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

BETWEEN:

THE QUEEN

v.

MAURICE NORMAN HANCOX

JUDGMENT

The accused is charged with committing an act of gross indecency with a male person. The course of conduct pursued by the accused amounts beyong question to gross indecency. The Complainant, the passive party, alleges that he was asleep at all relevant times. Possibly he was. I am unable to say. On the accused's behalf it is argued that the view that the Complainant was asleep is open on the evidence. It is. On that footing a submission is made that if such be a true state of affairs, the accused cannot be convicted under Section 211, in terms of which he stands indicted. That Section is in the following terms:-

> "Any male person who, whether in public or private, commits any act of gross indecency with another male person, or procures another male person to commit any act of gross indecency with him, or attempts to procure the commission of any such act by any male person with himself or with another male person, whether in public or private, is guilty of a misdemeanour, and is liable to imprisonment with hard labour for three years."

The argument sought to be made on the accused's behalf is this: The Section strikes at "any act of gross indecency with another person." The point to be emphasised is that the legislature employed the term "with", not the term "upon", and in so doing exposed to penalty acts of a male co-operating with another male in conduct answering to the description of "gross indecency".

It is submitted that acts committed by one male upon another in the absence of consent, at least by that other, cannot be said to be committed with that other, and so fall outside the purview of the subject Section. In support of this proposition various authorities are relied

upon, dominantly the case of Hornby v. Peaple, 32 Cr. App. Reports 1. In that case the Appellants were charged under the Criminal Law Amendment Act 1885 Section 11 with committing an act of gross indecency with one another. They were convicted and on appeal, Lynskey J., delivering the Judgment of the Court, said as a prelude to quashing the conviction - "In this case, the difficulty which we feel in supporting the convictions is that the Chairman nowhere directed the jury that they were each committing an act, or being a party to an act, of gross indecency the one with the other."

It is here submitted that such is the proper canon of construction of Section 211 which is indistinguishable from Section 11 of the Act of 1885. As I understand Lynskey J., he was not laying down any rule of general application at all. An examination of the facts shows that the Appellants who were described as being found in a compromising position in a public lavatory were not in physical contact, and each at his trial alleged that he was being subject to the unwelcome attentions of the other. The learned Chairman ignored this aspect of the evidence and directed the jury thus - "As regards the gross indecency, if you consider that the actual attitude in which these men were found did not go so far, one might say, as attempted buggery, then you have to consider the second charge, whether an act of gross indecency was committed in this lavatory." That being so, the only possible footing on which both men could properly be convicted would be on the basis of a proper direction that they were in fact acting in concert. The Court pointed out that no such direction having been given, the conviction could not stand.

In the case of Pearce, the Court of Criminal Appeal, quoting the passage from Hornby's case above referred to, says - "Obviously it is an offence which, if two persons are to be convicted of it, must be proved to have been committed with the consent of both of them, acting in concert together, otherwise those two persons cannot be convicted. There is nothing to support the proposition that where two persons are jointly indicted for such an offence, one cannot be convicted and the other acquitted. On the contrary, Jones (supra) is a direct authority to the contrary. Hornby's case (supra) decides no more than this, that if both are to be convicted then there must be a proper direction telling the jury that in the case of each person he must be proved to have committed that offence with the other person."

With those observations I respectfully agree and cannot see that any other meaning would be ascribed to the words of Lynskey J. Jones case above referred to establishes that it is open to the Crown to proceed against one only of two males who might be charged under this Section. The submission made on the accused's behalf here appears

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to me to be unsound. It would be surprising indeed if the Criminal Code made an act of gross indecency between consenting males an offence but excluded from the purview of the Section an act of gross indecency committed upon a male who violently resisted. I over-rule this submission.

A/J.
3:30 p.m.
21/6/1960.