IN THE SUPREME COURT OF THE
TERRITORY OF PAPUA AND NEW GUINEA

Appeal from Court for Native Matters, Port Moresby.

RUMA-HAMUA -v- PALA-UA.

JUDGMENT OF CHIEF JUSTICE.
(delivered on 20/6/56.)

On the 18th of May, 1956, the appellant, Ruma-Hamua of MANUAMADA, appeared before magistrate Mr. Redmond, who was sitting as a Court for Native Matters at Port Moresby, on a charge that had been preferred against him under Regulation 71(a) of the Native Regulations made under the Native Regulation Ordinance 1908-1952 of the Territory of Papua, namely, a charge that he on the previous day had unlawfully struck his wife Pala-Ua. He was convicted of that charge and sentenced to five months' imprisonment with light labour.

He has now appealed against the conviction on two grounds. The first ground is, that "the said conviction was against evidence and the weight of the evidence." The second ground is, that the magistrate "wrongly admitted as evidence a complaint which Pala-Ua had made to her son Ulo-Kuku."

For brevity I shall hereinafter refer to the appellant and his wife and her son Ulo-Kuku as Ruma, Pala, and Ulo respectively.

As this is the first appeal I have had from a Papuan Court for Native Matters, I naturally have been looking into questions such as the extent of this Court's appellate jurisdiction in such a case as this, the powers that it may exercise when disposing of such an appeal, and so on. I have been somewhat non-plussed to discover that Papuan legislation has left these matters very much in nubibus. Section 4 of Papua's Native Regulation Ordinance 1908-1952 empowered the Lieutenant-Governor in Council to constitute this Court's predecessor "a court of appeal from the courts for native matters" and the Lieutenant-Governor exercised that power by Order-in-Council in 1924: (see footnote 4, page 389, Volume IV of the Annotated "Laws of the Territory of Papua"). Section 4 went on to provide that the "cases in which an appeal may be brought, the grounds upon which an appeal will lie, the practice and procedure in appeals, and all other matters relating thereto shall be as defined and prescribed by rules of the (Supreme) Court." But no such Rules appear ever to have been made. Inquiries made by me of my brother Gore, who has heard many appeals from Papuan Courts for Native Matters, have confirmed that Rules were not made, apparently because it was thought that such appeals could be more speedily and effectively dealt with, especially at remote stations, if there were no rigid Rules. It could be argued that the provision in Section 4, that the "cases in which an appeal may be brought (etc.) shall be as defined and prescribed by Rules" of Court, was intended to be directory; and I think that it at least may be fairly supposed that the Legislature assumed that Rules of Court in regard to such matters would be made without undue delay. On the other hand, it could be argued that the word "shall" in the sentence I have just cited was used in the future tense, and that the provision that various procedural steps "shall be as defined or prescribed by Rules" did not necessarily mean that there was to be a vacuum until such Rules were made or that appeals were not possible until such Rules were made. One recalls Lord

Goddard's remark, concerning the (English) Courts (Emergency Powers) Act 1939, that, under the Act, "the judge is really put very much in the position of a Cadi under the palm tree. There are no principles on which he is directed to act. He has to do the best he can in the circumstances, having no rules of law to guide him": Metropolitan Properties Co. Ltd. v. Purdy (1940) 1 All E.R., 180, at 191.

A remarkable omission in the Papuan Native Regulation Ordinance 1908-1952 is, that it did not specify the powers this Court may exercise or the orders it may make when dealing with appeals from Courts for Native Matters. The rules and principles governing such subjects are by no means universal but vary in different places. Thus, appellate Courts in some States of Australia, and this Court when dealing with appeals from the lower Courts in the Territory of New Guinea, may, when dealing with appeals, make any one or more of a variety of orders, such as orders quashing or varying a decision, orders mitigating or increasing penalties, orders remitting cases for rehearing, etc. But what sort of order may this Court make, if it were to uphold the present appeal? No satisfactory answer to that question is to be found in the Papuan legislation. It could be suggested that the Court might adopt a procedure analogous to that prescribed for appeals from Papuan Courts of Petty Sessions. But that would mean that this Court would adopt an outmoded and restricted range of action, ("quashing-order" procedure), which the Legislative Council at its recent Meeting decided, I understand, to enlarge at last and in such a way that this Court will, when the new law becomes operative, have the same wide powers in relation to appeals from Papuan Courts of Petty Sessions as it now has in relation to appeals from District Courts in the Territory of New Guinea. However, the position at the moment is, that this Court's powers on an appeal such as this are not defined by legislation.

But although the Native Regulation Ordinance gives this Court no specific guidance about what it may do, when hearing appeals from Papuan Courts of Native Matters, it is specific enough about one thing that this Court may not do, for Section 4 provides that "no appeal shall be allowed unless it appears to the Court that some substantial injustice and hardship will otherwise be caused to the appellant." That provision suggests that the Legislature did not wish appeals from Courts for Native Matters to succeed on mere technicalities: and it is interesting to compare it with the English provision under which the Court of Criminal Appeal "may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred." As Archbold points out, "the chief application of that proviso occurs where the ground alleged is misdirection as to the law or wrongful admission or rejection of evidence."

Summing up the position, it seems to me that we have a dilemma. If this Court were to refuse to hear Luma's appeal it would, I think, be denying him a right that the Legislature meant him to have. On the other hand, if this Court proceeds to hear and determine his appeal, it must, in the absence of express rules for its guidance, do its best to justice in the circumstances, like the Cadi under the palm tree. The latter course appears to me to be the lesser evil, and, as it has been the practice for decades in Papua to hear such appeals as Luma's, I propose to adopt it in this case: admittedly this course is one that lies wide open to the criticism that it tends to produce an appellate supervision that will vary with the length of the appellate Judge's foot, and I must say that I think it most undesirable to leave this appellate jurisdiction on such a footing for long.

The Record of the proceedings at the lower Court on

the 18th of May last showe that the appellant there pleaded "Not Guilty" to the charge.

Then his wife, Fala, gave evidence of his alleged assault on her as follows:-

> "Last night, 17th May, 1956, I went to Mission "meeting to sing. When I came back to my house "my husband Kuma-Kuma said, 'I have been waiting "a long time for you. What have you been doing?' "He picked up a piece of wood, shone the torch on "me and then hit me on my right shoulder with it. "I fell down on the floor: I lay there for half an "hour before some people came and put some water "on me. The piece of wood was about one foot six "inches long."

The appellant did not cross-examine Fala on that evidence at all and it amounted to prima facie evidence of the charge.

At that point in the Record of the proceedings at the lower Court there is the following note by the Court:- "Court observed that the woman Fala is still in great pain and is unable to move her right shoulder."

The next witness was Ulee-Kuku, who said:-

> "Last night ... I saw a piece of wood near my mother "Fala-Ile. The wood was about one foot six inches "long ... My mother was on the floor unconscious. "I picked up the piece of wood and threw it away. "I went to the kitchen, got some water and put it on "my mother. She then became conscious. When she "was revived my mother told me her husband had hit "her with a piece of wood."

Ulee was not cross-examined, either, by the appellant.

Now it is the very last sentence of Ulee's evidence - the one in which he said - "When she was revived my mother told me her husband had hit her with a piece of wood" - that Mr. Sturgess, learned counsel for the appellant, objects to on the ground that it was "hearsay" evidence and should not have been admitted. Now Ulee did not say at the lower Court - probably he was not asked about it - whether or not the appellant had been present and within hearing when Fala said to Ulee that her husband had hit her with a piece of wood. If the appellant had been present and heard that said, Ulee's evidence about it was admissible; but if the appellant had not been there and had not heard Fala's complaint, then Ulee's evidence about it was "hearsay". The question, whether the appellant heard Fala make that complaint or not, should have been cleared up at the lower Court. But it was not cleared up, and I therefore consider that the appellant should have the benefit of the doubt about that and I should assume, in appellant's favour, that Ulee's evidence of Fala's complaint was "hearsay." Generally, "hearsay" evidence is not admissible. But it is interesting to note that the framers of the Papuan Native Regulations included a special provision in regard to "hearsay evidence" at Courts for Native Matters, - one that did not attempt to set a standard of perfection for such Courts; and that special provision is to be found in Regulation 17, which begins as follows:- "Hearsay evidence should not be received or, if it is given, should have no weight attached to it."

I shall return to this presently, but shall first continue my examination of the record of the proceedings at the lower Court:-

After Ulee had given evidence, Kuma (the defendant and present appellant) gave evidence in his own behalf as follows:-

> "Every day and every night, my wife Fala doesn't listen

"to what I have to say. She must think I am a "fool or a bushman. Every night she stays out "till 10.30 or 11.00 p.m. I often ask her where "she has been but she doesn't reply. Last night "she came home about 11.30 p.m. I asked her "where she had been but she was angry and didn't "reply. I was lying on my bed. She leaned "over me to get the torch but I jumped up and "struggled to get the torch. I pushed her and "her shoulders hit the window. The boy Ulee "picked up the piece of wood which I was using "as a pillow and threw it on the floor. Then "we slept. In the morning she reported to the "village Constable."

It will be noted that Numa's story is not identical with that given by Pale to the lower Court - yet it is not necessarily inconsistent with hers, that is to say, their stories might be narratives of different events that occurred on the one occasion. Curiously, nowhere in his evidence does Numa deny the truth of the story she had told the Court in his presence and, as we have seen, he had not cross-examined her. More curiously still, Numa did not at any time, when giving evidence at the lower Court, expressly deny that he had hit his wife with a piece of wood.

Next in the record came the magistrate's written reasons for the decision he reached. He wrote:-

"If the Court believes the Defendant's evidence, "then it appears that Numa must have pushed her "with considerable force to cause the injury which "is apparent in the complainant's right shoulder, "so that, in his own words, he is guilty of the "offence with which he is charged. However I "believe the evidence of the Prosecutrix in this "matter and therefore I must find the defendant "guilty. His action of striking his wife, with a "piece of wood is a serious matter, and in view of "the number of cases of violence of this nature "coming before this Court, I consider a heavy penalty "is necessary to deter other would-be offenders. "The defendant is found Guilty of the offence with "which he is charged and it is adjudged that he be "imprisoned at the Gaol at KOMAFA and there to be "kept to light labour for a term of Five Months."

Mr. Sturgess submits that that conviction should not be allowed to stand because, he says, of the wrongful admission by the magistrate of what was "hearsay evidence," - that is to say, the concluding sentence of Ulee's evidence, already referred to. Mr. Sturgess suggests that this Court, on the authorities he cited, should decline to speculate about what effect the wrongful admission of that piece of evidence had on the magistrate's mind because, he says, it is impossible to know what effect it might or might not have had on the magistrate's mind. Mr. Sturgess also contended, (citing Slender, 26 Cr. A.R., p. 159), that an appellate Court should consider evidence wrongly admitted at the lower Court as vitiating the lower Court's decision unless the appellate Court were satisfied that, had that evidence never been admitted at the lower Court, the lower Court "must inevitably have come to the same conclusion." Those words have been used in the cases but the word "inevitably" puts things too high, as was made very clear by the Court of Criminal Appeal in Rex v. Haddy, (1944) 1 K.B., 442. In that case, counsel for the appellant took much the same point as to a misdirection as Mr. Sturgess has taken here in regard to the wrongful admission of evidence. Humphreys, J., who delivered the Judgment of the Court, said:-

"Mr. Maude, for the appellant, argued that we could "not give effect to the proviso" (in Section 4(1) of the "Criminal Appeal Act, 1907) "unless the court was prepared

"to hold that no jury properly directed could have
"acquitted the appellant. He based that argument
"on a passage in the opinion of Viscount Sankey L.C.
"in the House of Lords in Woolmington v. Director of
"Public Prosecutions, (1935) A.C. 462, where after
"reading the proviso to the subsection, he said:
"'The Act makes no distinction between a capital case
"'and any other case, but we think it impossible to
"'apply (the proviso) in the present case. We
"'cannot say that if the jury had been properly directed
"'they would inevitably have come to the same
"'conclusion.' It is the word 'inevitably' in that
"sentence on which Mr. Maude relied. In our opinion,
"it would be wrong to give effect to that argument.
"To accept it would be to render the proviso
"practically otiose, for it can never be said with
"certainty in any criminal case, however strong the
"evidence for the prosecution, that no jury could be
"found to acquit. The Lord Chancellor, we are
"satisfied, was referring, not to a jury who might
"return a perverse verdict but to a jury of sensible
"persons anxious to do their duty which is, in the
"language of the juror's oath, to return a true verdict
"according to the evidence. If that be the correct
"view, the word 'inevitably' becomes merely an adverb
"of emphasis designed to express the necessity for the
"absence of any doubt on the part of the court that
"a reasonable jury properly directed would have returned
"the same verdict." In the same judgment Humphreys, J.
quoted with approval Channell, J.'s Judgment in Rex v. Cohen
and Lateman, (1909) 2 Cr. A.R. 197.

In this appeal I have already assumed in appellant's favour that Ilco's evidence of his mother's complaint was "hearsay" and should strictly not have been admitted. But that piece of evidence was let in, and Regulation 17 (already cited) became applicable. The effect of that Regulation is that, although that part of Ilco's evidence should not have been, but was, let in, no weight should have been attached to it by the lower Court. The question then arises:- Did the lower Court attach any weight to it or not? I cannot tell, from the record, whether the magistrate realised or not that that piece of evidence was, or might be, "hearsay evidence." But whether he did or not, I see nothing in the record that shows or suggests that the magistrate, once having written the offending sentence down, ever thought of it again, much less attached any weight to it. He did not in any way refer to it, or to any other part of Ilco's evidence, or to Ilco himself, in the written reasons he recorded for his decision. But was the magistrate perhaps unconsciously influenced, by Ilco's evidence of Pain's complaint, in arriving at his decision to convict the appellant? Suppose that piece of evidence had not crept in, as this Court satisfied that the magistrate would still have convicted the appellant? I can see no indication whatever, in the lower Court's record of proceedings, that the magistrate was swayed in the slightest by that part of Ilco's evidence: the indications are the other way, i.e., the complete absence, in the magistrate's written reasons for his decision, of any reference to Ilco's evidence. It seems crystal clear, from the magistrate's written reasons, that, having heard and seen both wife and husband give their evidence and having seen for himself the nature of Pain's physical injuries, he accepted the wife's story and rejected the husband's. After carefully studying the record of the lower Court's proceedings, I am satisfied beyond all reasonable doubt that, had the last sentence of Ilco's evidence never been uttered, the magistrate would have arrived at the same conclusion as he did. In my opinion the magistrate attached no weight whatever to that piece of evidence.

Mr. Sturgeon did not press the first ground of appeal, - that the conviction was against the evidence and the weight of the evidence). That ground is, in my view, entirely without substance. There was ample admissible evidence, if the-

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magistrate believed it, (as he apparently did), to convict the appellant.

In conclusion, - Section 4 of the Papuan Native Regulation Ordinance clearly lays it down, as already noted, that "no appeal shall be allowed unless it appears to the Court that some substantial injustice and hardship will otherwise be caused to the appellant." It does not appear to this Court that the appellant will suffer substantial injustice and hardship if it disallows his appeal, and that is what this Court has decided to do, for the reasons I have given.

Appeal dismissed.

CHIEF JUSTICE.