

HIGH COURT OF SOLOMON ISLANDS

BETWEEN:

RINALDO LAUTA

Appellant,

AND

REGINA

*Respondent.***At Honiara:** 8 October 2004.*Criminal Law-sentences-concurrent or cumulative- principles or guidelines.*

This appellant comes seeking redress on appeal from the Magistrates Court for he says a sentence awarded after trial for forgery should not have been made cumulative on a sentence for larceny as a servant when he was convicted of stealing \$70,000 for the offences were closely related, having arisen from the one set of circumstances.

Held: (1) In deciding whether to make sentences concurrent or cumulative, the courts should be guided by the following principles.

- i) where two or more offences are committed in the course of a single transaction all sentences in respect of the offences should be concurrent.
- ii) Where the offences are different in character or in relation to different victims, the sentences should normally be cumulative.
- iii) When a court has arrived at appropriate sentences and decided whether they should be concurrent or cumulative, it must then look at the total sentence to see if it is just and appropriate. If it is not, it must vary one or more sentences to get a just total.

(Rationale in *Public Prosecutor v- Sidney Kerua and Billy Kerua* (1985) PNGLR 85 adopted and followed.)

Lorrain Kershaw of the Public Solicitor's Office for applicant
Robert Barry for the Director of Public Prosecutions

Brown J. In paragraph 4 of the Notice of Appeal the acting Director of Prosecutions properly conceded the point made for that the Magistrate has given consecutive sentences in relation to the offence of forgery (of the cheque) and the two larceny charges, for that Ms. Kershaw says in the notice of appeal that sentences ordered to be served consecutively,

arose from the same set of circumstances surrounding the passing of the cheque, the Magistrate in his reasons having appeared to have overlooked the "same circumstances" principle. He says he addressed the totality of the sentences, a totality he accepted though perhaps acceptance arose through the circumstance of his overlooking the first principle.

Since giving my oral reasons, I have re-read the PNG Supreme Court's decision in *Public Prosecutor-v-Sidney Kerua and Billy Kerua* (1985) PNGLR 85 where the court had occasion to consider whether sentences should be made concurrent or consultative, and therein set forth guiding principles.

"The National Court has a discretion whether a sentence should be concurrent or cumulative but that discretion should be exercised in accordance with well-known principles. The latest local case on those principles is *Acting Public Prosecutor v Konis Haha* (1981) PNGLR 205. We follow that case and the useful statement of the English law found in Thomas, *Principles of Sentencing* (2nd ed), at 53-61. The first principle is what Thomas calls "the one-transaction rule": where two or more offences are committed in the course of a single transaction all sentences in respect of the offences should be concurrent. The Supreme Court in *Tremellan v The Queen* (1973) PNGLR 116 made the same point in different words (at 117):

"Although it is neither desirable nor possible to lay down any all-embracing rule as to when sentences for two or more convictions should be made concurrent, sentences should generally speaking be made concurrent where a congeries of offences are committed in the prosecution of a single purpose or the offences arise out of the same or closely related facts."

The facts of *Tremellan's* case illustrate this rule. The counts were paired for stealing and for fraudulent and false accounting, and the Supreme Court on appeal imposed concurrent sentences. Other examples are a series of sexual assaults or frauds on the same victim. There can be exceptions to this rule and the Court of Appeal in England has upheld sentences which appear to offend this rule because the court considered that the totality of the sentence was correct. It is more a rule of thumb or a guiding principle than a strict rule and it is subject to the totality principle which we mention in a moment.

The second rule is that where the offences are so different in character, or in relation to different victims, cumulative sentences are normally applicable. Examples given by Thomas are burglary and violence to the householder, assault plus escaping from custody, and sexual assaults on different victims. *Wari Mugining v The Queen* (1975) PNGLR 352 affords a

local example. Cumulative sentences were upheld for grievous bodily harm and assault with intent to commit rape. *Konis Haha's* case (supra) supplies another local example; cumulative sentences for robbery with violence and rape were imposed. This rule, like the first one, is flexible; it is a rule for guidance only and like the first rule is also subject to the totality rule.

The third rule, the totality rule or principle is that when the sentencer has arrived at appropriate sentences and decided whether they should be concurrent or cumulative he must then look at the total sentence and see if it is just and appropriate. If it is not, he must vary one or more of the sentences to get a just total. The court must look at the total sentence and see if it is just and appropriate for the totality of the criminal behaviour."

I am of the view these principles reflect the appropriate approach in this jurisdiction, so that those principles may be adopted here. To use the headnote, they are:

- (i) "Where two or more offences are committed in the course of a single transaction all sentences in respect of the offences should be concurrent.
- (ii) Where the offences are different in character, or in relation to different victims, the sentences should normally be cumulative.
- (iii) When a court has arrived at appropriate sentences and decided whether they should be concurrent or cumulative, it must then look at the total sentence to see if it is just and appropriate. If it is not, it must vary one or more sentences to get a just total."

The appeal is upheld on the basis of the argument on the mistake of adding the sentence for forgery of the cheque to the sentence of larceny of the \$70,000; the cumulative sentence breaches the principles.

Mr. Barry says the sentence of 4 years is appropriate for the larceny of \$70,000 by a servant, that sentence is clearly within the sentencing principles and the magistrate has correctly applied these principles on that charge. He had misdirected himself, however in making particular sentences cumulative in the circumstances of the case.

He was remanded on 2 Dec 2003 to sentence and hence has been in custody to date pursuant to that lawful sentence of 4 years.

Order

The order of the court is:

Appeal is allowed as to ground 4; the sentence of 2 1/2 years on the forgery charge shall be served concurrently with the other sentences of 4 years giving a total sentence to be served of 4 years.

The time spent in custody is reckoned as already time served so that the effective sentences of four years commence on the 2 December 2003.