REGINA -v- DANIEL DALA

HIGH COURT OF SOLOMON ISLANDS
(KABUI, J.).
Criminal Appeal No. 244 of 2004

Date of Hearing: 24th November 2004.
Date of Judgment: 25th November 2004.

S. Cooper for the Crown.
M. Swift for the Appellant.

JUDGMENT

Kabui, J. The appellant in this appeal is Daniel Dala. He is from Malaita but has lived on Choiseul for the last twenty years. On 30th November 2003, whilst he had gone to the market, his son, Wong Zesapa, a five old child, led other children to his house and took eggs kept in the house and one of the children dropped three eggs and thereby broke them. On returning to his house, he discovered what had happened to the three eggs and became very angry with his son. He began to hit his son with a piece of bamboo. He then threw his son up and let him land on the ground. He later took his son to the megapode ground and forced the boy to dig for megapode eggs to replace the broken ones. Three eggs were found to replace them but the appellant, still angry, threw his son into the megapode hole and attempted to bury the boy when the boy's older sister rescued him. The appellant was then reported to the Police and was later arrested and charged for being cruel to his son, being a child, contrary to section 233 of the Penal Code Act (Cap. 26) "the Code." The appellant pleaded guilty to the charge in the Magistrate Court in Gizo in the Western Province on 16th March 2004. The learned Magistrate sentenced him to a term of two years imprisonment with effect from the 18th March 2004. He has been in prison as a convicted prisoner since that date.

Grounds of appeal.

The appellant had appealed against both his conviction and sentence in his Notice of Appeal dated 25th March 2004. At the hearing of the appeal, I raised with his Counsel the question of duplicity in the charge laid against appellant. In the charge sheet, the appellant had been charged with willfully assaulting, ill-treating and neglecting his son, Wong Zesapa, at Niqaqote village, in the Choiseul Province, on 30th November 2003. Counsel for the Crown, Mr. Cooper, intervened to say that in this case, no question of duplicity arose. I suppose Mr. Cooper was right to the extent that Lord Diplock in **DPP v. Merriman** [1973] AC 584 had said that the rule against duplicity had always been applied in a practical way than in a strictly and analytical way. In this case, the appellant committed one act of assault and three acts of ill-treatment, namely

throwing his son up and letting him land on the ground, forcing him to dig for fresh eggs in the ground and attempting to bury his son in the megapode hole. I also raised the question of a statement the appellant made in mitigation implying that he had the right to punish his son as he did in this case. That statement was capable of being a defence under section 233(4) of the Code. I did not press the matters of duplicity and a possible defence of parental right to administer reasonable punishment because the appellant had decided to amend his grounds of appeal to be an appeal against sentence only and not against conviction as he had intended in the first place. I granted the amendment.

Is the sentence imposed excessive in the circumstances of this case?

Counsel for the Crown, Mr. Cooper, conceded that imprisonment for a term of two years for the offence committed by the appellant was excessive. The appellant has no previous convictions of any sort. The victim is his own son. The victim sustained no physical injuries to his body. The appellant is married and has two children who have missed him very much. The members of his family obviously do need him back home. The fact that he has been in prison since 18th March 2004 is enough to make him realize his mistake in overreacting against his son in the way he did. I find that a term of two years imprisonment is excessive in the circumstances in this case. In the exercise of my powers under section 293(a) of the Criminal Procedure Code "the CPC," I quash the sentence of two years imprisonment imposed upon the appellant by the learned Magistrate and substitute it with the period of time already served in prison since 18th March 2004 to the rising of the Court. I order accordingly. This means that the appellant is a free man at the rising of the Court. The total period of time already served is eight months plus a number of days to the rising of the Court.

Delay in this appeal.

I have noticed that the appellant signed his Notice of Appeal on 25th March 2004 and received by the Prison Authorities in Gizo on 29th March 2004. The first direction hearing by the High Court was Friday 22nd October 2004 at 3.30 pm. There had been a delay of five months in this appeal. This is an injustice. If a prisoner is convicted and appeals against conviction or sentence let him or her be imprisoned for no longer than is necessary to prepare his or her appeal for hearing and determination. Inordinate delay due to loss of the file or oversight or inattention by Magistrate Court officials is no excuse. Justice must be seen to be done and not just talking, apologies or silence. **"Justice delayed is justice denied"** as often quoted.

F.O. Kabui
Puisne Judge