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PAPUA NEW GUINEA

IN THE SUPREME COURT OF JUSTICE

CORAM : FROST, C.J.
RAINE, J.
SAIDANHA, J.

Thursday,
13th November, 1975.

(APPEAL NO. 57 OF 1975 (NG))

BETWEEN : SEBULON WAT
Appellant

AND : PETER KARI (NO.2)
Respondent

ORDER OF THE COURT.

Appeal dismissed. The order of the appeal judge confirming the conviction of the appellant affirmed.

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1975
Oct 27,28, 29 and Nov 13.

WAIGANI, NATIONAL CAPITAL DISTRICT.

Frost,C.J.

This is an appeal against the decision of Prentice, S.P.J. (as he then was) given on 24th April, 1975, confirming the appellant's conviction by the District Court at Kavieng on 24th July, 1974, upon a charge that between the 17th and 19th February, 1974, at Kulinus Island in Papua New Guinea he encouraged the commission of an offence against the law of Papua New Guinea, that is to say, to steal coconuts and copra bags the property of New Ireland Enterprises Pty Ltd, thereby contravening the Public Order Act s.15(a)* 1970.

The appeal succeeded as to sentence and in lieu of the term of imprisonment for ten weeks imposed by the District Court the appeal judge postponed passing sentence upon the appellant entering into a bond in the sum of K500.00 to be of good behaviour for two years.

*15. A person who -

(a) incites to, urges, aids or encourages; or
(b) ....

the commission of an offence against a law of the Territory or the carrying on of any operations for or by the commission of such an offence is guilty of an offence.

Penalty : Five hundred dollars or imprisonment for one year or both.

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Sebulon Wat
v.
Peter Kari
(No.2)

Frost,C.J.

There is also an application for leave to appeal on certain questions of fact under the Supreme Court (Full Court) Act 1968, s.10(d).

As appears from further particulars supplied by the informant prior to the original hearing the offence alleged to have been encouraged related to the stealing of the items mentioned by 14 named persons who were convicted on 6th and 7th March, 1974, by the District Court at Kavieng.

The case for the informant was that the appellant, who is a law student and comes from New Ireland Province, attended a meeting on the afternoon of Sunday, 17th February, at Kulinus Island, which is one of a small group of islands off Kavieng, and in an address to the villagers, amongst whom were included the 14 named persons, by words encouraged them to go to the plantation which was on Patio Island and steal coconuts, copra and bags, and also encouraged them by himself going to Patio Island the following day when the offence took place. The background of the case is the villagers' unrest at the continued European occupation of the plantation on Patio Island, which in the past had been traditionally owned by their clans. One of the issues considered by the magistrate was whether the convicted villagers acted under an honest claim of right to the land and thus to the produce of it or whether, as the magistrate found, "the raid was calculated to cause trouble and so stir the Government into swift action to purchase Patio Plantation and hand it over to the villagers and, incidentally, to provide funds to further their general aims."

As it happened the appellant was convicted by the District Court at Kavieng of a similar offence held to have been committed on the 11th and 12th February, 1974, at another plantation, also in the New Ireland Province. The conviction however was quashed on appeal by Lalor J. who had to consider similar issues as are before this Court (1). As Lalor J. points out, s.15 is obviously derived from the Australian Crimes Act s.7A which is in similar terms, and as in the case of prosecutions under the Australian provision if a person encourages the commission of an offence he would be guilty whether his encouragement "were adopted or rejected", that is to say whether the offence was in the event actually committed or not. Walsh v. Sainsbury (2). The passage referred to is from the

(1) Sebulon Wat v. Peter Kari (unreported) Judgment No. 840 of 25 Mar 75.
(2) (1925) 36 C.L.R.464 at p.476.

.../3

judgment of Isaacs J. who dissented, but on other issues. I agree also with the opinion of Lalor J. that as in the case of a prosecution under s.7(d) of the Criminal Code if a person encourages another to commit an offence, to adopt the words of Philp J. in R. v. Solomon (3), he is liable only for the actual offence he has consciously encouraged.

I now turn to consider the relevant portion of s.22 * of the Criminal Code concerning an honest claim of right. Again, as Lalor J. held, as s.1 of the Code defines the term "criminally responsible" as "liable to punishment as for an offence" and s.2 defines an offence as "an act or omission which renders the person committing the act or making the omission liable to punishment", if the offence in question is one relating to property to which s.22 is applicable and the defence of honest claim of right is raised and is not excluded on the evidence the effect in law is that no offence is committed. In the present case the offence alleged to have been encouraged was stealing, to which s.22 is clearly applicable.

The question arises as to whether a person charged under s.15(a) with encouraging another to commit the offence of stealing is entitled to avail himself of a defence under s.22 of the Code. I agree with Lalor J. that the issue is not whether the person encouraged acted in the event in the exercise of an honest claim of right. In the words of Lalor, J. the defendant "must know that the persons whom he advised did not have an honest claim of right and would thus be guilty of the offence of stealing..." A person cannot be said to have consciously encouraged the commission of that offence unless it is excluded that the person charged believed that the person encouraged had acted in exercise of an honest claim of right. (Of course there must be sufficient in the evidence to raise the defence as is implicit in the judgment of Lalor J. (4) (supra)). If a person believes that another has an honest claim of right to property it was surely not the intention of the legislature that the person who encourages that other to act in

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* 22. ....

But a person is not criminally responsible, as for an offence relating to property, for an act done or omitted to be done by him with respect to any property in the exercise of an honest claim of right and without intention to defraud."

(3) (1959) Qd.R.123 at p.128.
(4) (unreported) Judgment No.840 of 25 Mar 75.

the exercise of the claim should be guilty of an offence. But, s.22 cannot in my opinion directly or otherwise than I have set out be availed of by a person charged under s.15(a) of the Public Order Act because, even assuming that such an offence is an offence relating to property, his act of encouragement cannot be said to be an act done by him with respect to property. Pearce v. Paskov (5); Reg. v. Hobart Magalu (6); Olsen & Anor v. The Grain Sorghum Marketing Board. Ex parte Olsen & Anor (7). This was the view of Prentice, S.P.J. in the present case.

It is convenient to deal first with the application for leave to appeal the ground of which was that the appeal judge erred in refusing to quash the conviction on the ground that it was against the evidence and against the weight of the evidence in certain respects. The witnesses called by the informant included four of the villagers convicted of stealing. Each was obviously initially reluctant to give evidence against the appellant. The magistrate rejected the evidence of David Salaken, and relied mainly on the evidence of Lamandos Goten and, although he recognized that their evidence was not entirely satisfactory, placed some weight on the evidence of the two other villagers, Gaugauan Ro and Albert Demi. Each of the two latter witnesses was treated as hostile after admitting having made a prior inconsistent statement to the police implicating the appellant, and thereafter gave evidence supporting that statement. I agree, however, that the evidence of each is contradictory in a number of respects and should not have been given any weight.

Mr. Griffin then contended that the magistrate had placed too much weight on the evidence of Lamandos Goten having regard to the fact that it did not implicate the appellant in any way until after a point in the examination-in-chief when the witness was treated as hostile without such declaration having been sought or made. It is true that the witness did not implicate the appellant until after the following question was put to him: "Did Sebulon Wat tell you to take the coconuts from the plantation?" Upon objection being taken the question was rephrased and the examination-in-chief proceeded as follows:

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(5) (1968) W.A.R.6.
(6) (unreported) Judgment No.806 of 24 Aug 74.
(7) (1962) Qd.R.580.

.../5

"Q. Did anyone tell you take the coconuts from the plantation?
A. Yes.
Q. Who told you?
A. Sebulon Wat. "

Thereafter the witness' evidence, the substance of which was that the appellant told them to go and get coconuts and copra from Patio, clearly carried a ring of truth, as the magistrate said. Certainly no application was made to have the witness treated as hostile nor were any other leading questions put. In my opinion, the magistrate was clearly entitled to act on this evidence. Further, it was consistent with the evidence of three plantation employees, Apelis Yangalik, the boss-boi, Stephen Kikvaitas, the clerk, and Thomas Tokupep, the storekeeper on the plantation.

Mr. Griffin argued the ground of appeal that the evidence of these witnesses was not relevant to the charge and did not tend to establish that any offence had been committed by the appellant. However, the magistrate's finding on their evidence that the appellant's presence on the plantation on Monday, combined with his assumption of the role of leader and spokesman for the villagers who came to take the coconuts, amounted to an encouragement of their actions was, in my opinion, fully justified and was therefore relevant to the charge.

The other ground for the application for leave to appeal was that the reasons given by the magistrate for disbelieving the major part of the appellant's evidence were inadequate and without foundation. It is convenient to take this ground, which is based in part on a letter dated 17th January 1974 written by the appellant to one Abel Ges, with the first ground upon the appeal as of right, that the trial judge erred in law in holding that it was admissible in evidence. The letter was tendered as evidence by counsel for the informant during the appellant's cross-examination. It will be noted that the letter, which is set out in the judgment of Raine, J. which I have read in draft, was written a month before the appellant's visit to Kulinus Island. The letter certainly supports the inference drawn by the magistrate that it spelled out a policy of entering upon plantation lands to attract attention and expedite the handing over of plantations, but the evidence concerning the letter is unsatisfactory. After it was put to the appellant and he admitted writing it, no further questions were asked upon it to

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identify either the plantations or explain the circumstances referred to in the letter, and certainly the appellant who was unrepresented at this stage was not asked to give his explanation of the letter. Certain other meanings were put to the Court by Mr. Griffin but they are all speculative and, on the whole, I agree with the appeal judge that the letter was admissible as to the appellant's state of mind shortly before the material date, allowing for a possible change of attitude thereafter and also as going to credit. However, in the circumstances, in my opinion, the letter is deprived of any decisive weight.

The other main objection to the magistrate's assessment of the appellant as a witness was founded on the appellant's cross-examination upon a conversation which the appellant admitted he had had with Mr. Peter Saunders, who was apparently in charge of the plantation, on Thursday, 21st February, and which took place when the two of them met whilst travelling in boats. The ground of the objection is that the terms of the conversation were never proved. It was then argued that the magistrate's criticism of the appellant's evidence based upon his failure to recall portions of the conversation was wrong. However, reading the magistrate's reasons it is clear that he formed the view that during this part of the cross-examination the appellant by his demeanour gave evasive and untruthful answers and, to use the magistrate's own words, it was taking the evidence as a whole that he disbelieved the greater part of it. It is also to be noted that another valid reason for the finding was that the magistrate preferred the evidence of the plantation workers, as to the events of the Monday, to that of the appellant.

Accordingly, for all these reason, the grounds taken to support the application have not been made out, and whilst I would grant leave to appeal on these questions of fact I would dismiss that particular appeal.

The appellant's evidence was that he had first become involved with New Ireland land problems in 1973 after the Enuk people had moved onto Enuk Plantation. He took the matter up seriously with the Minister for Lands and also the Acting Director for Lands and from then onwards he had been constantly in touch with these two persons. The Acting Director gave him an assurance that he would help him if he, the appellant, organized the people into corporate groups which would then give the Government some indication that the people were willing to help themselves. Things had then gone well because the Government had acted promptly by sending its own valuer to

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Enuk Plantation and presumably going ahead with the purchase of the land. His efforts had not gone unnoticed by the people in the Kavieng area and he had then received instructions from the Public Solicitor's office to look at lands for which possible claims could be made out. At this stage Lamandos first contacted him about Patio. It was a request he could not refuse because he felt that he could negotiate on their behalf. By that time Lamandos and the other villagers had begun to appreciate the movement onto plantations in the area. He could see that it was inevitable that the people were going to move onto Patio Plantation so he told Lamandos that the villagers should wait until he could obtain directions from Port Moresby. It was on the Saturday, 16th February, that he heard of the people's intention to move onto Patio Plantation.

On the Sunday he was travelling back to his village and he stopped on the way to Kulinus Island. When he arrived the meeting was already in progress. The discussions of the villagers were centred around physically getting Patio Plantation but the appellant advised them that the best way to do it was for them to organize themselves by setting up a committee consisting of Chairman, Treasurer, Secretary and three other committee members. This advice was accepted and the committee chosen. The appellant's advice was that they should negotiate first and if the Government would not listen that he should then tell the Minister and Director that they were going to move onto Patio Plantation. Apparently there was discussion about the move, opposition coming mainly from the old men whilst the younger men agitated for action. The appellant's case was that he did not encourage the people either to go onto the plantation or to stop them from doing it. It was their problem, it remained with the land and would always remain with them.

On the following morning he was not intending to go anywhere but set off by boat for Matupit. His journey took him near Patio. Having been told by the driver that many canoes were travelling to Patio, he told the driver, "Let's go and see what's happening". When he arrived at Patio at about 10 o'clock in the morning the people were very excited when they were collecting coconuts. One of the stores had been broken into and new bags taken out and distributed to the village people. The appellant said he told Lamandos he was very disappointed. The appellant intervened to stop trouble between the villagers and the labourers when he found Demi and five other village men about to go into the copra shed and take bags of copra. He told them not to take copra. He came back and talked to the

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plantation labourers about land only.

His case thus was that he did not encourage the villagers on the Sunday afternoon and, contrary to the evidence of the plantation employees and the villagers, on the Monday he intervened to prevent trouble between the villagers and the plantation labourers and advised the villagers against taking copra or coconuts. However, upon the whole of the evidence the only conclusion open is that the magistrate was entitled to reject the evidence of the appellant, and where it was in conflict act on that of Lamandos Goten and the plantation labourers, which entirely supports his finding of encouragement on the part of the appellant.

I now turn to the remaining grounds of the appeal which are in effect that the magistrate was wrong in rejecting the defence of honest claim of right on the part of the convicted men, and in holding that the issue did not arise whether the appellant himself had a claim of right. As in the opinion I have held the appellant could not avail himself directly of the convicted men's defence under s.22, it is unnecessary to consider that first such ground.

Upon the remaining ground of appeal if there was evidence to raise the defence, the issue arose for determination by the magistrate whether the appellant consciously encouraged the commission of the offence if knowledge of an honest claim of right on the part of the convicted men was not excluded. Upon this matter the magistrate expressed himself as follows:-

> " In this case the defendant is not charged with an offence relating to property. The act he is charged with doing is encouraging the commission by others of the offence of stealing. It is not alleged that he himself did or omitted to do anything in relation to property.
>
> As far as the defendant knew those others may or may not have had an honestly held claim of right. He had no way of really knowing what those he encouraged honestly believed. In any case I don't accept that he can claim another person's belief in any such a right in exculpation of his own separate act. I don't believe that the defence of claim of right is open to him on the present charge. "

Whilst the meaning is not entirely clear, I think that in the course of holding, in my opinion correctly, that the appellant could not avail himself directly of a defence under s.22, the magistrate

in effect was saying that the question did not arise on the evidence whether the appellant was aware of any honest claim of right on the part of the convicted men. If there was evidence to raise the defence, then it was an issue to be determined, and that is the question now to be considered. Instead of examining the words used by the appellant at the meeting or what he said to the plantation employees which was in effect that the time had arrived for the Europeans to leave the plantations, the Court is entitled on this point to look rather at the evidence given himself by the appellant. The effect of that evidence was that the appellant on behalf of his fellow islanders, and to alleviate the land shortage, had adopted the role of negotiator between the villagers and the Government with a view to obtaining proposals for the repurchase of the plantation lands back from the European owners, but that if negotiations did not appear to be succeeding he was prepared to support moving onto the plantations to compel Government action.

It was the repurchase of the plantation on behalf of the former traditional owners with the latter contributing substantial sums of money that in this case concerned the appellant, and not the question whether they had claims of right to upset the title and recover the land. In my opinion the evidence is not sufficient to raise the defence that the appellant took account of the villagers having an honest claim of right. There was ample evidence to support the magistrate's explanation of the raid. The circumstances were that the villagers had been holding meetings for several years to discuss buying back the plantation which in the past their clan had traditionally owned. They had become tired of waiting for the expected Development Bank Loan. On the evidence the magistrate accepted the raid would not have taken place without the encouragement of the appellant, who to the knowledge of all in the area had successfully employed force at Enuk. After years of peaceful relations there were the two swift raids to Patio, followed by readiness to hand back the copra when demanded by the owner. The villagers were thus following the successful example of the Enuk people.

For these reasons in my opinion the appeal fails and the judgment of the appeal judge should be affirmed.

Before leaving this case, there is one matter to which reference should be made. The first relates to the expression of opinion by Lalor J. in Sebulon Wat v. Peter Kari (8)(supra) that the criminal law is not a proper vehicle to determine property disputes

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(8) (unreported) Judgment No.840 of 25 Mar 75.

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between individuals. I take it that His Honour did not mean that the police should not intervene to prosecute offences against property. It is sufficient to refer to the tragic toll of life arising from land disputes in Papua New Guinea as a consideration requiring police action.

RAINE, J. I have read in draft the judgment of the Chief Justice, and I agree in what His Honour proposes.

There is therefore no need for me to write at any length, but there are some matters with which I would like to deal.

Firstly, I am by no means sure that s.15(a) of the Public Order Act 1970 contemplates that one can only be liable to conviction for the actual offence one has consciously encouraged. I have serious doubts that this is so. I am minded to think that the section is not so much directed at "cause and effect", but rather at "possible effect". I would wish to leave this open. Many seek to sow the seeds of disaffection, and do so earnestly, not always with success,or, even, with any likelihood of success. I doubt whether the section is only aimed at those who actually succeed in persuading others to break the law.

The second matter that I would wish to refer to is the appellant's letter of 17th January, 1974, written in relation, so it seems, to a similar land problem in the area. This went in as an exhibit at a quite inappropriate time, it was a prosecution exhibit, tendered in the defence case. Inexplicably it was not the subject of cross-examination. It was a damaging letter, it mirrored the defendant's attitudes to the Patio land, which is the subject land in this appeal. It was an aggressive letter, in provocative terms.

It went in, without objection. It is said that the appellant was then unrepresented, and that he was never given a chance to explain the circumstances that gave rise to that which he wrote. Mr. Griffin suggests that it might have been a most proper letter, written about some rather wicked interloper. I set the letter out hereunder, with some parts underlined by myself:

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University of PNG
P.O. Box 4572
University

17/1/74

Abel Ges,
United Church
Bangatan.

Dear Ges,

Thanks a lot for your letter. The file is here and I'll be arriving there in February.

And my word that has been laid down is that - don't refer back. Now I have started a job and I want us to be strong, and go forward with it with those of Vutei and Nonovaul.

And cousin - I'm still not satisfied - I want you to cut copra and be very big headed so that we'll get a lot of attention and the handing over of the land will be quicker. Anything anybody says about you record them down and the person's name as well.

I'll be handing the file next month. I want you to cut copra from the plantation and start depositing some money into the "General Expenses Fund" because there'll be something coming into it from me.

But with the "Public Fund" it belong to you - it'll be your own money to help with anything within our land. Another thing, you heard of those at Vutei going into (the land of) Ungan and Kapatirung, I told them to do so and I want you to keep up with the work there. If those workers of the plantation show off (humbug) don't leave them alone.

Work hard so you can get the land back.

When I arrive I'd like you and all the members to wait for.

That's all

My love to you all there at Bangatan.

I'm

(signed) Sebulon Wat

cc. Silakot Kak
cc. Sokut Kak

"

How could it be suggested that this letter concerned the expulsion by proper means, of a trespasser? Of course it does not, it is nonsense to suggest that it does. It was a dangerous letter.

Had I been the appeal judge, in the first instance, I would have paid regard to the letter, although I acknowledge that the proper way to have dealt with it in the Magistrate's Court would have been for the prosecutor to take the appellant through it piece by piece, driving him, I would imagine, into an inevitable corner in relation to his state of mind and general motives. The letter was admitted in an irregular way, but had it been dealt with properly then its effect on the Magistrate's mind would have been no different. I see no substantial miscarriage of justice.

I would dismiss the appeal.

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SALDANHA, J. I have had the advantage of reading in draft the judgment of the learned Chief Justice. I agree broadly with his findings and the reasons for his findings but wish to make some observations of my own.

The defence of honest claim of right under s.22 of the Criminal Code was not open to the appellant. The relevant part of s.22 reads as follows -

> "But a person is not criminally responsible, as for an offence relating to property, for an act done or omitted to be done by him with respect to any property in the exercise of an honest claim of right and without intention to defraud."

The appellant was charged with having encouraged the commission of an offence contrary to s.15(a) of the Public Order Act, 1970. It was alleged by the prosecution that the appellant encouraged certain villagers to steal coconuts, copra and copra bags from Patio Plantation. The offence charged is not an offence relating to property although the offence encouraged is; but that is another matter altogether. Moreover the appellant could have availed himself of this defence only if he himself had an honest claim of right to Patio Plantation. But there is no suggestion that the appellant was setting up any claim on his own account. His own belief, however honest, that the villagers had a claim of right is not sufficient to found a defence under s.22. But in my view the appellant entertained no such belief nor did the villagers have an honest claim of right.

That the villagers themselves did not entertain an honest claim of right is clear from the evidence as a whole. Mr. Cardow testified that during the four years he had been Plantation Manager no one had made any attempt to occupy Patio Plantation, there had been no disturbance on the land, no theft of coconuts and no raids similar to the one that led to this prosecution. Although the villagers raided the plantation on two days they made no attempt to occupy any part of it, and, there is evidence that some of the stolen copra was recovered without any fuss or difficulty.

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It is clear also that the appellant did not for a moment believe that the villagers had an honest claim of right to Patio Plantation. Lamandos Goten testified that the appellant told him and others to steal coconuts and copra from Patio Plantation. The trial magistrate accepted his evidence as being true and rejected the evidence of the appellant who had denied telling him to steal. If the appellant believed that the villagers had a claim of right it would scarcely have been necessary for him to lie to the magistrate.

The trial magistrate came to the right conclusion when he made the following finding -

> "the raid was calculated to cause trouble and to stir the Government into swift action to purchase Patio Plantation and hand it over to the villagers and, incidentally, to provide funds to further their general aims"

The letter written by the appellant to one Abel Ges was inadmissible as evidence of similar acts. As it was written only a month before the raid on Patio Plantation it was admissible as indicating appellant's state of mind. But although put in by the prosecutor during the cross-examination of the appellant no attempt was made to cross-examine the appellant on the letter, and, although the appellant was at the time a fourth-year law student I doubt whether he would have been aware that it was open to him to give his own version as to what the letter meant, his state of mind, his reasons for writing it and the like. As the appellant had not been given an opportunity of explaining the letter little or no weight should have been attached to it. Unfortunately the trial magistrate did give it some weight.

There is merit also in the appellant's criticism of the weight the trial magistrate gave to the evidence of Gaugauan Ro and Albert Demi. These witnesses were treated as hostile and were proved to have made previous statements inconsistent with their evidence in Court. The following passage appears in R. v. Golder, Jones and Porritt (9)

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(9) (1960) 3 All E.R. 457 at 459

> "In the judgment of this Court, when a witness is shown to have made previous statements inconsistent with the evidence given by that witness at the trial, the jury should not merely be directed that the evidence given at the trial should be regarded as unreliable; they should also be directed that the previous statements, whether sworn or unsworn, do not constitute evidence on which they can act"

This passage was cited with approval in R. v. Oliva (10).

The evidence of Lamandos Goten that on 17th February, 1974, at Kulinus Island the appellant encouraged villagers to raid Patio Plantation together with the evidence of the three plantation employees, Apelis Yangalik, Stephen Kikvaitas and Thomas Tokupop that on the following day the appellant was present at Patio Plantation aiding and abetting while the raid was in progress was sufficient to enable the trial magistrate to find beyond reasonable doubt that the appellant was guilty of the offence with which he was charged, and, the error into which the trial magistrate fell in giving undue weight to the letter and the evidence of Gaugauan Ro and Albert Demi did not occasion a substantial miscarriage of justice.

I would dismiss the appeal.

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(10) (1965) 3 All E.R. 116 at 123

Solicitor for the Appellant :	N.H. Pratt, A/Public Solicitor.
Counsel for the Appellant :	J.A. Griffin I. McWalters.
Solicitor for the Respondent:	L.W. Roberts-Smith, Public Prosecutor.
Counsel for the Respondent :	L.W. Roberts-Smith S.B. Passingan.