, it must result in sentences which do not reflect the gravity of the crimes so cogently touched upon by the Magistrate.. (see *R v-Dillion* (1983) 5 C.App. R.(s) 439 per Farquharson J

"... while recognizing there may be a general rule in ordinary circumstances where the offences arising out of the same incident should not be the subject of consecutive sentences, held that it is not a universal rule and when the circumstances demand it, consecutive sentences should be imposed.")

It would seem *Dillons' case* accepts and applies Thomas 2nd rule.

I am not bound by Mr. Ryans concession where a series of events impact so seriously on the administration of justice to the extent of undermining the rule of law about the North Malaita Province at Malu'u.
The various appeals against sentence are dismissed.

Public Solicitor, Lawyer for the appellant
The Public Prosecutor, Lawyer for the crown