IN THE SUPREME COURT)
OF PAPUA NEW GUINEA)

CORAM: PRENTICE, J.
Saturday,
2nd December, 1972.

Appeal No. 162/72 (N.G.) - RUMINTS WOIE
Appeal No. 163/72 (N.G.) - NORI OU
Appeal No. 164/72 (N.G.) - MINEMBI KEN

1972

Dec 1 and 2

MOUNT HAGEN

Prentice J.

These three appeals have been heard together by consent, there being features common to them all as to legal argument. Each appellant was charged with two charges, the first of encouraging the commission of an offence (viz. to riot) under Sec. 15(a) of the Public Order Ordinance 1970; the second of behaving in a riotous manner, under Sec. 30(e) of the Police Offences Ordinance. Each was sentenced to nine months imprisonment on the first and to six months imprisonment on the second charge - the sentences being made cumulative.

Section 35(2) of the Public Order Ordinance provides that "Proceedings under the Ordinance shall be dealt with by a District Court constituted by a Stipendiary Magistrate or Resident Magistrate and shall not be brought in or transferred to a Local Court." The magistrate who heard the charges was Mr. A.M. Asmussen who is gazetted as a Reserve Magistrate and is presumably an officer of the Department of District Administration. He is neither a stipendiary nor a resident magistrate.

It is therefore submitted for the appellants, and conceded by the Crown, that there was no jurisdiction in the Court to hear the "Public Order" charges. I am accordingly of the opinion that there has been a substantial miscarriage of justice within the meaning of the appeal section of the District Courts Ordinance (Sec. 236). Alternative remedy might have been available perhaps by prerogative writ (cf. the reasoning in R. v. Hall (1)). I propose to allow the appeals in relation to these charges.

The respective charges under the Police Offences Ordinance, like those under the Public Order

(1) (1971) V.R. 293

1972

Appeals 162, 163 and 164 of 1972 (N.G.)

Prentice J.

Ordinance, were brought by information laid purportedly "in the District Court at Ogelbeng". For some reason that does not appear in the depositions, apparently a reserve magistrate (or magistrates) was (were) taken to locations where troubles were occurring, and the magistrates regularly sitting in the Courts at Mount Hagen nearby, two of whom were District Court Magistrates, appear to have been bypassed. By Gazette No. 60 of 23rd November 1967, the Court Room Mount Hagen is proclaimed as a place for holding District Courts in the Western Highlands District. There are eleven other such District Court places in the Western Highlands District - Ogelbeng is not one of them. As established by the map Milinch S.W. Hagen and Milinch N.W. Hagen, Ogelbeng is some miles outside the proclaimed limits of the town of Mount Hagen.

Section 25(1) of the District Courts Ordinance provides that "(1) The Administrator may, by notice in the Gazette, appoint places for holding court. (2) A court shall not sit in a room or place other than a courthouse unless - (a) there is no courthouse within a convenient distance; and (b) as much notice of the time and place of sitting as is practicable is given to members of the public likely to desire to attend." By Sec. 128(1) it is enacted that "Subject to this Part, informations of single offences shall be heard and determined at a place appointed for holding court within the District in which the offence or breach of duty was committed or in which the defendant usually resides or is at the time when the information is laid." By Sub-sec. (2) there is provision of the usual kind, for informations as to offences committed within twenty miles of the boundary to be heard either in the district of commission or in that neighbouring one. The provision of Sec. 128 appears to be mandatory, and the Crown is unable to present any argument to the contrary.

The result is that the magistrate has purported to hold a hearing in a location that is not the gazetted location and as such was sitting without jurisdiction. By way of analogy I might mention that it is well known that jurisdiction cannot be given to magistrates to sit extra-territorially their district,

even by consent (Kennedy Allen at 326).

There has therefore, in my opinion, been a substantial miscarriage of justice in regard to the Police Offences Ordinance charges also.

The Crown urged that if I found it necessary to quash the convictions, that I should nevertheless order a rehearing of the Police Offences matters. However, I consider that insofar as the informations were laid "in the District Court at Ogelbeng," no such court existing, no valid information has been laid upon which rehearings could occur.

A number of other irregularities occurred in the hearings. No allocutus was administered before sentence, which, as my brother Raine has recently held, could be sufficient to invalidate a sentence and perhaps a hearing; for the reason that by so failing to proceed properly, the magistrate may allow himself to exercise his discretion upon wrong principles, and justice does not appear to be done thereby.

It has also been argued, and I think that there is very great force in the submission, that inasmuch as the evidence, such as it was, that could be thought to constitute an offence of riotous behaviour, was only by way of aiding and abetting (Sec. 23A Ordinances Interpretation Ordinance and Sec. 7 Criminal Code); then by harnessing to that charge the Sec. 15(a) Public Order charge, the accused were being made to answer twice to and being punished twice for the one alleged offence, as the magistrate saw fit to impose the maximum term of imprisonment for each offence and made the sentences cumulative - this would be of the greatest significance.

The ground of manifest excess in sentence has been urged; but in the circumstances this has not been fully dealt with by the Crown and I make no comment on the question.

It is of course for the Crown Law authorities to decide, in the light of the alleged serious nature and extent of the fighting out of which these charges arose, whether fresh valid charges can and should be laid. Without seeking to bind the authorities, perhaps I should express my impressions on the arguments addressed to me as to

the matters of evidence, and one would wish to mark that at this date the appellants have spent a little over 2½ months in gaol - they are men getting on in years and senior men in their lines.

The evidence against Rumints is that he was present carrying an unstrung bow, that he was calling out to the Jiga men and pointing to a village where some houses were later burnt, that he walked with the men towards that village, that he was present when the houses were burnt. Rumints, interpolating between each witness, maintained that he had been told to get his people out and he was trying to get them out. I am of the opinion that the evidence against him was not of the kind to establish that he was behaving "in so tumultuous a manner as to disturb the peace" (Kelly J. in Re Leonard Eliza & Ors. (2)) - at best it could establish an aiding and abetting unless perhaps he were positively commanding and controlling the riot. The "directions" he was seen to give may well have been to his men to withdraw. For myself I would have doubts whether it was sufficient to establish the charge laid.

The evidence against the appellant Nori appears to me to establish merely that he was present unarmed at the time of the disturbance in which some men from his line were engaged (and one killed).

The evidence against Minembi is similar to that against Rumints. Minembi interpolated between witnesses to aver he was shouting to his people not to make trouble. The main evidence against him is from Sergeant Major Umba, who was very courageously trying alone to stop 4,000 men fighting a running battle. (Umba seems to deserve a commendation.) He says he saw Minembi unarmed urging and encouraging the Jigas and calling out "por por por" meaning in Pidgin "igo igo igo". He "marked" Minembi and shouted to him that he would be in court. Minembi did not reply. This appellant contended that Umba (who has lived in the district nine years) mistook the meaning of the Jiga language (Umba was not crossexamined as to his knowledge of the language); that he himself was, as I understand it, passing a message. He was doing this by calling "po po po" a term for gaining attention so that he could (and did) warn his men not to start a fire, lest everything burn.

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(2) Unreported judgment No. 663 of 27/1/1972.

For myself I would incline to the view that the evidence was such as to make it unsafe to conclude against the appellant that he was behaving riotously.

I therefore allow the appeals of each of the appellants. I quash their convictions as to each of them on both counts. I order their release.

Solicitor for the Appellants: W.A. Lalor, Public Solicitor

Solicitor for the Respondent: P.J. Clay, Crown Solicitor