PAPUA NEW GUINEA

IN THE NATIONAL COURT)
OF JUSTICE)

CORAM: PRENTICE,
Deputy C.J.

Monday,
30th March, 1976.

PETER ROY WIEDEN v. BOGUNU DI'I

(App. No. 141 of 1975 (NG))

Appeal from District Court - failure to take a view (though not asked for) NOT good ground of appeal; "unlawful hold", "unlawful use violence" discussed; dictum of Kelly, J. that "injury" required to establish "use of violence" (Secretary for Law for Benny Kisi v. Nash, Unreported No. 682) NOT followed - suspended sentence - period bond elapsed - no substantial miscarriage of justice.

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PORT MORESBY, NATIONAL CAPITAL DISTRICT

PRENTICE, Deputy C.J.

The appellant was convicted in the District Court Kokopo on the 25th August, 1975 of unlawfully laying hold of the respondent. The respondent was an agricultural labourer employed by the appellant. He claimed to have been misused on an occasion when he came to the appellant to make a complaint about his pay. The appellant was convicted and sentenced to two months' imprisonment with hard labour - the sentence being suspended upon his entering into a bond to be of good behaviour for six months.

As amended by consent, the grounds of appeal were that:-

(a) The verdict was against the evidence and weight of the evidence,

(b) the learned magistrate misdirected himself in that he failed to take a view of the scene of the alleged incident when the taking of such a view was relevant to the better understanding of the oral evidence,

(c) the penalty although suspended was inappropriate in the circumstances and too severe.

Should a view have been taken?

Under this ground it was argued the conviction was improper not only because no view

1976

Peter Roy Wieden

v.

Bogunu Di'i

Prentice, Deputy C.J.

was taken, but also because the appellant appearing in person, was not positively invited to say whether he thought a view should be taken.

In my understanding it has always been a matter for the tribunal of fact whether it desires to take a view. Counsel or parties may suggest that a view would be desirable. A judge may suggest to a jury that it might like to take a view. But if the tribunal decides it would not be helped by a view, that is an end of the matter. In other cases a judge in charge of a jury may decide that a view is inappropriate (R. v. Boxshall (1)) - though this no doubt, would be most unusual, if a jury expressed a wish to do so. The position at common law appears to have been enshrined in s.568 of our former Criminal Code, in the statement "The court may in any case, if it thinks fit, direct that the jury shall view any place or thing which the court thinks it desirable that they should see and may give any necessary directions for that purpose....."

The proposition that a tribunal should go out of its way to ask an unrepresented party whether it, the tribunal, should take a view, seems to me novel and untenable. In any event, in these proceedings, though both parties were unrepresented, the appellant was probably in the more advantageous position; for it appears from the magistrate's comments that the appellant as a European employer of labour has had occasion frequently to himself conduct cases in the District Court at Kokopo. In addition, the nature of the evidence given by the respondent and his witness, the cross-examination of the latter by the appellant, and the admissions of the appellant, were such as could have carried conviction in the magistrate's mind on the question of whether the independent witness, John Muru, had the opportunity to, and could see, what he claimed to have seen. In my opinion the learned magistrate would have been justified in refusing to take a view, if he had been asked to do so.

(1) 1956 Q.W.N. 45

Was unlawful holding established?

S.30(a) of the Police Offences Act New Guinea provides that a person who "unlawfully lays hold of, strikes or uses violence towards any person" commits an offence punishable with a fine of K100.00, six months' imprisonment, or both.

It was contended that, though a push was admitted, "laying hold" within the meaning of the section had not been established. While it was admitted that the learned magistrate could have treated the matter as a variance and have recharged the appellant with either "unlawful strike" or "unlawfully using violence"; it was submitted that it is not open to this court to substitute a verdict of guilt of either of these alternative charges under s.236(c) of the District Courts Act. It was further argued that a "push" did not in law amount to a "strike", and it was argued that there would have been no "unlawful use of violence" unless bodily harm had resulted. The last-mentioned argument was based on the approval given by Kelly, J. to the O.E. Dictionary definition of "violence" - "the exercise of physical force so as to inflict injury or damage to persons or property", and his wedding of it to the phrase in s.30(a), (Secretary for Law for Benny Kisi v. Nash, (?). In as much as His Honour in that case seems to imply that to constitute "unlawful use of violence" infliction of injury must be caused (which I would take to equate the offence with 'assault occasioning bodily harm', s.349 old Criminal Code) I would, with respect, disagree with His Honour's conclusion. I can imagine many uses of violence, e.g. presentation of a spear against a person's body, which I consider might come within the section without causing "injury".

However, these questions seem to me to be academic in this case. The complainant's evidence was that the appellant grabbed him by the jaw and threw him to the ground. The witness John Muru swore that the appellant held the complainant by the jaw and threw him to the ground; and again in cross-examination he said, "I came further down

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(2) Unreported No. 682

and stood where the tree was and saw you held (sic) the complainant and threw him on the ground". No question was put to this witness to suggest a "push" rather than a grabbing. Nor was any such question put to the complainant.

In his own evidence the appellant said "What Bogunu said was true during that time he said I been to the court .....I did (sic) admit Pus(h)ing him but I doubt he fell down. I did not strike him....." The learned magistrate accepted the evidence of the complainant and his witness and was I think clearly entitled to come to the conclusion as he did that there had been a "laying hold" and that it was illegal.

On both the above grounds the appeal should be dismissed.

Severity of Sentence

Although the sentence of imprisonment was suspended it was argued that a sentence of two months' imprisonment was, in the circumstances, too severe. I do not find myself impressed by the argument in support of this ground. The learned magistrate who presided at this trial is experienced and has been at Kokopo some time. The appellant was known to him. The magistrate was familiar with the somewhat inflamatory situation potentially existing in the area among Highland labourers. Although I would probably not myself have imposed such a punishment, I do not consider that a suspended sentence of two months' imprisonment would have been so excessive as to call for remedy.

But Mr. Bredmeyer, appearing for the respondent, has very properly drawn to my attention a factor which he considers apparently did not occur to appellant's counsel; and submits that in purporting to suspend the sentence under s.656 of the old Code the magistrate was exceeding his powers. It was not a point that had occurred previously to me either. Mr. Bredmeyer contends that the only powers a magistrate has to exercise on sentence, are those to be found either in s.19 of the Code or in the special provisions of the District Courts Act and Local Courts Act. The specific provision

of s.36 of the Code that the provisions of the chapter in which it appears (Chapter V), apply to all offences against statutory laws has the effect (on the inclusio unius exclusio alterius principle) it was submitted, that provisions in other chapters of the Code do not so apply to all offences including those dealt with summarily.

It appears to me that the submission is basically unsound. Many of the provisions in the Code appearing in chapters other than Chapter V, would by their terms, I think, be applicable in all courts. I instance, allocutus (s.605), evidence of previous conviction (s.635), verdict on a Sunday (s.629), presence of the accused (s.617), defence by counsel (s.616), offences involving circumstances of aggravation (s.575), provisions as to indictments made applicable to summary convictions of indictable offences (s.574).

And indeed s.656 by its terms purports to give powers to courts of summary jurisdiction in that it provides "then, if in the opinion of the court or justices sentence of imprisonment.....(2) the court may, if it thinks fit, suspend the execution of the sentence upon the conviction....." And sub-section (5) provides that "the court or justices may.....order....." (restitution); and "the court or justices may require...." (security).

I am satisfied that the court had jurisdiction to make the order which it did.

I would add that it would be my opinion that even if the sentence of two months' imprisonment as suspended, was so severe as to have called for correction; the period of the recognizance entered into, namely, six months, has expired; so that no substantial miscarriage of justice has occurred (s.236(2) District Courts Act).

The appeal is dismissed. The conviction and sentence are confirmed.

Solicitor for the Appellant: F.N. Warner Shand
Counsel: M. Wilson
Solicitor for the Respondent: K.B. Egan, A/Public Prosecutor
Counsel : T.R. Bredmeyer