ORIGINAL 16.

IN THE HIGH COURT OF AUSTRALIA

ANDERSON

V.

THE QUEEN

ORIGINAL

17/-

REASONS FOR JUDGMENT

Oral *Judgment delivered at* Sydney

on Thursday, 12th December 1957

W. M. HOUSTON, Govt. Print., Melb.

C.1978/55

ANDERSON

v.

THE QUEEN

JUDGMENT
(ORAL)

JUDGMENT OF THE COURT
DELIVERED BY DIXON C.J.

CORAM: DIXON C.J.
McTIERNAN J.
WEBB J.
KITTO J.
TAYLOR J.

ANDERSON

v.

THE QUEEN

This is an appeal from the Supreme Court of the Territory of Papua and New Guinea. The appeal is against certain convictions and sentences on proceedings on indictment before the Chief Justice. The appellant was an Acting Assistant District Officer at a post in Papua which was in a somewhat remote sub-district and which involved the performance by him of a number of duties. Some of these would, according to the standards of the Australian mainland, be in conflict with others. But in the circumstances which prevailed it was no doubt essential that various offices should be reposed in the same man. The appellant had been in the area since January 1955 and had been in charge of it as Acting Assistant District Officer since September 1955. In July 1956 he went on patrol. The precise date of his return is not clear but it appears to have been about a fortnight before the events to which I am about to refer. During his absence there was a shooting among the natives which might be regarded quite seriously. A man named Avila, in company with another man Koupa, shot Inai the wife of Koupa. Avila had no right to firearms or ammunition and that no doubt added to the seriousness of what would be in any case a very serious matter. Avila and Koupa admitted the shooting but said that Avila had mistaken the woman for a cassowary. In the absence of the appellant a corporal who was apparently in charge of the prison, put Avila in the prison and there he was when the appellant returned. The woman Inai was put into hospital where her life was saved, and Koupa in accordance with what appears to be native custom was at the hospital with her. When the appellant came back he found this had occurred and on 24th September 1956 he brought before him the two men separately. He was, as perhaps has been made clear, a magistrate, a gaoler, and

an administrator, and he was in command of other services. He interviewed the two men separately in his office. They each told the story of the shooting and asserted that the woman was shot in mistake for a cassowary. This the appellant clearly regarded, as might no doubt be expected, as an absurd statement. In each case he hit the native concerned when he made it and in one case, that of Avila, he kicked him. He then in turn directed that each man should be handcuffed to a flag-pole which was in front of the offices. At the hauling down of the flag at sunset they were liberated from that position and Avila went back to the gaol and Koupa apparently to the hospital. Avila remained in or about the gaol. His status is not very clear. He was put on the list of prisoners. His name was called but he seems to have been what might be described as under open arrest. He went from the gaol to various tasks at the hospital (under whose precise control does not appear) and he took part in patrols; but he was, technically, a prisoner. The appellant made out no warrant, exercised no function of a magistrate, so far as I can see, and took no proper legal course to see that Avila was lawfully held at the gaol. It is not at all clear on the facts as we have them what amount of restraint Avila was under. He seems to have been reasonably free in his actual movements. There he remained until January 1957, at which date it became necessary to relieve the appellant from his duties and have him replaced by another officer. In what might be called the accounting between him and the relieving officer Avila was mentioned and the appellant said that if it were possible he proposed to have him charged before the judge, who was expected shortly. We do not know what eventually happened to Avila as a prisoner. But it would seem that during the period when the appellant was responsible Avila might have been held on some legal warrant had it been made

out and had proper steps to commit him been taken. That, however, was not done and his actual position at the gaol was quite irregular. These events led to criminal charges being made against the appellant. There were five charges in all made against him. The criminal law of Papua is in effect the Criminal Code of Queensland, which is adopted subject to modifications, as part of the law of the Territory by the Criminal Code Ordinance, No. 7 of 1902. The charges against him were made under the provisions of the Criminal Code. He was charged on two indictments one containing four counts and a separate one in relation to holding Avila in gaol. That indictment as first framed charged that from 24th August 1956 or thereabouts until 23rd January 1957 or thereabouts the appellant unlawfully confined one Avila in Tapini gaol against his will. That charge is framed under sec. 355 of the Queensland Criminal Code as adopted. The provision says:- "Any person who unlawfully confines or detains another in any place against his will, or otherwise unlawfully deprives another of his personal liberty, is guilty of a misdemeanour, and is liable to imprisonment with hard labour for three years." The other indictment, containing four counts, was also framed on the code. All four counts related to the incidents, in the office and outside the office, when he questioned the two persons involved in the shooting. The first count was that on 24th September the appellant unlawfully assaulted one Koupa. The second count was that on the same day he deprived Koupa of his personal liberty by securing him to a flag-pole and so detained him against his will. The third count said that on 24th September 1956 the appellant unlawfully assaulted Avila; and the fourth count was that on the same day he unlawfully deprived Avila of his personal liberty by securing him to the flag-pole and so detained him against his will. To these four counts of the second indictment that I have read the appellant pleaded not guilty and he was tried on the facts before the Chief Justice.

The Chief Justice found him guilty on each count. It is, of course, unnecessary to say that common assault is included in the Criminal Code. The other two counts were framed, like the first indictment I read, on sec. 355 of the Code. Having heard of the appellant's career which, I may say, was a creditable one so far as the past is concerned, the learned judge sentenced him to six months imprisonment on each count of assault and to eighteen months imprisonment on each of the two counts under sec. 355 for detaining in the one case Avila and in the other case Koupa. The trial finished on 24th September and on the following day, 25th September, the appellant was presented on the first indictment which I have read, containing one count under sec. 355, the count which was dependent upon his detaining in gaol against his will Avila from September to January. I should perhaps have said that before he pleaded to that count it was amended to make 24th August read 24th September 1956. The prisoner, having been sentenced to these heavy terms of imprisonment on the previous day, thought fit to plead guilty to the second indictment under sec. 355 and received a sentence of twenty-one months imprisonment upon that count. All five sentences were concurrent. We heard an application for leave to appeal on 18th November and granted leave to appeal, and directed that the appellant should be admitted to bail to attend in this Court on the hearing of the appeal. The appeal has now been argued and it is that with which we now have to deal. Points have been made on behalf of the appellant against the correctness of the convictions but we think it is unnecessary to say more about those points than has been said during the argument. Counsel sought to apply to have his plea of guilty to the indictment containing the single count under sec. 355 withdrawn but there are no circumstances which would justify such a course and the application was not

persisted in. The real question in the case lies in the severity of the sentences. The facts have been discussed yesterday and this morning and it is not necessary for me to say more about them than is contained in the brief outline which I have already given. The mere statement of the sentences will shew that they are of very considerable severity. No physical harm was done to either of the two Papuans. No doubt they were in an unpleasant posture and no doubt it was an unpleasant experience to be handcuffed to the flag-pole for some hours, but no actual harm resulted to them. The physical assault upon them was not of a violent description and it left no marks upon them. It is plain that the appellant cannot have thought that he was in any way acting lawfully in assaulting them in his office or in having them handcuffed to the flag-pole. These were acts for which he could not have imagined he had any lawful justification. As regards the long detention of Avila in gaol, the situation is somewhat different. It would appear that the learned Chief Justice of the Supreme Court thought that the circumstances which were disclosed were insufficient to warrant putting Avila on his trial or arresting him. We cannot take that view. It would appear from the evidence as it exists before us that Avila, and perhaps Koupa, might well have been committed for trial and held under arrest pending committal. The fact that they stated that they mistook a woman for a cassowary could hardly be treated as exculpation worthy of credit, and a prima facie case existed against them. It seems therefore that in acting as he did in keeping Avila in this loose kind of arrest in gaol the appellant acted with considerable irregularity but did no more than might have been accomplished by a regular course of legal procedure. No doubt it would have required warrants and repeated formal remands and a committal. The learned judge, however, took a much more serious view of that, as the sentence of twenty-one months which he

imposed betokens. We have given anxious consideration to the whole question of the severity of the sentences. Of course this Court would always give very great weight to the view of the judge in Papua or New Guinea when it depended upon or involved in any way any local circumstances. But when you come to a question of punishment you cannot lose sight also of the case of the individual upon whom it has been imposed. Here we have a man who was a trusted servant of the Crown exercising very considerable power in a difficult and, I think, dangerous territory with very little white aid and great responsibility. His actions, indefensible as they are, have brought him to disaster. He has been dismissed from the service. He was imprisoned for eight weeks and one day in Papua before he was released on a recognisance under the direction of this Court and his life must appear to him at the moment to be in ruins. These are matters which one cannot leave out of account whatever view may be taken as to his conduct. Looked at in comparison with sentences that are ordinarily imposed on the mainland of Australia sentences of this description viz. 6 months for assault, 18 months for directing the two Papuans to be handcuffed for some hours to a pole and 21 months for the irregular manner in which he held them in gaol, seem to be very severe indeed. We ought, I think, to take some account, from the point of view of the individual punished, of the standards which prevail on the mainland of Australia.

We fully realise that a strong control must be exercised over administrative officers who are entrusted with the well-being of native communities, but it may properly be remarked that administrative misconduct should in the first instance be corrected by control exercised administratively - that is to say by departmental discipline. That is a matter with which we are not concerned. What we are concerned with is the administration of the ordinary criminal law.

Taking these matters into consideration, we cannot help thinking that the sentences that are imposed could not stand. The imprisonment of eight weeks which the appellant has already suffered involves in itself punishment which is as great as any of the five convictions could possibly justify. Many people would think that it was too great a punishment.

In all the circumstances of the case the course which we propose to take is to make an order at once that the periods of imprisonment imposed upon him under the five counts that I have mentioned - the four counts contained in one indictment and the single count contained in the other indictment - should be reduced so as to expire on the day on which he was liberated upon recognisance under the order of this Court, that is on 20th November 1957. It is only necessary to add that we take that course because he has already endured that term of imprisonment and because we think the punishment is adequate - if not more than adequate. It does not indicate in any way that we would have imposed a punishment as severe had it fallen to us to deal with the question in the first instance.

The order will be that the appeal be allowed in the case of each conviction, and that the sentences be reduced so as to expire on the 20th November 1957.