J. Ross SE771

IN THE SUPREME COURT OF PAPUA NEW GUINEA

CORAM: PRENTICE, J.

Thursday,

1st November, 1973.

PAUL PAPALAMNAN v. SAMSON VIRGIL NUAKONA

Appeal No. 192 of 1973 (P)

1973

Oct 26 and Nov 1

PORT MORESBY

Prentice J.

Appeal is brought herein from a conviction in the District Court of unlawfully laying hold - Sec. 8(a) Police Offences Ordinance. The primary ground of appeal is that the learned magistrate erred in law in convicting on the evidence proffered; no tribunal, it is said, could have been satisfied thereon beyond reasonable doubt, that he who undoubtedly committed the offence of assaulting the complainant, Mrs. Keyes, in the manner averred, was the appellant.

Leave was given to add the further ground that the sentence was manifestly excessive.

During the course of argument it became clear that Crown counsel would wish to refer to a certain report of the magistrate, which it was said purported to give reasons for judgment. Apparently this report was forwarded to the Crown and to the Court, but not, it is said, to the appellant or his representative. This Court's copy was eventually located, and I entertained argument as to whether I might have recourse to it in deciding the appeal. (A copy of any such report should of course go to an appellant or his representative.)

Mr. Wood contended that no regard might be had to the report - Secs. 230 and 231 of the District Courts Ordinance being the only provisions relevant. Under these sections, the (District) Court clerk is charged with the duty of forwarding the magistrate's reasons for decision; and, where no reasons were given, with the duty of notifying the magistrate of the appeal. The magistrate is charged in this latter event, with the duty of forwarding to this Court a report setting out the reasons for the conviction. Counsel submits that here reasons <u>were</u> given, and recorded by the magistrate, and that they appear in the transcript of proceedings. Any magisterial report in such a case therefore is a res nulla and should not be looked at.

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Most statutory provisions for criminal appeals include reference to the forwarding of a report by the subordinate tribunal. An indication of the circumstances in which such a report will not be received appears in the practice note issued by the Court of Appeal (U.K.) and recorded as Regina v. Williams (1). That court expressed disapproval of a Recorder having forwarded a detective sergeant's report made as the result of post-trial enquiries. The court pointed out that though it or the Home Office sometimes asked for a special report - the practice followed by the Recorder was undesirable.

Though this Court has delivered judgments suggesting that the District Courts Ordinance is by way of a Code (Robin Kumaina v. Barrington Gerald Reade (2); Reg. v. Amdjuonye (3)); I should be loath to come to the conclusion that it might have regard only to a magisterial report that had been prepared in circumstances of no reasons having been given - that Sec. 231 should so to speak be regarded as governed by the maxim expressum facit cessare tacitum (when there is express mention of certain things, then anything else not mentioned is excluded). Courts, and not only Local and District Courts, in this country labour under great disadvantages. One can imagine many circumstances when a mere sketchy note of fairly lengthily expressed reasons for judgment was kept; where no note was recorded of reasons actually given; where a correct note of reasons given was subsequently lost or corrupted. In any such case, of regrettable irregularity perhaps, one would wish nevertheless to have a report of reasons given, available for consideration in this Court.

Again in many cases, particularly on the aspect of sentence, many matters such as the frequency of the type of offence involved, and the pattern of sentencing (the "tariffs") of himself and his brother magistrates must be in gremio the Bench, and unexpressed in each and every one of the sometimes, dozens of cases, to come before the court in a busy day. Some degree of amplification of reasons would be expected and certainly helpful to the Appeal Court in a case of that kind.

Giving judgment and reasons at the conclusion of the hearing is the most convenient and expeditious way

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(1) (1957) 1 W.L.R. 463
(2) Unreported judgment No. 433 of 7/7/67, Mann C.J.
(3) Unreported judgment No. FC10, Full Court of Oct. 70.

of disposing of many cases. I think it would be correct to say that there are very few men, pressed for time, who can give their reasons in a complete order and fit state to be reported either to an appellate court or the profession, unedited. But of course it would be normally regarded as improper to alter the sense of anything said or done by the magistrate by addition or excision of vital matter to or from an edited version of reasons.

Some guidance to the magistrate in the preparation of reasons for judgment and to this Court in receiving and studying the same, may be found in the remarks of Willmer L.J. in Bromley v. Bromley (4): "I am far from saying that in no circumstances is it possible for this court to go behind the official transcript of the judgment with which it is furnished. If there were ever a case in which it could be shown that, after delivering judgment and after the drawing up of the order, the judge had in substance rewritten his judgment, so as to put a completely different complexion on the issues in dispute, then I apprehend that this court would not be slow to censure any such behaviour on the part of the judge, and I have no doubt that in such a case this court would think it not only proper but necessary to look at the transcript of the judgment in its original form. But an application to do anything of that sort would, in my view, have to be supported by cogent evidence. There would have to be evidence from someone who was present at the trial and heard the judgment (preferably somebody who himself or herself took a note of the judgment) and who was able to say, and say in evidence, that the official transcript as approved by the judge was substantially different from what the judge actually said when he delivered his oral judgment at the trial.

In the present case we are not concerned with any such situation. What we are offered is a copy of the judgment as taken down and transcribed by the shorthand writer, submitted to the judge and corrected by him. There are deletions, there are alterations, and there are some additions to fill gaps made by the deletions. That perhaps does not seem particularly strange to members of this court, whose unrewarding task it is to revise the transcript of every single judgment which we ever have to deliver; and it not infrequently happens that the transcript submitted to us does not accord with what at least we think we said, or intended to say. It is, I think, to be remembered that shorthand writers, wonderfully efficient as

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(4) (1965) P. 111 at p. 114

some of them are in getting down evidence often given very rapidly and sometimes inaudibly, are, after all, human beings liable to error, and I do not think that there could ever be any guarantee that a transcript prepared by the official shorthand writer is necessarily the last word as to what the judge really said. Indeed, it is for that very reason that before a judgment is published the transcript is submitted to the judge for revision. The purpose of that is to enable the judge to see that what is imputed to him is really what he thinks he said, or intended to say.

It seems to me that in those circumstances it would be quite wrong to look at the shorthand writer's original version, which ex hypothesis is only a provisional version awaiting ratification by the judge's approval. The whole purpose of submitting the transcript of a judgment to the judge is to make sure that it does convey what the judge really did mean to say.

In those circumstances, in my view, in the absence of any evidence to show that the judge has deliberately so altered his judgment as to change its whole character, it would be improper for us to look at the original transcript merely because it is the original transcript. What we must look at is that which bears the stamp of the judge's approval, and on that must stand or fall the success of the appeal."

I am of the opinion that Sec. 231 is intending not so much to set out an exclusive condition upon which a report of reasons might be forwarded and considered; but rather to ensure that when no reasons have been given, they <u>are</u> later forthcoming. I would therefore propose to look at the reasons submitted by the learned magistrate in a report dated 2nd August, 1973. I feel myself fortified in my decision so to do by a scrutiny of the magistrate's remarks actually recorded on the transcript. These to my mind do not appear to be in any way a full statement of reasons - including as they do a mere short summary of the evidence and a statement of satisfaction as to identification of the appellant by the complainant.

A considerable amount of inadmissible evidence was recorded in this case, which appellant's counsel submits was highly prejudicial and should result as a further ground of appeal, in the appeal being allowed (citing <u>Rex. v. Lawrence</u> (5)). However, it is notorious that experienced tribunals in this country find it almost essential, certainly more practi-

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(5) (1906) 25 N.Z.L.R. 129

cal, to allow witnesses to tell their stories in their own ways; and later to excise from consideration any material which is clearly inadmissible. This they are accustomed to do every day of the week. Rules germane to trials by jury or by assessors are not all necessarily appropriate to hearings before magistrates. I find it impossible to suppose that the evidence improperly "admitted" (that is, "recorded") here (improperly by the strict rules of evidence), would have had any influence on the experienced magistrate presiding. I would reject this as a ground of appeal.

A further matter was urged in relation to the record of interview, in that no detail appears as to the language used or as to the accuracy of any translation which was made in the course of obtaining the record. However I consider I should presume that the learned magistrate proceeded correctly. (nothing appears to suggest to the contrary in the transcript), and would have satisfied himself that the appellant understood the questions asked of him, and that his answers were correctly recorded. No questions were asked of the police witnesses by the appellant, and the appellant did not in his own sworn evidence challenge the record of interview. I do not regard this ground as having any substance.

The next matter urged is the question of identification. The complainant is the only witness as to identification. She states that her assailant had a pale blue shirt on, and he was grinning at her. There was a street light. She did not keep him in sight after he ran away - nor did she see him stop. Plainly she claimed to have seen the face of her assailant. At the beginning of her evidence she said "I saw the defendant running towards me diagonally across the street". One is left in doubt as to whether she intended by this to mean "a man" or "this man" (in the dock). It was not investigated whether she had known the defendant by name or face before. They both worked for the same organisation - but it was not clear whether they had met before. She follows the same pattern in her evidence referring to the assailant throughout as "the defendant", without it being clear that she was intending to identify the man who did these things as actually being the defendant. The magistrate appears to have been impressed by her demeanour and found her a truthful witness. He found the evidence of the appellant and his witnesses to be full of discrepancies and he was satisfied from the demeanour of one of them Ecove that he Ecove should be disbelieved.

The constable who took the appellant to the police station said the appellant was wearing a black singlet at the

time.

Other bystanders apparently purported to take part in the process of identifying the appellant as Mrs. Keyes' assailant; but apprently owing to poor police work, and the interference of a European (the two things appear to have been connected), these men were not forthcoming as witnesses - their names may not even have been recorded.

Sub-Inspector Nuakona took the record of interview in which the appellant denied grabbing a European woman; but to the further question "A woman alleged that she can identify you as the man who grabbed her", he replied "I don't know. I have had some drink to drink and I don't know." To a third question "When the woman screamed and the men chased you to the hotel, were you identified as the man who tried to grab her"; (one that might be classified as a "beating the mother-in-law" question par excellence - especially as there was a "mother-in-law" in this case - the complainant Mrs. Keyes) - he replied "I don't know about this". I would regard both these answers as possibly explicable in the accused's favour, rather than necessarily to his detriment, in terms of indigenous politeness in the face of a statement by a European woman. These questions and answers are the subject of counsel's comment as to the language used and quality of translation had.

The sub-inspector was unable to pledge his recollection as to the clothes the appellant was wearing when at the Boroko Police Station - a most vital matter; while on this point of clothing, the accused in his sworn evidence stated he was wearing a black shirt. Ecove, the witness called by the defence, agreed that the accused was wearing a long-sleeved blue shirt - but in view of the magistrate's dismissal of his evidence as a fabrication, it would not be safe to use this piece of evidence to corroborate the complainant as against Constable Levi and the accused.

The complainant herself says that the two boys who caught him were in the doorway and they identified him to the policeman and specially went over and identified him. This statement incorporates an inadmissible element (that they caught him), and may be objectionable in form (in that it uses the verb "identified" - a loose description perhaps of what she saw happened and what she thought was the effect of their movements). On the other hand the constable says "She and I went to the Saloon Bar in the Papua Hotel and she pointed out the defendant". This version appears to be corroborated by a question asked of Ecove by the appellant - "While I

was drinking inside the lady and the policeman came in and the lady took hold of my sleeve?", which was answered "Yes".

There are indeed many discrepancies in the accounts given by the appellant, and the witnesses Kane Savage and Ecove Kamalefi. The appellant said he was at work on the wharf between 7 and ten to 9 when he returned to the hotel. He later asked a question of Ecove to establish that he the appellant went inside the hotel at twenty to 9. Mr. Savage says he was with the accused from 8 p.m. to twenty to 9 when he left him at the hotel entrance. He himself went to the Moresby Hotel and next encountered the appellant being led out of the Papua Hotel at a quarter past 9. Ecove puts the appellant inside the Papua Hotel sitting with a European drinking at a quarter to 8. A woman came in at that time and pointed at the appellant. It is clear he is referring to Mr. Savage, who was with the appellant later at the station.

Despite the completely unreliable accounts of the appellant and his witnesses; is the evidence of identification satisfactory enough to allow a tribunal to have come to a conclusion to the necessary degree of satisfaction beyond reasonable doubt? The High Court has laid down that where evidence of identity is given by a witness whose previous knowledge has not made him familiar with the appearance of the accused and where he has been shown the accused alone as a suspect and has on that occasion first identified him, the conviction of the accused is not safe unless his identity is further proved by other evidence (Davies v. The King (6)). With due respect to the learned magistrate the situation there predicated appears to me very similar to that obtaining here. On the complainant's account she does not claim prior knowledge of the appellant (though if this had been investigated the contrary might have been shown), and she has him pointed out to her by two other men she believes, but has not seen, to have chased and caught her assailant.

I am satisfied that properly instructing himself the learned magistrate could not have been satisfied beyond reasonable doubt of the identity of the assailant - that he must have allowed himself to proceed on a wrong principle. This constituting as it does a substantial miscarriage of justice the appeal should be allowed. Normally I should have considered that the matter should go back for a retrial - it appears to me that the complainant's evidence if properly led

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(6) (1937) 57 C.L.R. 170

might have established other elements going to identity. But bearing in mind that the accused has served 15 days of the sentence of imprisonment laid upon him, the length of time he has been under stress of this charge (nearly 10 months), and the costs no doubt incurred by him - I do not think he should be exposed to a second trial.

Before leaving the case I should say that if the facts as to the European's intervention in the case, were as stated by Constable Levi, then it is a pity he the European was not arrested and presented before the Court on a charge of attempting to obstruct justice. The duties of policemen, particularly in the questioning and arrest of suspects in the atmosphere of a hotel, are sufficiently hazardous and unpleasant without they the policemen being subjected to threats and interference by Europeans claiming the ear of authority.

The appeal is allowed, the conviction is quashed and the appellant discharged.

Solicitor for the Appellant : R.H.B. Wood, Barrister at law

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