RULING OF CHIEF JUSTICE (PHILLIPS C.J.) ON SUBMISSION OF "NO CASE" - GIVEN ON MONDAY 13TH FEBRUARY 1956.

Mr. Kirke, learned Counsel for the Defence, has submitted that there is no case to go to the jury and he has based that submission on two grounds.

First, he has contended that, because of the proviso in Section 8 of the White Women's Protection Ordinance 1926-1934 of the Territory of Papua, the accused should never have been charged as he has been charged under the present amended indictment - that is to say, with a charge of attempted rape under the Criminal Code of Queensland(adopted). Mr.Kirke has raised this point somewhat late in the day and I think it might properly have been raised at the outset of this trial - see Section 596 (et seq. of the Criminal Code). However,the Crown took no objection on this scroe and I propose toconsider the point.

The White Women's Protection Ordinance is concerned with certain specified sexual offences against women and girls described in that Ordinance as "European"; and in Section 8 of that Ordinance it is provided, in effect, that a person who commits any of those specified sexual offences against such a "European" woman or girl"shall be charged" under that Ordinance and not under the Criminal Code. Punishments prescribed under that Ordinance are much more drastic than those prescribed under the Criminal Code for corresponding offences: e.g. attempted rape is, under Section 349 of the Criminal Code, punishable with up to fourteen years' imprisonment with hard labour, with or without whipping, whereas attempted rape on a "European woman or girl" is, under Section 3 of the White Women's Protection Ordinance, punishable with death: again, e.g., indecent assault on a female is punishable under the Criminal Code with two years' imprisonment with hard labour with or without whipping, but is punishable under the Ordinance with imprisonment with hard labour for life with or without whipping.

In a criminal case (apart from some exceptional ones that are not relevant here) the Crown has the onus of proving, beyond all reasonable doubt, each and every element of the offence charged. It follows that, in a prosecution under the White Women's Protection Ordinance,one of the elements that the Crown has to establish beyond all reasonable doubt is, that the prosecutrix comes within the description of "a European woman or girl". Indeed that is an element of the highest importance because it founds a prosecution under that Ordinance: if that element is not proved beyond reasonable doubt, the charge under that Ordinance must fail and the accused must be acquitted of that charge,(although it is quite possible that he may be liable to further prosecution under the provisions of the Criminal Code).

The question therefore arises:- What is the meaning of the word "European" as used in the White Women's Protection Ordinance - e.g. in the phrase "European woman or girl?" Strangely enough, that Ordinance does not define "European" (perhaps the most important word in the Ordinance), and learned Counsel tell me that they have not been able to find a definition of the "European" in other Papuan legislation. I have not come across one either but I see that in The Jury Ordinance of 1907, Sections 1 and 2, the words "of European descent" are used and that in Section 2 it is provided that, for the purposes of Section 1 and 2, "no person shall be deemed of European descent who is partly of European descent and partly of descent other than European". But The Jury Ordinance does not define the word "European" itself.

It seems reasonable to assume that the legislating authority, when about to pass the White Women's Protection Ordinance in 1926, was aware that the words "of European descent" had been used in The Jury Ordinance nineteen years before. But the words, "of European descent", were not introduced into the White Women's Protection Ordinance: the

word "European" was used, and it was not defined.

In the judicial interpretation of legislation it is, as has been said, a "fundamental rule....that a Statute is to be expounded according to the intent of the Parliament that made it, and that intention has to be found by an examination of the langugage used in the Statute as a whole." Another general rule is that the language used is to be given its "Ordinary grammatical meaning".

But when we seek to determine the ordinary grammatical meaning of the adjective "European" in the White Women's Protection Ordinance we are at once faced with the difficulty that "European" has different meanings, each in common use. For example, in the "Shorter Oxford English Dictionary" the adjective "European" is defined as - "Belonging to Europe or its inhabitants: extending over Europe," and the noun "European" is defined as - "A native of Europe." In Chamber's Twentieth Century Dictionary the adjective "European" is defined as-"Belonging to Europe" and the noun "European" as - "a native of Europe: a white descendant thereof." Webster's New International Dictionary (2nd Edition) gives the meaning of the adjective "European" as "Of or pertaining to, or confined to Europe or its inhabitants", and it gives the following definitions of the noun "European", viz. - "(1) A native or inhabitant of Europe: loosely, a person of European descent:" and "(2) A member of a race inhabiting Europe." Thus the word "European" has been used in both narrow and wider senses. As Papua is situated on the opposite side of the earth from Europe and as most of the non-indigenous women living in Papua at the time the White Women's Protection Ordinance was passed had come, it is assumed, from Australia, it seems reasonable to suppose that the framers of that Ordinance intended the words "A European woman(or girl)" to have a wider meaning than "a woman (or girl) of Europe." But how much wider a meaning they intended those words to bear is difficult to determine. Did they intend them to include any woman or girl who could trace her descent from forebears who were natives of Europe? If so, did they intend that that descent should be a pure and unmixed descent on both sides from such forebears, or would a partial descent from such forebears be sufficient?

The word "European" also appears in Section 71A of the Papuan Evidence and Discovery Ordinance 1913-1952, the Section under which Mr. Kirke has invited me to act. A Section 71A was inserted in that Ordinance for the first time by Ordinance No.36 of 1952 and it read as follows:-

> "In any prosecution, if the Court, Judge, Magistrate, Justice or Justices do not consider that there is sufficient evidence to determine the question whether the accused or defendant is a native, part-native or European, the Court, Judge, Magistrate, Justice or Justices having seen the accused or defendant may determine the question. "

It will be noted that that Section related expressly to the question of the racial category of an "accused or defendant" and consequently could have no relevance whatever to the question whether the prosecutrix in a proceeding under the White Women's Protection Ordinance was a "European woman or girl" or not.

A few months later, that Section was repealed and a new Section, 71A was substituted for it, by Ordinance No.99 of 1952. The new Section was in similar terms to the repealed one, except that the word "person" replaced the words "accused or defendant" wherever they appeared in the old Section. So, "in any prosecution, if the Court...(does) not consider that there is sufficient evidence to determine the question whether a person is a Native, part-Native or European, the Court..... having seen the person may determine the question." Some comments may be made on the new Section. In the first place it is obvious that the word, "person" standing by itself, is wide enough to include any prosecutrix. In the second place the Section is concerned with the determination of what is expressly described as the "question whether a person is a Native, part-Native or European": if that expression were

interpreted literally, it would seem to limit the determination to a choice of one of three specified categories - "Native, part-Native or European": but probably the expression is an elliptical one and was intended also to permit a Court to determine that a person was not a Native, or not a part-Native, or not a European - in other words, to determine that a person fell within none of the three specified categories. In the third place, no definition of "European" is given in the Evidence and Discovery Ordinance; but it would appear from Section 71A that it was intended to distinguish a "European" from a "part Native" person, at any rate. In the fourth place, the opening words of the Section are - "In any prosecution, if the Court"....(does) "not consider that there is sufficient evidence to determine the question...." Those words seem to me to show that it was not the intention of the Legislature that anyone, seeking to establish that a person was a "European", need not even attempt to prove that, or that any such a one might, by a mere assertion, cast the responsibility of determining the point on the Court's discretion.

Here I should mention that Mr. Kirke suggested that Section 71A of the Evidence and Discovery Ordinance was a mandatory one, compelling the Court to the determination of the question "whether a person is a Native, part-Native or European". I am unable to agree with that suggestion, because I think that the wording of the Section and the use of "may" (and not the mandatory "shall") clearly show that the Court has a discretion in the matter.

This brings me to a personal difficulty I feel about that Section. Let us assume that the Legislature intended that Section 71A should give the Court the discretionary power, after merely seeing the prosecutrix in a proceeding under the White Women's Protection Ordinance TO determine the question whether she is or is not a "European" woman or girl; - whatever meaning the word "European" may have in that context. I can understand that a Judge might properly say, after merely seeing the prosecutrix , - "This person looks like my conception of a European woman or girl", or perhaps "This person looks like what I understand the popular conception of a European woman or girl to be" but that is a very different thing from <u>determining</u> the question and saying - "Having seen the prosecutrix, I determine that she is a European woman (or girl)" or "Having seen the prosecutrix, I determine that she is not a European woman (or girl)". Speaking solely for myself, I feel that I utterly lack whatever qualifications may be necessary to enable a Judge, on a mere view of a person, to <u>determine</u> positively and with the moral certainty normally required in a criminal proceeding, that that person is, or is not, "European" (whether in a narrow or in a wider sense). This is the first occasion on which I have had to consider, judicially, either Section 71A of the Evidence and Discovery Ordinance or the provisions of the White Women's Protection Ordinance. But I understand that, before there ever was a Section 71A in the Evidence and Discovery Ordinance, people had been charged and had been convicted in this Court on charges of sexual offences against"European" women or girls under the White Women's Protection Ordinance; and that goes to show that it should be possible to establish that a prosecutrix is a "European" woman or girl without recourse to Section 71A of the Evidence and Discovery Ordinance.

The present proceeding is one under the Criminal Code and the amended indictment charges attempted rape, which is an offence against Section 349 of that Code. On the face of Section 349, the race of the prosecutrix is quite immaterial; consequently it was not surprising that the learned Crown Prosecutor said nothing whatever, during the case for the Prosecution, about the race of the prosecutrix. Nor did Mr. Kirke, in his cross-examination of the witnesses for the Crown, give any hint that he was going to raise any question about the race of the prosecutrix. He did not raise that question until he began his submission of "no case". His argument then was as follows:- In the course of this trial, the Court has seen the prosecutrix in person and must have formed the impression that it is at least possible that she <u>might</u> be a "European": therefore,and because of the proviso in Section 8 of the White Women's Protection Ordinance, the present charge under the Criminal Code should never have

meant by "European"). Mr. Mallon for the Crown said that if, in the course of a trial under the Criminal Code on a charge of attempted rape, the Defence raised the question whether the prosecutrix was "European" or not, it might be that the Defence had a right to have that question decided one way or the other; but he submitted that the real and manifest objectof the proviso of Section 8 of the White Women's Protection Ordinance was, not to provide a defence to a sexual charge under the Criminal Code, but to ensure that certain sexual offences against "European" women or girls were prosecuted under that Ordinance, instead of under the Criminal Code, in order that the more drastic punishments prescribed in the Ordinance might be available. In the course of the argument by learned Counsel, I put this suppositious case to them: - "Suppose a man attempted in Papua to rape a White Woman who had been a foundling and whose parentage and descent were unknown and unprovable, under what provision of Papuan Law might he be proceeded against? Mr. Kirke submitted that in such circumstances the woman would not be protected either by Section 349 of the Criminal Code or by Section 3 of the White Women's Protection Ordinance and that, though this was an unfortunate position, it was for the Legislature to remedy it, not for the Courts. Mr. Mallon said that he thought that the prosecuting authority would, in the circumstances put, be in a dilemma.

I do not propose on this occasion to attempt to define the word "European", as used in the White Women's Protection Ordinance because I think that Mr. Kirke's point may be dealt with without having to decide whether "European" in that Ordinance has a narrow or some wider meaning.

The Legislature clearly intended, in passing and amending the White Women's Protection Ordinance,that certain sexual offences,including attempted rape, should, if committed against "European" women or girls, be charged under that Ordinance and not under the Criminal Code. To support any such charge under that Ordinance it is essential in my opinion, that the Crown should establish beyond all reasonable doubt that the prosecutrix comes within the description "European woman(or girl)"; and if the Crown fails so to establish that vital element of the offence charged, the charge must fail. When, in Papua, an alleged offender is on trial on a charge of attempted rape under Section 349 of the Criminal Code, the question of the race of the prosecutrix is normally immaterial: but if, at such a trial, it be established, e.g., on an application to quash the indictment, that the prosecutrix is in fact within the description "European woman(or girl)", used in the White Women's Protection Ordinance, then the proviso in Section 8 of that Ordinance would become applicable. That position has not been reached in the present case. Not a scrap of evidence has been put before me to show that the prosecutrix is within the description "European woman or girl" used in that Ordinance. All that Mr. Kirke has advanced is the suggestion that the Court, having seen the prosecutrix, should, in some supposed exercise of the power given in Section 71A of the Evidence and Discovery Ordinance, determine that the prosecutrix <u>might</u> be a "European". I need not repeat what I have already said about the difficulty I feel in regard to the practical application of the provisions of that Section; but I must say that I see nothing in Section 71A that empowers me to determine, on having seen a person, that that person "<u>might</u>" be a "European".

For the reasons I have given, I consider that the first ground advanced by Kirke in support of his submission of "no case" is unfounded.

The second ground for his submission of "no case" was, that the Crown had failed to establish a <u>prima facie</u> case against the accused. Mr. Kirke stressed that as the Crown has the onus of proving the charge beyond all reasonable doubt, it has so to prove that the accused intended to commit rape on the prosecutrix no matter what resistance she put up, that the accused had begun to put that intention into effect, and that the accused had manifested that very intention by overt action. That is undoubtedly correct. Mr. Kirke then contended

that the Crown had failed to discharge that onus and that the evidence it had led about the actions of the accused and the force he had used was insufficient to establish any intent or attempt on his part to commit rape: at the most that evidence might show indecent assault. The question I am now called upon to decide is, as the High Court said in May v. Sullivan, 1955 A.L.R.671, "really a question of law"; and that question is "not whether on the evidence as it stands the (accused) ought to be convicted, but whether on the evidence as it stands he could lawfully be convicted." I think there is evidence in this case on which an honest jury could, if it accepted that evidence, lawfully find the accused "guilty"; therefore I must let that evidence go to the jury, so that the jury may pass upon it and on any further evidence or arguments that may be put before it. This does not mean, of course, that the onus of proof shifts to the Defenc or that the onus of proof ceases to be fully on the Crown. Thus, the second ground of the submission of "no case" also seems to me to be unfounded.

I therefore have to reject the submission of the defence that there is no case to answer.

CHIEF JUSTICE.