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

CORAM : MANN C.J.

Tuesday,
22nd October, 1968.

IN THE MATTER of an appeal against a conviction of the District Court, Kerema.

BETWEEN : KAKAETO ORELA (MIRAKAKARI)

and

Appellant.

GEORGE ORELA

Respondent.

J U D G M E N T

1968
October
15, 16.
Kerema
and
October
22.
Pt.Moresby.

Mann C.J.

This is an appeal against a conviction in the District Court at Kerema whereby the appellant was sentenced to three months imprisonment upon a charge of wilfully and unlawfully threatening the complainant with sorcery, contrary to the Papuan Native Regulation 80(2)(b).

The original ground of appeal was that the sentence was excessive but, at some later stage, what purported to be an amended Notice of Appeal was filed relying on additional grounds of appeal against the conviction as well as the sentence. The new grounds of appeal are somewhat obscure in some respects and difficulty arose because the original record of the District Court could not be found. What purports to be a copy of the record seems to be incomplete, but since they were sent to the Registrar as copies of all documents in the proceedings, I must proceed on the assumption that they do constitute the complete record.

In his judgment the Reserve Magistrate says :

" The Government of Papua and New Guinea thinks sorcery is a bad thing, and that sorcery should be heard in the Supreme Court because of this. However, to-day I have heard evidence that Kakaeto says silly things when he is angry. I believe this. Perhaps he did not mean to work sorcery on his son, but this Court has heard overwhelming evidence of the extenuating circumstances as certified in Councillor Amoupa's

Between Kakaeto Orela (Mirakakari) and George Orela.

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evidence. I have decided to hear this case in the lower Court. You are convicted and sentenced to three (3) months I.H.L. at Kerema. Next time you will know not to threaten people with sorcery."

The starting theme in this judgment is that these cases should be heard in the Supreme Court, but because there were what he regarded as extenuating circumstances the Magistrate decided to hear the case in the lower Court. It is not at all clear to me how the complaint could give rise to a trial for an indictable offence in the Supreme Court. The offence charged is a creature of the Papuan Native Regulations, which do not constitute indictable offences, and which establish a tribunal to hear cases concerning these offences summarily. No objection was taken to the Magistrate hearing the case in the District Court and that question was not argued before me.

One might have expected that under the transitional provisions set out in Part VIII of the Local Courts Ordinance, 1963, the matter would fall to be heard in the Local Court, because the jurisdiction to hear cases arising under the Regulations is now transferred to the Local Court and the Regulations remaining in force are to be read as importing a reference to the Local Court instead of the Court for Native Matters. Such a view would be supported by reference to Regulations 7 and 8 as construed by virtue of the provisions of Section 53 of the Local Courts Ordinance. I have not noticed any corresponding provision in the District Courts Ordinance, 1963, bearing a like reference to the Court of Native Matters, so that I do not see how a case could be heard and determined in the District Court upon the charge that was actually laid.

The judgment indicates that the reasoning of the Magistrate in disposing of the case involved three steps, which may be tabulated as follows :

(1) Sorcery involves very serious offences.
(2) This particular case involved overwhelming evidence of extenuating circumstances and so should be decided in the lower Court.
(3) Three (3) months imprisonment with hard labour was an appropriate punishment for

such a case as this.

The Magistrate then concluded that this would be a warning to the appellant not to threaten people with sorcery.

My impression is that the sentence of three months imprisonment with hard labour, being half the maximum penalty, would be a good deal more than I would expect to find awarded in the Supreme Court for a first offence were the case heard in that jurisdiction. It would have been sufficient to satisfy the Magistrate's reasons, if he had ordered that the accused be bound over to keep the peace, or given a bond to be of good behaviour. I think, therefore, that the punishment was clearly excessive and would vary the order accordingly, except that I think that there are stronger grounds for disturbing the orders made.

A number of procedural difficulties were adverted to, but in the circumstances some of these would not constitute fatal objections. The plea of "Guilty" which was entered on the record is not supported by any statement on the Court record that the charge was read over and explained to the appellant, or that he made some answer which could be properly interpreted as a plea of "Guilty". The appellant was told that he had the right not to make a statement and upon receiving this advice he decided to refuse to give evidence. The record does not show that he was told that he had a right to cross-examine or that he was invited to ask questions. Objection was taken that the witnesses did not appear from the record to have been sworn or affirmed. These objections are somewhat obscure because it seems to me that the case was heard in the wrong Court.

Regulation 42 of the Native Regulations required that witnesses be affirmed rather than sworn but where a case now proceeds in the Local Court, the procedural requirements of the Local Courts Ordinance would no doubt operate as a repeal pro tanto of the Regulations. It does not seem to add any weight to the appeal to rely on procedural objections arising from the District Courts Ordinance unless it can be shown that that Court did have jurisdiction to hear

and determine the actual charge made. The same applies to the objection taken that the appellant was not told of other rights that he would possess on the hearing, such as the right to address the Court.

I think that the question of substance that is involved in this appeal stems from the argument that the words said to have been used by the appellant do not constitute a threat of sorcery. The only evidence recorded on this point appears to be a quotation from the evidence of each of the three main witnesses. It was argued that there were inconsistencies between these witnesses on the particular point, but I do not think that that matters a great deal. Indeed, comparing the actual words recorded it seems to me to be most likely that each of these witnesses actually said the same thing in his own language and that the idiomatic usages of the local language led the interpreter to give somewhat different interpretations.

According to the informant's evidence, the appellant said to him "You are a bastard and you should be dead". This statement contains two ideas. The first having to do with his parentage, or his filial relationship and the second involving the question of his survival. In the statements made in evidence by the other two witnesses precisely the same themes are expressed in different wording in the English translation. The assertion "You are the son of the father" involves the theme of parentage, or filial status, of the complainant, and in each case the remainder of the sentence raises the question of the capacity of the complainant to survive. It seems to me to be most probable that all these witnesses were saying the same thing and that because of some slight difference in dialect or idiomatic usage, or some question of expression, the interpreter has given differing versions in English. Each version in English bears the same basic structure.

Each of the three witnesses went on to say that in the local language this statement <u>means</u> that the appellant threatened the complainant with sorcery. It seems to me that this question should not have been put to any of these witnesses and the evidence on this

point was wrongly admitted. In each case it is not possible for such a meaning to be attributed to the actual words in the local language, whatever they might have been. The assertion that the appellant was threatening sorcery could only be in this context the explanation, reaction, or rationalisation of the witnesses in response to whatever it may have been that the appellant actually said.

In many parts of the Territory we encounter people from different language groups who not infrequently resort to the practice which is known in Pidgin as "tok bokis" or "tok win" or "tok bilas". In each case this involves indirect expressions of meaning ranging from a pre-arranged secret signal, useful in bargaining or attack, to some meaningless nonsense or abuse. Even if it is assumed that some such process could be involved in the present case, it would be necessary for this question to be investigated with the aid of expert evidence and it would have to be established that both the appellant and the complainant were well aware of whatever secret meaning might be involved.

A threat is essentially a communication of an intention from one party to another. The appellant could not be made guilty of threatening sorcery merely because of some obscure remark which he made, coupled with the reactive opinion of his hearers to the effect that the speaker must have sorcery in mind because they otherwise could not quite understand his meaning. I think it probable that investigation of the local language would reveal that what was translated as "You are the son of the father" is in the local language a stylised expression or term of abuse developed into common use by people whose knowledge of biology and genetics was extremely vague, as was undoubtedly the case in this Territory. The fact that in one instance the interpreter adopted the much more fashionable and specific English word "bastard" when speaking in English, is scant evidence of a change of meaning in the local language.

There is one other rather extraordinary feature of this case and that is the complainant, who describes the appellant as his step-father, has filed

an affidavit seeking to clarify the record of the Court. The affidavit scarcely does this in fact, because it merely quotes the same words as appear on the Court record and repeats the assertion, without anything to support it, that in the local language the expressions used mean that the appellant had threatened him with sorcery.

This carries the matter no further, but the complainant goes on to say that at the time that the words were spoken he knew that the appellant was ignorant of sorcery and that he is still now ignorant of it. He does not state his means of knowledge, and I would need a great deal more information before attaching any weight to this statement. The interesting thing is that at this late stage the complainant is providing additional material to support the appellant's argument by the proposition that the words could not have been intended seriously as a threat or understood to constitute any real threat because of the appellant's ignorance. This change of tactics on the part of the complainant may be some indication of the effectiveness of the sorcery, if any, but it is noteworthy that the appellant himself does not depose to his own ignorance of the art.

In the case of Wood and Anor. v. Bowron (1) Lush J. at page 30, gave a classical definition of one aspect of a threat when he said :

> " The cases that have been decided shew that the word must have a wider sense; namely a threat by act or words of doing some injury to another person, But I apprehend that it is the very essence of a threat that it should be made for the purpose of intimidating or overcoming the will of the person to whom it is addressed."

There is nothing on the record of the District Court to suggest that the appellant expressly or by implication, or by his conduct, conveyed any intention of his to cause any injury to the complainant by means of sorcery or otherwise. There is nothing to indicate that he was seeking to achieve any objective by means of a threat or trying to influence in any way the mind or actions of the complainant. There is no reason to suppose that he was in any sense or degree trying to overpower him. The known circumstances are that the

(1) (1866) 2 Q.B. p.21.

appellant, having been a man of some influence and standing in the community, was in the habit of making caustic or abusive remarks. The complainant, who has been referred to as his son by the Councillor, was not the true son, but was in fact the step-son, of the appellant. His true father was apparently deceased. There was an argument having something to do with a canoe and the appellant became excited. Making the normal allowance for a shift of meaning in the course of interpretation, I think it is not possible for the Court to infer more than that the appellant made some kind of remark, probably mildly offensive, but certainly not offensive to the high degree sometimes encountered as a prelude to a killing, and that the remark had some reference to the complainant's lack of a normal father, coupled with some reference to his chance of survival. It apparently angered the complainant enough to cause him to lay a complaint at the time but his anger does not appear to have persisted. I see no ground on the evidence to infer any threat which was not expressed. So far as it appears from the record, the remarks might have amounted to no more than an assertion that the complainant should be grateful because the appellant had brought him up after his true father had died.

In these circumstances I think that there is nothing to be gained by sending the case back for re-trial and I think that the appeal should now be allowed and the order of the District Court set aside. The appellant should be released from his bond.

Solicitor for the appellant : W. A. Lalor
Public Solicitor.

Solicitor for the respondent : S. H. Johnson
Crown Solicitor.
