

SUPREME COURT OF THE TERRITORY OF PAPUA AND NEW GUINEA

MICHAEL JAMES LEAHY

Appellant

- and -

ROBERT BAKER MONFRIES

Respondent

The Supreme Court (The Acting Chief Justice), as Court of Appeal
from District Court holden at Wau 13th March 1956.

Criminal offence - proof of - need for court to be
satisfied to the required extent on all elements of
the offence and none can be overlooked.

Penalty - only those penalties which the court is
empowered to impose can be imposed.

Respondent built a gate at the point where a public road
traverses his boundary fence. Appellant is a stock-owner in
the neighbourhood. On 6th May, 1955 the gate was found broken
off its hinges and later A. was charged with wilful and malicious
damage. On the trial evidence was given that A., seeking some of
his cattle, arrived at the gate where he was told that his own
servant had chased the cattle in a certain direction. A. opened
the gate and when he pushed it away from him the gate swung and
broke off its hinges and fell to the ground. Other evidence was
produced to show the gate had functioned normally as a gate in
the past. The Magistrate (G. F. Hall, S.M.) found :-

"That the gate was in fact wilfully destroyed by Mr.
Leahy, and I order Mr. Leahy to repair the gate in
a good workmanlike manner".

HELD :

- (i) where there are two elements of an offence, viz.
"wilfully and maliciously", it is incumbent on
the court to address itself to each of them
equally, and not to deal with one and ignore the
other;
- (ii) where there is power to remit a case back to the
magistrates the appeal court should not venture
to determine a matter which the magistrates have
overlooked, but should remit it back;
- (iii) where a court has now power to order a particular
thing in the nature of a penalty, i.e. an order
to repair, the penalty is incorrect.

Cases referred to :

Metropolitan Transit Commissioners -v- Muir, ex parte Muir (1903) St. R. Qd. 326; 12 Aust. Dig. 677.

Newell v. Birt & Co. Ltd. (1915) St. R. Qd. 77.

GORE, A.C.J.

J U D G M E N T.

The complaint in this matter was laid under Section 44(1) of the Police Offences Ordinance 1925-1955 (New Guinea) which reads as follows:-

"Any person who wilfully and maliciously commits any damage, injury, or spoil to or upon any real or personal property whatsoever, whether public or private, shall be guilty of an offence.

Penalty: Ten pounds or imprisonment for one month, and, in addition, such compensation to the person aggrieved as the Court thinks just."

It will be seen that there are two elements of the (2) offence, viz, "wilfully and maliciously," and it was incumbent on the Magistrate to find as a fact that the damage to the gate was caused by the defendant both wilfully and maliciously. His finding was only as to the element "wilfully" and he does not appear to have directed his mind properly to the finding of fact according to the inferences to be drawn from the evidence adduced in relation to the element "maliciously." This Court should not venture to determine the matter where there is power to remit to the Magistrate for determination. The power to remit is given by Section 234c of the District Courts Ordinance 1924-1952. If there had been no power to remit, then this Court would of necessity have dealt with the subject to a finality (vide Metropolitan Transit Commissioners v. Muir Ex parte Muir 1903 St. R. Qd. page 326 at page 330).

It does not seem that the Magistrate addressed his (3)
mind to the determination of the facts in relation to the element
maliciously. The proper course is to send the case back to the
Magistrate to be dealt with by him "according to his view of the
facts proved and the inferences of fact which commend themselves
to his judgment upon the evidence which may be presented to him."
(Vide Newell v. Birt & Co. Ltd. 1915 St. R. Queensland page 77).
He is directed to take further evidence for this purpose.

The Section clearly sets out the penalty, and I do (4)
not know from what authority the Magistrate derived the power to
order the defendant to repair the damage as a penalty. It was an
incorrect penalty.

Consideration of the costs of this appeal and in the (5)
Court below to abide the event.

Published By P. J. Quinlivan,
Barrister-at-Law, from material
made available by the trial Judge
and the Supreme Court Registry.