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

Appeal No. 2 of 1961.

IN THE MATTER of the Native Administration Ordinance 1921-1951 and Regulations made thereunder.

- and -

IN THE MATTER of an Appeal from the Court for Native Affairs.

TOPORE of TOTOVEL.
TOLAMULAI of TAKAKEL.
TENDENAI of TAKAKEL
TORAMAU of VUNADAVAI.
TOIRIMA of TOTOVAL.

Appellants.

- and -

MICHAEL JOHN COCKBURN.

Respondent.

REASONS FOR JUDGMENT

PORT MORESBY .6/6/61

MANN C.J.

This appeal raises three grounds. At the hearing Mr. Risson of Counsel for the Appellants, sought leave to add an additional ground, which may conveniently be considered as an additional branch of ground two. The added ground was that the Appellants did not admit or deny the complaint. The application was not opposed and I granted it.

The first ground of appeal set out in the Notice, was that the Magistrate had no jurisdiction to hear the complaint of Michael John Cockburn, who is not a native. The argument in support of this ground was largely based on Section 6 of the Ordinance which is in the following terms:-

> "Nothing in this Ordinance, or in the regulations made under this Ordinance, shall be taken to confer upon any Court for Native Affairs any authority except as between natives and over natives."

The construction contended for on behalf of the Respondents, was that Section 6 must be read in conjunction with Regulation 7 of the regulations made under that Ordinance. The material part of Regulation 7 provides that the Court shall have jurisdiction in respect of all offences against the regulations and jurisdiction in all civil matters. I was invited to find that these provisions which are set out in separate sub-paragraphs of the Regulations, afford justification for inferring that when the Ordinance was passed it was intended that the words "as between natives" should apply to the civil jurisdiction and that the words "over natives" were applicable to criminal or quasi-criminal proceedings.

Apart from the difficulties which would arise if Ordinances were to be interpreted by reference to the text of regulations passed

under those Ordinances, which is by no means a common aid to construction, there is nothing in Section 6 of the Ordinance to indicate that any similar division into jurisdictions was contemplated, in fact any supposed reference to separate jurisdictions which might be read into Section 6 would place the jurisdictions contemplated by the regulations in the reverse order and would give rise to peculiar questions as to the limitations which might be found appropriate in cases of jurisdiction conferred by any other Ordinance or Regulations, (a provision added to Regulation 7 in 1950).

I think that these arguments are too tenuous. The jurisdiction intended to be conferred must be arrived at on a consideration of the regulations as a whole and the special purposes which they were to serve. I do not think that Section 6 has any intended reference to the kinds of cases which may come before a Court for Native Affairs or to any particular kind of jurisdiction which might be called in aid. Broadly the regulations were intended to afford an easily understood Code to be applied to questions which arise in the field when officers are engaged in carrying out specified classes of essential administrative functions, largely as an aid to establishing what may broadly be described as a state of law and order, and the observation of basic principles of public hygiene amongst native people.

I think that the only purpose of Section 6 is to draw attention to and supplement the ordinary rule that Regulations must not exceed in scope the powers conferred by the Ordinance under which they are made. Section 6 has no reference to the classes of business which might come before the Court, but deals directly with the authority which such a Court may exercise. It is not an enabling or enlarging provision, it is in my view designed to make it clear that the Court is not to have any authority except as between and over natives. The Ordinance and the Regulations contemplate that certain things are to be introduced to natives in rudimentary form, sometimes in broad terms, and in many respects at the discretion of the officer administering the particular area in question. Outside of the limited range of matters which arise in the course of the kind of native administration contemplated by the Ordinance, the Courts for Native Affairs are to have no concern.

The Native Administration Regulations of New Guinea are directly based on the Native Regulations of Papua, subject to the elimination of a good deal of explanatory and other matter which was apparently thought to serve no useful purpose in New Guinea. In the Papuan Regulations express provision is made by Regulation 4 to supplement Section 6 of the Ordinance and provide a further safeguard against encroachment by the Court outside the field in which it was intended to operate. The omission of this minor express provision, along with many other provisions from the regulations as promulgated in New Guinea, does not in my view afford any reason for inferring an intention that the converse position should obtain in New Guinea. Perhaps Regulation 3

of the Papuan Regulations, which is reproduced as Regulation 5 in New Guinea, was thought sufficient to cover the provisions of the Papuan Regulation 4. At any rate I think that this is the position for a Court which has no power over a party to a proceeding cannot give an effective determination.

The difficulty which would in practice arise when a matter arose within a native society and in the course of native administration, but in circumstances in which it was not possible to find a native willing to make a complaint, is anticipated by Regulation 23 of the New Guinea Regulations, which is also taken directly from the Papuan Regulations. Regulation 36 gives a reasonable clear indication that the Court is to have a degree of control over everybody who becomes a complainant but that the compulsive power as well as other compulsive powers are still limited to natives.

In my opinion, upon a reading of the Ordinance and Regulations as a whole, it was not intended that anything in the Regulations should have any compulsive operation in relation to persons other than natives. I think that it is not possible for proceedings to be taken as between a non-native complainant and a native defendant.

It is possible that acting within the scope of his appropriate duties a Magistrate for Native Affairs might properly bring proceedings under Regulation 23 upon information coming to him otherwise than from a person who is qualified to be a complainant for the purposes of the Regulations. Even assuming, however, that such a course would have been open in the present case, it was not in fact followed and would make a substantial difference to the proceedings and to the position of the parties.

I think that the defect is not curable by amendment and that in fact the proceedings which were taken were not proceedings authorised by the Ordinance or Regulations.

The second ground is that the Magistrate did not ask each appellant individually whether he admitted or denied the complaint, as required by Regulation 28 of the Native Administration Regulations.

I think that this ground of appeal is also sustained but that if it stood alone the proper course for me to take would be to send the case back to the learned Magistrate with a direction that he should ask each appellant the specific question required by Regulation 28 and then proceed to a fresh determination of the matter in accordance with the regulations.

The learned Magistrate had a difficult task to perform and he went to a good deal of trouble to adopt what appeared to him, with good reason, to be the most practicable solution to the difficulty, and also to give the defendants what he considered an adequate opportunity to deny the complaint.

I have only two comments to make. The first is that the simplified procedure which is laid down appears to me to be quite mandatory. Each defendant is I think intended to be fully protected and each should be asked the specific question set out in Regulation 28. The answer, if any, provides an essential foundation for the procedure as a whole which is to be adopted. Although the form of questioning adopted was intended to operate fairly without antagonising an already defiant and numerous group of natives, it had the practical effect of placing a considerable onus upon any individual defendant who did not wish to give the affirmative answer contemplated by Regulation 29. It was rather like telling a company of soldiers that anybody who was not prepared to volunteer for extra duty must leave the ranks and stand to one side of the parade ground. In view of the very nature of the case and of the element of community action which was an essential feature, it might have been extremely difficult for an innocent individual to come forward and deny the complaint.

I think that the omission to ask each defendant the specific question specified in Regulation 28 and the absence of an affirmative answer to satisfy Regulation 29 precluded the Magistrate from determining the matter under the latter Regulation, and that, in addition, the omission of a mandatory step in the procedure specified by Regulation 28 is of itself a sufficient objection.

The other comment which I should make is that the question set out in Regulation 28 and the answer contemplated by Regulation 29, do not amount to the same thing as a plea of guilty commonly encountered in other jurisdictions. It is clear from Regulation 29 that an admission of the complaint does not disentitle the defendant to a trial on the merits and the Magistrate is required to consider whether in the interests of justice it is necessary to hear a complainant and his witnesses. The admission of the complaint becomes merely evidence before the Court and the Court must consider what weight should properly be given to such evidence. Commonly, of course, amongst natives such an admission has no evidentiary value, especially when the admission extends to matters beyond the knowledge of the defendant, or to matters of mixed law and fact. The effect of a formal plea of guilty to a charge laid in a normal criminal jurisdiction is quite different.

The third ground of appeal was that the sentence imposed by the Magistrate was excessive.

I have only considered this in one narrow aspect, as to whether the learned Magistrate erred by taking into account in fixing the penalty, a number of matters which occurred subsequently to the alleged offence. In his reasons for the verdict, the learned Magistrate said that the Court took into consideration certain matters three of

which were subsequent to the alleged assault.

I agree with the contention that these matters ought not to be "taken into account" in the ordinary sense when fixing sentence, but on reading all the learned Magistrate's reasons, I think that all he meant to say was that this subsequent conduct on the part of the defendants was of substantial evidentiary value in determing what was in fact the state of mind of the defendants at the time when they committed the assault. Subsequent conduct of this kind, clearly referable to a sustained attitude, may be very good evidence of the existence of the same attitude at an earlier material time in the course of a sequence of events. Of course such evidence must be considered with great caution, for an attitude of defiance amongst such people as those involved in these proceedings tends to be cumulative in its effect and might well have originated or become much more pronounced after the parties had got into a position in which they were involved in trouble. This consideration appears to me to have been well present in the mind of the learned Magistrate and on the aspect of sentence which I have considered, I see no grounds for departing from the Magistrate's views. It is not necessary, in view of the other conclusions which I have reached, to give further consideration to the question of sentence.

ORDER: The Order and Sentence of the Court appealed from, in relation to each of the appellants, to be set aside and each of the appellants is to be discharged from custody thereunder.