[HIGH COURT OF AUSTRALIA.]

HARRIS . . . . . APPLICANT;

AND

THE QUEEN . . . . . RESPONDENT.

ON APPLICATION FOR LEAVE TO APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF PAPUA AND NEW GUINEA.

H. C. OF A. 1954.

MELBOURNE, *Sept.* 16, *Oct* 12.

Dixon C.J., Webb, Fullagar, Kitto and Taylor JJ.

High Court—Appellate jurisdiction—Supreme Court of the Territory of Papua and New Guinea—Appeal against sentence—Principles governing—Papua and New Guinea Act 1949-1950 (*No.* 9 *of* 1949—*No.* 80 *of* 1950), *s.* 64 (1).

While the High Court has jurisdiction under s. 64 (1) of the *Papua and New Guinea Act* 1949-1950 to " hear and determine appeals from all judgments, decrees, orders and sentences of the Supreme Court of the Territory ", nevertheless before it will interfere with a sentence of imprisonment imposed, it must be satisfied that the discretion exercised by the court imposing the sentence miscarried or was unsound or unreasonable in its exercise. It is not sufficient to show that the sentence is substantially greater than would have been imposed by a court sitting in Australia or by the High Court.

Cranssen v. *The King* (1936) 55 C.L.R. 509, at pp. 519-520 applied.

Application for leave to appeal from the Supreme Court of the Territory of Papua and New Guinea (*F. B. Phillips* C.J.) refused.

APPLICATION for leave to appeal from the Supreme Court of the Territory of Papua and New Guinea.

Edward Norman Harris appeared, upon indictment, at the criminal sittings of the Supreme Court of the Territory of Papua and New Guinea which commenced at Port Moresby before his Honour the Chief Judge, Mr. Justice *F. B. Phillips* on 2nd December 1953, charged with that, between 31st May 1952 and 13th October 1953, in the Territory of Papua, he stole several sums of money, the property of Kenneth Roy Wenke and others, amounting, in all, to £3,620 13s. 0d. being the amount of a general deficiency in respect of divers sums of money which had come into his

possession for, and in the name, and on account, of the said Kenneth Roy Wenke and others. The accused pleaded guilty and on 7th December 1953 was sentenced to imprisonment with hard labour for four years.

From this sentence the accused sought leave to appeal to the High Court.

J. M. Cullity, for the applicant.

Peter Murphy, for the respondent.

Cur. adv. vult.

Oct. 12.

The following written judgments were delivered :—

DIXON C.J., FULLAGAR, KITTO AND TAYLOR JJ. This is an application pursuant to s. 12 of the *Supreme Court Ordinance* 1949 of Papua and New Guinea for leave to appeal from a sentence of imprisonment imposed by the Supreme Court of that Territory. The applicant pleaded guilty before the Supreme Court on 2nd December 1953 to an indictment charging him with stealing between 31st May 1952 and 13th October 1953 sums of money amounting to £3,620 13s. 0d. being the amount of a general deficiency. The property in the money was laid in certain persons who no doubt were office-bearers or members of a social club called the Aviat Club. On 7th December 1953 the Chief Judge, who presided, sentenced the applicant to imprisonment with hard labour for four years. After the sentence the applicant was held in Bomala prison near Port Moresby until he was sent to Long Bay gaol in New South Wales, where he was received as a prisoner on 7th May 1954.

It appears that the applicant was an officer of the Department of Civil Aviation, which he joined in February 1947 after serving during the war in the Navy. He was stationed at Port Moresby and had a wife and a young child who lived in Australia. At the time he was sentenced he was thirty-three years of age. His salary was for most of the period mentioned in the indictment £20 a week, although it afterwards rose by £2 or £3. From his salary he supplied his wife and child with £10 a week. In February 1952 he was requested to take up the position of Honorary Treasurer at the Aviat Club. At the time he appears to have been in debt, and two or three months after taking that office he took £10 of the club's money, as he says, to pay a creditor. He went on taking moneys of the club to pay debts and cover living expenses. He made fruitless journeys to Australia to raise money to recoup what he

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had taken and at length in a vain attempt to recoup his position he used large sums of the club's money in betting on horses. In the end he informed the president of the club of what had occurred. The committee of the club took a merciful view of his conduct and were unwilling to prosecute. However, the charge was laid by the authorities. After he had been sentenced the members of the club resolved that they should take no action to recover the money and would not accept the applicant's right to long service pay, superannuation or life assurance which he had offered to make over. During his incarceration at Bomala apparently he became ill with malaria and was for a short period in hospital. Otherwise he was the only white person confined at Bomala.

In supporting his application for leave to appeal the applicant's counsel submitted that the sentence was excessive and that it should be reviewed. He contended that the learned judge had paid insufficient attention to the fact that up to the commission and discovery of the offence the applicant possessed a good character and an unsullied record and was a first offender. No consideration, counsel said, had been given to the circumstance that the applicant after sentence would necessarily be detained in gaol in New Guinea before being transferred to Australia and to the hardship that involved. Counsel also suggested that the views of the Aviat Club and its officers as to the applicant should have been taken into consideration because they were in a position to understand all the circumstances and to form an estimate of the prisoner's character. He also contended that the six months which the prisoner spent in the Bomala gaol and the consequences to his health should be considered by this Court. The maximum sentence under the law of New Guinea for the offence to which he pleaded guilty is seven years and that was fixed under the *Queensland Criminal Code*.

The learned judge in pronouncing the sentence explained the nature of the offence and his reasons for fixing four years' imprisonment. His Honour concluded with the following observations :— " In my opinion, a short term of imprisonment in this case would be futile. A longer term is called for and will, in the long run, benefit you, I believe, and help you to rehabilitate yourself. When I say that, I have this in mind :—It is possible, that you may experience difficulty, at a future date, in obtaining a position of trust or clerical work involving the handling of money, and I suggest that you would be wise to acquire a ' second string ', so to speak, by learning, when in prison, a trade that may ensure you a livelihood afterwards, should you not be able to get the clerical work you have been used to heretofore ". Counsel contended that this

consideration was not well founded and, in any case, ought not to have been taken into account in fixing a sentence.

The jurisdiction of this Court to entertain the appeal arises, if not under the Constitution, at all events under s. 64 of the *Papua and New Guinea Act* 1949-1950. Sub-section (1) of that section provides that the High Court shall have jurisdiction, with such exceptions and subject to such conditions as are provided by ordinance, to hear and determine appeals from all judgments, decrees, orders and sentences of the Supreme Court of the Territory. The language of the provision follows s. 73 of the Constitution and in this respect is not identical with that of s. 24 of the former *Judiciary Ordinance* 1921-1938 of New Guinea, where the words are "grant leave to appeal . . . from any conviction, sentence, decree or order of the Supreme Court". In *Cranssen* v. *The King* (1), the manner in which under that ordinance this Court should exercise its powers upon appeal with respect to sentences of imprisonment was discussed. The following observations were made:—"Section 24 of the *Judiciary Ordinance* 1921-1927 expressly mentions convictions and sentences among the judicial orders from which an appeal by leave shall lie to this court. It is evident that these words refer to convictions on indictment and sentences of imprisonment or other punishment. This court is thus specifically given a jurisdiction to hear appeals from sentences of the Supreme Court of the territory. But, although this consideration may distinguish the power it is called upon to exercise from the general appellate power invoked in *House* v. *The King* (2), it remains true that the appeal is from a discretionary act of the court responsible for the sentence. The jurisdiction to revise such a discretion must be exercised in accordance with recognized principles. It is not enough that the members of the court would themselves have imposed a less or different sentence, or that they think the sentence over-severe. There must be some reason for regarding the discretion confided to the court of first instance as improperly exercised. This may appear from the circumstances which that court has taken into account. They may include some considerations which ought not to have affected the discretion, or may exclude others which ought to have done so. The court may have mistaken or been misled as to the facts, or an error of law may have been made. Effect may have been given to views or opinions which are extreme or misguided. But it is not necessary that some definite or specific error should be assigned. The nature of the sentence itself, when

(1) (1936) 55 C.L.R. 509. (2) (1936) 55 C.L.R. 499.

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considered in relation to the offence and the circumstances of the case, may be such as to afford convincing evidence that in some way the exercise of the discretion has been unsound. In short, the principles which guide courts of appeal in dealing with matters resting in the discretion of the court of first instance restrain the intervention of this court to cases where the sentence appears unreasonable, or has not been fixed in the due and proper exercise of the court's authority. Moreover, this court has always recognized that, in appeals from courts of the territories, there may be many matters upon which the court appealed from is in a better position to judge than we can be. It is familiar with the special conditions which obtain in the territory and thus should be better able to estimate the importance of considerations arising out of them, or the significance of facts associated with them" (1). Although the language of s. 64 of the *Papua and New Guinea Act* differs from that of the old *Judiciary Ordinance*, there is nothing in the difference to weaken the application of the principles stated in this passage to appeals under s. 64. It is not enough in applying those principles that the judges of this Court should regard the sentence as greater than they themselves would have imposed. In the present case a sentence of four years' imprisonment is probably substantially greater than would have been imposed upon the applicant by a court sitting in Australia itself. But that is not enough. Before we interfere with the discretion exercised by the learned Chief Judge we must be satisfied that in some way his discretion miscarried or the exercise of it was unsound or unreasonable. The observation that his Honour made concerning the possible benefit which the prisoner might obtain from a longer term in gaol cannot fairly be regarded as expressing a ground which determined the exercise of his judgment. It was no more than an observation as to what advantage it might be hoped the prisoner might obtain in the course of his punishment. There is in truth no ground which would justify this Court in interfering. If the sentence is to be reduced it must be done by the clemency of the Executive.

For these reasons the application should be refused.

WEBB J. I would dismiss this application for the reasons given by the Chief Justice for the Court.

The amendments of ss. 19 and 656 of the *Queensland Criminal Code* made in 1943 and 1948 empowering a judge to suspend part of a sentence upon the prisoner entering into a recognisance do not appear to have been adopted in Papua and New Guinea. Judges in Queensland purported to exercise that power even before the

(1) (1936) 55 C.L.R., at pp. 519-520.

amendments; but it does not follow that the Chief Judge should have suspended part of this sentence upon the applicant entering into a recognisance. It would, I think, be too much to expect his Honour to suspend the whole of the sentence. The position might be different if he were dealing with a younger man on a lower salary, required to handle large amounts of money in the course of his duties, and who had encountered unavoidable misfortune, such as serious and prolonged illness in his family: provided the offender had no previous convictions and had a good character apart from the particular offence.

Application refused.

Solicitors for the applicant, *John W. & Frank Galbally.*

Solicitor for the respondent, *D. D. Bell*, Crown Solicitor for the Commonwealth of Australia.

R. D. B.