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MEGOI'I MALAGIGI — Appellant

v.

ROBERT MICHAEL GEELAN and
DOWLEIS LEDUBA — Respondents.

APPEAL FROM COURT OF PETTY SESSIONS AT KULUMADAU: (PAPUA).

REASONS FOR JUDGMENT ON APPEAL (read by the Chief Judge, on 23rd October, 1953).

On the 11th February, 1953, in the Court of Petty Sessions at Kulumadau, Woodlark Island, Papua, the Appellant Megoi'i Malagigi was convicted and fined £3 on a complaint that he, on the 11th day of December, 1952, at Kauani Plantation, Woodlark Island, "being a native employed under Agreement No. 1304 (Sam) by Reginald Charles Neate of Kulumadau said agreement containing an undertaking by the said Megoi'i Malagigi that he will at all times and to the best of his ability perform the duties allotted to him under the agreement the said Megoi'i Malagigi did without reasonable excuse fail to perform the said duties to the best of his ability in that he did cut down from a tree the property of his employer two coconuts after being instructed not to do so. S.32(1)(b) N.L.O. 1950-52", - (i.e. Section 32(1)(b) of the Native Labour Ordinance 1950-1952).

He appealed against that conviction and order, and, on the 18th of August last, obtained an order nisi on the grounds:-

(a) that the complaint disclosed no offence; and

(b) that the Magistrate acted in excess of jurisdiction in making an order that the amount of £3 should be deducted from the wages due to the Appellant.

On the 21st of October, 1953, on the return of the order nisi, I directed that the order nisi be made absolute and quashed both the conviction and order, stating that reasons for my decision would be given later. Those reasons I now proceed to give:-

The complaint against the Appellant purported to be one of an offence against Section 32(1)(b) of the Native Labour Ordinance and was

apparently regarded by the Magistrate as such. In this, the complainant and the Magistrate were in error - an error that was obviously based on a complete misunderstanding of Section 32(1)(b). That paragraph provided that an agreement made under the Ordinance between an employer and a native employee "shall"..... "contain an undertaking by the employee that he will at all times and to the best of his ability perform the duties allotted to him under the agreement": in other words, the agreement had to contain such an undertaking and, if it did not contain that undertaking or if someone struck out the clause containing that undertaking, the agreement would be one in breach of Section 32(1)(b). But although paragraph (b) of that Sub-section provided that an agreement for service under the Ordinance must contain an undertaking by the native employee that he would at all times and to the best of his ability perform the duties allotted to him under that agreement, it said nothing whatever about what was to happen to him if he failed at all times and to the best of his ability to perform the duties allotted to him under the agreement. Paragraph (b) certainly did not say that such a failure would amount to a punishable offence. It therefore follows that the conduct that was alleged against the Appellant in the complaint at the lower Court and of which he was there convicted was not an offence against the Section under which he was charged.

Thus the lower Court was in error. The question then arises whether that error is now amendable, for Section 178 of the Justices Ordinance 1912-1940 of Papua provides that:- "When the mistakes or errors" (of justices) "appear to be amendable, the" (appellate) "court shall allow the conviction or order to be amended accordingly and after such amendment the conviction or order may be enforced and dealt with in all respects as if it had been so drawn up originally."

But the difficulty in the present instance is this:- In what way does the mistake or error of the Magistrate "appear to be amendable"? The act of the Appellant that was the subject of the "complaint" at the lower Court does not fall within any of the specific offences set out in the Native Labour Ordinance. As learned Counsel for the Appellant pointed out, even if what the Appellant allegedly did was in breach of an undertaking in his agreement, that did not make it a criminal offence; the general policy of the present Ordinance was to get away from the former policy of penal sanctions and to regard such a breach as a civil, not a criminal, breach. He referred to Section 47 of the Ordinance, which empowers a court to terminate agreements and award liquidated damages on certain grounds; and to Section 51 of the Ordinance, which permits a court

to vary agreements of service and award liquidated damages on various grounds, such as the failure of an employee to show ordinary diligence, any other breach of the agreement on the part of an employee, or negligence on the part of an employee resulting in the loss of the employer's property. But Sections 47 and 51 did not go so far as to make any of those lapses criminal offences. It may be that those provisions were in the back of the Magistrate's mind: yet that seems unlikely, because he convicted the Appellant on a complaint which, as its text throughout shows, related expressly and solely to a supposed offence against Section 32(1)(b) of the Ordinance, and he then (to use his own words) "fined" the Appellant "in the sum of three pounds, said sum to be deducted "from wages due to" the Appellant. Clearly, as that conviction and that order show, the Magistrate regarded the Appellant's alleged act, not as a civil breach of contract, but as a criminal offence.

With all respect, I am unable to find, in the record of the proceedings at the lower Court that has been put before me, any justification for that conviction or for that extremely drastic punishment. Let us look at that record. One would have supposed that one of the first things that would have been done at the lower Court would have been to have the agreement, made between the Appellant and his employer and referred to in the complaint, produced and proved and marked as an "Exhibit". Whether that was done or not, the record does not disclose; and as neither the agreement nor a copy of it has been put before me, I do not know what its terms may have been. The record does show that one witness gave evidence "for the prosecution," namely, Dowleis Leduba, who testified on affirmation. He described himself as being "in charge of labourers on Mr. Neate"s plantation LAUANI"; and he described the Defendant (Appellant) as working at that plantation, but did not say whether the Defendant was working as a "casual" labourer or as one under contract. Dowleis continued:- "A week or so before Christmas I saw defendant go up a coconut tree in Mr. Neate's plantation on a working day and cut down about two ripe nuts with a knife. Defendant then came down the tree and cut the two dry nuts open and scooped out the copra and put it in his bag." It will be noted that Dowleis did not suggest that the defendant appropriated the two nuts to his own use or that the Defendant deprived his employer of them or of the copra in them. Dowleis then said:- "I had previously" - (how long previously was not stated) - "told the defendant not to cut down coconuts but to pick up the windfalls ..... There were some coconuts still left lying on the ground when the defendant did this." Dowleis also said:- "I try to keep the labourers in the proper places in the plantation which I select to be worked but they do not listen and wander about wherever they like." Why that allegation against the labourers generally

was allowed in, is hard to understand: presumably the Magistrate thought it admissible against the defendant and, if he did, a doubt would arise whether it influenced him in deciding to convict the appellant and in imposing the punishment he did. Although, when Dowleis had given his evidence and the case for the prosecution had closed, no prima facie case of an offence had, in my opinion, been established against the Defendant, the Magistrate did not then dismiss the case but proceeded to give the statutory caution to the Defendant and to ask him if he wished"to say anything in answer to the charge", etc. The Defendant then made the following brief statement:- "I have not had a job on a plantation before. I thought that there were not enough coconuts on the ground, so I went up the tree to get them. I remember the man Dowleis telling us not to cut down nuts from the trees. I made a mistake." There is nothing in that short statement that establishes guilt of any criminal offence. It is an explanation that is consistent with innocence of any criminal offence and consistent with a bona fide desire on the part of the Defendant to cut enough copra for his employer: it would seem he knew there were already plenty on the ground. It is a general rule in criminal cases that, when an explanation consistent with the accused's innocence has been given and, at the end of the trial, has not been disproved by the prosecution, the prosecution has failed to discharge the onus that rests on it and the accused must be acquitted.

In my opinion, on the material before me, the conviction of the Appellant cannot rightly be supported on any ground and must be quashed.

As to the fine of £3 imposed by the Magistrate on the Appellant:- Not having seen the Appellant's agreement of service, I do not know what wages were specified in it but normally £3 would represent several months' wages of an ordinary native labourer on a plantation. Even if the Magistrate had been right in thinking that it was an offence on the part of the Appellant in good faith - (since bad faith was not proved against the Appellant) - to cut two coconuts from his employer's tree, in the not disproved belief that there were not enough cocomuts on the ground, and apply these two coconuts wholly to the employer's use, the punishment by a fine of £3 was, in my view, utterly excessive and beyond all reason. However, the conviction having been quashed, it necessarily follows that the punishment based on that conviction must be quashed too.

For the reasons I have given, the order nisi is made absolute and the conviction and order of the lower Court quashed.

(Sgd.) Phillips C.J.

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