IN THE SUPREME COURT
OF PAPUA NEW GUINEA

CORAM: Prentice, ACJ.
Thursday,
10th April, 1975.

WAMA UL v. JANSEN

(Apps. 69, 70 & 71 of 1973 (N.G.))

1975
9, 10 April
Mount Hagen

Prentice, ACJ.

These appeals have at last been brought to a hearing, after years of losing of papers and failures to link the interlocutory applications with original appeals. Even at this stage, the Supreme Court files contain neither the Magistrate's reasons for judgment, nor copies of the depositions. I have conducted the appeals, by consent hearing them together, by borrowing the actual District Court files. The appellant, I am informed was bailed out after serving between six and seven months of an accumulation of ten months of sentences to imprisonment. I am unofficially informed that he, a corporal in the Defence Force at the time of the incidents, has also been dismissed from the Army.

The appellant on the day in question had been drinking at the Highlander Hotel (then Mount Hagen Hotel). He sought to engage the bar manager Douglas Terry in conversation about life in Australia where he himself had been. When told by Terry that he was too busy to talk at that time, to see him another time; the appellant used language including the words "you fucking white European bastard. I will fucking well kill you tomorrow ... I know where you live I'll fucking well kill you tonight." The manager John Melis sought the aid of an off duty but uniformed policeman Larry Fo'o, who tried to arrest the appellant. Melis and Terry tried to assist in the arrest; and all were subjected thereafter to a barrage of stones thrown by the appellant and others. Each was hit several times, one required hospital treatment. It is clear that a very ugly and dangerous scene developed.

Three informations were laid against the appellant. The first (the subject of Appeal 69) enumerated -

(1) unlawfully use violence against Larry Fo'o
(2) unlawfully use violence against John Melis
(3) unlawfully use violence against Douglas Terry.

The other two (the subject of Appeals 70 and 71) alleged successively "did behave in a threatening manner towards Douglas Terry" and "did behave in an insulting manner towards Douglas Terry".

Appeal 69

It was first argued that the enumeration of three matters in the information was in breach of s.37 of the District Courts Act, rendering the process a nullity. The learned Magistrate had considered this matter and had come to the conclusion that the case came within the exception (b) to that Section - "the matters of the information" being "substantially of the same act or omission on the part of the defendant". Apparently he informed the appellant that he would not hear the matters together however, if he the appellant had any objections. The appellant, who was fluent in English, said he had no objection. In a sworn statement following the unchallenged prosecution evidence, the appellant claimed no memory of the incident, and affection by drink. I am satisfied that the learned Magistrate's approach in the circumstances was a correct one.

It was next argued that there had been more than one conviction on the one indictment. Edwards v. Jones (1) was relied on as authority for stating that such showed the information and subsequent convictions were bad. I am of the opinion that s.37(2) necessarily allows of more than one conviction.

Then, it was said, the matter of conviction was not identified. Inasmuch as the Magistrate specifically noted on the bench sheet "all three offences found proved" I find this submission not substantiated.

Mr Russell then submitted that defences open to the accused were not considered. The bar manager's use

(1) (1947) K.B. 659

of the words "I'm too busy to talk to you ..." constituted provocation which exculpated any subsequent assault. In addition, the bar manager's action amounted to an illegal assault and the appellant's stone throwing should be held to be self-defence. The submission as to provocation might be thought to win the prize for quaintness, if such prizes were available ... The submission as to self-defence seems to me to ignore the duty imposed on managers of licensed premises to maintain order on their premises and the common law right, if not duty of citizens, to come to the assistance of a policeman endeavouring to make a legal arrest. I find both submissions entertaining but not entertainable. I refuse to entertain them.

Finally it is urged that the sentence of five months' imprisonment was a manifest excess. It is not clear from the District Court file how this five months' sentence was arrived at. The fact that it was not allotted to one specific offence or apportioned (as an accumulation) to the three would seem to constitute on the face of it an irregularity. The Magistrate had this to say in regard to this point -

> "In imposing a single sentence of 5 months imprisonment in respect of the three convictions, I am unable at this time to explain why separate sentences were not imposed. As I recall it was not the intention to impose any more than a total of 5 months imprisonment cumulative on all three convictions."

I think it suffices to say, that such irregularity as is disclosed may not constitute a substantial miscarriage of justice within the meaning of s.236 if the overall sentence not be excessive.

The sentence is stern (the maximum is six months' imprisonment <u>plus</u> $100 fine). But in his reasons for decision the Magistrate justifies it in the following terms:-

> "This was the third occasion within the preceding six months in which I had before me a Defendant, born in the Mount Hagen area, whose educational opportunities and advancement were generally far greater than his less fortunate villagers; on similar charges and in similar circumstances. The Defendant, a non-commissioned Officer in the Army, on leave, could be expected to show reasonable behaviour in relation to his position and this would certainly be expected by the community generally. Mount Hagen had had a reputation of volatility, violence and crime and it was to be hoped that the events of the preceding few months and intensified Police activity would have the desired effect. To a large extent it had; but when people such as the Defendant offer unjustified violence to a Policeman and other persons going about their lawful duty and business then it was considered (and still is by me) time that the Courts handed out a salutary lesson to persons who should know better. Far too often persons before the Courts have offered the excuse 'I was drunk,' I didn't know what I was doing. If I had not had too much to drink I would not have done it', or similar, in an attempt to justify their actions."

The learned Magistrate was particularly experienced in the conditions and needs of Mount Hagen. I feel unable to disagree with his assessment of the needs for salutory punishment and deterrence to this and other offenders. I dismiss the appeal on all grounds. I vary the Magistrate's order by entering a conviction on each of the counts in the information. On the count of unlawfully using violence towards Larry Fo'o I sentence the appellant to five months with hard labour. On each of the other counts of unlawfully using violence I sentence the appellant to one month with hard labour; the three sentences to be served concurrently.

Appeals No. 70 and No. 71

There appears to be no substance in the claim that the hearing of these two charges together rendered the procedure invalid. It was an appropriate thing to do, the appellant was in a position to agree to it; his rights were carefully explained to him and he agreed to their being heard together. Defence Counsel with quite artistic drollery submitted that the words used should have been considered neither insulting nor threatening. People he said, who undertake the position of bar and hotel managers should expect such language as part of every day's trade, and are not entitled to be insulted or offended or regard themselves as threatened thereby. I think the potential reality of the threat was proved by the violence exhibited immediately afterwards. As to the "insulting manner", I can only say by way of illustration that I myself was the recipient of similar language a very few yards from the scene described the same year - as I returned from an afternoon walk with my associate. A party of drunken trainee teachers treated me to the greeting "fucking white European bastard - what are you doing walking with a Niuginian." As the intended legal embodiment of the "reasonable man" I did not show irritation, but I considered those words were intended to insult me, and I regarded them as insulting me. However this is really by the bye. Doing the best I can now to estimate what the reasonable man would feel - I consider he, even if he were a bar manager (and I reject the suggestion that a bar manager is not to be considered a possibly reasonable man) would be entitled to be offended or insulted by them. The words are in any event per se insulting I consider.

In my view the entry of two convictions in respect of the words used is otiose. Once "threatening manner" had been made out "insulting manner" the lesser charge, should not then call for a conviction. Inasmuch as the words were all the run on of the one shouted stream of abuse; it was in any event I think, a clear breach of s.16 of the Criminal Code to impose punishment in respect of both "threatening manner" and "insulting manner".

The learned Magistrate imposed five months with hard labour on the "threatening manner" charge and directed that it be served cumulatively upon the sentence of five months for "using violence". I have had regard to the reasons expressed, and the necessities of law and order in Mount Hagen at the time. But I yet consider a total sentence of ten months' imprisonment for offences arising substantially out of one semi-drunken incident - a comparatively short one - involving a man of hitherto blameless record - whose conviction would entail dismissal from the Army; manifestly excessive.

As to Appeal 71 (insulting manner) I allow the appeal. I quash the conviction and sentence. In lieu of the Magistrate's order I substitute the finding:- "I find the offence proved. I enter no conviction."

Appeal 70 (threatening manner). I allow the appeal. I confirm the conviction. In lieu of the sentence imposed I substitute a sentence of eight weeks' imprisonment with hard labour to be served cumulatively with the sentence of five months imposed for the offences of "using violence" on the same date.

As the appellant has served a term of greater than the accumulation resulting from the cumulative effect of the orders as varied, he should not be returned to imprisonment.

Solicitor for the Respondent: B. Kidu, Crown Solicitor.

Solicitor for the Appellant : N.H. Pratt, Acting Public Solicitor.