

## MINIMUM PENALTIES LEGISLATION THE PAPUA NEW GUINEA EXPERIENCE

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### 1. Introduction

In 1983 and 1984 the Papua New Guinea Parliament passed four pieces of legislation known as the Criminal Code (Minimum Penalties) (Amendment) Act No. 10 of 1983, the Summary Offences (Amendment) Act No. 17 of 1983, the Criminal Code (Amendment) Act No. 29 of 1983 and the Criminal Code (Minimum Penalties) (Amendment) Act No. 11 of 1984. The purported purpose of all these amending Acts was to compel the Courts to impose minimum custodial sentences for certain prevalent offences.

For example, under the Summary Offences Act s.6, the minimum penalty for an assault is now 'imprisonment for a term of not less than six (6) months and not exceeding two years'. Under s.9, inciting to fight carries a minimum penalty of not less than one year and not exceeding four years and under s.7, 'provoking a breach of the peace' carries a minimum penalty of not less than three months and not exceeding one year.

For the more serious offences under the Criminal Code, Housebreaking/Burglary now carries a minimum penalty of five years imprisonment and not exceeding fourteen years, and, if committed in the night, the minimum penalty is eight years imprisonment and the maximum is life. (See s.395, Criminal Code). Threatening violence now carries a minimum penalty of one year and a maximum of three years but if happening in the night, the minimum penalty is now two years imprisonment and the maximum is four years. (See s.76 of the Criminal Code).

Sexual offences such as rape now attract a minimum penalty of not less than ten years imprisonment and not more than life. (See s.347 of the Criminal Code).?

As will become apparent in this article the Minimum Penalties Acts have not altogether been welcomed by the Judiciary, nor have they necessarily achieved the legislative objects for which they were introduced. These penalties have however been the catalyst for the judiciary to develop its own jurisprudence, yet always jealously retaining unto itself that common law endowment of independence from the executive. The judiciary has also clearly put paid to any executive assumptions that statutory discretions vested in the courts can be easily removed by implied repeal.

This article examines the way in which the judiciary have been reluctant to become part of the process of rule by the Executive. The cases cited hereinafter clearly depict the extraordinary lengths the courts have gone to in retaining for themselves the right to dispense justice according to well established sentencing principles. Running parallel with all this, is Parliament's attempts to frustrate the innovative judicial approaches to the problem created by, what has become collectively known as, the Minimum Penalties Legislation.

### 2. The Courts Approach

It was not long before summary offences bearing minimum penalties were taken to the National Court on appeal. In the landmark decision of *Laho Kerekere v. Robin Amria*,<sup>1</sup> Amet J. was faced with an appeal from the District Court whereby the appellant had been

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1. Unreported National Court Judgment N 432 (M) dated 1 September 1983.

convicted under s.20 of the Summary Offences Act of being unlawfully on premises and was sentenced to the minimum term of twelve months imprisonment. Section 20 is in similar terms to the various Australian States legislation and provides that 'a person who, without lawful excuse, in, on or adjacent to any premises is guilty of an offence'. The minimum penalty prescribed is one years imprisonment. Here, the appellant wanted to watch a rock concert. He had no money to pay and simply jumped over the fence.

At first instance, the District Court was of the view that because of the minimum penalty provided, it had no power to use its discretion under ss 138(1) and 206(2) of the District Courts Act.

Section 138 empowers a Court where a person is charged with a simple offence, and the charge is proved, in certain circumstances to, without proceeding to conviction, dismiss the charge or give a conditional discharge. Section 206(2) empowers a Court to impose a fine when a penalty of imprisonment only is provided for, if it considers that the justice of the case would be better met by a fine rather than by imprisonment.<sup>2</sup>

Amet J., in following two earlier National Court authorities of *Henderson v. Blackwell*<sup>3</sup> and *Richard Cheong v. Namil*<sup>4</sup> said that these cases were 'authorities for the proposition that the mere provision of minimum penalties, such as is contained in s.20 of the Summary Offences Act does not exclude the operation of s.138(1) of the District Courts Act in an appropriate case'.<sup>5</sup>

His Honour was unable to find that the Magistrate at first instance erred in proceeding to conviction. Nevertheless, his Honour then went on to examine whether the discretionary power under s.206(2) remained in the sentencing court despite the wording of the minimum penalty of one year prescribed under s.20 of the Summary Offences Act.

Amet J. examined the earlier authorities of *Makin v. Kelly*<sup>6</sup> and *Henderson v. Blackwell*.<sup>7</sup> In the former case, Ollerenshaw J. followed the Victorian case of *Healey v. Festini*<sup>8</sup> and there held that ss. 220 and 244 of the Customs Ordinance 1957-1959 did not exclude the general powers granted to a court under s.207(2).<sup>9</sup> Ollerenshaw J. was of the view that a substitution of a fine for a term of imprisonment was not a reduction of the penalty of imprisonment. It merely substituted one form of penalty for another, and that s.244 did not purport to deal with reducing in severity a particular penalty, but merely prevented the imposition of a period of not less than three months imprisonment when a prison sentence was considered more appropriate.<sup>10</sup>

Frost S.P.J. (as he then was) in *Henderson v. Blackwell*<sup>11</sup> in dealing with s.7(1)(d) of the Dangerous Drugs (Possession) Ordinance 1970, followed *Makin v. Kelly*.<sup>12</sup> There, the minimum penalty was imprisonment for not less than three months or more than two years.

In *Richard Cheong v. Vincent Hamil*<sup>13</sup> Kearney D.C.J. had the benefit of being able to refer to both *Makin's* case and *Henderson v. Blackwell*. Kearney D.C.J. said *obiter*, that there

2. Cf. similar legislation in England and the various Australian States.

3. [1973] P.N.G.L.R. 223. This case followed *Cobiac v. Liddy* (1966) 43 A.L.J.R. 257.

4. [1981] P.N.G.L.R. 472.

5. *Supra* n.1 at 3.

6. [1963] P.N.G.L.R. 127.

7. *Supra* n.3.

8. [1958] V.R. 225.

9. Predecessor to the present s.206(2) of the District Courts Act.

10. Section 220 of the Customs Ordinance was in identical terms to s.20 of the Summary Offences Act which provided for a penalty of imprisonment for not less than three months and not more than two years. Section 244 of the Customs Ordinance provided that 'no minimum penalty imposed by this Ordinance shall be liable to reduction under any power of mitigation which would, but for this section, be possessed by the Courts'.

11. *Supra* n.3.

12. *Supra* n.6.

13. *Supra* n.4.

was some doubt whether the discretionary power in s.206(2) of the District Courts Act could stand against the wording of a similar minimum penalty provision in s.7(1) of the Dangerous Drugs Act.

In the event, Amet J. was left to determine whether the later enactment of the Minimum Penalties Legislation repealed by implication s.206(2) of the District Courts Act. His Honour considered the classic statement of Barton J. in *Goodwin v. Philips*<sup>14</sup> where it was said:

The Court must be satisfied that the two enactments are so inconsistent or repugnant that they cannot stand together, before they can from the language of the later imply the repeal of an express prior enactment i.e., the repeal must, if not express, flow from necessary implication.<sup>15</sup>

Amet J. then went on to say:

Whether a later act has taken away a discretionary power given by an earlier act must depend upon a comparison of the actual language of each, to see whether they do not stand together or whether the later has, pro tanto . . . abrogated the former.<sup>16</sup>

Amet J. adopted the approach taken in *Healey v. Festini*<sup>17</sup> whereby Gavan Duffy J. posed a series of questions in comparing the actual language used in each Act to determine whether they were inconsistent and could not stand together such as to imply a repeal of the prior by the later.

In that case, the Full Court of Victoria had to determine whether s.161 of the *Licensing Act* 1928, which provided only a term of imprisonment as the penalty for a second offence of selling liquor without a licence, did not expressly exclude the operation of s.71 of the *Justices Act*. The latter Act in short, empowered a court of Petty Sessions to impose a monetary penalty instead of a term of imprisonment as the penalty for a second offence of selling liquor without a license, if it thought that the justice of the case would be better met by imposing a fine instead of a prescribed period of imprisonment.

Gavan Duffy J. was of the opinion that the sections were not inconsistent.

*Healey v. Festini* was approved by the High Court in *Rose v. Hyric*.<sup>18</sup>

In the latter case the Court had to consider s.154(1) of the *Justices Act* (1958 Victoria) and s.154(1) of the *Licensing Act*. The Court said that the question was simply whether s.154(1) meant to exhaust the topic of punishment and that questions of this nature are usually questions of implied repeal. In short, a later enactment does not automatically repeal an earlier enactment unless the words of the later are such as by their necessity to import a contradiction.

Drawing some comfort from these authorities, Amet J. postulated that:

The Draftsman of the minimum penalties provisions is presumed to have known what the law is or the Courts rulings in relation to similar laws have been, so that I would expect to see specific express provisions in an amending act if the intentions were to repeal provisions which had been held to be available to the Courts in relation to similar legislation.<sup>19</sup>

His Honour held that the Magistrate erred in concluding he had no discretion on the question of penalty. In considering the circumstances of the offence and the antecedent background of the appellant, His Honour concluded that had the Court properly exercised

14. (1908) 7 C.L.R. 1.

15. *Ibid.* at 10.

16. *Supra* n.1 at 5.

17. *Supra* n.8 at 229.

18. (1964) 37 A.L.J.R. I.

19. *Supra* n.1 at 7.

its discretion, it ought to have imposed a fine as being in the best interests of justice.<sup>20</sup> The first chink in the minimum penalties armour had been made.

The next important decision was that of *Moer and Herol v. Morea*<sup>21</sup> wherein McDermott J. approved the decision in *Laho Kerekere v. Robin Miria*.<sup>22</sup> In the former case the appellant had been convicted under s.77 of the Summary Offences Act of obtaining money reasonably suspected of being stolen and a fine of K200.00 in default six months imprisonment was imposed. (Six months imprisonment being the minimum period prescribed).

McDermott J. approved the Magistrates decision to use his discretion to impose a fine under s.206(2) of the District Courts Act but regrettably, to use the words of His Honour, the Magistrate in using his powers under s.206(2) 'went off the rails'.<sup>23</sup> There was no evidence to justify the imposition of what was in fact the maximum fine, nor was there evidence even to suggest an ability on the part of the appellant to pay any fine at all. In the event, McDermott J. in reducing the fine to K50.00 had this to say:

The power of sentencing is discretionary and requires proper consideration of all the relevant factors involved: the crime, the circumstances of it, the accused, their background and present circumstances. To sentence in isolation of these considerations flies not only in the face of commonsense but against authority and inevitably leads to error.<sup>24</sup>

It was not long before the Supreme Court had its first reference in relation to minimum penalties legislation. Under s.19 of the Criminal Code the National Court has a discretion to impose some *other form of punishment*. For example it may order the defendant to pay a fine instead of imprisonment, or that he be discharged on his entering into a recognizance with or without sureties, or that part or all of the sentence be suspended on terms. The Chief Justice in the National Court sentenced four persons to five years imprisonment. (The minimum prescribed under s.398 of the Criminal Code). He then referred to the Supreme Court<sup>25</sup> the question of whether or not there still existed a discretion under s.19 of the Criminal Code, despite the fact that s.398 of the Code provides for a minimum prescribed penalty.

The five man Full Court could not agree. The importance of the majority judgment, however, is the way in which they reached their conclusions that s.19 was not abrogated by the Minimum Penalty Legislation.

Kapi D.C.J. considered various statutory provisions in other jurisdictions. His basic premise was that s.19 applies to all offences under the Code. However, there were exceptions to this in those cases where the words in a Code provision expressly prescribe a penalty. Such prescription precludes, limits or restricts any of the powers under s.19. He said that these results may be achieved in a number of ways: for example, s.305 of the Queensland *Criminal Code* expressly precludes s.19 where, for the punishment of murder, the section states:

Any person who commits the crime of murder is liable to imprisonment with hard labour for life, *which cannot be mitigated or varied under Section Nineteen of this Code*.<sup>26</sup>

Kapi D.C.J. was cognizant that the same result could be achieved by the provision

20. *Ibid.* at 8. A fine of K100.00 was substituted by the Court.

21. Unreported Unnumbered National Court Judgment dated 28 October 1983.

22. *Supra* n.1.

23. *Supra* n.21 at 2.

24. *Ibid.*

25. Unreported Unnumbered Supreme Court Judgment dated 2 November 1983. S.C.R. No. 5 of 1983. Referrals to the Supreme Court are made pursuant to s.21 of the Supreme Court Act (Chapter 37).

26. Kapi D.C.J.'s underlining.

containing an express negative implication and quoted the High Court of Australia decision in *Rose v. Hvrlic*,<sup>27</sup> where it was said:

Questions of this nature are usually questions of implied repeal . . . it was settled in law that a later affirmative enactment does not repeal an earlier affirmative enactment unless the words of the later are 'such as by their necessity to import a contradiction' . . . there must be in the later provision an actual negation of the earlier. *Ex hypothesi* there is no negation in words, but there must be a negation as a matter of meaning.

Kapi D.C.J. then gave two examples<sup>28</sup> of restrictive and mandatory legislative provisions. Firstly, in the *Tasmanian Criminal Code Act*, s.158 states:

Any person who commits murder is guilty of a crime and *shall be sentenced* to imprisonment for the term of his natural life.

The second example he gave was the predecessor to s.309 of the Criminal Code provision in Papua New Guinea which then stated:

Any person who commits the crime of wilful murder *shall be* liable to imprisonment with hard labour for life.

These two examples are clearly mandatory penalties and by necessary implication the powers under s.19 are precluded.

Kapi D.C.J. thus considered that there was nothing in s.398 of the Code which precluded, in a blanket way, the application of s.19.<sup>29</sup> He concluded that the words 'not less than' really meant 'not less than the period of five years . . .' and accordingly to suspend part of a five year sentence does not mean that such a punishment is less than the period of five years.<sup>30</sup>

His Honour, after acknowledging the statement in *Rose v. Hvrlic* that 'care must be taken in answering it not to forget the distinction between the meaning of a provision and the underlying policy to which it may be supposed to point'<sup>31</sup> then went on to say that:

It is obvious from my reasoning that the meaning of s.398 falls far short of the view that Parliament intended to deal exhaustively with the question of punishment. If this is what the Parliament purported to do (as may be evident in the debates) then further appropriate legislation enactment is necessary.<sup>32</sup>

The bottom line of all this, is that in Kapi D.C.J.'s view, although the court under s.19(1)(a) cannot impose less than five years imprisonment where it exercises its discretion to impose a term of imprisonment, it may nevertheless suspend a portion thereof under s.19(6). The power of suspension thus remains unaffected.

The same conclusions were reached by Amet and McDermott JJ.

McDermott J. gave two further examples of exceptions to s.19. Firstly, he cited the Queensland Criminal Code s.305, and secondly, he cited the *Western Australian Criminal Code* s.282 (*Punishment for Wilful Murder and Murder*). That section states:

A person who commits the crime –

- (a) of wilful murder is liable to punishment of death;
- (b) of murder is liable to imprisonment with hard labour for life and shall not be sentenced to imprisonment for any shorter term.

McDermott J. also referred to *Craigs on Statute Law*<sup>33</sup> and adopted the learned author's statement that:

. . . express and unambiguous language appears to be absolutely indispensable in statutes passed for conferring or taking away legal rights, whether public or private or

27. *Supra* n.18 at 3.

28. *Supra* n.25 at 6.

29. *Ibid.* at 7.

30. *Ibid.* at 8.

31. *Supra* n.18 at 3.

32. *Supra* n.25 at 9.

33. 7th Edition.

for excepting from the operating of or altering clearly established principles of law or for altering the jurisdiction of the courts.<sup>34</sup>

He then went on to cite the statement of Dr. Lushington in *The India*<sup>35</sup> that:

The prior statute would, I conceive, be repealed by implication if its provisions were wholly incompatible with a subsequent one; or if the two statutes together would lead to wholly absurd consequences . . .

McDermott J. then referred to several cases<sup>36</sup> for the authority that:—

In matters of implied repeal, it is settled law that a later affirmative enactment does not repeal an earlier affirmative enactment unless the words of the later import a contradiction of the former words, that the contrariety between the two enactments must be such that effect cannot be given to both at the same time.<sup>37</sup>

McDermott J. also appears to have placed great reliance on the statement of Windeyer J. in *Cobiac v. Liddy*<sup>38</sup> that:

The whole history of criminal justice has shown that severity of punishment begets the need of a capacity for mercy. The more strict a rule is made, the more serious become the consequences of breaking it, the less likely it may be that Parliament would intend to close all avenues of exception. Especially when penalties are made rigid, not to be reduced or mitigated, it might seem improbable that Parliament would not retain a means of escaping the imposition of a penalty which must follow upon conviction, that it would abolish it, not directly but by a side wind . . . It is that a capacity in special circumstances to avoid the rigidity of inexorable law is of the very essence of justice . . . I do not think it should be said that the Parliament . . . has done by implication what it certainly has not done explicitly.

In further support of his view McDermott J. adopted the statement of Murphy J. in *Sillery v. The Queen*.<sup>39</sup> The case concerned s.8 of the *Crimes (Hijacking of Aircraft) Act 1972* (Commonwealth) which provides that: 'The punishment for an offence against the section is imprisonment for life'.

Murphy J. said:

The presumption (against mandatory penalties vis a vis maximum penalties) is even stronger when a heavy penalty is applicable to a range of offences differing in nature and gravity so that although the maximum might be appropriate for some, it would be manifestly oppressive for others. Otherwise, the law would be draconian. The Athenian Lawmaker Draco is reputed to have imposed for all offences, even the most trifling, the penalty appropriate for the most severe so that there was only one punishment.<sup>40</sup>

McDermott J's parting shot perhaps reflects the attitude of the majority to the whole concept of the Minimum Penalties legislation when he said:

Mandatory sentencing raises the spectre of general and widespread applications to the Executive involving executive hearings parallel to the judicial process of hearing and determining sentence. *This could well make the judicial sentence a term, the real*

34. *Supra* n.25 at 28.

35. (1864) 167 E.R. 345 at 346.

36. *Kutner v. Phillips* [1891] 2 Q.B. 267 at 272.

*Hack v. Minister for Lands* (1905) 3 C.L.R. 10 at 23-24.

See generally *Hill v. Hall* [1876] L.R. 1 Ex. D. 411 at 413-14.

*Flannagan v. Shaw* [1920] 3 K.B. 96.

37. *Supra* n.25 at 29.

38. *Supra* n.3 at 261.

39. (1981) 55 A.L.J.R. 509.

40. *Ibid.* at 513.

*sentence would be by the Executive. This is surely not intended.*<sup>41</sup> (emphasis added)

Amet J. also adopted the approach taken by Windeyer J. in *Cobiac v. Liddy*, who said, 'It is, I think, to be decided not by any assumptions of what Parliaments purpose was, but by its intention as expressed in the language it has used.'<sup>42</sup>

Amet J. also approved of the statement in *McLean v. Kowald*<sup>43</sup> where Bray C.J. cited Windeyer J.'s classic statement in *Cobiac v. Liddy*. Bray C.J. said:

It must depend upon a comparison of their language, and I would add, with respect, of their purposes, as gathered from their language and the state of the law before their enactment and not from some a priori pre-supposition.

Nevertheless, Amet J. tempered his judgment by stating that:

... it should be clearly understood that the interpretation given to the language used does not mean that the courts will arbitrarily and discriminately impose fines or good behaviour bonds for serious break and enters and tribal fights. These discretions are available now on more serious offences such as rape, armed robbery and wilful murder, and it is virtually unheard of that a fine or a good behaviour bond is imposed for these offences. The courts will still continue to apply the proper principles in the exercise of these discretionary powers. In a good majority of all serious cases, these discretions will very rarely be an option.<sup>44</sup>

In the interim, Parliament had not been idle. Indeed, five days after the Supreme Court reference, the Criminal Code (Amendment) Act No. 29 of 1983 was certified as law on the 7 November, 1983. Section 19 of the Criminal Code was amended by adding the following new subsection:

(8) where a minimum penalty is prescribed for an offence, nothing in this section authorises a court to impose any penalty *other than that minimum penalty* on a person convicted of that offence. (emphasis added)

Was the loophole closed by this amendment?

In the author's opinion there still exists a discretion to suspend part or all of a minimum penalty sentence. To reiterate what Kapi D.C.J. said: 'To suspend part of a five year sentence does not mean that such a punishment is less than the period of five years.'<sup>45</sup>

In short, the amendment merely restates that in minimum penalty offences the only penalty that can be imposed is that minimum as prescribed. In support of this conclusion see for example the South Australian Supreme Court decision of *McLean v. Konrad*<sup>46</sup> where the question posed was simply whether the *Offenders Probation Act* gave a power to suspend the sentence of imprisonment imposed upon the appellant under s.47 of the *Road Traffic Act*. Section 47(4) of the latter Act provided that the minimum period of imprisonment 'shall not be reduced or mitigated in any way'.

There, Bray C.J. had this to say:

No doubt a shortening of the period would be a mitigation as well as a reduction. But to suspend a sentence of imprisonment does not, it seems to me, as a matter of the English language, mitigate, abate or reduce the period of imprisonment but only the effect of the sentence of imprisonment . . . In ordinary speech I would have thought that the only way in which the period of a sentence of imprisonment as opposed to the effect of imprisonment could be mitigated would be by reducing its length.<sup>47</sup>

41. *Supra* n.25 at 31.

42. *Supra* n.3 at 261.

43. (1974) 9 S.A.S.R. 384 at 388.

44. *Supra* n.25 at 40.

45. *Ibid.* at 8.

46. *Supra* n.43.

47. *Ibid.* at 389. In this case Bray C.J. was compelled however to find a wider meaning of the work 'mitigated' because of its use together with the word 'reduce'.

The majority decision of *Acting Public Prosecutor v. Clement Maki and Tom Kasen*<sup>48</sup> is however authority for the proposition that it is the whole sentence which is the 'effective' sentence including the portion suspended and not merely the unsuspended portion. As Amet J. said in Supreme Court Reference No. 5 of 1983 'The sentence of imprisonment is the whole of that which is imposed and not the unsuspended portion only, if that sentence were partially suspended'.<sup>49</sup>

In so far as the meaning of the word 'penalty' is concerned reference may be made to the dissenting judgment of Bredmeyer J. in the Supreme Court Reference No. 5 of 1983. There His Honour turned for guidance to the *Oxford Dictionary* meaning:

The word 'penalty' is a wide term, it is not restricted to terms of imprisonment. The *Oxford Dictionary* meaning of 'penalty' is 'punishment, concerned with inflicting punishment e.g. *penal servitude* = imprisonment with hard labour. The meaning of 'penalty' is given as 'punishment, especially payment of a sum of money for breach of a law, a rule or a contract'.<sup>50</sup>

It is submitted that the amending Act does not take away the discretion under s.19(6) given to the judges to suspend part or all of a sentence. Indeed it would have been simple for Parliament to have expressly stated in the amendment, that the discretion to suspend part or all of a sentence did not lie with the courts in minimum penalty provisions.

It has been observed elsewhere that, 'other countries with Criminal Codes similar to ours have no minimum penalties for indictable offences, except that many of them have a mandatory sentence of life imprisonment for murder'.<sup>51</sup> It will also be observed that other jurisdictions have a similar s.19 giving the courts a discretion on the form and type of penalty to be imposed.

Shortly after all this, came Pratt J's well publicized judgment in *Henry Tuk v. First Constable Gari*.<sup>52</sup> In this case the Local Court sentenced the appellant to the minimum sentence of six months imprisonment for assault. The court of first instance was of the view that the minimum penalties legislation took away any discretion it might have had to impose a fine. Here, Pratt J. was faced with s.20 of the Local Courts Act. That provision was similar, although not as comprehensive as s.138 of the District Courts Act. Section 20 states that 'a Local Court is not bound to convict if the offence complained of is, in the opinion of the Court, of so trivial a nature as not to merit punishment'.

His Honour said in relation to s.20 that 'despite its greater brevity and simplicity, s.20 is still directed to the same end as s.138 . . . affords an alternative course of action to the magistrate'.<sup>53</sup>

Section 206(i) and (ii) of the District Courts Act has an almost word-for-word counterpart in s.19A(i) and (ii) of the Local Courts Act. Pratt J. came to the conclusion that the latter section was available to the magistrate despite the Summary Offences (Amendment) Act No. 17 of 1983 which prescribed a minimum penalty for the offence. Accordingly, His Honour held that the magistrate erred in concluding that he had no power to impose a fine if he considered imprisonment was too severe in the circumstances.

Pratt J., although accepting the magistrates view that in the present case it was quite

48. Unreported Supreme Court Judgment No. S.C. 205 dated 7 August 1981.

49. *Supra* n.25 at 39.

50. *Ibid.* at 10.

51. *Ibid.* at 12, per Bredmeyer J.

52. Unreported National Court Judgment N 446 (M) dated 18 November 1983.

53. *Ibid.* at 2.



a serious assault, and 'that the law must set its face strongly against "wife bashing", had this to say:

I do not think the wife would really appreciate the loss of the breadwinner of the family for six months. In some cases of course it would be a blessed relief. In the present circumstances there is nothing to indicate one way or the other.<sup>54</sup>

His Honour accepted the magistrates view that this was quite a serious assault. He also observed that the appellant was a married man with two children, was self-employed as a goldminer and that he had had no prior convictions. His Honour commented that no doubt there were tensions which erupted during the domestic argument which led to the assault. Having made these observations his Honour then went on to say:

*To put a person in a gaol for a first conviction of what is a relatively minor misdemeanour, in my view, flies in the very face of commonsense, humanity and modern sentencing principles. In the circumstances of this case it is excessive punishment*<sup>55</sup> (Emphasis added)

It was not long before the first real broadside was fired by the judiciary at the whole concept of the minimum penalties legislation. In the case of *Lakea Sareaka v. Simon Pepi*<sup>56</sup> the appellant was convicted on his plea under s.20 of the Summary Offences Act of being unlawfully on premises. He was sentenced to the minimum penalty of one year imprisonment. It was a classic case where the plea of guilty should not have been accepted. The defendant stated, in the court of first instance, that the reason he went inside the house was, 'because the rascals chased me. The owner sent me out so the rascals came and belted me. The owner of the house did not like me to go inside'.<sup>57</sup>

Pratt J. was faced with several difficulties. There was an unreasonable delay by the magistrate in sending the depositions to the appeal court, and by the time the appeal came on, the appellant had already spent some three months in gaol. His Honour said that '. . . an insuperable difficulty stems from the Minimum Penalties Legislation itself'.<sup>58</sup> In essence, if the case were remitted back to the District Court for re-hearing, and the appellant were lawfully convicted there would be '. . . no way in which the magistrate can take into account the three or four or five months which he has already served'.<sup>59</sup>

As Pratt J. put it:

. . . what I am being faced with is the possibility that this young man may well be facing a minimum sentence, not of 12 months because of the errors which have been occasioned in his case, but perhaps 17 months. Of course, *this type of situation is not the only blatant injustice which can be perpetuated by the ill-conceived, ill-advised, ill-considered, inherently illogical and draconian burst of legislation passed in Parliament in May and November under the general titles of minimum penalties*<sup>60</sup> (Emphasis added)

To illustrate his point, His Honour then gave the example of a breaking and entering of a dwelling house by a 16, 14 and 12 year old at night. 'Night', is defined as between the hours of 9.00 p.m. and 6.00 a.m. Just before 9.00 p.m. the oldest boy pushes open a partly opened window to the house and removes a bottle of coke and consumes it. He has committed an offence of breaking and entering a dwelling house with intent and is liable to a minimum sentence of five years. Half a minute after 9.00 p.m. the younger children, preferring fanta

54. *Ibid.* at 3.

55. *Ibid.* A fine of K50.00 was substituted for the imprisonment term.

56. Unreported National Court Judgment N 448 (M) dated 15 December 1983.

57. *Ibid.* at 3. 'rascal' is a local term for criminal or thug.

58. *Ibid.* at 4.

59. *Ibid.*

60. *Ibid.* at 4-5.

to coke, go through the same process and take some fanta. Their offence has been committed in the night and they are liable to a minimum sentence of eight years gaol.<sup>61</sup>

In the upshot His Honour considered that '*this mish - mash of hopeless legislation presents me with a real difficulty*'<sup>62</sup> (Emphasis added)

His Honour noted that the appellant had suffered considerable injustice already and if he did not send the matter back for rehearing he would be open to criticism for not allowing the statutory law to take its course. That is to say - that the matter should be investigated and a proper decision made by a court.

His Honour resolved the conflict when he said:

... it seems to me that in the ultimate my task is really quite clear. Both under the law and under the *Constitution*, it is my duty so far as it is possible for me to do so, to ensure that justice is done and, of course, to assure it is done in accordance with the law, with a proper interpretation thereof, and applying the principles which underlie the law.<sup>63</sup>

Pratt J. accordingly quashed the conviction and made no further order as to a re-hearing.

Whilst these judicial decisions were receiving wide publicity Parliament again moved very swiftly by passing the District Courts (Amendment) Act No. 34 of 1983 which was certified on 8 December 1983. This amendment provides that s.206 of the District Courts Act 'does not apply to Minimum Penalties'.

The next judicial broadside against the Minimum Penalties Legislation appeared in the decision of Kapi D.C.J. in *Peter Kekai v. Munagun*.<sup>64</sup> In that case, the appellant was convicted of unlawful assault under s.6 of the Summary Offences Act. The magistrate at first instance, imposed the minimum penalty sentence of six months imprisonment. Kapi D.C.J. held that as the magistrate had considered the discretion available to him under s.206 of the District Courts Act, and further considered that the assault was of a serious nature, namely a sexual assault, then a fine would not be an adequate punishment.<sup>65</sup>

His Honour then however, had this to say:

I realize that if I had the discretion, as previously existed in the law, I would have imposed a term of much less than six months. This is beside the point. I must apply the law as directed by the Parliament. I cannot allow my disagreement with the policy of the law to affect my discretion on the question of a fine.<sup>66</sup>

In early 1984, Amet J. again had to consider the Minimum Penalties Legislation in the case of *Utula Samana v. Demas Waki*.<sup>67</sup> In this case the appellant had been convicted of 'using insulting words whereby a breach of the peace was likely to take place'. Under s.7(b) of the Summary Offences Act, the minimum sentence prescribed is three months imprisonment.

Although the appeal succeeded on other grounds, his Honour still made reference to s.138 of the District Courts Act, and again restated the law when he said:

The question and the discretion whether or not to convict under Section 138 obtains only when there is a correct finding of guilty or that the charge has been lawfully proven.<sup>68</sup>

61. *Ibid.* at 5-6. Note also that under s.32(2) of the Child Welfare Act the Childrens Court can not deal with an offence carrying a maximum of life imprisonment which is the maximum set for breaking and entering a dwelling house at night.

62. *Ibid.* at 6.

63. *Ibid.*

64. Unreported National Court Judgment No. 453 dated 19 January 1984.

65. *Ibid.* at 2-3.

66. *Ibid.* at 3.

67. Unreported National Court Judgment N 449 dated 23 January 1984.

68. *Ibid.* at 14.

What is of more significance however, is that the last ground of appeal in this case although being unnecessary to deal with, was that the imposition of the minimum penalty was *unconstitutional as being contrary to fundamental rights of freedom from inhuman treatment and the rights to a fair trial*. (Emphasis added)

In short, the embryonic stages of a major constitutional challenge to the minimum penalties legislation was born.

By this stage in the *Judicial v. Legislators* battle it had become patently clear, that the courts would have to consider in great depth the little discretions they had left, and how best they could be utilized in the prevailing legislative arrangements. The onlookers had not long to wait. The court in *Utu Yame v. Titai Kinapu*<sup>69</sup> had to consider (*inter alia*) the meaning and scope of s.138(1) of the District Courts Act and said:

It is not incumbent on a magistrate to consider s.138(1) in every criminal case that comes before him . . . the application of this section is confined to cases where a magistrate is of the opinion that '*having regard to the character, antecedents, age, health or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict punishment, or other than a nominal punishment or that it is expedient to release the offender on probation.*'<sup>70</sup>

The interesting aspect of the decision was Kidu C.J.'s comment that s.138 'vests magistrates with a discretion which must be exercised in a judicial manner and not in an arbitrary way.'<sup>71</sup> He then went on to say:

In this case there was nothing in the records as to whether or not the learned magistrate adverted to Section 138(1). So I could not say whether or not he exercised his discretion properly nor could I say he failed to consider the application or non applicability of that provision.<sup>72</sup>

The next most important decision on s.138 is the decision of Pratt J. in *Ito Memairi v. Nelson Guia and William Jiwaiba v. Nelson Guia*.<sup>73</sup> Here Pratt J. again stated that:

Not only must one take into account whether or not a gaol penalty is appropriate to the circumstances of the case, but whether it is appropriate to impose such a penalty in view of the fact it is such a heavy one, that is heavy because it is a minimum period of time, be it six months or 12 months, or whatever.<sup>74</sup>

What was essentially a family dispute resulted in the appellant being sentenced to imprisonment for the minimum period of twelve months for being unlawfully on premises.

The magistrate here clearly misapplied s.138(1). He alluded to it, but felt that the case was 'proved' and accordingly should only be dismissed if he found the defendant not guilty. Pratt J. said that this was '*. . . therefore not one of those cases in which the magistrate has failed to consider the section of all.*'<sup>75</sup> He went on:

*. . . the court must be satisfied that the charge is proved . . . it is a matter in which it would bring down a verdict of guilty . . . Despite the fact that it has been proved beyond reasonable doubt, are there special features about the matter which cause the magistrate to believe that it would not be proper, that it would not be expedient to inflict punishment or more than mere nominal punishment; or that, thirdly, in all the circumstances should the offender be released on probation.*<sup>76</sup>

69. Unreported National Court Judgment N 451 (L) dated 15 February 1984.

70. *Ibid.* at 2 per Kidu C.J. The italicized words are the words of s.138.

71. *Ibid.*

72. *Ibid.*

73. Unreported National Court Judgment N 459 (M) dated 11 April 1984.

74. *Ibid.* at 1.

75. *Ibid.* at 2.

76. *Ibid.* at 2-3.

Pratt J. then looked at the words of s.138 and concluded that the magistrate must be satisfied that at least one of those three matters set out in that section exist before the section can be applied.<sup>77</sup>

His Honour then examined what he considered to be matters that would 'meet the bill' in any of the three requirements.

He said in relation to character and antecedents that:

It is clear enough that there must be something quite special about them, such as his extraordinary good character and background, a pillar of the church and the community, and a great social worker and so forth. In other words if the defendant has made an extraordinary or a special contribution to community welfare.<sup>78</sup>

In relation to mental condition His Honour was of the view that it applies to '... someone who is perhaps just a little above being declared mentally ill under the appropriate Act.'<sup>79</sup>

Of special character Pratt J. said about the appellant, 'They are not of any special character; they are not someone who, say, is of an age that is special, such as eight years of age, or ninety-five years of age, with one and a half feet in the grave ...'<sup>80</sup>

In relation to extenuating circumstances, it would seem that the mere fact that the offence arose out of a 'domestic' argument does not necessarily equate with extenuating circumstances. For as Pratt J. put it:

I think it would be holding the court and the interpretation of the law up to ridicule if I were to say there were any extenuating circumstances in two drunkards coming along at half past eleven at night and frightening the life out of the inmates of a house, most of whom were asleep, with drunken challenges and door bashing.<sup>81</sup>

Then, in his second broadside attack on the Minimum Penalties Legislation, Pratt J. had this to say:

*Parliament has still left open a door, but unfortunately I cannot agree with Counsel that the door is open for his client, despite the evil consequences which will flow from the Minimum Penalty Legislation.*<sup>82</sup> (Emphasis added)

Aside from the matters I have mentioned above, the case has considerable importance in Papua New Guinea, and indeed common law jurisprudence, because Pratt J. for the first time disagreed with the view that a verdict under s.138(1) can only be one of 'guilty' or 'not guilty'.

As Pratt J. put it:

You find the charge proved and that constitutes the judgment of the court ... one brings in a "no verdict" decision, because of the proven offence side by side with a provision which allows a court to record "No Verdict".<sup>83</sup>

A month after he gave his judgment in *Ito Memairi's* case, Pratt J. in *Mogia Widu v. Koda Ubia*<sup>84</sup> found himself dealing with yet another appeal involving a minimum sentence of six months imposed on the appellant for assault. it was here argued (*inter alia*) that, although the magistrate considered s.138 of the District Courts Act, he exercised his discretion wrongly.

Pratt J. said:

I would point out again that there is a special responsibility on the shoulders of the

77. *Ibid.* at 3.

78. *Ibid.*

79. *Ibid.* at 4.

80. *Ibid.*

81. *Ibid.*

82. *Ibid.* at 5.

83. *Ibid.* at 5, 6.

84. Unreported National Court Judgment N 473 (M) dated 11 May 1984.

members of the bench when dealing with minimum penalty offences to *ensure that they investigate every possibility.*<sup>85</sup> (Emphasis added)

His Honour again adopted his previous approach and did not remit the matter back for rehearing:

... because it would mean that under the present minimum penalty legislation if he were to be convicted on a re-hearing he must be given an automatic sentence of six months. This would then mean he would end up serving 11?1?/?2? months for the same offence. In my view that would be a most unjust result and for that reason alone I shall not send the matter back for re-hearing.<sup>86</sup>

The next important decision in the evolutionary development of the law in relation to minimum penalties legislation is the case of *John Worofang v. Patrick Wallace*.<sup>87</sup> Here, the appellant was convicted and sentenced to eight years imprisonment for breaking and entering which was an offence under s.395(1) of the Criminal Code. On appeal the sentence was reduced to five years being the minimum for the offence, as it was one committed in the night.

The difficulty faced by Bredmeyer J., was that under s.35(5) of the Child Welfare Act a court (other than a Childrens Court) may deal with offenders over the age of 16 years but under the age of 21 years. However, the maximum period of imprisonment that can be imposed under the provisions of the Child Welfare Act is six months. Additionally, the court can only deal with an offender under the Child Welfare Act provisions if the offence does not include rape, homicide or any other offence punishable by death or imprisonment for life.<sup>88</sup>

It would appear at first glance that the magistrate could have treated this 19 year old as a child for the purposes of the Child Welfare Act. Regrettably, that is not the case, as s.35 of the Child Welfare Act states as follows:

A Children's Court is not bound by a minimum penalty prescribed for an offence dealt with by it and may disregard the minimum penalty prescribed in imposing a penalty.

Bredmeyer J. had this to say:

I consider that s.35(6) of the *Child Welfare Act* means that when the District Court deals with a minimum penalty offence and the defendant is aged 16-21 it has no alternative but to impose the minimum penalty. That is so because of the application of the *expressio unius personae vel rei, est exclusio alterius* rule.<sup>89</sup>

In essence, the express mention in subs. (6) of the Childrens Court and the failure to mention other courts referred to in subs. (5) means that these other courts are bound to apply the minimum penalties to youths aged 16 to 21.

Bredmeyer J. then went on to say:

I consider that when the District Court (or National Court) is dealing with an offender aged 16 to 21 and the offence is a minimum penalty one, it is required to impose the minimum penalty *subject to Section 138 of the District Courts Act*.<sup>90</sup> (Emphasis added)

In any event Bredmeyer J. was of the view that even if subs. (5) did allow the District Court to avoid a minimum penalty he did not think six months (being the maximum which a Children's Court could impose) would be adequate in that particular case.

What is of interest is Bredmeyer J's opinion of what he would consider adequate in that case. He said:

Before the introduction of minimum penalties, he would have got about 18 months' imprisonment for this offence. The minimum penalty legislation was an expression of

85. *Ibid.* at 2, 3.

86. *Ibid.* at 3.

87. Unreported National Court Judgment N 479 (M) dated 21 May 1984.

88. See s.35(5)(a), (b) of the Child Welfare Act.

89. *Supra* n.87 at 3 - 4.

90. *Ibid.* at 4.

parliamentary or public opinion that penalties were too low for these offences. It is unrealistic to argue now that a six months sentence would be appropriate.<sup>91</sup>

Bredmeyer J. had the opportunity to examine closely the scope and extent of s.138 of the District Courts Act in *Freda Nup v. Chris Hambuga*.<sup>92</sup> This was an appeal from the District Court where the appellant had been convicted of assault and sentenced to six months imprisonment being the minimum penalty prescribed under s.6(1) of the Summary Offences Act. His Honour of course, no longer had the opportunity to consider the possibility (as Amet J. did in *Laho Kerekere's* case<sup>93</sup>) of applying s.206 of the District Courts Act and substituting a penalty.

His Honour, although rejecting the submission that provocation was a defence to assault under s.6 of the Summary Offences Act, did consider that it was an important mitigating factor in punishment.<sup>94</sup> His Honour was left with only one option to consider – that is s.138 of the District Courts Act. He then reiterated that ‘Section 138 remains open to the District Court despite the minimum penalties legislation’.<sup>95</sup>

It is his Honour’s consideration of those seven factors mentioned in s.138 of the District Courts Act which are of some importance.

Bredmeyer J. analysed some of these factors. As to ‘character’ he considered that ‘It means more than simply the absence of prior convictions. It means positively good character as shown by voluntary work in the church or community for example.’<sup>96</sup>

As to antecedents, his Honour said:

... the existence of priors would almost invariably preclude s.138 being applied. This appellant has no priors, it does not automatically lead to the application of Section 138 but ... a factor which when taken with other factors may lead to the application of Section 138.<sup>97</sup>

In considering the factor of ‘trivial’ Bredmeyer J. broke new ground. In the present case he was of the view that the assault although minor was not trivial. In approving *R. v. Morse*<sup>98</sup> and the views of Thomas in ‘Principles of Sentencing’<sup>99</sup> his Honour said that:

Under common law principles of sentencing the sentencer must always look at the place which the criminal conduct occupies in the scale of seriousness of crimes of that type ... the less serious the violence the greater the importance of personal mitigating factors.<sup>100</sup>

In relation to the factor of extenuating circumstances his Honour held the view that they are circumstances which ‘... lessen the seeming magnitude of guilt by a partial excuse.’<sup>101</sup>

His Honour then went on to say, that domestic or emotional stress is accepted by the courts as a mitigating factor, and in his view should also be regarded as an extenuating circumstance. His Honour quoted Thomas:

A frequent explanation of uncharacteristic offences is that they result from acute emotional stress. The most common example is the offence of violence committed against a wife or husband, or a third party who has become involved with one of them,

91. *Ibid.*

92. Unreported National Court Judgment N 478 (M) dated August 1, 2 1984.

93. *Supra* n.1.

94. Cf. *Mogia Widu v. Koda Ubia*, *supra* n.84. On appeal the Supreme Court held that provocation was a defence. See Unreported unnumbered Supreme Court Judgment S.C.A. 48 of 1984 dated 1 May 1984.

95. *Supra* n.92 at 3.

96. *Ibid.* at 4.

97. *Ibid.*

98. (1979) 23 S.A.S.R. 98 (S.A.C.C.A.).

99. Thomas, ‘Principles of Sentencing’ (2nd ed.) at 101 and 105.

100. *Supra* n.92 at 5.

101. *Ibid.*

as a result of a deteriorating marriage. In such cases the circumstances which precipitate the violent act are usually treated as significant mitigating factors.<sup>102</sup>

In the present case the appellant had already served three months of the six months sentence. He could not of course reduce the sentence as it was a minimum penalty, and if he remitted it back for re-hearing, the appellant could ultimately receive a 9 month imprisonment term.

On appeal the National Court can of course exercise the same powers as a District Court magistrate.<sup>103</sup> Adopting Pratt J's approach in earlier decisions his Honour applied s.138 of the District Courts Act and in short, released the appellant on probation and a one year good behaviour bond.

It was inevitable that the question of payment of costs of a prosecution would arise in a situation where s.138 was applied, and indeed it did so, in the case of *Agatha Harangu v. Veronica Wanguira and Dorothy Tomarit*.<sup>104</sup>

In this case, two private informations were brought against the appellant for using insulting words likely to cause a breach of peace thus contravening s.7(b) of the Summary Offences Act. The section carried a minimum penalty of three months imprisonment. In the event, although a s.138 order was made, the magistrate nevertheless awarded costs to the respondents.

Bredmeyer J. after carefully examining the District Court provisions in relation to costs, found that on a question of statutory interpretation, the court had no statutory power to award costs against the defendant where the result is a s.138 order.

The irony of the decision was that the appellant (defendant) was awarded costs on the appeal.

His Honour did however say *obiter* that:

In private prosecutions I believe it is desirable that costs should generally follow the event. That is the practice in New Zealand. See Oxford, *Police Law in New Zealand* (3rd Ed.) p.115 and it should be the practice here.<sup>105</sup>

The Supreme Court decision in *The State v. Mathew Peters*<sup>106</sup> highlighted the unjust results that can emanate from the minimum penalties legislation in respect to minimum penalty offences under the Criminal Code.

At first instance, the National Court convicted the accused of breaking and entering a dwelling house in the day. Although the minimum penalty for the offence was five years imprisonment, the trial judge used s.155(4) of the Constitution to reduce the sentence by two months – being the period the accused had already spent in custody awaiting trial.

The Supreme Court followed its earlier decision in Supreme Court Reference No. 2 of 1981.<sup>107</sup> In that case, Kidu C.J. said in relation to s.155(4):

The provision under reference is worded in very wide terms. It does not, however vest in the National Court or the Supreme Court the power to make orders which confer rights or interests on people. Such rights or interests are determined by other constitutional laws, statutes and the underlying law. Section 155(4) exists to ensure that these rights or interests are enforced or protected if existing laws are deficient to render protection or enforcement.<sup>108</sup>

Pratt J. in the same case put it this way:

102. *Supra* n.99 at 207.

103. Section 256, District Courts Act.

104. Unreported National Court Judgment N 482 (M) dated 19 and 28 September 1984.

105. *Ibid.* at 4.

106. Unreported Supreme Court Judgment SC 282 dated 24 September and 28 November, 1984.

107. (1982) P.N.G.L.R. 150.

108. *Ibid.* at 155.

The phrase appears to direct the court to supply a remedy where there is a clear hiatus. Where the law deals with an issue, be it by way of statute or as part of the underlying law, that is the end of the matter.<sup>109</sup>

In the present case the court said:

The *Criminal Code* is quite specific. In s.20(2) it is expressly stated that a penalty by way of a term of imprisonment takes effect from the first day of the sittings of the court at which the offender is convicted. And s.19(8) states that 'Where a minimum penalty is prescribed for an offence nothing in this section authorises a court to impose any penalty other than the minimum penalty on a person convicted of that offence.'<sup>110</sup>

Nevertheless, the Supreme Court recognized that:

Courts in imposing a term of imprisonment or a penalty have often taken into account the time a person has spent in custody in his or her favour, this is only a discretionary practice applied in mitigation of penalty and not a rule of law reducing the penalty as provided by statute. We have no statute similar to the 1962 English *Criminal Justice (Administration) Act* which allows for sentencing to be reduced by the period spent in custody before sentence.<sup>111</sup>

### 3. The Ultimate Challenge

The constitutional validity of the Minimum Penalties Legislation was eventually referred to the Supreme Court under s.19 of the Constitution of Papua New Guinea by the Provincial Executive of the Morobe Provincial Government. Known as *Supreme Court Reference No. 1 of 1984*<sup>112</sup> the majority of the Supreme Court upheld the validity of the Minimum Penalties Legislation.

- (a) The first question posed in the case, put simply, was: Did the minimum penalties offend against s.36(1) of the Constitution? That section states:  
No person shall be submitted to torture (whether physical or mental), or to treatment or punishment that is cruel or otherwise inhuman, or is inconsistent with respect for the inherent dignity of the human person.
- (b) The second basic question posed was: If the minimum penalties were constitutional under s.36(1) of the Constitution, could the courts in individual cases, give a lesser punishment under s.41 of the Constitution? Section 41 provides that:
  - (1) Notwithstanding anything to the contrary in any other provision of any law, any act that is done under a valid law but in the particular case –
    - (a) is harsh or oppressive, or
    - (b) is not warranted by, or is disproportionate to the requirements of the particular circumstances or of the particular case, or
    - (c) is otherwise not, in the particular circumstances reasonably justifiable in a democratic society having a proper regard for the rights and dignity of mankind,
 is an unlawful act

Each question will be dealt with separately and in the order stated. The way in which each of the members of the five man Supreme Court examined the questions will be considered.

- (a) Firstly, it was argued that the Eighth Amendment of the U.S.A. Constitution was in similar terms to s.36(1) of the P.N.G. Constitution. Accordingly the U.S.A. cases dealt with under the American Constitution provision were of high persuasive value and their reasoning should be adopted by the Papua New Guinea Courts.

109. *Ibid.* at 174.

110. *Supra* n.106 at 2.

111. *Ibid.* at 2 – 3.

112. Unreported Supreme Court Judgment SC 282 dated 25 April, 3, 17 August and 2 November 1984.



The Eighth Amendment states shortly that:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Kidu C.J. was of the view that because of such obvious differences between the two countries' constitutional provisions, '... decisions of the American Courts on the meaning of the 8th Amendment should be approached with caution and not readily accepted as guides to the interpretation of s.36(1) of the P.N.G. Constitution.'<sup>113</sup>

Indeed, Kidu C.J. made no analytical references to the American decisions but concentrated instead, on the Constitutional Planning Committee Report and the Constituent Assembly debates on the Report. His Honour concluded that:

Section 36(1) meant to prohibit cruel, degrading and inhuman punishment and treatment and nothing else. Minimum penalties were far from the minds of those who constituted the Constituent Assembly when s.36(1) was sanctioned and the Constitutional Planning Committee (C.P.C.) did not, quite clearly from its recommendation, have them in mind either.<sup>114</sup>

Kidu C.J. then went on to say that it was:

... difficult and not desirable to define the exact meaning of 'cruel punishment or treatment' or 'inhuman punishment or treatment' or 'punishment or treatment inconsistent with respect for the inherent dignity of the human person'.<sup>115</sup>

His Honour considered that a punishment of cutting off the left hand for stealing would be cruel and inhuman, and a punishment of parading an adulteress naked through streets would clearly be inconsistent with respect for the inherent dignity of the human person.<sup>116</sup>

Having made these *obiter* remarks His Honour was of the opinion that:

Custodial sentences or fines do not contravene Section 36(1) whether or not such sentences are maximum, minimum or left to the absolute discretion of the courts. . . . the power to make criminal laws for this country is vested in the National Parliament and not the Judiciary. Also the power to prescribe penalties for breaches of these laws is vested in the National Parliament.<sup>117</sup>

His Honour appeared to place great reliance<sup>118</sup> on other provisions in the P.N.G. Constitution, particularly s.109 which (*inter alia*) says that:

No law made by the Parliament is open to challenge in any court on the ground that:  
(a) is not for the peace, order or good government of Papua New Guinea or the welfare of the people;

In the final analysis, the Chief Justice was of the opinion that the minimum penalties provisions were not unconstitutional. He appears to have justified his decision on the simple basis that punishments which do not go beyond incarceration or fines, no matter for how long or how much respectively, are Parliaments prerogative. Punishments which however, go beyond this, such as physical violations of the person are, on the other hand, the prerogative of the courts to strike down.

Kapi D.C.J. came to the same conclusion as the Chief Justice and although he made special reference to several U.S.A. decisions he also declined to adopt them for substantially the same reasons.

His Honour paid close and copious reference to the leading U.S.A. decision of *Weems v. United States*.<sup>119</sup> In that case the U.S.A. Supreme Court had concluded that the Eighth

113. *Ibid.* at 2.

114. *Ibid.* at 4.

115. *Ibid.*

116. *Ibid.*

117. *Ibid.* at 5.

118. *Ibid.*

119. 217 U.S. 349; 54 L. Ed. 793.

Amendment prohibits excessive or disproportionate punishment as distinct from cruel punishments against which that prohibition was originally enacted in the English Bill of Rights.<sup>120</sup>

His Honour added however, an additional reason for not adopting the U.S.A. approach when he said that:

... with respect to the United States Supreme Court, by introducing the notion of proportionality or excessiveness into the Eighth Amendment, the court has overstepped its judicial function and ventured into the legislative function of prescribing penalties for crimes . . . This is a violation of the principle of separation of powers between the judiciary and the legislature.<sup>121</sup>

His Honour then gave examples of what he would consider to be cruel or inhuman punishments by referring to those measures once employed in England such as the use of the rack, thumb screws and stretching of the limbs<sup>122</sup> and concluded that what s.36(1) of the Constitution prohibited, related to the *kinds of punishment* which are inconsistent with the dignity of the human person, and not the degree of punishment given in relation to the seriousness of the offence committed for any particular offence.<sup>123</sup>

Bredmeyer J. in his judgment, was also of the view that the Minimum Penalties legislation did not infringe s.36(1) of the Constitution. He opined that examples of cruel punishment might be cutting off the hand of a thief, stoning an adulteress and castration.<sup>124</sup> Bredmeyer J. did however say that:

Giving Section 36 a fair and liberal interpretation I accept the argument that a gaol penalty can by its very length be inconsistent with respect for the inherent dignity of the human person and probably cruel. To take an extreme example, a law which imposed a 30 year mandatory sentence for a first offence of shoplifting would fall into that category. The shoplifter deserves the punishment but not that extent. . . . As I see it the excessiveness of a mandatory penalty can infringe Section 36 but not the fact that it is mandatory.<sup>125</sup>

Kaputin J. in agreeing with the majority said:

I do not consider that the minimum penalties in question are so disproportionate, unusual, unconscionable, excessive or that they would not contribute to the achievement of the goals of punishment. In fact the range of the minimum penalties are still within the parameters justifiable in a democratic society.<sup>126</sup>

His Honour however had this to say:

... at the moment the minimum penalty legislation creates a lot of peripheral injustice . . . we can only hope that the legislature will review the legislation . . . to avoid peripheral injustices that have been and will be created by the present legislation.<sup>127</sup>

McDermott J. in his dissenting judgment, noted that s.36(1) of the Constitution could be traced back to the Bill of Rights of 1689 and that 'for its true meaning and explanation, the system of government between 1660-1688 has to be borne in mind'.<sup>128</sup>

His Honour said:

120. *Weems* case was followed by *Robinson v. California* 370 U.S.; 660. 8 L. Ed. 2d. 758; *Trop v. Dulles* 356 U.S. 86; 2L. Ed. 630 and by *Furman v. Georgia* 408 U.S. 238; 33 L. Ed. 2d. 346.

121. *Supra* n.112 at 14.

122. *Ibid.* at 16.

123. *Ibid.* at 17.

124. *Ibid.* at 31.

125. *Ibid.* at 33, 34.

126. *Ibid.* at 54.

127. *Ibid.* at 58, 59.

128. *Ibid.* at 65.

Thus historically there is this concept of freedom from inhuman treatment which was put before a new King in 1689, taken into the U.S. Constitution in 1791 and with modification taken into this country's constitution in 1975.<sup>129</sup>

Accordingly, his Honour found no difficulty in placing considerable reliance on the U.S.A. decisions,<sup>130</sup> and with respect to the leading case of *Weems*<sup>131</sup> said that:

The majority decision is built on a precept of justice that *punishment for crime should be graduated and proportioned to the offence and this is equated with the fundamental law, i.e., the constitutional provision prohibiting the infliction of cruel and inhuman punishment*<sup>132</sup> (Emphasis added)

In *Weems* case the court concluded that there was 'the possibility that punishment in the State prison for a long term of years might be so disproportionate to the offence as to constitute a cruel and unusual punishment'.<sup>133</sup>

McDermott J. quoted the Chief Justice of the United States Supreme Court in *Tropp v. Dulles*:

... while the state has the power to punish, the amendment stands to assure that this power be exercised within the limites of civilized standards. Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime but any technique outside the bounds of these traditional penalties is constitutionally suspect ... The amendment must draw its meaning from the evolving standards of democracy that mark the progress of a maturing society.<sup>134</sup>

McDermott J. concluded:

Excessiveness is equated with the punishment being unnecessary i.e., disproportionate to the crime and, more significantly, because such a punishment would not serve any penal purpose more effectively than a less severe punishment.<sup>135</sup>

McDermott J. cited with approval the statement by Douglas J. in *Furman v. Georgia* where it was said:

The high service rendered by the 'cruel and unusual' punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are even-handed, non-selective and non-arbitrary ...<sup>136</sup>

McDermott J. then said:

What the challenged legislation here effectively does is treat all offences as equally reprehensible up to an arbitrarily set level of punishment.<sup>137</sup>

He then said further that:

... the amendments in applying minimum terms of imprisonment Carte Blanche preclude considerations being give to (a) probation, (b) relatively minor fines (c) relatively minor terms of imprisonment, (d) the entering into of recognizances or (e) conditional discharge, for what must be on any view minor offences in many instances, e.g. assault, unlawfully on premises, unlawfully disturbing householders, breaking glass in a public area, or negligent driving. The legislature has been insistent upon this

129. *Ibid.* at 68.

130. See *McDonald v. Commonwealth* 173 Mass. 322; 73 AM St. Rep. 293; 53 NE, *Wilkinson v. Utah* 99 U.S. 130; 25 L. ed. 345; and *O'Neill v. Vermont* 144 U.S. 323; 36 L. ed. 450.

131. *Supra* n.119.

132. *Supra* n.112 at 69.

133. *Supra* n.119 at 799, 800.

134. 356 U.S. 86; 2L. ed. 630 at 647.

135. *Supra* n.112 at 72.

136. 408 U.S. 238 at 359.

137. *Supra* n.112 at 73.

denial. The speed with which the *Criminal Code (Amendment) Act 1983* was passed is testimony of the no proportionality view.<sup>138</sup>

McDermott J's final conclusion was that:

... when the *Tropp v. Dulles* statement ... is linked with the ratio of *Weems* and *Furman* and these further cases, the minimum penalties legislation here is inherently unreasonable and Draconian.<sup>139</sup>

(b) Turning now to the second question, the Chief Justice said in relation to s.41 of the Constitution that:

The suggestion that the courts imposing the relevant minimum sentence can itself apply Section 41 is not supported by the very words of the section ... minimum penalties are directed by statutory law. A judge has no discretion but to impose them.<sup>140</sup>

His Honour then went on to say:

... if Section 41 is used to challenge a minimum penalty it amounts to a backdoor challenge to the legislation rather than the action taken under it and such a challenge is prohibited by the very words of Section 41 itself ... So a challenge indirectly to impugn the relevant legislation cannot be sustained.<sup>141</sup>

Kapi D.C.J. although coming to the same conclusion as the Chief Justice had this to say:

In an appropriate case, a minimum penalty imposed under the minimum penalty provisions may be declared invalid or unlawful.<sup>142</sup>

He then continued by stating however, that:

The power to impose a lesser penalty is a different issue and cannot be found in Section 41.<sup>143</sup>

Bredmeyer J. put it another way when, in agreeing with the majority, he said:

To say that the Judges' action is harsh or oppressive or disproportionate to the circumstances of a particular case etc., is really to challenge the statute and not the judge's action. It is to say the statute is harsh or oppressive, etc. in its application to an individual.<sup>144</sup>

McDermott J. in agreeing with the majority judgment in relation to the second question posed said:

In giving sentence, the judge is giving the judgment or decision of the court. Under the challenged legislation, he is pronouncing what is mandatory under a valid law. If this sentence can be labelled an 'act', it is one devoid of choice. To make any sense of an 'act' in Section 41, it seems to me that the doer has to have some room for manouver, in other words, he has a choice in giving effect to a valid law.<sup>145</sup>

His Honour then went on to say:

In my view, from the conception, content and context of Section 41, it applies to discretionary acts affecting constitutional rights which can be qualified ... There is simply no discretionary act involved when a court gives a minimum penalty ... Section 41 is not aimed at constitutionally restating the law on sentencing.<sup>146</sup>

138. *Ibid.* at 74 - 75.

139. *Ibid.* at 76. The further cases McDermott J. referred to in support of his view were *Steven v. Warden, Maryland Penitentiary* 382 F 2d 429; *Willoughby v. Phend* 302 V. Supp. 644; *U.S. v. Dawson* 400 F 2d 194, *Bethea v. Crouse* 417 F 2d 504; *Jackson v. Bishop* 404 F 2D 571; *Hart v. Coiner* 483 F 2d 510 and *Imprisoned Citizens Union v. Shapp* 451 F Supp 893 (1978).

140. *Supra* n.112 at 8.

141. *Ibid.* at 9.

142. *Ibid.* at 27.

143. *Ibid.*

144. *Ibid.* at 46.

145. *Ibid.* at 81.

146. *Ibid.* at 82.

Kaputin J. in his dissenting judgment did not consider that 'to call in aid Section 41 would be a backdoor way of invalidating the statute.'<sup>147</sup> His Honour reasoned that any act 'would include a judicial act'<sup>148</sup> and that '. . . the legislation is still valid but that the act done upon it becomes unlawful by operation of Section 41 for that particular case only.'<sup>149</sup>

#### 4. Conclusions

It is abundantly clear from the cases that the Judiciary have gone to great lengths to find exceptions to the Minimum Penalties legislation in an effort to achieve the 'justice of the case' in dealing with the various minimum penalty enactments.

It is equally apparent that Parliament has closely monitored the judicial approaches and where necessary swiftly moved to establish its will.

Ironically, the 1984 Judges Report discloses what can only amount to a back door capitulation by the Executive.<sup>150</sup>

Under the sub-heading '*Prisoners Released on Licence*'<sup>151</sup> the report reveals that a large number of prisoners were released on licence by the Minister for Justice.<sup>152</sup>

In Government Gazette G.38 of 7 June 1984 no less than 1400 prisoners were released on licence. Since that time, further names have been published in subsequent gazettes.

In the Judges Report, their Honours made it clear that they do not question the Ministers power to release prisoners on licence, but do question the way in which this power has been exercised.<sup>153</sup>

On sentencing and early releases the judges report states that:

There are many considerations which affect a court sentence. That a licence can be given so easily and apparently without regard to these considerations is disturbing.<sup>154</sup>

The Judges then conclude with the statement that:

No reasons are given in the National Gazette as to why prisoners are given early release on licence. With the current public disquiet about law, order and administration of justice, the early release of such a large number of prisoners on the one hand and the imposition of minimum penalties on the other, cannot inspire public confidence in the criminal justice system.<sup>155</sup>

This apparent 'about-face' by the Executive runs quite counter to the current legislative arrangements and the whole thrust of the minimum penalties legislation.

It is quite illogical to have on the one hand massive releases on licence of prisoners convicted under these minimum penalties, and on the other hand to expect the law to take its natural course. After all, both matters express the will of the Executive. The Executive cannot marry the two – it must either divorce itself of one or the other. It cannot have it both ways. Until legislative action, or indeed, executive non-action is taken, the whole concept and purpose of retaining minimum penalties is meaningless.

147. *Ibid.* at 62.

148. *Ibid.* at 60.

149. *Ibid.* at 62.

150. Annual Report for the year 1984 by the Judges to the Head of State, for presentation to the National Parliament, on the work of the Supreme and the National Court, Pursuant to the Constitution, s.187 and the National Court Act 1975, s.9.

151. *Ibid.* at 8.

152. Pursuant to a power contained in s.615 of the Criminal Code.

153. *Supra* n.151 at 8.

154. *Ibid.* at 9.

155. *Ibid.*