SC92

PAPUA NEW GUINEA

IN THE SUPREME)
COURT OF JUSTICE)

CORAM: FROST, C.J.
PRENTICE, Deputy C.J.
WILLIAMS, J.

Friday,
2nd April, 1976.

BETWEEN: BOKUN UMBA
Appellant

- and -

THE STATE
Respondent

(Appeal No. 190 of 1975 (N.G.))

Criminal law - application for leave to appeal against sentence on ground that it was manifestly excessive. Sentence of five years imposed for breaking, entering and stealing from a factory. Leave to appeal refused.

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ORDER OF THE COURT

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1976

Mar.4,29
April 2

PORT MORESBY, NATIONAL CAPITAL DISTRICT

CHIEF JUSTICE

WILLIAMS, J.

An indictment was presented against the appellant in the National Court at Kundiawa on 13th October, 1975 charging that he broke and entered the factory of Chimbu Developments Pty. Limited and therein stole a safe containing K13,800.00, the property of the company.

He pleaded guilty to this charge and was sentenced to imprisonment with hard labour for five years. He now applies to this Court for leave to appeal against the sentence on the ground that it was manifestly excessive.

The principal ground of appeal was based on certain comments of the trial judge when imposing sentence. The principle relied on was that he "acted on a wrong principle or has clearly overlooked, undervalued, overestimated or misunderstood some salient features of the evidence" (see Wanosa and Others v. The Queen (1). In particular it is said that findings of the trial judge that the factory "was most efficiently broken into", that the appellant was "the brains

(1) (1971-72) P.N.G.L.R. 90

behind the operation", that the safe was "a fairly large modern safe" which was of "extremely strong construction" and that the operation was carried out in "an intelligent sophisticated and very determined way" cannot be supported by the evidence.

It is also contended by counsel for the appellant that the trial judge gave no or insufficient weight to the following matters:-

(1) That a large part of the money contained in the safe was recovered,

(2) that the appellant received none of the proceeds, and

(3) that the appellant pleaded guilty to the charge and generally co-operated with the investigating police.

The evidence shows that the appellant and seven others had a meeting at the appellant's house when breaking and entering the coffee factory and stealing money from the safe in those premises was discussed. They then left for the coffee factory, the appellant taking with him a hacksaw and a screw driver. In the words of the appellant the "purpose of the hacksaw is to cut the galvanized iron and the screw driver is for the purpose of unscrewing the nuts". On arrival at the premises at about 3 a.m. "we all separated ourselves and I informed the other five to stand by and guard for Mr. Shelley's fierce dogs and two other accompany me went near the office where the big safe usually kept". The premises are apparently surrounded by a galvanized iron fence and the appellant, on his own admission, used his hacksaw to cut an opening in it. Having got inside the fence the appellant and others then broke down a wall of the office which contained the safe. The appellant and others then dragged the safe from the premises to the bush about 50 yards away and attempted to cut

it open with the hacksaw. This proved unsuccessful and the appellant went back to his house to obtain a crowbar. On the way back to the safe he met four men and enlisted their aid. The safe was then apparently prised open. At this stage the operation was interrupted by the arrival of dogs and the appellant decamped with his crowbar.

Upon these facts it is clear that the appellant played a leading role. According to his statement to the District Court he appears to have had a grievance against Mr. Shelley, a principal in the coffee factory, arising out of an argument over the sale of coffee so he decided to break into the factory and steal money from the safe. A meeting, when the operation was apparently planned, took place at the appellant's house. He gave instructions and directions to others and supplied the implements with which the crime was carried out.

It was first necessary to cut an opening in a galvanized fence with an implement taken there for that purpose. The safe was a heavy one, as evidenced by the fact that it required a number of men to manhandle it away from the factory. The safe was described by the trial judge as an "extremely strong construction". It was exhibited before him and he had the benefit of observing its construction and the force required to prise it open, which must have called for determined effort.

It is true that the appellant left the scene on the approach of dogs without obtaining any financial gain. However, it is clear that up to this point he had carried out his part of the crime in a determined and resolute way.

The trial judge's description of the crime as a serious one was fully justified. It was one carried out by a gang of men in an area where crimes of breaking and entering are prevalent. The consideration of general deterrence is, therefore, of prime importance.

Counsel for the appellant produced a list of sentences recently imposed for crimes of breaking and

entering and contended that the sentence imposed in this case was outside the range of sentences hitherto imposed. It is, however, always difficult to make comparisons of this nature as each case must depend upon its own individual facts. Counsel also drew attention to the fact that another man who took part in the same operation was subsequently sentenced by another judge to an effective term of 2½ years' imprisonment. It is said that this man actually obtained K50.00 for his part in the activity. However, it seems that this man, unlike the appellant, played a minor role in the operation and on this footing alone was entitled to a lesser sentence.

Upon a consideration of the whole of the circumstances we consider that the sentence imposed was a stern one and probably higher than either of us would have imposed. But in our opinion the sentence is within the upper limit of the permissible range and cannot be said to be manifestly excessive. It must also be kept in mind that the trial judge had the advantage not enjoyed by this court of the atmosphere of the trial held in the town where the offence was committed.

We would accordingly refuse leave to appeal.

PRENTICE, Deputy C.J. The principles guiding an appellate court on such an appeal as this, against excessive sentence, do not require to be re-stated.

I say at once that I might not have myself imposed in this case a sentence of five years' imprisonment. But I am not confident that if I had been in the advantageous position of the trial judge, of being able to see the accused, and the safe which was stolen and broken open, and of sitting in the Kundiawa of that time, with the feel of the case and surroundings influencing me, that I might not have come to a similar conclusion, or one very close to it.

His Honour's remarks on sentence have been subjected here to a microscopic examination such as has been deprecated many times by appellate courts. The analysis and criticism of them has been conducted with conspicuous ability. Nevertheless I do not find myself impressed by the criticism. It is not obligatory for a judge to make remarks on sentence. It is not as though he is called to, or wishes to, produce a conspectus of his reasoning such as he would attempt in a judgment. In my experience, when the judge does make some remarks, it is with a view of bringing to the accused's attention certain aspects of the seriousness of his misdeed and to assist his reformation; and to publicize certain elements with a view of deterrence to other members of the public.

His Honour has used here somewhat picturesque language, of, if I might say so with respect, perhaps his own distinctive variety. I do not think that it shows that he has misdirected himself. It is not apparent to me that he has overlooked any vital matter. As I have said in other cases, the mere failure to mention in remarks on sentence every point that was made or could have been made is not, in my opinion, indicative that the trial judge did not consider them and give them proper assessment.

Appellant's counsel has made much of the

expression by the accused of a motivation by way of payback. Even allowing an interpretation of the facts most favourable to the accused, and assuming that his initial motivation was one of payback, a gang of eight men does not come together equipped with appropriate tools, does not break a corrugated iron building and at considerable labour man-handle out and prise open a safe, (the nature of which must have been evident to His Honour, as it was present in court) merely for the purpose of recouping one of its members to a trifling extent. On any acccunt this was a bold, determined enterprise obviously entered upon with the expectation of considerable financial gain. It very nearly succeeded in this respect. There have been cases of safe robberies in Papua New Guinea where the burglars were subsequently unable to open the safe. The equipment these people, by forethought, possessed themselves of proved adequate to their task, and to my mind their efforts exhibited shrewdness, cunning and cleverness, plus determination. I do not think "sophistication" is too strong a word to use in relation to their efforts.

Mr. Wall has urged that this court should apply the principle adopted in Winugini and The Queen (2) in reverse. If one judge gives to one of several co-offenders a severe sentence, and a second judge gives to another a much lighter one, that establishes, it is said, such a sense of grievance as calls for an appellate court's interference. It will be seen that this places the judge in the second hearing potentially in the position of a court of appeal sitting on his brother judge. I consider the sense of grievance principle cannot be applied in this way in reverse. There is the additional factor that in the instant case time for the State to appeal against inadequacy of sentence in the case of Tep Witnek (who received subsequently a lesser sentence) was not then up. Is the State to be invited to appeal on the ground of inadequacy of sentence in every case where a second judge gives to a second offender a lighter sentence than his co-offender received? And if the person receiving

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(2) Unreported judgment No. FC72 of 29th November, 1974

the heavier sentence also appeals, which appeal is to be heard first? In any event, though the second offender may have been a somewhat older man (though this is by no means clear), and should therefore have been more responsible than to take part in such an undertaking; the appellant was undoubtedly a leader, if not the leader, of this enterprise. It is plain he was directing it, as is revealed by his statement to the District Court, corroborated by the record of interview. The estimates of his age vary from 23, through 29 to 32. He is certainly not a youth. The disparity between his sentence and that subsequently received by the co-offender is not, therefore, in my opinion, in any case such as should provoke a sense of grievance.

In a further argument, appellant's counsel has put before the court a schedule of outlines of recent cases in an endeavour to show that this five year sentence of a man with only one prior conviction (some years before) is so inappropriate as to call for correction.

The attempt to collate cases and compare them in detail with an instant one is, I think, as unhelpful in criminal cases as it is in civil cases of estimates of damage. Each case differs on its own circumstances. Each offender is a separate individual who must be dealt with as such. Judges of the National Court exchange summaries of sentence with the purpose of ensuring equivalence of sentence where possible for equivalent crimes. But I think they would agree that reference to details of other cases, in practice can only be used in the most general way to assist their determinations of proper sentences. I do not think the process engaged upon here by appellant's counsel should be encouraged, as reference to results in other cases can rarely be useful except in the most general way. The thought that yielding to persuasive advocacy towards leniency in a particular trial, would be creating a precedent with which other courts might be pressed - might well lead judges to shut their ears to such pleas for clemency.

Regrettably, most of the cases of house breaking

and store breaking are being carried out by teenage youths. The practice has developed into what almost might be called an industry with an inbuilt tax holiday. Speaking for myself, I have up to date found myself, though progressively increasing sentences for such offences, inhibited by the youth of the offenders from thinking in terms of years rather than months of imprisonment. I am coming to the conclusion that the sentences handed down by the National Court, even on youthful criminals, must increase significantly further, if they are to avoid being regarded by the public, and perhaps by the offenders, as derisory - to adopt a phrase used by Saldanha, J. in a recent appeal; and if they are to deter from crime.

Kundiawa, like Port Moresby, Lae, Goroka and Mount Hagen, now suffers from a good deal of breaking and entering. The offence requires deterrence. This was a bold undertaking with potentially big stakes. I have adverted to the appellant's leading role. To view him as his counsel would wish us to do, as "a village youth led astray", I find an impossible task. The only community defence at present available against the current wave of this type of crime is, seemingly, a vigilant, able police force backed by sternness in the community's judicial officers.

I am not satisfied that His Honour has overlooked any matter, has given gravely wrong emphasis to any aspect or proceeded on any wrong principle. Nor do I find myself persuaded that his sentence is so manifestly excessive that I would wish this court to disturb it.

I would disallow the appeal and confirm the sentence.

Solicitor for the Appellant: N.H. Pratt, Acting Public Solicitor
Counsel: C.F. Wall
Solicitor for the Respondent: K.B. Egan, A/Public Prosecutor
Counsel: K.B. Egan, B.T.J.S. Sharp and W.J.K. Karczewski