

HENRY KALFAU -v- THE PUBLIC PROSECUTOR

JUDGEMENT

On 27th October 1989, this appellant pleaded guilty to four offences of unlawful entry and theft and was sentenced to two years imprisonment for each pair of offences consecutive to give a total of eight years imprisonment. He now appeals against that sentence on the sole ground that, the total sentence is manifestly excessive. Counsel for the appellant suggests to the Court that the individual sentences of two years were higher than sentences for similar offences passed earlier and that the lower Court also failed to consider the total sentence.

The first point may be dealt with shortly. It has frequently been said that sentencing is not an exact science. People and circumstances vary from case to case and sentences equally will vary. Thus comparisons with other cases can, at best, be a very imprecise guide. Earlier cases will always act as an indicator of the proper range but this Court will only interfere on that ground if a case is clearly well outside for no good reason.

In this case and others we have heard that, during 1989, there was a sudden and serious increase in offences of this nature in Port Vila, so serious in fact that the normal citizens of the city were unable to continue the way of life they had hitherto enjoyed.

As a result, a number of cases were sent to the Supreme Court for sentence or trial because it had become clear that a reappraisal of the level of sentences was necessary. We feel this was a proper approach. Where such a change is considered necessary, the lower courts should allow the Supreme Court to decide.

This was one of those cases. This appellant, although a man of previous good character, had committed the earlier

offences with others in all cases. In the later one he had apparently entered the house alone but then taken the goods to an island off North Efate in a truck stolen by one of his accomplices. It was thus a clear and obvious case for the Supreme Court to reassess the proper penalty.

It is appropriate to pause and consider the offences of unlawful entry and theft themselves. In a place where such offences are few, it may be possible to pass short sentences and it is clear Port Vila was such a place prior to 1989. But the offence is, in itself, extremely serious. Measured in terms of the affect on the victim, many courts place house breaking, particularly at night, in a similar category to crimes of violence. This is not an unreasonable approach.

The house is the most fundamental unit for most families. It includes many aspects of family life which depend, in most cases, on the security of the house in which they live. Violation of that security can have an enormously disruptive effect. Many people whose homes have been subjected to a breaking are affected by it for years - sometimes the remainder of their lives. It is not unusual for some to be left so that they can never feel safe alone again. That is a dreadful legacy of any crime and a criminal who is willing to commit such a crime must expect a serious penalty.

Considered in that way, as the learned Chief Justice clearly did, a sentence of 2 years imprisonment is perfectly appropriate and may be considered still on the lenient side.

We pass to consideration of the total sentence passed.

The general rule in sentencing is that sentences for separate offences should normally be consecutive but this may be modified in two main ways. In the first case, a series of offences that form part of the same overall transaction and cause harm to the same person may be appropriately dealt with by a concurrent sentence.

The second basis for modification is where, having passed a proper sentence for each of a number of offences, the aggregate effect of making them consecutive will produce an inappropriate total. Thus in any case where the Court has imposed a number of consecutive sentences, it should stand back, in effect, and look at the total. It was suggested in *Smith v R* (1972) Crim LR 124 that if, at such a point, the total is substantially above the normal level of sentence appropriate to the most serious offence for which the accused is being sentenced, the court should reduce that total to a level that is "just and appropriate."

Even where the total does not offend against that principle, the court may in an appropriate case reduce it if, in the circumstances of a particular accused, the effect would be crushing.

It should finally be pointed out that the reduction of the total is best achieved by making some or all the penalties concurrent rather than to reduce the sentence for any individual offence below the proper level.

In this case, the learned Chief Justice was faced with exactly the type of case that was causing so much concern. The accused was a member of a gang and had taken part in a number of attacks on private homes.

Having allowed for the fact the accused had no previous convictions and had pleaded guilty to all the offences, a sentence of two years imprisonment for each offence was wholly appropriate.

The learned Chief Justice then considered the total sentence and decided an overall sentence of eight years was appropriate. In that assessment he stated that "it is quite clear from the facts presented by the Public Prosecutor and from the statements made by the accused that he was one of the leaders of the gang that operated in the Vila area." We have studied the record with care and can find no support for that statement.

With some slight hesitation, we feel that factors together with the feeling that a total sentence of eight years on a first offender may well have a crushing effect, suggests the sentence should be reduced to one of six years imprisonment in this case as an act of mercy.

The appeal is allowed to the extent that the sentences for the offences of 10th and 15th May are all made concurrent to each other but consecutive to the remainder giving a total sentence of 6 years imprisonment.

Dated at Port Vila, this 26th day of October, 1990.

G. Ward

MR JUSTICE G. WARD
COURT OF APPEAL JUDGE

E. Goldsbrough

MR JUSTICE E. GOLDSBROUGH
COURT OF APPEAL JUDGE