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

The King

v.

Jeffrey Kenneth GILL

SUMMING UP

Phillips C.J.

On 31/12/47, accused (a Government Patrol Officer) at KAIAPIT, held investigation into marital affairs of IATSA, whose husband (BOBA) she wished to leave and had left, she said, because of his beatings: she wanted PORPUA (whom she had wished to wed, but had not, because overborne by parental arrangements). She admitted she had committed adultery with PORPUA. At his investigation, Gill said it was wrong for IATSA to leave her husband. He sent the parties away. After that he sent for IATSA and PORPUA. He said that they two had been committing adultery and were set on marriage, and, according to the witness Angian, accused also said either "All right. You must fornicate first in the open and in public and be shamed. You can then be man and wife," or "All right. You can be man and wife. You must fornicate in the open and in public and be shamed." On one construction of the evidence, and bearing in mind that Gill would presumably be sitting as a Court for Native Affairs, it would be open to find that he decreed a divorce or told IATSA she was divorced: but the evidence as a whole (including that just quoted) did not go so far as to establish that IATSA and PORPUA were then and there declared by Gill to be man and wife. Gill said they could become man and wife and that is not the same as declaring them married. In any case, Gill was a Patrol Officer and had no power to marry natives; nor could such a statement by him be deemed marriage by native custom, without something more. On the evidence given, I can only find that IATSA and PORPUA were not man and wife at that particular time, though the evidence shows they wished to become man and wife.

Evidence, undisputed, that Gill sent a policeboy to tell IATSA to strip naked and come back to Gill's office naked; and that Gill sent ANGIAN to get PORPUA and bring him to the same place. Gill, through policeboys, told the woman to lie down on the grass in front of the Government office and told PORPUA to strip and fornicate with her. She protested but obeyed Gill because afraid of him. PORPUA stripped and lay on her because he was afraid of Gill. But PORPUA did not at first penetrate. Goaded on by accused and by policeboys under accused's orders, PORPUA penetrated, but was passive. To accelerate matters, Gill had plank put under woman's buttocks: then had a glowing ember put under her buttocks: he also prodded PORPUA's buttocks with a stick and threw lighted matches on PORPUA's back. All this in the presence of native policeboys and a crowd of visiting natives. He moved couple to shade of tree, waited till ejaculation occurred, then left. The native couple went and washed themselves. After that they were allotted a house on the Station — (incidentally, PORPUA was an employee on the Government Station).

Now does this evidence support charge?

Prosecution says it does. Defence, on the other hand, says it does not suffice to prove "procuration."

Prosecution has argued that "procure" means "to obtain by any manes."

Defence has strongly contended that to "procure" within meaning of Section, the procureur must act as agent for a man who wants the woman for his own purposes or gratification: further, that there can be no "procuring" in a case where the woman and the man about to have carnal knowledge of her are man and wife, or are lovers who have and sexual relations, (as here).

I see no force in "agency" argument, because, e.g. a procurer might be the principal throughout and procure a woman to be carnally known by one of his own servants and for the procurer's own gratification. The intent we are concerned with here is that of alleged procurer, not that of man who had the woman carnally.

As to the man-and-wife and lover-and-lover argument — this, I think, rests on some notion that prior sexual relations between such a couple make

it impossible to have procuration in regard to that same couple. In my opinion, this does not follow. It may be noted that s. 218, as amended, no longer says "unlawful carnal knowledge" but says "carnal knowledge."

Mr. White had to face fact that s. 218, in its original form, contained the words "prostitute" or woman "of known immoral character," and that these words were dropped from amended s. 218. He contended that this was because framers of amendment had in mind:

(a) that there should be no discrimination between white and native woman: also that Administration has a strict duty to protect white and native woman equally: and

(b) the difference in morals and moral standards of whites and natives - also between those of natives of different areas (many unknown to framers of new section 218 when they framed it): these differences, Mr. White submitted, would lead framers to think of difficulty, in the case of some native communities, of proving that a native woman was of "known immoral character."

But this rests on fallacy. The Code does not take into account different standards of morality: it imposes one standard (our standard) on non-natives and natives alike: (e.g. "provocation," etc.).

Compare S. 218 (also S. 217 on a similar subject matter) as they were before their amendment in 1936 and as they are since being amended. The words relating to common prostitutes and women of known immoral character have been dropped: "unlawful carnal knowledge" has become "carnal knowledge" simply: and the punishments greatly increased. These changes seem, to me, to be significant and to show that the protection given to women was intentionally widened. But there is a limitation, nevertheless, to the protection given, and that, I think, is to be found in the word "procure."

I give a meaning to that word, as used in S. 218 (as amended), which lies between that put by Prosecution and that put by Defence. There is a difference, for instance between "procuring" inanimate things and "procuring" animate beings or persons. Inanimate things have no say in the matter; but in the case of a human being someone may be trying to "procure," the procurer has to reckon with the will and wishes of that human being. It seems to me to follow that if a woman, at the instance of another person, comes willingly,

she can hardly be said to be "procured," but aliter, if she is not willing: (see Archbold, 30th Edition, pages 1053 1054, citing R. v. Christian, 23 Cox, 544). Where the woman and man concerned are man and wife or lovers on intimate sexual relations, the jury, before convicting, would have to take care to be satisfied beyond all reasonable doubt that the woman was unwilling: if the jury considered she needed no procuring and acted of her own free will, there would be no "procuring" within the section, in my opinion. Of course, in a case where the woman is a prostitute or woman of known immoral character the jury would also have to look closely at the evidence and before convicting be sure beyond all reasonable doubt that the woman was not willing: normally, there would be more likelihood of a woman of such a type to be "willing" for sexual intercourse than a woman who had led a virtuous life, and the jury would have to take that into account in deciding whether or not the woman had been willing to be carnally known and had acted of her own free will. Similarly, where the woman and the man are man and wife or are lovers on most intimate terms, an act of carnal intercourse between them might well be something the woman was more inclined to than one between herself and another man altogether (a complete stranger to her). But even if such prior sexual relations had existed between the woman and the man, it would still be possible (I think) for circumstances to occur in which an act of sexual intercourse might take place between them which the woman was opposed to or was forced or tricked into against her will: (e.g. married woman living apart from her husband). Here, IATSA and PORPUA were admittedly lovers who had had sexual relations. But their act of sexual intercourse in public was - according to the evidence for the prosecution (which has not been challenged or contradicted by evidence for the Defence or by the Defence) - one that IATSA did not want and one she only submitted to through fear of the Government officer (accused). She was, according to the evidence, brought by accused's orders to the place under police escort and had already been told by a native police constable (at accused's orders) to strip. She was ordered by accused to submit to carnal knowledge of her by PORPUA. She protested, but submitted through fear of accused. I consider that was a "procuring." (I may add, that had she been PORPUA's wife at that moment - though I have found as a fact that she was not - and had the same circumstances otherwise obtained and the same

procedure been adopted as that alleged against accused — I think that would also have been a "procuring").

The evidence amply shows "abuse of authority" and also amply shows "carnal knowledge" as defined in the Queensland Criminal Code.

As a jury, I am satisfied beyond all reasonable doubt that the accused "procured" IATSA by abuse of authority with intent that she should be carnally known by PORPUA and that the charge has been proved.

Accordingly, I find accused 'Guilty' of the charge."

SENTENCE.

In sentencing accused, the Court read the following:-

Accused: You have been found 'Guilty' of having, on or about 31/12/1947 at KAIAPIT in this Territory, procured by abuse of authority the native woman, IATSA, with intent that another person, the male native PORPUA, might have carnal knowledge of her. That offence is one against the provisions of S. 218 of the Queensland Criminal Code (as adopted and amended for the Territory of New Guinea) and anyone guilty of it is liable, under that Section, to imprisonment for ten years.

The facts of this case are clear and not disputed. On the day in question you were a Patrol Officer of the Administration and Officer-in-Charge of the Government Police Post at KAIAPIT in the MARKHAM Valley. Early that morning you investigated a native matter — the marital problems of the woman IATSA and her husband BOBA. IATSA had run away from BOBA because she said, he often beat her: (he had, as you knew, beaten her only the day before and been put in prison for that by you). IATSA wished to marry PORPUA, the man she had always wanted to marry but had not, because parental authority made her marry BOBA. She admitted that she had had sexual relations with PORPUA, that is, that she had committed adultery. You first said it was not right that she should leave her husband. Later you said that as she and PORPUA had already been committing adultery and as those two were bent on marrying, they could marry but first must commit sexual intercourse in public and so be publicly shamed — obviously, made ashamed of their

adultery. You directed a native police constable to tell IATSA to take off her grass skirt and come before your office stark naked. You sent another messenger to bring PORPUA to the grass in front of your office and you ordered PORPUA to strip naked. You were present, a number of native police were present and a number of natives visiting your station were eye witnesses of what followed. You ordered IATSA, through your police, to lie down on the grass and then ordered PORPUA, through your police, to have intercourse with her. The woman protested her shame and was unwilling as was PORPUA, but presently both of them, through fear of you, the representative of "the Government" (to natives the all powerful Government) obeyed. Though PORPUA lay on IATSA he deliberately did not at first effect penetration. That led you and your police to goad him until he did insert his penis. Even then he tried to be passive. You then ordered your native cook DIDI to get a plank and push it under the woman's buttocks, elevating them. He obeyed your orders. PORPUA was still not active enough so you told DIDI to get a live ember or firestick (which he did get from the kitchen) and put it under IATSA's buttocks and between them and the ground. This DIDI did. This ordeal by fire did not produce the acceleration of sexual intercourse you desired, so you, the representative of the Government, dropped one lighted match at least on PORPUA's back and then prodded his buttocks with a cane. It was hot in the sun where you and the couple were and you ordered them to move a little distance to the shade of a tree and continue intercourse there. At length the man ejaculated, and you left. They, wretched creatures, went away to bathe and cleanse themselves. Dreadful though that narrative is, you have not attempted to deny any part of it. Look at your actions how you will, they may only be described as sadistic, diabolically so, and thoroughly vicious. And you are only 25.

In mitigation or by way of pleading for leniency, you have told the Court the story of your life. It appears that your parents separated because of your father's cruelty when you were 9. You remained with your mother and attended a public school in Melbourne until, against your wish, you were taken away at 15 by your father's direction and put into a softgoods warehouse. To get away from there and your father, and your father's atmosphere (which you say you "loathed and hated") you went jackerooing and worked on stations in

N.S.W. until you enlisted in the A.I.F. in June, 1940, at the age of 17. Through no fault of your own, you saw no real active service but were kept more or less inactive in Australia throughout the war: enforced inaction of that kind is to many people irritating and demoralising. You were honourably discharged from the Forces in January, 1946 but had not found a job by August of that year. Then however you were accepted for a course at the School of Pacific Administration and came on to this Territory as an officer of the Administration in February, 1947 — roughly a year ago. You came to LAE and you were sent on patrols — the first in the company of another officer, later alone. Ultimately you were sent to KAIAPIT, with instructions to rebuild that station. You carried out those instructions and, you tell us, took pride in your work, worked incessantly, and did your best. Just three weeks after you had committed this abominable offence you went to Brisbane to marry, marrying there on the 28/1/48. I do not know whether you thought that no report of your offence would reach the eyes or ear of higher authority. It seems almost incredible that any adult person should lack the degree of intelligence, or imagination, that would be sufficient to warn him that such an offence "would out," sooner or later. However, you did marry and you brought your bride to the Territory on Sunday 15/2/48, on which day you were arrested for your offence. You tell us you have had no previous convictions.

You are young, new to the Territory, and can have had little experience of natives. Perhaps you do not realise that the enormity and atrociousness of your offence have not only fouled your reputation, but that of the Administration and of your race. What effects and what repercussions may occur among the MARKHAM natives as the byproducts of your conduct, it is not yet possible to estimate. But I may tell you that the public "shaming" of natives is a dangerous device, and it is not unknown for an officer of this Territory, who has publicly "shamed" a native in a far less humiliating manner than you have, to be done to death by his victim. The misery your actions must have brought upon your young wife is pitiable — but that is a tragedy that you alone have brought about and that you should have had enough wit to foresee and the honour to avoid.

You must be punished for what you have done, and the sentence you

will receive must be one that will convince you and anyone else who chooses to do as you have done, that the law will protect the rights and liberties of the natives as well as those of other residents of this Territory and will visit dire retribution on anyone who commits offences as vile and atrocious as that which you have committed. Your offence merits most drastic punishment, but because of your youth and inexperience, I am not going to impose upon you the maximum penalty the Code allows, but something less/ I sentence you to imprisonment for five years.

Sentence:- Imprisonment for 5 years (without hard labour).

F. B. PHILLIPS.

C.J.