COPY/

IN THE MATTER of the Native Administration Ordinance 1921-1951 of the Territory of New Guinea

and

IN THE MATTER of an Appeal by STANISLAUS TOBOROMILAT against a conviction by the Court for Native Affairs, Talasea.

REASONS FOR JUDGMENT ON APPEAL DELIVERED BY HIS HONOUR THE CHIEF JUDGE MR. JUSTICE F. B. PHILLIPS ON TUESDAY, 24TH NOVEMBER, 1953.

This is an appeal by Stanislaus Toboromilat against his conviction and sentence of four months' imprisonment, for adultery, by the Court for Native Affairs at Talasea, New Guinea, on 26th May, 1953. As the Entry of Appeal, filed herein on the 23rd June last, shows, this appeal was initiated on the following grounds:-

"(a) that the conviction was against the evidence and the weight of evidence;

(b) that the Appellant, although he applied so to do, was not allowed to call his wife as a witness in his defence;

(c) that the proceedings were irregular in that two Magistrates participated consecutively in the hearing;

(d) that the Appellant was unable to call material witnesses in his defence."

The Entry of Appeal was "supported" by an affidavit, also filed on the 23rd June, 1953, that had been sworn on the 18th June, 1953, by Mr. Dudley Fearnside Jones, barrister and solicitor of Rabaul: he deposed therein that he was informed and verily believed "that at the hearing at which the said appellant was convicted he applied for permission to call his wife as a witness and that such permission was refused by the Magistrate"; ..... "that the appellant who was not represented at the hearing was unable to call certain witnesses who could have given material evidence in his defence"; and "that two Magistrates consecutively participated in the hearing at which the said appellant was convicted." As Mr. Jones, (notwithstanding the provisions of Order 41, rule 3), did not, in that affidavit, disclose the sources of his information or the grounds of his belief, it cannot be described as a helpful document.

The certified copy proceedings that have been sent in and are on the file purport to be a copy of the proceedings at "the Court for Native Affairs holden at Talasea" (the) 26th day of May, 1953, before "E. S. Sharp;

M.C.N.A." In the heading of those proceedings the defendant's name is given as "Stanis" and the proceedings themselves contain a statement by "Stanis". In the certified true copy of the minute of conviction attached to the copy proceedings, however, the name "Stanis Toborimilat" appears: that minute, which, by the way, is dated 27th May, 1953, reads:- "Case Number 54 - "52/53. Stanis Toborimilat guilty of the offence with which he stands charged, convicted, and adjudged to be imprisoned in the gaol at Talasea, and there to be kept at hard labour for the term of Four Months." In the Entry of Appeal, as already noted, the name of the appellant is given as "Stanislaus Toboromilat."

It seems to have been assumed by everyone concerned in this appeal that the names "Stanis", "Stanis Toborimilat", and "Stanislaus Toboromilat" all relate to one and the same person - the present appellant: and this judgment is written on the basis that their assumption is correct.

The charge preferred against the appellant at the lower Court is recorded in the copy Notes of Proceedings as follows:- "Adultery with married female native Nuli of Bamba Village married to Meta, thereby contravening the provisions of regulation 84(2) of the Native Administration Regulations 1924-40". (Actually, these Regulations have been repeatedly amended since 1940, but Regulation 84(2) was not affected by those amendments).

Regulation 84(2) appears in Part VI of the Native Administration Regulations of New Guinea and Part VI is headed - "Offences and Forbidden Acts." Further, in Regulation 84(2) itself, a "penalty" (a maximum penalty) of "Three pounds or imprisonment for six months, or both" is prescribed. There is no doubt whatever therefore that adultery, for the purposes of Regulation 84(2) is made a criminal offence. That fact must not be lost sight of, especially as very important consequences flow from it: for example - adultery, charged under Regulation 84(2), being a criminal offence, must be proved by the prosecution beyond all reasonable doubt.

Mr. Kirke, learned Counsel for the appellant, has argued this appeal on the first ground of appeal only. He informed the Court that he was still not in a position to offer evidence in support of grounds of appeal (b), (c) and (d). As the appellant has had the conduct of this appeal for months past (the entry of appeal being filed as long ago as June last) and as a special adjournment was granted on 2nd November last at the request of the appellant for the purpose of getting further evidence, this Court was not prepared to abet further delay by granting a further adjournment to seek further evidence. Consequently, Mr. Kirke's argument was limited to the first ground of appeal.

In regard to that ground of appeal, (which was that the appellant's "conviction was against the evidence and the weight of evidence"), Mr. Kirke pointed out that there were only two witnesses for the prosecution at the lower Court - Nuli, the woman with whom appellant was alleged to have committed the adultery charged, and Bio her uncle.

As to Bio's evidence, this included Bio's account of a conversation that he had had with Nuli, several days at least after the date of the alleged adultery; he said that Nuli stated, after being questioned by him, that she had committed the alleged adultery with the appellant, but that she had committed it unwillingly. There was nothing in the proceedings to show that the appellant was present when Bio and Nuli had that conversation. Mr. Kirke contended that Bio's evidence of what Nuli had then told him was inadmissible as "hearsay"; and further that what Nuli may have told her uncle several days after the event could not be regarded as a "fresh complaint", i.e. the "fresh complaint" by a woman of a sexual offence committed upon her that falls within the well-known exception to the "hearsay" rule. Further, Mr. Kirke contended, even if what Nuli told Bio could conceivably be regarded as a "fresh complaint", it was no evidence of its own truth, but at most would only go to show that what she may have told Bio was consistent with what she said at the lower Court. In my opinion, Mr. Kirke's contentions as to that evidence of Bio's are sound: clearly Bio's evidence about what Nuli told him days after the event and not in the presence of the appellant was inadmissible as "hearsay", and what she reputedly told Bio was far too belated to be admissible as a "fresh complaint". Incidentally, even if Nuli admitted to her uncle Bio, in the absence of appellant, that she had had sexual intercourse with the appellant some days earlier, it is elementary law that such an admission by her could in no way bind the appellant.

As to Nuli's evidence, Mr. Kirke submitted that her evidence against the appellant was not corroborated by any other evidence given at the lower Court, and that there was grave danger in accepting as true, the uncorroborated testimony of a woman against a man charged with having committed a sexual offence upon her (or with her). There was nothing, he said, in the copy Notes of Proceedings to show that the Magistrate at the lower Court appreciated that grave danger or was aware of it. It is not possible to decide, on the material available to me, whether or not the Magistrate at Talasea was aware that it is a rule of practice, though not a rule of law, not to convict on the uncorroborated testimony of the woman, in sexual cases. I see nothing about it in the copy notes of proceedings -

and no reasons whatever for the Magistrate's decision are recorded in those notes. This Court has said before, more than once, that Magistrates, like all judicial officers, have a duty to give and record reasons for their decisions (except perhaps in plain cases, such as where the accused pleads "Guilty"). This does not mean that the reasons should be "long and elaborate": a "concise statement" of them is sufficient and is something that an appellate Court should have - for reasons that should surely be obvious.

The reason why it is a rule of practice not to convict, in sexual cases, unless the woman's evidence is corroborated, is simply this:- Experence has shown that allegations of sexual misbehaviour are very easy to make but may be very difficult (however innocent the person accused may be) to refute.

I do not forget that the lower Court has had the advantage of seeing and hearing the witnesses give evidence, whereas I have not had that advantage. Nevertheless, I think that a perusal of the copy Notes of Proceedings shows that the circumstances of this case were such that corroboration of Nuli's story was desirable, to say the very least. Her story was that she carried the appellant's child to Bitokara Mission one Wednesday and stayed the night there, at the house of the appellant and Martina, his wife. Next morning (Thursday), after a meal, the appellant left that house and a little later Nuli left it to go back to her village of Bamba. En route, she said, she placed some taro she was carrying at the foot of a Ficus tree, because she "wanted to go in the bush and relieve (herself)." Continuing her evidence she said:- "As I entered the bush I saw Stanis standing there. I saw him and turned round to go back to the main road. He held hold of my hand and said to me, 'Come on with me.' He removed my laplap and his as well. He put me on the ground and had sexual intercourse with me. He stood up and went back to Bitokara. I then stood up and went back to pick up the taro, etc. that I had left on the road and went back to Bamba." After returning to Bamba, she said, she went to a coconut grove and worked there with other Bamba women but apparently told no one what had happened. There is no reference, in the copy notes of her evidence, to her making any complaint to her husband - if he was about. The notes somewhat idiomatically record her as having said:- "I never told anyone then, as Stanis threatened me if I did." She is also recorded in the notes as having said that it was not till "Monday" - (what Monday is not clear, but presumably it was the following Monday) - that Martina, appellant's wife, struck her and asked her what she and the appellant had been doing. Nuli did not reply to that question, but (she said) went to Bamba, where, in answer to her uncle Bio's questions, she spoke of what had happened between herself and the appellant: that, as far

as can be gathered from the copy Notes of Proceedings, appears to have been the first occasion she spoke to anyone about what had happened.

Although Mr. Kirke did not refer to it, I think there is another possible aspect of Nuli's evidence that made its corroboration desirable, and even necessary; and that is, the possibility that it was the evidence of an accomplice in the offence charged against the appellant. If Nuli was in fact a consenting party to the adultery charged - (an offence under the Native Administration Regulations), then she was an accomplice, and the appellant could not rightly be convicted on her uncorroborated testimony because, as Section 632 of the Queensland Criminal Code, as adopted for New Guinea, provides:- "A person cannot be convicted of an offence on the uncorroborated testimony of an accomplice or accomplices." Whether this possible aspect of the matter occurred to the Magistrate at the lower Court it is impossible to say from the copy Notes. But I should think that it is plain that Nuli's evidence, as therein recorded, was such as should fairly have given cause to a jury - or to a Magistrate as jury - either to consider or at any rate entertain a serious doubt whether she was not an accomplice: if there was room for doubt about that, it was a doubt of which the accused should have been given the benefit. It seems a strange coincidence that the appellant should have happened to be in the bush that morning, off the main road, and in the very part of the bush that Nuli, on her way back to her own village, should choose to go to for the purpose of relieving herself; but, of course, strange coincidences have been known to happen. In Nuli's recorded account of what then happened, there is no suggestion that she screamed or struggled or resisted at all, though the main road could not have been far away; and afterwards she complained to no-one, apparently, for several days (and then only in answer to a specific question by her uncle) because (she said) of some vague "threat" by the appellant of which no details were given. In my opinion, it was open to an honest jury to find that she was an accomplice whose evidence was insufficient to convict the appellant unless corroborated.

It occurs to me that perhaps the Magistrate was of the opinion that Nuli's evidence <u>was</u> corroborated by other evidence given at the lower Court. The fact that he allowed inadmissible evidence to be given by Bio suggests that the Magistrate may have thought that Bio's evidence corroborated Nuli's. If the Magistrate thought that, he was grievously in error about what constitutes "corroboration" in law. Corroboration in law is "some independent testimony which affects the accused by tending to connect him with the offence; that is, evidence, direct or circumstantial, which confirms in some material particular not only the evidence given by" (e.g.) "an accomplice that the offence was committed, but also the evidence

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that the accused committed it." (See R. v. Baskerville: (1916) 2 K.B. 658). "Corroboration", therefore, must be by "independent testimony": but what independent testimony was there, in this case, corroborating Nuli's allegations of adultery against the appellant? Bio's testimony about what he said Nuli told him, several days after the event and in the absence of the appellant, is not "independent testimony", but a mere repetition of her statement: if that were "corroboration" it would mean that Nuli could "corroborate" herself by repeating her story to others, and that is certainly not the law. As Bio was the only other witness for the prosecution, it is obvious that Nuli's evidence was not corroborated by any other evidence given for the prosecution. But did the accused say anything in his defence that could fairly be regarded as corroboration of Nuli's evidence? It would appear, from the copy Notes of Proceedings, that after Nuli and Bio had given evidence, the accused made a statement. Regulation 31 of the Native Administration Regulations provides that a defendant cannot be compelled to give evidence, except in civil cases. It is the duty of the Court to explain that to an accused. The copy Notes do not tell us whether or not this was done, but it would appear from those Notes that the appellant wished to speak, because his statement begins:- "I wish to tell the Court that I have never been before a Court before and I have never had any trouble with a woman." His statement was not a long one and portions of it consist of protests that such a charge should be laid against him, and of assertions of his good character. Mr. Kirke said in argument that that statement amounted to a denial of the charge against him, even if the appellant did not make that denial in express words. The appellant's statement was, in part, made in an oblique way - a not uncommon characteristic of native statements: but as the appellant, at the outset of the proceedings at the lower Court, had pleaded "Not Guilty"; as he denied in his statement there that he had ever had trouble with a woman; and as he concluded his statement by saying:- "I also will not admit any other female into my house so that they can accuse me wrongfully again" - an obvious though indirect reference to the fact that Nuli had stayed at the house of the appellant and his wife on the Wednesday night and to its sequel) - his statement seems to me to have been intended by him to be, and to have amounted to, a denial of the charge against him. I do not see how that statement of his could rightly be held to corroborate Nuli's evidence against him.

It therefore comes to this, that Nuli's evidence against the appellant was not, in my opinion, corroborated by any other evidence recorded in the copy Notes of Proceedings. Those Notes are the only material before me and they purport to be a true copy of the record of the proceedings at the lower Court at Talasea, and of the evidence given there - on which evidence and on which evidence alone that Court was bound to arrive

at its decision.

How, on the evidence that Nuli is recorded as having given, entirely uncorroborated as it was, and in the face of the appellant's denial, the Magistrate could rightly find (if he did so find) that the charge against the appellant had been proved beyond all reasonable doubt, I do not understand. Nor do I understand how, on the evidence that Nuli herself is recorded as having given, the Magistrate could rightly or reasonably find (if he did so find) that he was satisfied, beyond all reasonable doubt, that she was not an accomplice in the offence charged against the appellant. Of course, as I have already said, I am in the difficulty that I do not know what reasons may have governed the lower Court in arriving at the its decision, for they have not been disclosed to me.

For the reasons I have given, I think that this appeal must succeed and that the appellant's conviction and sentence should be quashed: and I do so order.

(Sgd.) Phillips C.J.