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

-113

COPY/

TUMAIA Appellant

and

GAINE Respondent

J U D G M E N T.

This is an appeal from a conviction and sentence of a Court for Native Affairs held at Garaina on the 17th December, 1957, whereby the Appellant was convicted and sentenced to imprisonment with hard labour for two months on a charge of unlawfully striking the Respondent Gaine.

The three main submissions advanced on behalf of the appellant may be shortly indicated as follows:-

First, the appellant was exercising lawful parental control over Gaine, and this defence having emerged in the course of the hearing, the Court ought to have dismissed the charge. The plea of guilty should be taken as qualified by the subsequent statement of the accused. According to this argument I was invited to come to the conclusion that the only proper verdict was one of not guilty.

The second and alternative view which was not greatly favoured by the appellant was that I should treat the plea as one of not guilty, and upon the footing that there had been no proper trial of the defence indicated, direct that the case be re-tried by the Court for Native Affairs.

The third argument was that in any event, and having regard to the relationship between the parties and the circumstances under which the appellant acted, the sentence imposed was excessive and ought to be reduced.

The Court from which this appeal is brought was established under the provisions of the Native Administration Ordinance 1921-1938 of New Guinea, and under the same Ordinance the Central Court was established a Court of Appeal. The cases in which an appeal may be brought, the grounds upon which an appeal will lie, and the practice and procedure in appeals and all other matters relating to appeals are to be by virtue of Section 3(2) as prescribed by Rules of the Central Court.

Two limitations on the right to appeal must be borne in mind, one in Section 3(3) of the Ordinance to the effect 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, and the other arising by virtue of Rule 4 of the Rules of the Central Court regulating appeals by virtue of which an appellant is required to establish by Affidavit a prima facie case of mistake or error on the part of the Court.

In view of what was said in Ex parte Blyth (1944) 1 K.B. p. 532, it appears that there is no power at present to admit to bail a person convicted by a Court for Native Affairs, and accordingly the hearing was expedited to avoid possible further hardship to the appellant.

Upon the hearing, both sides were represented, and formal compliance with some of the purely procedural requirements was dispensed with, but I had great doubt whether, in relation to the first or second arguments, a prima facie case of error had been made out at any stage of the proceedings, and accordingly reserved my decision. I was invited by the appellant to conduct the appeal as a re-hearing and to form my own independent judgment of the facts upon the evidence appearing from the Court records and to reach the affirmative conclusion that the appellant was in fact acting within his rights in the exercise of parental authority.

It seems to me that I am not at liberty to do this. I think that it is clear that the appeal is not a rehearing in the sense that I should disregard the conclusions of the Court below and hear the case de novo. Although the Appeal Court clearly has power to draw its own conclusions of fact where necessary and for this purpose to hear fresh evidence, the general policy of the Ordinance seems to me to be that Native Affairs cases are to be heard and determined by officers expert in native affairs especially appointed for the purpose, and that the Appeal Court should not re-try the entire case merely to see whether it reached a different conclusion. Not only have the Native Affairs Magistrates special knowledge of native matters arising in the locality, but they have the overwhelming advantage of seeing and hearing the witnesses and of clearing up any points which remain obscure.

I think that the object of the Ordinance was to afford the natives the full protection of the substantial provisions of the law and an effective right of appeal, but to dispense with technical legal language and forms which like all other forms of technicalities are essential tools of precision in the hands of trained experts but a source of great difficulty and many errors for unqualified people.

If I were to reconsider the whole case independently guided only by the record of evidence before me, I would find many essential questions of fact altogether too obscure, and would need the assistance of considerable expert and other evidence.

I think, therefore, that the first inquiry on this appeal must be whether there is anything to show that the Magistrate made any mistake or error. It was argued with great force that since the complainant had called no evidence to show that the punishment was excessive or that the Appellant acted improperly, I must hold that the case was not proved beyond reasonable doubt. This argument was supported by reference to Sparkes v. Martin Ex parte Martin (1908) Q.J.P.R. 12 where the conviction of a schoolmaster who administered the cane to a pupil was set aside on similar grounds.

Assuming, for the purpose of this argument, that the Magistrate was fully aware of the defence in question, I think it would be going too far to say that he could not have decided on the evidence before him that the punishment was excessive or unreasonable in the local circumstances, even assuming that the claim to authority was justified.

It was also argued that although the record shows that a plea of guilty was recorded, this plea should be set aside and treated as a plea of not guilty, having regard to the statement made by the accused in explanation of his conduct. I was referred to the passage in the 3rd Edition of Halsbury's Laws of England Volume 10 at p. 408 and to R. v. Durham Quarter Sessions Ex parte Virgo (1952) Q.B.D. 1. There is, I think, more substance in this argument.

It is true that all that the appellant offered in his statement was an explanation of his conduct which may or may not have amounted to ground for defence. It may be that he intended to plead guilty and was

merely putting forward his explanation in mitigation, and it is quite likely that it did not occur to anybody at the hearing that what he was saying contained the elements of the defence which was raised and argued before me, nor does the record of the Court for Native Affairs enable me to say one way or the other whether the Magistrate took this possible defence into account as he would be bound to do once the matter emerged in the proceedings before him.

Having regard to the informality of the nature of the proceedings, I think that I should take the more favourable view towards the appellant that what he said sufficiently raised the defence that he was acting under parental authority to require the Court to investigate that defence.

In these circumstances I think it would be quite wrong for me merely to assume that the Magistrate did not take these matters into account, nor can I, by simply looking at the record of proceedings, say whether the defence is good or bad on the facts. It is plain that there was evidence before the Magistrate which if accepted would support the conclusion at which he arrived. The vital question therefore is:- "Is there any sufficient indication that the Magistrate did not consider this defence?"

In the circumstances which I have indicated, the question of the plea taken by the Court assumes great importance. I think that the fact that the plea on the Court record remained undisturbed is a sufficient indication that the Court, although it properly exercised the power to hear evidence, did proceed upon the footing that the appellant pleaded guilty, and that therefore the defence indicated was never put in issue. The onus is on the Crown throughout the proceedings to meet any such defence, but when the trial is conducted upon a footing of a formal plea of guilty, it is not possible to say that the evidence called on either side represents the whole case which could or would have been put if the defence had been in issue. It does appear that there was no evidence as to Gaine's age or domestic status, and nothing was said by the other witnesses as to the appellant's claim to authority as an uncle. Therefore I think that the true position, so far as it may be inferred from the record of proceedings, is that there has never been a trial on the issues now sought to be raised by the appellant and that the complainant was not entitled to the advantage of a plea of guilty.

The only Order which I can make in these circumstances is to set aside the conviction and send the case back for rehearing, so that the Magistrate may decide whether or not the appellant had any parental authority and whether, if he had, his actions were a proper exercise of that authority. It will be necessary on this issue to have evidence as to the age and domestic status of the respondent Gaine, since none of the circumstances affecting the question of parental authority appear from the Court record.

I think that I should point out, having regard to what I said earlier about technical legal language and forms, that it seems to me to be inappropriate in a Court of Native Affairs to record a formal plea of guilty or not guilty. Regulations 28-30 of the Native Administration Regulations 1924 provide for the defendant in such proceedings to state whether he admits or denies the complaint. It is apparent that if he admits the complaint, the Court is not strictly bound to receive any further evidence unless the defendant himself elects to tender it, but whether the Court hears evidence or not, it seems to me that the statement of the accused amounts to no more than an admission or denial of his guilt, and in either event becomes part of the evidence before the Court.

An admission of guilt under these Regulations does not necessarily have the same effect as a formal plea of guilty upon arraignment in a criminal trial, and I think that it would be a better practice for the Magistrate not to use the technical language relating to pleas but to use the expression "admit" or "deny" specified in the Regulations. A formal plea of guilty not only affects the mode of trial and procedure subsequently followed, but amounts to a bar to an acquittal unless and until the plea is set aside, and failure to set aside the plea when occasion arises constitutes ground for a new trial. If the words of the Regulations, however, are followed, there is no need to set aside any admission of the truth of the complaint, but the Magistrate must decide what weight ought to be given to that admission as a matter of evidence when considered in the light of any contradiction, qualification or explanation made by the defendant in the course of his subsequent statement.

As to the third submission that the sentence is excessive, I am unable to accede to this argument on the evidence before me. Matters properly taken into account in deciding the quantum of punishment are conveniently set out in the 3rd Edition of Halsbury's Laws of England pp. 488-9.

If the appellant acted wrongly but in good faith and in discharge of what he thought to be a duty, the Magistrate in reconsidering the matter might well see fit to impose a merely nominal sentence, for example, until the rising of the Court, but at the other end of the scale, the abuse of a position of power according to the rules of native society might call for substanial punishment and warrant sending the appellant back to serve the rest of his sentence.

I think that in view of the fact that I have reached the conclusion that there should be a new trial, these matters should be left for the Magistrate to decide after he has investigated all the circumstances. If satisfied beyond reasonable doubt that the appellant had no parental authority to justify his actions, either because of the age of Gaine or because under native custom he was not at the relevant time "in loco parentis", or that the punishment was unreasonable or excessive, the Magistrate should record a conviction and award whatever punishment he thinks appropriate, taking into account that the appellant has been in custody for about a month already. If this or any other defence raised leaves a reasonable doubt on the evidence, the appellant should be discharged.

I do not think that any further observations that I may make at this stage will be of any assistance to the Magistrate.

ORDER that the conviction be set aside and that the matter be remitted to the Court for Native Affairs for re-hearing, and that the appellant be now released from custody.

C.J.

16/1/58.