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

CORAM: WILLIAMS, J.

Friday, 13th August, 1971.

ALBERT TOKULAU TOMARUM v. JIM NAPPAI

1971
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PORT MORESBY
Williams, J.

The appellant, Albert Tolulau Tomarum, was, on 27th April, 1971, charged before the Local Court at Kavieng, with an offence against Sec. 70(1)(m) of the Police Offences Ordinance 1925-1966 in that on 24th April, 1971 he "was unlawfully adjacent to a dwelling house of another person to wit one, Frank Carson". He was convicted and sentenced to imprisonment with hard labour for three months.

Before this court the appellant seeks an order that the conviction be quashed on the ground that it was against the evidence and the weight of the evidence. Alternatively, it is said that the sentence was manifestly excessive.

The evidence given before the Local Court in support of the charge consisted solely of the evidence of one Maria Pum. Her evidence does not give a clear account of the events which gave rise to the charge. It also contains matter clearly objectionable as being hearsay.

The offence is alleged to have been committed on 24th April, 1971 (a Saturday). Maria Pum in evidence stated that she was employed by Mr. Frank Carson, that she knew the defendant and that she remembered 24th April, 1971. She then went on to relate a conversation had by her with the appellant at the Carson residence from which it appears that the witness's "boy friend" was going away and that the defendant wished to visit the witness. She says that she rejected these advances and informed the appellant that she did not want him to call. Whilst the date of this conversation was not given it is apparent that it took place on a day prior

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to Saturday 24th April, 1971.

The witness then went on to relate that "on Saturday (presumably 24th April, 1971)at about 2 p.m. the defendant went up and stood on the main road and called me out. I went up to him". She then related a conversation with the appellant the substance of which was that the appellant again stated his desire to call on her and that she again informed him that she did not want him to come "because its not allowed for anyone to enter our premises". Despite this lack of encouragement the conversation concluded, according to the witness as follows:-

> "He then later said 'at about 7 p.m. I will be here'. Later the defendant said at about 7 p.m. or 8 p.m. I will come to your house. I did not answer him any more".

It appears that the events which culminated in the laying of the charge took place early on the Saturday night. The evidence given by Maria Pum was as follows:-

> "At about 6.30 p.m. my Misses called me. I went up but I did not know that the defendant was there already. Misses gave me a death rat and asked me to bring it. I took the rat and went out to bury the rat. I did not know that the defendant was there already. John my brother-in-law saw the defendant already, he then went and hid himself at the back of the house, thinking that the defendant was trying to steal something. John was just going to stop me from digging when the defendant was walking towards me. He got surprised when he saw John he then ran away. John flashed torch at him. I then saw them. John told the defendant to go with him to see Mr. Carson. The defendant then later ran away."

It should be observed that a large amount of this evidence concerns the observations and activities of her brother-in-law John. As such they were matters of hearsay so far as she was concerned and should have been excluded. It does appear that Maria saw the appellant when the burial of the rat was about to take place. There was no evidence as to the proposed place of interment of the rat nor of its position in relation to the Carson residence. In this state the evidence, it is contended by Mr. Keenan for

the appellant, that there was no evidence or sufficient admissible evidence that the appellant was "adjacent" to the dwelling house of Mr. Carson within the meaning of Sec. 70(1)(m) of the Police Offences Ordinance.

An inference may, I think, be drawn that the place where Maria saw the appellant when about to bury the rat was somewhere in the vicinity of the dwelling house of Mr. Carson. However, bearing in mind that the fact that the appellant was "adjacent" to the dwelling house was an essential element for the complainant to prove in the prosecution of a criminal offence it seems to me that the admissible evidence adduced fell short of the required standard.

But there is a further objection to the conviction of the appellant. At the conclusion of the evidence in chief of Maria the appellant cross-examined her. The following question and answer appears in her deposition:-

"Defendant Cross-Exam. -

Q. When I asked you on Saturday afternoon, if it O.K. for me to come over to your house, did you say wakuku?

A. Yes, I said wakuku which nothing and when I said it, I meant not to come over to my house."

It is claimed for the appellant that in his language the word "WAKUKU" may be interpreted so as to connote an invitation. It is conceded by Counsel for the respondent that the word can be construed as an off-hand invitation in the sense "if you want to you can". It thus appears that at the conversation between Maria and the appellant on the Saturday afternoon Maria used an expression which may well have caused the appellant to think that, despite the lady's earlier protests, his proposed visit would not be unwelcome.

The evidence therefore disclosed that, if the appellant were at the relevant time "adjacent" to the dwelling house of Mr. Carson, then he was there for the purpose of paying a social call on Maria who, despite some protests, had nevertheless also given him some encouragement.

Sec. 70 (1)(m) of the Police Offences Ordinance has received consideration in this court on prior occasions

(see Boas-Tito v. Konzib (1) and Tiki-Nori v. Thackeray (2)). Similar legislative enactments in Victoria and Queensland have also received judicial consideration (see Haisman v. Smelcher (3) and Roffey v. Wennerbom ex parte Wennerbom; Roffey v. Stacey ex parte Stacey (4). It is plain that the section is not directed at behaviour that may, because of an infringement of some civil right, give rise merely to a civil remedy; it is designed to make punishable conduct that is preparatory to or in furtherance of some criminal purpose, or which, by reason of its violating recognised standards of decency, tranquillity and decorum and the accepted usages of the community, is likely to put occupants in fear or apprehension and thus lead to a breach of the peace.

On the evidence adduced in the Local Court it does not seem to me that the court could reasonably have concluded that the conduct of the appellant was such as to be within the principles I have set out above. In consequence he should not have been convicted.

There is another matter to which I should advert. There is on the Court file a report from the learned Magistrate who heard this case in the Local Court. The following is an extract from the report:

> "The evidence which was given on oath by MARIA PUM whom, the defendant claims that she invited him to go there was a very strong evidence.
>
> During the defendant's cross-examination, the defendant did ask one question only concerning the word WAKUKU.
>
> The Police cross-examination and the witness' evidence convinced the court that the said defendant had been unlawfully adjacent on to the premises of Mr. Frank Carson and for an intention of some bad purposes.
>
> After all, the Court explained the defendant's right if he wished to give evidence with or without oath, or he may shut his mouth if he wish to.

(1) 1965/66 P. & N.G.L.R. 279
(2) 1967/68 P. & N.G.L.R. 37
(3) (1953) V.L.R. 625
(4) (1965) Qd.R. 42

The defendant elected to stay silent by saying 'I have nothing else to say'.

The complainant had one other witness left, but the court refused to call the other witness on the ground that the defendant did not argue the case during the cross-examination time for the defendant".

I am somewhat at a loss to understand the course which the hearing took. It does appear, however, that the fact that the appellant asked one question only in cross-examination of Maria was construed by the Magistrate as an admission of guilt by the appellant whereupon the Magistrate stopped the complainant from adducing further evidence. The fact that the appellant limited his cross-examination could not in the circumstances have possibly been construed as an admission of guilt. The proper course for the Magistrate to have taken was to hear all the evidence which the complainant wished to adduce affording to the defendant the opportunity to cross-examine the complainant's witnesses. When the evidence for the complainant was completed it was then for the defendant to give evidence if he wished.

I did consider whether in view of the remarks contained in the Magistrate's report I should send the case back for re-hearing as it appears there was further evidence available to the complainant which he was precluded from calling. But Mr. Pratt who appeared for the respondent conceded (and, I think, very properly so) that in the event that I should conclude that the conviction should not stand then the Crown would not seek a re-hearing for the reason that the appellant served a substantial portion of the sentence awarded before being released on bail.

The order which I make therefore is that the conviction be quashed.

Solicitor for the Appellant: W.A. Lalor, Public Solicitor
Solicitor for the Respondent: P.J. Clay, Crown Solicitor