Asst. Crown Sol.

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IN THE SUPREME COURT
OF PAPUA NEW GUINEA

CORAM: Lalor, J.
Tuesday,
25th March, 1975.

SEBULON WAT
Appellant

- and -

PETER KARI
Respondent

Appeal 156 of 1974 (N.G.)

1975
12 Mar.
RABAUL
25 Mar.
PORT
MORESBY
Lalor, J.

This is an Appeal against a decision of the District Court at Kavieng where on a charge that the appellant on or about the 11th and 12th days of February, 1974, did encourage the commission of an offence against a law of the Territory, to wit, steal coconuts and copra the property of James Hubert Walker, the Court found the facts proven, but acting under the provisions of s.138 of the District Courts Act, did not proceed to conviction but discharged the defendant conditionally on his entering into a recognizance in the sum of two hundred dollars to be of good behaviour and keep the peace for one year.

The charge was laid under s.15(a) of the Public Order Act, 1970.

The Offence

S.15 of the Public Order Act 1970 states -

"A person who -

(a) incites to, urges, aids or encourages; or

(b) prints or publishes any writing which incites to, urges, aids or encourages,

the commission of an offence against a law of the Territory or the carrying on of any operations for or by the commission of such an offence is guilty of an offence."

This Section reproduces s.7(a) of the Commonwealth Crimes Act.

It is important for the purposes of this case to construe the Section under which the information was laid and to lay down the essentials of the offence. In the first place it should be noted that s.15 like s.7(a) of the Commonwealth Crimes Act creates a new offence; it does not merely reproduce s.7 of the Criminal Code which deals with accessories to offences. The essential difference is that under s.7 of the Criminal Code a person is not liable for acts of aiding or counselling the commission of an offence unless an offence has been committed. S.15 of the Public Order Act on the contrary creates a substantive offence whether or not the offence which is urged or incited or encouraged, is in fact committed or not.

The words of Isaacs, J. in Walsh v. Sainsbury (1) are equally applicable to s.15 of the Public Order Act -

> "Sec. 7A of the Crimes Act creates a new and substantive offence. The mere fact that A 'incites to' or 'urges' the commission of an offence or offences against a Commonwealth law is enough to constitute A an offender. He may 'incite' or 'urge' a particular person or generally, but, the 'incitement' or the 'urging' once proved, the offence is complete. Withdrawal does not obliterate it, though no doubt it may affect the measure of punishment. But to be itself an offence the 'incitement' or the 'urging' must be to the commission of some 'offence'."

The second matter which must be noted is the fact that s.15 of the Public Order Act is a statutory offence of Papua and New Guinea. As such by reason of s.36 of the Criminal Code the provisions of Part 5 of the Code are applicable to it. Now Part 5 of the Criminal Code provides a statutory freedom from criminal responsibility which

> "cannot be destroyed except by express enactment of the Legislature or by language in a later statute so clear and unequivocal

(1) 36 C.L.R. 464 at 476

> in its meaning that one must necessarily conclude from it that the Legislature intended to destroy that freedom."
> (Stanley, J. in Hunt v. Maloney (2).

There is nothing in the Public Order Act to lead one to the conclusion that s.36 does not apply to offences under s.15 of that Act.

The principal effect of this is that the offence created by s.15 of the Act is not an offence of strict or vicarious liability. Under the Criminal Code itself there is no such doctrine of strict or vicarious liability. Nor can there be in any statute unless it is expressly provided by the legislature, contrary to s.36 of the Code, that this should be the case.

S.23 of the Code, which is part of Part 5, provides for freedom from criminal responsibility for acts or omissions which occur independently of the exercise of the will of or for events which occur by accident.

> "It has never been doubted that s.23 has the effect of requiring knowledge of all the elements of the offence on the part of the defendant."
> (Howard - The Protection of Principle Under A Criminal Code (1962) 25 Modern Law Review 190 at 192; and more fully, Howard - Strict Responsibility, Chapter 7, The Australian Criminal Codes, 145 ff).

As Stanley, J. says in Hunt v. Maloney (3) (supra)

> "Section 23 lays down principles, adapted no doubt from the common law - which satisfy a deep-rooted sense of justice."

Thus for example, it would be obviously unjust to make criminally responsible a taxi driver who carried a

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(2) (1959) Qd. R. 164 at 177
(3) (1959) Qd. R. 164 at 172

passenger who in fact, was a thief about to commit a break and enter, to the scene of the crime, if the taxi driver had no knowledge of what the thief was about. If s.15 were an offence of strict responsibility it could be said that the taxi driver, in this situation, had in fact, aided the thief and was thus liable because knowledge of the ingredients of the offence, viz that he was assisting the thief would not be an element of the offence.

Applying, then, these principles to the offence in question, it may be asked what is the effect on the elements which the prosecution was required to prove. He was charged with encouraging the commission of an offence against a law of the Territory. We have already noted that the present offence under s.15 differs from an offence under s.7 of the Criminal Code only in that the offence under s.15 is complete upon the encouragement of the commission of an offence, while s.7 of the Criminal Code requires the further element, that following the encouragement, the offence must actually have been committed. The element of encouraging the commission of an offence is common to both Sections. s.7(d) of the Code makes criminally liable "any person who counsels or procures any other person to commit the offence". The element to be proved in a charge under s.7(d) of the Code has been considered by the Full Court of Queensland on two occasions. In Reg. v. Solomon (4) Philp, J. said -

> "Section 23 makes it plain that if B does an act which is done independently of the will of A the latter cannot be criminally responsible for that act. Similarly under s.7(d) - if A counsels or procures B to commit an offence A is liable only for the actual offence he has consciously counselled or procured".

Mansfield, C.J. agreed with Philp, J.

In West v. Perrier (5) Mansfield, C.J. stated the position as follows -

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(4) (1959) Qd. R. 123 at 128
(5) (1962) Q.W.N. 11

> "Section 7(d) does not create criminal responsibility in a person who counsels or procures another person to do the act which constitutes the offence - the responsibility attaches only to a person who counsels or procures another to commit the offence. That suggests that the counsellor or procurer must know that what he has counselled or procured is an offence."

Matthews, J. and Stanley, J. agreed with this judgment.

The reasoning in these cases is equally applicable to s.15 of the Public Order Act.

I have spent some time in reviewing the nature of the offence because it is the central question in this case. The broad facts on which a prosecution was based, were that village people claimed that certain of their land had never been bought and was now being used by the occupier of a plantation. Since they believed it had never been bought, they regarded it as their own and, presumably in default of better advice being available, sought assistance from a law student who came from their area. He is said to have advised them to take coconuts from the plantation. Assuming that this was the case it raises the question firstly, whether he in fact advised them to do something which was in fact an offence; and secondly, whether he so advised them knowing that it was an offence. Obviously, as has been pointed out, s.23 and s.24 of the Code are extremely relevant to this.

Additionally, s.22 of the Code which provides that -

> "a person is not criminally responsible, as for an offence relating to property, for an act done or omitted to be done by him with respect to any property in the exercise of an honest claim of right and without intention to defraud."

s.2 of the Code defines an offence as "An act or omission which renders the person doing the act or making the omission liable to punishment".

s.1 defines criminally responsible as "liable to punishment as for an offence;"

Therefore if the village people acted in the exercise of an honest claim of right and without intention to defraud, they had not committed an offence by taking the coconuts and copra and the consequences of this was that a person encouraging them to so act was not encouraging the comission of an offence, even objectively.

But as has been noted, the objective criminal liability is not the issue as regards this case where the defendant is charged with encouraging the commission of the offence. He must know that the persons whom he advised did not have an honest claim of right and would thus be guilty of the offence of stealing the copra by taking it.

It then becomes necessary to consider what is meant by an honest claim of right. It should be noted that the Section does not speak of an honest and reasonable claim of right. It has merely to be honest. Thus, as Gibbs, J., with whom the rest of the Court agreed, said in Reg. v. Pollard (6) -

> "It is not to the point that the accused had no right to take the vehicle. If he had honestly believed that he was entitled to take it, or if the jury had a reasonable doubt whether he had such a belief, he should have been acquitted, however wrong his belief may have been, and however tenuous and unconvincing the grounds for it may seem to a judge."

It was then for the prosecution to establish beyond reasonable doubt, all the elements of the offence

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(6) (1962) Q.W.N. 27 at 29

and to exclude, beyond reasonable doubt, any of the "excusatory defences" found in Chapter 5 of the Code and fairly raised by the evidence.

This then leads us to a consideration of the pleadings and evidence.

The Pleadings and The Evidence

It is of some importance to note that the case was tried by a lay magistrate and prosecuted and defended by counsel. It will be seen that in a number of important aspects counsel for the prosecution strongly argued a case which was erroneous in law, and which was accepted by the magistrate.

In reply to a request for particulars of the charge, the solicitor for the informant detailed a number of acts by the defendant upon which he relied as establishing the encouragement by the defendant to commit the offence charged. It is necessary to examine these in some detail to see whether they could constitute evidence on which a Court could convict.

The first acts of encouragement were described in the Particulars as -

> "(a) Four letters to Abel Ges Tasman dated the 7th, 17th, 21st and 29th January, 1974".

The prosecution case was that the contents of these letters encouraged certain persons, subsequently named in part later in the Particulars, to commit the offence charged. The defence contested that the letters contained any encouragement. For the present purposes, it is unnecessary to decide whether there was evidence from the letters which could be found by a tribunal of fact to have constituted encouragement. Assuming that there was, the question which must be answered is, whether this was evidence probative of the charge against the defendant.

It has been seen that the defendant was charged that "on or about the 11th or 12th February 1974" he encouraged the commisssion of an offence. An offence under s.15 has already been seen to be complete on each act of encouragement. Thus, if the prosecution contention was correct, the defendant had committed complete offences on the 7th, 17th, 21st and 29th January, 1974. But he was not charged with these offences. He was charged with acts of encouragement "on or about the 11th or 12th February".

In the words of Viscount Sankey L.C. (Maxwell v. The Director of Public Prosecutions) (7) the case for the informant as set out in the particulars -

> "offended against one of the most deeply rooted and jealously guarded principles of our criminal law, which as stated in Makin v. Attorney General for New South Wales is that 'it is undoubtedly not competent for the prosecution to adduce evidence to show the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried'".

A fortiori, it is even less competent to allege, as was done by the prosecution in this case, that the acts earlier in time than the date of the alleged encouragement charged could constitute the offence of a later date.

There is however, an even more fundamental objection arising out of the particulars as set out above.

s.37 of the District Courts Act provides that "an information shall be for one matter only ..." with two exceptions which are not relevant to the facts of the present case.

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(7) (1935) A.C. 309 at 317

Now, as has been seen, if by the four letters the defendant encouraged the persons concerned to commit an offence then there were four separate offences all forming the subject matter of the one information. Counsel for the informant should have been required to elect on which charge he was proceeding and if he did not so elect, the information should have been dismissed. (See Johnson v. Miller (8), judgments of Latham, C.J., Dixon, Eratt and McTiernan JJs).

In addition to the above, the evidence adduced by the defendant at the trial included a letter from the defendant dated 2nd February, 1974 to the same Abel Ges Tasman saying, "I want you to tell the men to stop cutting the copra", and later "do not cut any more copra".

The legal effect of this is dependent on s.23 of the Criminal Code as has been set out earlier. Assuming that the villagers had been advised by the defendant to cut copra belonging to the plantation at an earlier date he could not be criminally responsible for acts after that date when he had explicitly withdrawn his advice. To hold otherwise would be to make him vicariously liable for acts of others independently of his will. As Philp, J. said in Reg. v. Solomon (9) (supra) -

> "At common law a counsellor may by countermanding his counsel limit or destroy his responsibility - Archbold op cit. p. 1501 - and I assume that an aider may show that by words or conduct his aid was limited to a particular offence. In Queensland s.23 covers these matters".

The second and third particulars of the acts constituting encouragement as alleged by the prosecution were as follows:

> (b) By his presence words (sic) at a meeting held at Bangatan village on Monday, 11th February. This meeting was attended by

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(8) 59 C.L.R. 467
(9) (1959) Qd. R. 123 at 129

those listed in paragraph (4) below.

(c) By his words spoken at other meetings of those referred to in paragraph (4) and others to discuss land matters between January 1973 and the end of February 1974.

As regards (c) above it is evident that there is a further duplicity introduced into the information which now includes an unspecified number of other acts of encouragement both before and after the date of the alleged offence. Hence on this further ground the information, unless amended, should have been dismissed.

The particulars outlined in (b) above, had they stood on their own and been properly particularised, could have substantiated some of the elements of the charge as laid. As it was, being only one of many alleged offences in the one information they remain part of the one defective information.

The evidence by which counsel for the informant sought to prove that the defendant's presence and words at the meeting of the 11th February constituted the offence, was that of the villagers who were present.

He was in some difficulty with this as his witnesses either swore that the defendant had not encouraged them to take the copra, or did not remember. He then applied to have his principal witness Abel Ges Tasman declared hostile, and for another witness, Saranos Takap, to refresh his memory from reading from a statement made by him to the police over a month later.

Counsel for the appellant sought to challenge the magistrate's ruling declaring Abel Ges Tasman to be a hostile witness. I can see no grounds for interfering with the magistrate's discretion in this matter. It was shown that the witness had given sworn contradictory evidence in previous proceedings.

However, the limited use which may be made of such evidence and its weight is all important. Firstly,

the contents of the previous inconsistent statements made by the witness are not evidence upon which the Court can act. Secondly, where the credit of a witness has been destroyed by showing that he has made previous inconsistent sworn statements in circumstances such as the present case the value of his evidence is, at the best, negligible and, at the lowest, nil. As the Full High Court said in Davies and Cody v. The King (10) -

> "We respectfully think that this does not sufficiently take into account the not remote possibility of the jury's having given some definite weight to the fact that Stevens, however criminal in instincts, was prepared to give evidence against the prisoners, with whom, he swore, he had associated. We know that His Honour the Chief Justice when he presided at an earlier trial, expressed the view that no effect at all should be given to Stevens' evidence, and, if this view had again been strongly commended to the jury which convicted the prisoners, there might be much to be said for the view that Stevens' recantation could not have much importance. But it must be remembered that the Crown chose to rely on the man's evidence and press its probative value, and the judge's charge does not advise the jury to reject his testimony. It is now known that it is completely untrustworthy, and ought not to be allowed to enter into the reasons for any verdict of guilty."

The Court of Appeal states the law succinctly in the following passage:

> "In the judgment of this Court, where a witness is shown to have made previous statements inconsistent with the evidence given by that witness at the trial, the jury should not merely be directed that the evidence given at the trial should

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(10) 57 C.L.R. 170 at 184

be regarded as unreliable; they should also be directed that the previous statements, whether sworn or unsworn, do not constitute evidence upon which they can act" (R. v. Golder Jones and Porritt (11) and see R. v. Pearson (1964) Q.R. 471).

In the case of the witness Saranos Takap, counsel for the prosecution sought permission and was allowed to show the witness a statement which he had made to the police over a month later than the event, in order to refresh his memory. Counsel for the defendant objected that this amounted to leading the witness's prior inconsistent statements without having him declared hostile. I have no doubt that that was in fact, the case and that the evidence so obtained was for this reason inadmissible. (See R. v. Cox (12).

In my view, apart from the above, the statement should not have been permitted to have been used as it was not made substantially at the same time as the occurrence of the events to which the witness was required to depose. Additionally, since the witness subsequently contradicted his evidence in cross-examination, because of the sworn contradictions, it should have been regarded as without weight for the reasons given above.

Particulars (d) of the means used by the defendant to encourage the commission of the offence consisted of allegations of threatening behaviour by the defendant to plantation labourers on 12th February. He was alleged to have made threats against them whilst the stealing was taking place to dissuade them from going to the police or assisting their employer. Presumably, the Court was asked to infer from that behaviour that he was encouraging the defendants to steal.

Defence counsel submitted the evidence was not admissible, as the defendant had already been charged and acquitted of the offence constituted by the facts which it was sought to prove. Counsel for the informant pressed the admissibility of this evidence on the basis

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(11) (1960) 45 C.A.R. 5 at 11
(12) (1972) Q.R. 366 at 370

that the present charge was for a different offence and that the defendant had never been in danger of being convicted of this offence. In other words, that no question arose of autrefois acquit. The magistrate admitted the evidence.

Now what counsel for the informant was seeking to do was to establish that the accused had done certain acts on the 12th February which constituted the offence although he had been acquitted previously, by a Court of competent jurisdiction, of doing those acts.

In accepting counsel's submissions for the informant, the Court was lead into error. The issue was not one of autrefois acquit but of issue estoppel. As Dixon, J. as he then was, said in The King v. Wilkes (13) -

> "Such rules (of issue estoppel) are not to be confused with those of res judicata, which in criminal proceedings are expressed in the pleas of autrefois acquit and autrefois convict. They are pleas which are concerned with the judicial determination of an alleged criminal liability and in the case of conviction with the substitution of a new liability. Issue estoppel is concerned with the judicial establishment of a proposition of law or fact between the parties."

Issue estoppel applies in criminal cases in courts of summary jurisdiction in the same manner as in other courts. O'Mara v. Litfin (14).

The pre-requisite conditions of issue estoppel are set out in the decision of the Privy Council in Sambasivam v. Public Prosecutor, Federation of Malaya (15). Lord MacDermott, giving the reasons of the Board, stated the principles as follows:

> "The effect of a verdict of acquittal pronounced by a competent court on a lawful charge and

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(13) 77 C.L.R. 511 at 519
(14) (1972) Q.W.N. 32
(15) (1950) A.C. 458

> after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication. The maxim 'Res judicata pro veritate accipitur' is no less applicable to criminal than to civil proceedings. Here, the appellant having been acquitted at the first trial on the charge of having ammunition in his possession, the prosecution was bound to accept the correctness of that verdict and was precluded from taking any steps to challenge it at the second trial."
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> (And see Kemp v. The King (1951) 83 C.L.R. 341 following the above case.

Both the present case and the earlier case were police prosecutions brought against the same defendant. His acquittal on the first charge of threatening behaviour concerned the same allegations sought to be led in evidence in the present case. His acquittal then was inconsistent with those allegations. Accordingly counsel for the informant was not entitled to call evidence of them and they were wrongly admitted.

Apart from this, the evidence led for the prosecution was so contradictory that no tribunal of fact properly directed could rely upon it to bring in a verdict of guilty. The evidence of the prosecution witness Bob Matbobs, an Assistant Patrol Officer, and the only independent witness to the events, is at complete variance with the evidence of the labourers as to what occurred at the meeting between them and the defendant, and contradicts their evidence that there was a second meeting since Matbobs and the defendant had already left together by speed boat when this was alleged to have occurred.

Particulars 4 gave the names of the persons alleged to be encouraged to steal.

Particulars 5 and 6 gave the times when the stealing took place.

Particulars 7 gave details of the convictions of Abel Ges Tasman and Sakanos Takap for stealing.

Particulars 5, 6 and 7 appear to have been asked for and given on the basis that the offence charged was not complete until the actual stealing was proven. As I have said, in my view this is a wrong view of s.15, so that the evidence adduced was more surplusage.

It has been seen that the offence with which the defendant was charged was encouraging "to steal coconuts and copra the property of James Hubert Walker".

In view of the overall unsatisfactory nature of the case it is unnecessary to dwell in detail on evidence adduced to support the allegation of ownership in Walker, other than to note that it had two serious deficiencies as proof in a criminal case.

Firstly, although a copy Certificate of Title was produced, Walker, who claimed to be a lessee for a term of five years, was not registered on the Title, nor was the lease produced nor any evidence given that it has been consented to under s.75 of the Lands Act 1963. In other circumstances, it would be necessary to consider whether there was any admissible evidence of ownership by Walker since as Parke B. said -

> "The moment it appears that there is a lease, you cannot talk about its contents without producing it". (Augustein v. Challis & Anor.) (16)

Secondly, no real evidence was called to show that the coconut trees from which the coconuts were alleged to have been stolen were within the area covered by the Certificate of Title or the lease. The village people claimed that portion of the land occupied by the plantation had never been bought and thus, both under German and Australian law, could not, prima facie, be

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(16) 154 E.R. 118

part of the Title. Encroachment beyond the boundaries of a Title is a common enough event and, where there was evidence to suggest that this may have happened, acceptable evidence of the identity of the land in question with the land in the Title should be given.

The Judgment:

It would be surprising if the magistrate had not fallen into error in view of the case which was presented to him.

Firstly, he was wrong in law in proceeding to conviction upon an information which, as has been seen, comprised a number of offences. He should have required the counsel for the informant to elect upon which offence he wished to proceed. As Lord Goddard said in Edwards v. Jones (17) in respect of an information for more than one offence:

> "No conviction could take place upon it, because any such conviction would be bad for duplicity"

and later

> "It is elementary law that a conviction always follows the information. If the conviction showed two findings, one of not guilty on one charge and guilty on another, there you would have a conviction which at once would show, there was duplicity in the information, and which, in my opinion, would be bad. If on the other hand, the conviction was drawn up with one charge only, it would mean it was not following the information, so that again it would be bad. I do not think, therefore, it would have been possible in this case to have properly drawn up a conviction which would have stood." (at pages 665-666).

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(17) (1947) 1 K.B. 659 at 662

On these grounds the decision was bad and must be quashed.

Secondly, the decision is bad in that the findings of fact as to the encouragement go no further than establishing an objective rather than a subjective encouragement by the defendant. The judgment reads -

> "However the Court is satisfied beyond all reasonable doubt that certain village people looked to the defendant as their friend and mentor and that without the defendant's involvement and encouragement which operated on the minds of the village people there would have been no pursuing of matters with the Minister or Director and no encouragement to steal coconuts and copra from James Hubert Walker. It may be said Sebulon gave them hope and possibly some justification in pursuing an illegal course (that of stealing coconuts) the proceeds to be used in part to buy back plantation property."

As has been shown earlier, to establish this offence the defendant must have been found to have knowingly encouraged them to steal. It is not enough to find that they received encouragement from him, for that would be to make the offence one of strict responsibility, which, as has been shown, it is not by virtue of s.36 of the Code. Nor is the situation different at common law. As Lord Parker, C.J. said in Wilson v. Danny Quastel (Rotherhithe) Ltd. (18) -

> "In my judgment 'encourage' there merely means incite. It does not mean cause to be encouraged but inciting someone to bet"

No personal knowledge would have been required if the legislation were to be read as "cause to be encouraged" as no mens rea would be involved in the offence. See Laird v. Dobell (19) per Lord Alverstone, C.J.

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(18) (1966) 1 Q.B. 125 at 133
(19) (1906) 1 K.B. 131 at 133

Additionally, the finding that the defendant gave them "possibly some justification" is inconsistent with such knowledge of guilt as must be found.

On this ground, also, I hold the decision bad.

Thirdly, as has been seen, there was no evidence which would justify a conviction of the offence charged. The evidence of the witnesses who gave contradictory sworn evidence could not, on the authorities set out above, supply such evidence. Nor could the evidence of the "confrontation" with labourers for the reasons set out above.

On this ground also, I hold the decision bad.

Fourthly, the conviction was clearly based on inadmissible evidence. The judgment reads:

> "In the confrontation with the labourers I find there was encouragement calculated to prevent the labourers from stopping the stealing then in progress".

As has been shown, the evidence of this alleged confrontation was inadmissible since the informant was estopped from leading it by virtue of the defendant's previous acquittal.

Again, the judgment reads:

> "He has told the Court of his discussions with the Director of Lands and spoken of events in the Gazelle and Namatanai. I am satisfied that the course adopted by the defendant was an illegal and calculated course to stir long and hard if need be".

Quite clearly, the Court took into account acts of the defendant prior to the offence alleged which were inadmissible to base a conviction for the offence charged. The reference earlier in the judgment to nullifying the encouragement again clearly indicates

that the Court was influenced by the evidence of the earlier letters in its finding of guilty.

On this ground also I hold the decision bad.

Fifthly, the magistrate misdirected himself as to s.22 of the Code in a number of ways. Firstly, he misconceived the nature of this defence. In saying "I do not hold it is open to this Court to go behind the Title to Bangatang" he is confusing the common law rule that a Court of summary jurisdiction has no jurisdiction to decide a matter in which the Title to land is in dispute with the defence under s.22. In saying that "I do not feel at liberty to plumb the depths of possible village Bangatang village rationalisations" he in fact was refusing to consider whether they honestly held a claim of right however wrong in law it might be. Secondly, the real issue was not whether the defendant had a claim of right himself but whether he knew their claim to be dishonest. Thirdly, he misconceived the onus of proof where the evidence fairly raises the issue of an excusatory defence under Part 5 of the Code. It is not for the defendant to "make out" a defence; it is for the prosecution to negative the defence so raised by the evidence. I have already noted the indeterminate nature of the evidence of Walker's Title and the failure to identify what Title he might have with the coconuts in issue. Whatever that Title may be, it is not the law, as the magistrate appears to have assumed, that there can be no action brought against the holder of a registered Title. His findings that there was evidence of irrelevancier such as land shortages, over-population, appeal against the final order further emphasize the onus which he sought to cast on the defendants as does also his speculation that "There was possibly never any claim raised before the provisional order was read".

I hold then that insofar as the decision was based upon a misdirection as to the nature and effect of a claim of right made under s.22 of the Code and the failure of the magistrate to consider the one relevant issue to this case, namely the state of the defendant's mind, the decision is bad in law.

For these reasons I quash the decision and order pursuant to s.236 of the District Courts Act 1964, that the information be dismissed.

I would add that, in my view, the criminal law is not a proper vehicle to determine property dispute between individuals. If Walker, in fact, has a lease which has received the consent of the Minister for Lands he has adequate remedies in a civil action to determine such rights to the disputed land as he may establish and to restrain interference with such rights. It is not for the police or any executive authority to set themselves up as the arbiter of these issues.

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

Solicitor for the Appellant : N.H. Pratt Esq., A/Public Solicitor.