Judgment No.

IN THE SUPREME COURT)
OF THE TERRITORY OF )
PAPUA AND NEW GUINEA)

Mann C.J. PORT MORESBY
2/5/61
Appeal No. 18 of 1960 (N.G.)

ISHMAL TOWAIAKA

Appellant

v.

ROBERT CLIFFORD HARRIS

Respondent

This was an appeal against a conviction for supplying to a native one WESLEY ELIAS intoxicating liquor contrary to Section 5 of the Liquor (Natives) Ordinance 1953-1958. The Appeal was as to sentence only. The sentence imposed for three months' imprisonment with hard labour. The Ordinance in question fixes imprisonment for one year as the maximum penalty and makes no express provision for the imposition of a fine instead of imprisonment.

In the case of Overbeck v. Beattie (Appeal No.9 of 1960 (N.G.)) I declined to reduce a similar sentence imposed by the Stipendiary Magistrate at Lae. I drew the inference, which was drawn by the learned Magistrate in that case, and also by the learned Magistrate in the present case, that when Section 5 of the present Ordinance replaced Section 3 of the Arms, Liquor and Opium Prohibition Ordinance 1921-1936 the language of the Ordinances disclosed an intention on the part of the legislature to do away with the practice of imposing fines in cases of this kind. The Arms, Liquor and Opium Prohibition Ordinance had expressly provided that the penalty was to be £200 or imprisonment for one year, or both. In the Ordinance of 1953 the sole penalty is imprisonment for one year.

In the case of Overbeck v. Beattie I did not have the assistance of Counsel's argument for the Defence. Both of these cases were heard on Circuit, but in the present case I have been very greatly assisted by the argument submitted by Mr. Lalor on behalf of the Appellant, and I think that in consequence the views which I expressed in Overbeck's case ought to be revised and re-stated.

Mr Lalor has argued with considerable force that the Ordinance of 1953 is in many respects an enabling and relaxing Ordinance and not one which gives any general indication of a "hardening" of the legislation. The earlier Ordinance dealt with

firearms, ammunition and opium as well as with liquor, and the Court was given a very wide discretion as to both the quantum and the nature of the penalty to be imposed. In the 1953 Ordinance liquor was dealt with on its own, and Mr. Lalor argues that I should only infer that the legislature has indicated that it is the penalty of imprisonment which it regards, prima facie, as the appropriate punishment for cases involving liquor. Beyond this there is nothing to indicate that any penalty is to be more severe than under the old Ordinance. Further, the new legislation is passed with a presumed knowledge of the existence of powers vested in the Court by other legislation or otherwise, and it should be readily inferred that the legislature did intend that the Court should, in the ordinary course, resort to an existing power to impose a fine if it should see fit. It would have been simple, had the legislature intended to take away a power to impose a fine, for the new section to have carried a provision to this effect.

It is an unsatisfactory process to draw inferences as to legislative intention unless there are clear indications in the words used as to what the intention may be. I agree that the Court should not pursue inferences beyond this stage. However, the intention, which must be arrived at one way or the other in the present case seems to me to be indicated to this extent; that in selecting only the provision as to imprisonment, the legislature has by implication rejected the alternative of the imposition of a fine. This may or may not be caused by any change of view as to the seriousness of the offence, and in the light of Mr. Lalor's argument, I think that I should not infer that there was any such change. However, I adhere to the view previously expressed to this extent; that the legislature did contemplate that the normal punishment would be imprisonment and has by implication rejected the alternative of the imposition of a fine.

Under Section 207(2) of the District Courts (New Guinea) Ordinance the Court is authorised to impose a fine for an offence in the circumstances specified in that Section if it thinks that the justice of the case will be better met by a fine than by imprisonment. Since this Section applies to other Ordinances past or future, it must be read together with Section 5 of the Liquor (Natives) Ordinance of 1953 with the inference which I have previously indicated as to the intention of the Legislature in passing the latter provision. Section 207(2), and the costs in Section 208, are today somewhat out of date, and it is difficult

to apply the scale to a modern provision. Reading all these provisions together, however, in the case of an offence under Section 5 of the Ordinance of 1953, one gets the following composite picture in relation to fines: a fine may be imposed if the Court thinks affirmatively that the justice of the case will be better met by a fine than by imprisonment. Imprisonment for twelve months would be the equivalent of a fine of £100 or thereabouts but the fine imposed must not exceed £25. A fine of £25 is the approximate equivalent of imprisonment for about three months.

Pending some further expression of legislative intention in the matter, and in the light of Mr. Lalor's argument, I am prepared to conclude that the Court may impose a fine of up to £25 in cases where it would impose a sentence of no more than three months' imprisonment, but that since the legislature appears to have contemplated in the later Ordinance that a fine should not be imposed as a normal practice, and since it must appear affirmatively that justice requires a fine rather than imprisonment, the Court should not exercise the power given under Section 207(2) unless a fairly strong case is made out to show that by such a course justice will be better met.

I think that the alternative power, if available, to release a first offender upon a Bond, ought in many cases to be regarded as more appropriate.

I have had some difficulty in the past in regarding the provisions of the Criminal Code set out in Sections 19(9) and 656 as applicable to proceedings before Magistrates for offences arising otherwise than by virtue of the Criminal Code. Mr. Lalor has referred to Connolly v. Meagher (1906) 3 C.L.R. p. 682 and Davisson v. Sklavos (1942) 36 Q.J.P. 122. In the general dearth of authority on the subject these two decisions do much to intensify the present problem. In Connolly v. Meagher, Sir Samuel Griffith, in delivering the judgment of the High Court of Appeal, treated the provisions of the Criminal Code authorising convicted persons to be released on Recognizance as applicable to Magistrates. The context of Sections 19 and 656 lends no support to this view, except in cases where under the Code jurisdiction is conferred upon Magistrates who try cases summarily. It is clear from the report that the Court was not concerned to construe Sections 19 or 656 of the Code, and it does not appear that the precise wording of these provisions was considered by the Court.

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In Davisson v. Sklavos the Full Court drew attention to this omission, and according to the report of the case, the Court appears to have held the view that if these Sections of the Code did not apply to Magistrates, then the Magistrates may have had no power to release an offender on a Recognizance.

The difficulty which I feel at the present time is that none of this discussion as to a particular power arising by virtue of the express provisions of the Criminal Code would have been of any consequence if, in either case, the Court had taken the view that no such express statutory provision was needed to confer such a power upon Magistrates. My specific difficulty therefore has been to endeavour to find some clear authority on this point.

It appears to me that the position is that the question is not one which requires some specific jurisdiction to be conferred upon Magistrates. At Common Law, Justices and Magistrates by virtue of their Commission were authorised to bind persons by keep the peace, and such a power has been freely exercised, either upon a specific complaint alleging a threatened breach of the peace, or in the course of proceedings involving a breach of the peace, at the discretion of the Magistrates. The power to bind over a person to be of good behaviour is a much wider power, the precise origin of which as a matter of legal history, is somewhat obscure, and whether the original authority for this practice is to be found in the terms of the old Commissions of the Peace or otherwise is open to some conjecture, but there is no doubt that the power has been exercised in the absence of express statutory authority for a very long time. The process has been described by Lord Coke and by Sir William Blackstone as preventive justice. I think that the exercise of this power was not regarded as a matter of jurisdiction which requires to be conferred upon a statutory Court, but rather that it is merely a technique, developed by the Courts, in imposing punishments within the sphere of discretion which is left by law to the Courts in deciding questions of punishment.

On this view the only question which remains is as to the extent of the discretion which is left to the Court. If that discretion is wide enough to allow the Court to use this technique in cases where the Court considers it appropriate, then the Court has undoubted power to do so without the necessity for citing some express statutory authority.

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As to the question of discretion in awarding punishment, the general position is that a penalty nominated by statute, without further express provision, is to be taken as the maximum penalty for the particular offence. The Ordinances Interpretation Ordinance 1949-1959 Section 17 preserves this traditional view. Under these circumstances where only a maximum penalty is stipulated, the amount of the penalty to be imposed in any particular case is left entirely to the Court, and the Court is not bound to impose any penalty at all, if the circumstances warrant such a course. I accept Mr. Lalor's argument that in such a case the penalty which ought to be imposed is a question which is personal to the accused himself.

In these circumstances it is open to the Court, especially in the case of a first offender, to adopt the technique of prevention of crime in lieu of punishment. At the same time it must be remembered that releasing a convicted person upon a Bond does not in itself constitute punishment for an offence, but is in effect a means of affording an accused person the opportunity to expiate his offence by entering into an obligation to uphold the law, subject to the condition that if he should fail to carry our his obligation he will receive the punishment appropriate to his offence.

In the Territory, since the Courts have such an important educational role to play, I think that it is of the utmost importance that they should freely exercise their powers when dealing with first-offenders, to encourage these people to assume new responsibilities of this kind, and to direct their efforts towards achieving a greater understanding of legal responsibilities.

I think that the present case is one in which no harm would be done, and much good could possibly be achieved, by affording the present Appellant the opportunity to play a responsible part in relation to this very difficult question of native drinking, and the supply of liquor to natives.

I think that the learned Magistrate might well have been prepared to exercise his discretion if he had felt that he was at liberty to do so, but the general view has been that in relation to this question the Ordinance has removed this question from the discretion of the Courts.

Since I now accede to the argument that this is not the case, the particular position of the Appellant needs to be considered to see whether there are sufficient grounds for exercising this discretion in his favour.

The present case is for a less serious breach of the Ordinance than in the case of Overbeck. Beattie, for the Appellant, upon a social occasion when he was in a sense socially bound to extend his hospitality to his visitor, supplied him with some liquor in a glass. He did not give him a quantity to take away. Both persons concerned in the supply were members of the same native community, and it is quite well known that very many members of this community consume substantial quantities of liquor and have done so for very many years. It is in this context that the social obligation assumes considerable force, yet creates difficulty for the Court.

The Appellant has an exemplary record of service to the public, and is well known to the Court as a very efficient Interpreter from English into two languages. If the policy contemplated by the Ordinance of 1953 of allowing certain natives or classes of natives to drink had been implemented, one would imagine that the Appellant and many of his friends and social acquaintances would be amongst the first who would qualify for exemption; nevertheless, the Appellant must realise, as he undoubtedly does today, that it is going to be extremely difficult for the authorities to relax the statutory prohibition on the supply and consumption of alcohol for natives, if, by reason of social obligations and practices subsisting within native communities, persons in whose favour permits are granted, are going to find themselves under an obligation to supply liquor to others in whose favour exemptions have not been granted.

This is the most obvious problem which stands in the way of relaxing the law, and the Appellant himself, who is in a position to understand the problem from both sides, might do much to help resolve the difficulty. However, he must realise that in the meantime he must be particularly careful to avoid committing offences of this kind, for not only will it destroy his present good character, but it will also aggravate the problem to which I have referred.

If the accused is prepared to undertake the responsibilities involved in entering into a Recognizance to be of good behaviour for a period of twelve months, and to come up for sentence if and when called upon during that period, I think that no harm would be done, for if he cannot maintain the obligations of the Bond he will understand that he will still have to serve a term of imprisonment, for it seems to me that there is no sufficient reason in the present case to allow the Appellant the alternative of paying a fine.

I appreciate that such a Bond will place the Appellant in a position of considerable embarrassment in his own community, but if he can discharge his obligations under the Bond, I think that the discipline and restraint involved may well prove to be of more value ultimately than the imposition of a term of imprisonment.

In case it should be necessary at any future time for a sentence to be imposed upon the accused, I should indicate that in all the circumstances of the present case and in the light of the view which I have now taken as to the effect of the present statutory provisions, I think that one month's imprisonment would be appropriate.

ORDER.

Order of the District Court at Rabaul varied to the extent of setting aside that part of the Order which imposed a sentence of three months' imprisonment and substituting in its place an Order that upon entering into his own Recognizance in the sum of £15 to be of good behaviour for a period of twelve months and to come up for sentence if and when called upon during that time, the Appellant be discharged from custody.