

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

CORAM:

3rd September, 1959.

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THE QUEEN

v.

JOHN CHARLES PATON FINCH AND KARO NAIN

J U D G M E N T

The accused JOHN CHARLES PATON FINCH comes before the Court charged on two counts as follows:-

1. That he on the Eighth day of July One thousand nine hundred and fifty-nine in the Territory of Papua procured one KARO NAIN a male person to commit an act of gross indecency with him; and
2. That he on the Eighth day of July One thousand nine hundred and fifty-nine in the Territory of Papua committed an act of gross indecency with one KARO NAIN a male person.

The other Defendant, a native member of Police, who was off duty at the relevant time, appears charged on a count in the same indictment as the one relating to Finch, as follows:-

3. That he on the Eighth day of July One thousand nine hundred and fifty-nine in the Territory of Papua committed an act of gross indecency with one JOHN CHARLES PATON FINCH a male person.

It is obvious that Count No. 2 and Count No. 3 are based on the two accused acting in concert in regard to the gross indecency charged.

Both accused were defended by Mr. Norman White of Counsel, and each pleaded Not Guilty, Finch in respect of both counts. The native accused, KARO, elected to say nothing at the conclusion of the Crown case, but the accused, Finch, elected to give evidence on oath and to call witnesses.

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The Crown, by reason of the pleas, is thus put to strict proof of every element of the offences charged beyond a reasonable doubt, and if it falls short of that, each accused is entitled to be acquitted.

Before addressing myself to the facts of the case, I remind myself of the dangers inherent on charges involving offences of a sexual nature. They are notoriously easy to make and difficult to refute. There is a salutary rule of practice that it is dangerous to convict on uncorroborated testimony in such cases, that is, testimony which is not corroborated in some material particular by other evidence implicating the accused person.

The Crown case is that the European accused and the native accused, KARO, were seen about 9 o'clock at night talking together under a street light near the Bowling Club gate. The accused, Finch, was dressed in a white pair of shorts and white shirt, and the other accused was dressed in a khaki lap-lap with the word "Qantas" on each side of it.

The accused, Finch, admits the above, but says his shorts were in fact khaki ones.

Sub-Inspector Such has testified that through the back of a motor vehicle in which he was being driven towards the Police Station, he looked back and saw the accused, Finch, nod beckoningly to the native and thereafter the native accused followed Finch down the side of the Pre-School building towards the beach.

The principal Crown witness, Acting Corporal USISI, describes both accused as walking to the beach side by side, whereas Sub-Inspector Such and Acting Corporal BATUE say that the accused, KARO, followed in the direction of the beach a few paces behind the accused, Finch.

Sub-Inspector Such appeared to me as a thoroughly truthful witness, but I do not think that the circumstances of his observation of the two accused would satisfy me that the two were going in the direction of the beach by mutual agreement, as the nod believed by Sub-Inspector Such to be an indication by Finch to the other accused to come on the beach might not have been so, though it appeared to Such to have that character.

Acting Corporal USISI, who was on duty in Ela Beach Road, testified that he saw the two accused side by side go down the side of the Pre-School, the accused, KARO, carrying a red plastic Qantas shoulder bag, which has been identified as similar to one lent to KARO only an hour or so previously by a friend.

Having seen the two accused go down beside the Pre-School building to the beach, the Duty Acting Corporal USISI moved over to the wall at the back of the Pre-School building.

He has testified that looking through a small hole in the wire and sago palm fence above the stone wall, he saw the accused persons kissing each other and that after that, the European removed his trousers and underpants and lay on the ground. The native accused also lay on the ground. He says their heads were towards the Koki end of the beach, with the European accused lying on the sea side and the native accused, KARO, on the wall side of the European accused and facing towards the sea. He says their faces were close together. USISI testified that the European accused was naked and that he had his legs across the native accused's legs. Acting Corporal USISI has in his evidence confused right and left hand side, but the learned Crown Prosecutor elicited surprisingly that this Acting Corporal does not know his right from his left, though a serving member of the Police Force.

USISI says that the native had his left hand on top of his body and the other one could not be seen properly.

USISI then described that the European put his hand on the native accused's penis, and that the native lifted up his rami and underneath had pants on with the fly buttons already undone.

Later Acting Corporal USISI admitted that he saw both accused lying on the ground and that was all he saw.

The native Acting Corporal USISI seems to be the whole hinge of the Crown's case, though this could not be conceded by the learned Crown Prosecutor. In my view, the evidence of gross indecency is dependent upon the evidence of USISI, and I do not hesitate to say that I think USISI both an unreliable and dangerous witness, for he does not shrink from testifying to facts as such, when he never saw what he said he saw, but drew on his imagination.

USISI gave conflicting accounts in the Lower Court of his position on the fence. I think it highly improbable from his point of observation on top of the stone wall that USISI saw anything involving detail, and that the shadow cast out from the wall that night would not permit him to observe what he said he did.

Although he had a torch, he never used it; he says because he might frighten the two accused.

After making his observations, USISI left to go to the Police Station, and as he started to do so, says he saw two European Police and three Acting Corporals approaching along the beach from the dressing sheds. He recognised them as such by the European Police caps and their Police belts. This Court is doubtful whether at night this could have been possible, but it is not impossible that it was so.

Sub-Inspector Such testified that nearing the Pre-School wall as he and Sub-Inspector Trewin and the three Acting Corporals walked along the beach from the dressing sheds towards Koki, he saw some movement and shone his torch on the accused, Finch, with his trousers half up; simultaneously, he says that he saw a native running towards the Bowling Club beside the sea wall. He said that when first seen this native was about 6 yards from Finch and that it was too dark to see how the native was dressed. Such says that he and Trewin walked up to the accused, Finch, who was then facing the wall with his hands in front of the lower part of his body.

Upon hearing Such, he says, Finch turned round and he noticed some of Finch's fly buttons undone. Such says he called out - "Police here. Can you tell me what you were doing?" Finch replied - "As a matter of fact I was having a crap." To which Such replied - "Do you mean to say you were having a crap here?" Finch replied - "Yes, I have just come back from leave and my bowels are infected. I have had some beer and felt urgently that I required to have a crap. I tried the R.S.L. and it was closed and so was the Bowling Club." Such then asked the accused - "Have you any toilet paper?" Finch replied - "No, as a matter of fact I have a letter in my pocket." Such then said - "You could have gone to the change-room", to which Finch said - "Oh well."

Sub-Inspector Such then shone his torch along the ground and found a red Qantas shoulder bag, produced in Court. This bag was against the sea-wall and about 2 yards from Finch, who disclaimed any knowledge of it. The accused, Finch, then volunteered that he had no letter in his pocket and would have used his handkerchief to complete his toilet. There were no marks of defecation on the ground in the vicinity. Sub-Inspector Such's evidence as to what happened on the beach is confirmed by Sub-Inspector Trewin.

The accused, a man of 32 years of age, and of unblemished character, has a knowledge of natives, being engaged for some years by A.P.C. as a Recruiter. He is a fluent Motu speaker and has a good knowledge of Pidgin, and has given evidence on oath. His story is that on the way back from the R.S.L. he talked with a native under a light outside the Bowling Club building and, having some abdominal trouble, he felt that he must urgently obey a call of nature, but the pain went off, so he continued to watch the football being played, when the pain returned with a strength not to be denied.

The native who was speaking to him about football was dressed in leather belt and khaki lap-lap. The accused said to him - "You look like a Policeman", and the native admitted as much. (He was in fact the other accused).

The accused, Finch, says that he left the native (whom he now knows to be his co-accused) and went down past the Pre-School building when he realised that someone was following him, so jokingly said - "What are you following me for." The native (KARO) denied that he was doing so. The accused says that his need to empty his bowels had by this become essential, and he thought of going to the dressing-sheds which were in darkness, but seeing some cars parked between him and the dressing-sheds and not knowing if there were toilet facilities there, he decided to go down in the dark in front of the Pre-School wall to effect his purpose.

After looking to see that all was clear, he crossed the sand and lowered his trousers to defecate, but moved back again into the dark as he saw people about. A torch was shone on him and he turned away. He agrees that his trousers were as described by the Sub-Inspector, but maintained it was for a natural and not indecent purpose that they were so.

The accused denies being on the beach with a native; he denies that he ever committed any indecent act or procured anyone to commit an indecent act.

There was a good deal of cross-examination directed towards showing that the urgent bodily needs of the accused seemed to evaporate, as he did not go to the toilet until his return to the hotel. The accused explains this by saying that he asked the Police Inspectors about his need, but they do not recall this. Finch here says the shock of finding himself in the hands of the Police, though innocent, suspended his bodily functions.

Besides hearing evidence about the visibility at night in the relevant area, the Court has had the advantage of a night view. The defence has established that on the night of the alleged offence there was no moon at the relevant time.

The finding of the accused's KARO's borrowed bag, the red Qantas shoulder bag or one identical near the foot of the wall in question is an interesting feature of the case, but I do not propose to conjecture about it, as it does not carry the Crown case far, as I am dissatisfied with the evidence of Acting Corporal USISI, and would be uncomfortable about a conviction which depended upon his testimony. I was amazed on the view at the lack of visibility at night in the locus in quo, and this, quite apart from his own admissions, makes me rate USISI as not a credible witness.

As I am not satisfied beyond a reasonable doubt of any act of gross indecency, I find both accused Not Guilty: the European accused Not Guilty on both counts, and they are discharged.

I think the Crown Prosecutor, Mr. McLoughlin, has made the best use of the material available to him.

J.

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