

26th June, 1948.

THE KING V.CHOW HUNG CHING

and

SI PAO KUNG.*Decision affirmed
by High Court.
77 C.L.R. 449.*JUDGMENT.

As I have already mentioned, the two accused are jointly charged, in this case, first, that on or about 25th January, 1948, in the Territory of New Guinea, they unlawfully assaulted the native, Pondranei, and thereby did him bodily harm; and secondly, that on or about the same date in the Territory of New Guinea, they unlawfully detained Pondranei in a hut against his will. Each of the two accused has pleaded "Not Guilty" to each of the two counts in the indictment. It is not, of course, for the accused to prove their innocence of these charges. On the contrary, the onus is on the Prosecution to prove the charges beyond all reasonable doubt; and, should the prosecution fail to do this in respect of any charge, there must be an acquittal on that charge. In this case, as will appear in the course of this summing-up, the defence strongly contended that the prosecution has failed to establish beyond reasonable doubt that the two accused were identical with any of the Chinese who allegedly assaulted Pondranei and deprived him of his liberty on the day in question; that the prosecution has therefore failed to discharge the onus of proof that rests upon it; and that the two accused should accordingly be acquitted.

It is alleged that the offences now charged were committed at Lugos, on the Island of Manus; and evidence has been given that Lugos is situated about 3½ miles from the site of the Administration's pre-war District Office at Lorengau and about 3 miles from the nearest part of the Chinese Camp at Lorengau - the only Chinese camp at Manus and the one where the local personnel of the Chinese Board of Supplies and the two accused were stationed. Evidence was also given that Lugos is the rendezvous where local natives and Chinese from that camp met to barter for native produce, etc. - a sort of market.

On Sunday, 25th January last, Pondranei, and a native companion named Poma, had taken pineapples to Lugos, where they exchanged them with Chinese (who were not the accused) for cartons of cigarettes. About midday, heavy rain fell and Pondranei took shelter from it in a nearby hut. So did other natives, who included Hapkas, Sirip and Sinyenyam, all of whom have given evidence in this case. Suddenly, according to Pondranei, Hapkas, Sinyenyam and Sirip, four Chinese entered the hut. Another native named Nowan, who was approaching the hut from outside at this time, says he saw two Chinese enter the hut and two remain outside; this differs, and the defence has stressed this difference, from the evidence of the other four natives that four Chinese entered the hut. Pondranei, Hapkas and Sinyenyam say that two of the four Chinese who entered the hut were the two accused; and Nowan says that the two Chinese he saw go into the hut were the two accused. Pondranei, Hapkas and Nowan say that each of the four Chinese was carrying something:- one carried "pitpit" (a species of long reed), another carried a "plank" (a piece of dressed or partly dressed wood), another carried a piece of telephone wire, and another something flexible of "brass" or cored with "brass". Pondranei, Hapkas and Sinyenyam say that the Chinese who carried the "pitpit" was the taller of the two accused, Si Pao Kung, and that the Chinese who had the "plank" was the shorter of the two accused, Chow Hung Ching. Sirip too mentioned Chow Hung Ching as having a "plank". Hapkas and Sinyenyam further say that Chow Hung

Ching, in addition to having a "plank", had some wire cable coiled around his fore-arm. Nowan, in his evidence in chief, did not specify who carried the "plank", but in his evidence in cross-examination said that he noticed one Chinese who was not Chow Hung Ching, and who had not gone into the hut, holding a "plank": Nowan also gave evidence that Chow Hung Ching was holding wire.

At the time the Chinese entered the hut, Pondranei and Hapkas were sleeping on a shelf or platform some six feet up from the floor level; and Pondranei had cartons of cigarettes in his possession. The Chinese called or beckoned Pondranei to descend, which he did, followed by Hapkas. Pondranei was accused by a member or members of the Chinese party of having stolen cigarettes. He denied this. But then, (according to himself, Hapkas, Sinyenyam and Sirip), his hands were seized and held behind his back by two of the four Chinese and they, with a third Chinese pushing, took Pondranei out of the hut. Pondranei, Sinyenyam and Sirip have referred to these three Chinese as "they" or as "Chinese" without otherwise identifying them. Hapkas, however, said that the two Chinese who held Pondranei's hands behind his back were the two accused.

The party halted about 8 paces outside the entrance to the hut, arguing about the cigarettes. There, Pondranei says, his hands were fastened behind his back, first with "laplap" (cotton material) tied around his wrists, and then with wire cable twisted around his wrists, over the "laplap", in such a way as to leave a length of the cable dangling: he could not say who of the four Chinese did these things, his back being towards them: but he says he saw that the shorter accused, Chow Hung Ching, was ultimately holding the hanging or free end of the wire cable. The onlooking Hapkas was more specific: he said that the two accused were the two Chinese who held Pondranei's hands behind his back while a third Chinese bound them with the wire cable: he said he did not see "laplap" tied round Pondranei's wrists first: he also said, that at that time and place, he saw the shorter accused, Chow Hung Ching, hit Pondranei, with the "plank". Sinyenyam, Sirip and Nowan all say that they saw three of the four Chinese bind Pondranei's wrists with wire, but they did not specify which three of the Chinese did this. Sirip confirms Hapkas's evidence that the shorter accused hit Pondranei with a "plank" at this stage: and Sirip confirms Pondranei's evidence that the shorter accused was holding the free end of the cable that had been tied round Pondranei's wrists.

Then, it is said, the Chinese announced that they would take Pondranei to the "Service Police", that is, to the Chinese Military Police at the Chinese Camp at Lorengau. Pondranei does not appear to have been averse to this proposal, for his claim was that he had come by the cigarettes in his possession honestly. The evidence is that he actually led the way along the road to Lorengau, with the shorter accused (Chow Hung Ching) immediately following him and still holding the free end of the wire cable; then came the other Chinese.

Nowan says he followed Pondranei and the Chinese along this road.

Pondranei says that, as he was walking along the road, he was beaten "strongly" on the back with the free end of the wire cable; but that he could not see, or say, who inflicted this beating. The shadowing Nowan, however, not only corroborates Pondranei's evidence as to this beating, but says that he saw the shorter accused (Chow Hung Ching) administer it, and that it made Pondranei cry out. Nowan also says that he also saw the taller accused (Si Pao Kung) take Pondranei by the hair and draw a knife across Pondranei's throat in a threatening way, but without cutting the flesh: on seeing this, Nowan called out, whereupon (he says) the taller accused (Si Pao Kung) chased Nowan with

the "pitpit" reed he was carrying: Nowan took to his heels and did not return.

Pondranei says that the Chinese did not take him to the "Service Police" at Lorengau as they had at first proposed, but turned off the road, en route, and took him into another hut (a "Quonsett" Hut). There, he says, the free end of the wire cable was passed round the junction of one of the semi-circular rafters and a cross-beam, and was hauled on in such a way that his arms were pulled up behind him and his body was bent forward, until his toes only rested on the ground - the heels being raised from the ground. He says he saw no natives about at this time. Then, he says, the accused Si Pao Kung slapped him across the face (over his nose and eye). This caused Pondranei to shut his eyes and to keep them shut as a protection. He consequently did not see who gave him the ensuing second slap across the face. After that, he says, "they" (he does not say who) beat him with the "plank" and the "pitpit" on his back, buttocks and legs and in a short time he became unconscious. He says he did not struggle while being beaten.

When Pondranei regained consciousness, he found himself, he says, alone and lying on the ground with his wrists still bound - but bound only by the "laplap" fastening: the wire cable had disappeared. He got up, went into the bush, and made his way to a village called Tingau, where he saw an old man named Pokowi whom he asked to free his fettered wrists: Pokowi could not undo the knots in the "laplap" fastening, so cut them with a knife. Pokowi himself has confirmed this, at this trial.

Next morning, between 9 and 10 o'clock, Pondranei was examined by the Government Medical Officer at Inrim, (Dr. Smythe). The doctor has said in evidence that he saw that Pondranei had two black eyes; a bruise, about four square inches in area, on the right side of the thorax or chest, from which some blood had escaped, a bruise of similar area on the left buttock, from which blood had also escaped; and abrasions on both wrists. The doctor was of opinion that the wrist abrasions could have been caused by something rubbing against the wrists with "fairly considerable force", and the bruises by blows with a hard object that had a sufficiently rough surface to cause abrasion of the skin. He described Pondranei's injuries as "minor" ones, and of such a kind as could be attended to by the native medical orderly of a native village without the assistance of a qualified medical practitioner like himself.

Another event of the 26th January last, that is to say, the day immediately following that of the alleged ill-treatment of Pondranei, was the visit of Mr. White, (Assistant District Officer at Inrim), to the Chinese Camp at Lorengau. He was accompanied by ten native constables and by Pondranei and other natives who might be able to identify Pondranei's assailants of the previous day. Mr. White arranged with a Chinese officer for an identification parade to be held. Captain Kuo Ke-Cha, called by the defence, has given evidence that, in consequence of Mr. White's request for such a parade, he instructed all the Chinese, who were having their midday meal at the Mess in the Camp that day, to remain seated in their places, and not leave the Mess-room. Captain Kuo has also said that Mr. White would not agree to have the identification parade held inside the Mess-room, but insisted that it should take place outside. It took place outside. Captain Kuo also said that he thought that "everybody in the camp" was on that parade; but there were "hundreds of men" there so he could not say definitely whether the two accused were there or not: his estimate of the Chinese in the camp that day was "a round 300". Mr. White, in his evidence, said that the parade

took place in a space that was "about 20 yards by 50 yards" in size and that was surrounded by huts; and that, "at a very rough estimate", 200 Chinese were on the parade, but it was "very difficult to say how many were there" because the Chinese were "truculent, jumping about from rank to rank and shouting out": he put the natives he had brought with him for possible identification purposes "apart and under guard, because" (he says) "the position looked ugly". Captain Kuo, on the other hand, said in cross-examination that the Chinese at this parade were not shouting or jumping about. Mr. White, giving evidence, was not sure of the exact number of natives who tried that day to identify the alleged assailants of Pondranei; nor was he sure of the order in which natives attempted identification: but he did remember that some only of the natives he had brought with him attempted identification. He said that two of the natives, Pondranei and another native, Pomakik (also called Amos) went along the lines but did not apparently identify anyone. Then (Mr. White says):- "I went to where the other natives were - (apart and under guard because the position looked ugly) and when I endeavoured to get them to come, some said that there was too much row and too many Chinese and it was long ago, so they doubted whether they could identify anybody - this lot seemed frightened: but some did come - Pondranei and Amos and Popalaling - and all failed to identify. I think there were more than three who tried, possibly six in all, but I cannot be absolutely sure. All failed to identify anyone". Two of the natives mentioned by Mr. White, Amos and Popalaling, have not given evidence at this trial. But Pondranei, Hapkas and Sinyenyam have given evidence here and have said that they could not identify, at that parade, any of the four alleged Chinese assailants of Pondranei. The witnesses Sirip and Nowan say that they were at Lorengau that day, but did not go and inspect the lines of Chinese (or attempt identification):

As to that parade, I think that I may properly observe, and should observe, that throughout this trial, no direct evidence whatever has been given (either on behalf of the prosecution or the defence) showing whether any of the four alleged assailants of Pondranei was present at this parade or not, or showing whether either of the two present accused was at that parade or not.

On 25th March, 1948, almost two months to the day after the first parade, another identification parade was held at the Chinese Camp at Lorengau. On this occasion the Superintendent of Police (Colonel Grimshaw); Mr. White (the A.D.O.); three European officers of Police (one of whom was Acting Sub-Inspector of Police Carr, a witness in this case); a detachment of native police; and Pondranei and other natives who might possibly be able to identify Pondranei's Chinese assailants, went to the Chinese Camp. There, Colonel Grimshaw met a Captain Wong and requested co-operation in the arrest of any Chinese identified. Captain Wong referred him to General Wu at Momote. General Wu was interviewed and, as a result, (Mr. White has stated,) "the General told Captain Wong that he was to bring the four men to Colonel Grimshaw." Mr. White says the party returned to Lorengau and he was "present in the Chinese Office when Colonel Grimshaw interviewed four Chinese who were brought there by Chinese Military Police". Acting Sub-Inspector Carr says that the four Chinese so brought to the Office included the two accused. Mr. Carr also says that Colonel Grimshaw, speaking through an interpreter, addressed the four Chinese and said:- "I am a police officer and I am investigating a report of an alleged assault upon a native at or near Lugos on 25th January. Did any of you four people assault a native on 25th January?" and that the taller accused (Si Pao Kung) replied:- "I tied a native up. I did not beat him". Mr. Carr also says that Colonel Grimshaw then gave that Chinese the customary caution and followed this with a question to which

that Chinese replied. But as this caution was given through an interpreter, and the Chinese, after the caution was given, made no reply (Carr says) the Court considered that it could not properly infer that the Chinese understood the caution; or understood that it was not compulsory to say anything thereafter; and the Court therefore disallowed the reply the taller accused gave after the caution. As to that accused's earlier reply, before caution given (that he had tied a native up but had not beaten him), that reply was made by one of four Chinese brought under military escort and by Colonel Wu's orders, before Colonel Grimshaw, and was made in reply to a general question by Colonel Grimshaw about an assault at or near Lugos on 25th January (two months earlier) on an unspecified native. In these circumstances, it cannot be inferred with certainty that the taller accused's reply related to an assault on Pondranei and on no-one but Pondranei; as I consider that; it would be unfair to that accused, and too dangerous, to draw such an inference I direct myself to exclude that reply from my consideration, as a jury, altogether.

After the interview in the office at the Chinese camp, some 40 to 50 Chinese were lined up in two ranks outside that office. Every reasonable precaution seems to have been taken to make the ensuing identification test a fair one. The natives, who had been brought to the camp for the purpose of identifying Pondranei's assailants, if possible, were segregated and tucked away out of sight of the Chinese assembling in front of the Office; those natives were put behind that Office where the ground sloped down steeply and they were also put under police guard. Later, those of them who were called upon to identify Chinese, were brought up and to the parade singly or one by one: each was told that if he identified any Chinese he was to "mark" that Chinese merely by touching him. As each finished his inspection of the Chinese he was taken aside, under guard, and not permitted to rejoin or communicate with his companions. The four Chinese who had been in the Office had already been told by Colonel Grimshaw through an interpreter to disperse themselves just as they chose, among the lined Chinese, and to change their positions if they chose after any native had attempted identification - a choice of which they availed themselves. Colonel Grimshaw had also suggested that the Chinese in the lines should either all wear hats or all be hatless: they all doffed their hats. Now Mr Jones in his closing address for the defence stated that the four Chinese who had been brought under the escort of military police to the office that day for an interview with Colonel Grimshaw "might quite easily have been seen" by the natives who had been brought to the camp that day for the purpose of identifying Pondranei's assailants. During the trial no witness gave any evidence to the effect that those natives "might quite easily have seen" the four Chinese brought to the office, and Mr. Jones did not put any questions in his cross-examination of witnesses for the prosecution that might have elicited such evidence. The evidence actually given seems to be against Mr. Jones' assertion. Thus Mr. White said in his evidence that he was present at the interview between Colonel Grimshaw and the four Chinese in the office; that "after that there were approximately 40 Chinese labourers lined up outside the office"; that Colonel Grimshaw then suggested that the four Chinese should disperse themselves among the other Chinese as they wished; and that all the Chinese should be as much alike as possible, i.e. either all wear hats or all be hatless; that the four Chinese did disperse themselves and all the Chinese took off their hats; and that Colonel Grimshaw then told Mr. White to go and get, one by one, the natives who had come for identification purposes and (Mr White says) "who had been put at the rear of the office", on ground that sloped down steeply and from where they could not see "anything at all" of "what was going on around the lines in front of the office". Thought Mr. White was not asked at what precise moment the natives were put behind the office, it may be noted he said that, at

the time he spoke of, they "had" been put behind the office, and "had" usually relates to something already past. Further, in cross-examination, Mr. White said the natives were "first" put at the back of the building. Mr. Carr's evidence, bearing on this matter, was that, after the interview in the office, Chinese officers arranged a parade of between forty and fifty men, and the four Chinese who had been interviewed were instructed to take up positions on the parade and advised that they could themselves choose the positions they took up. That witness then continued:-
"The native complainant and native witnesses were at that time behind a Quonsett hut and out of sight of the parade of the Chinese". Assistant Sub-Inspector Carr did not, it is true, say just when these natives were put behind the hut and "out of sight of the parade of the Chinese", and I therefore have, as a jury, to consider what his statement that the natives were "at (this) time" behind the hut and "out of sight" amounts to. Sirip gave evidence that he was called on to inspect the lines of Chinese after Pondranei, Amos and Hapkas had been called; but that he did not actually see those other natives inspect the line "because" (he said) "we were all put at the back of a house first, and taken out one by one". Nowan gave similar evidence. As a jury, I shall have to consider, therefore, whether the evidence leaves open a possibility that, notwithstanding the elaborate precautions subsequently taken by the officers concerned in arranging this identification parade (Colonel Grimshaw, Mr. White, Mr. Carr and the Chinese officers), they had been initially so careless as to allow the natives to see the four Chinese beforehand - thus prejudicing the later precautions. Were those precautions possibly a farce because of an earlier gross oversight? As a jury, I shall also have to consider why, if these natives saw the four Chinese only a few minutes before some of those natives were called on to inspect the lines of Chinese among which the four Chinese had mingled, none of these natives could pick out all the four Chinese they had, on that hypothesis, just seen, and none of them in fact picked out more than one Chinese.

After the four Chinese had mingled in the lines of paraded Chinese, Mr. White, at Colonel Grimshaw's direction, brought certain of the natives, one at a time, from behind the hut, to identify, if they could, any of the alleged assailants of Pondranei.

Pondranei was first called on, and, (he says, and so do Mr. White and Mr. Carr) he identified Si Pao Kung, the taller accused, and that Chinese only. Pondranei says that, to him, Chinese resemble each other, so he was careful to pick out only the one he was quite sure of, that is, the taller accused. Pondranei was then segregated. Mr. White is not sure of the order in which the natives were called on, one by one, to identify Chinese if possible; but he has mentioned that Amos and Nowan were also called on. Amos was not called as a witness; therefore it was not open to the prosecution to tender secondary evidence of any identification he may have made on that occasion, as secondary evidence on such a matter is inadmissible. Mr. White says that Nowan identified the shorter accused, Chow Hung Ching, and Nowan had earlier given evidence to the same effect. Mr. Carr also confirmed Nowan's evidence as to his identification of Chow Hung Ching. Mr. White is not sure which of the other natives brought to LORENGAU were called on to inspect the Chinese on the parade, but thinks that six or seven, of the dozen brought, did so. He says that Sinyenyam did, but Sinyenyam himself has testified that he was not called on to inspect the parade or identify anybody, and Sirip has confirmed Sinyenyam's evidence on this point. Sinyenyam, however, says that, though not called on to identify Chinese, he did in fact see the shorter accused on that parade, but he did not mention this to Mr. White. Hapkas also says that he was at LORENGAU that day, saw the parade

- (he did not say he went along the lines) - and recognised the shorter accused among the Chinese, but did not tell Mr. White about this. Sirip says he inspected the lines of Chinese that day but did not identify either of the accused: yet at the trial he insisted that he saw the shorter accused strike Pondranei on the 25th January. Mr. White, cross-examined by the defence, agreed that two months would be a long time for natives to remember Asiatics. Under cross-examination by the Defence, Hapkas and Sinyenyam agreed that they had, after the second parade, seen the two accused in police custody at Inrim, and Sirip said he had seen them in such custody after the second parade at LORENGAU, and later on board the "Sirius", and also at INRIM. The purpose of this line of cross-examination was, of course, to suggest that these three natives, having seen the two accused in custody, might readily then assume that they were two of the four Chinese who molested Pondranei at LUGOS and, on that assumption, later say in evidence that the accused were two of those four Chinese. Although two of those natives say they recognized the shorter accused at the second parade, but did not mention this to Mr. White, the suggestion of the Defence, that the recollection of those natives may really spring from the sight of the accused in custody, must be carefully considered by me as a jury. The defence has suggested, either by the line taken in cross-examination of the witnesses for the prosecution or by the arguments put by Mr. Jones in his closing address, that the evidence of the native witnesses for the prosecution, implicating the two accused, should not be accepted as credible, for various reasons:- for example:- none of the native witnesses identified any Chinese at all at the parade held on the day after that of the alleged offences; to the uninitiated, Chinese resemble each other; at the second parade, one native identified the taller, and other natives identified the shorter, of the two accused, but no native identified both; the second parade was held two months after the date of the alleged offences and two months is a long time to remember Asiatic faces; and some, at any rate, of the native witnesses had seen the two accused in police custody after the second parade and therefore might easily have been led to assume that those two Chinese "must" have been implicated and to say so in their evidence. These are all suggestions of great force, and, as a jury, I must consider them with extreme care before arriving at any final conclusions.

What, then, are my conclusions? The material upon which I have to arrive at those conclusions is, in general, the evidence given by the witnesses for the prosecution; because, although their evidence was subjected to cross-examination by the defence, no evidence at all on the merits (except for very brief evidence by Captain Kuo as to the first parade) was called by the Defence; and, acting on the advice of their defending officer, the two accused neither gave evidence nor made unsworn statements at this trial. In thus describing the compass or the quantum of the evidence available to me, I must not be taken as in any way suggesting that the defence erred in not tendering evidence on the merits or that the accused erred in not giving evidence or making a statement - on the contrary. As I said at the beginning of this summing-up, the prosecution has the onus of proving the charges beyond reasonable doubt, and there is no onus whatever on the accused to prove their innocence: it follows that it is wholly proper for the defence, if it so wishes, to rely on such weaknesses and inconsistencies as it may discover in the case for the prosecution, and it is under no obligation at all to tender evidence or put the accused in the witness-box or allow the accused to make a statement from the dock.

Now the evidence of the witnesses for the prosecution, in my opinion, establishes beyond reasonable doubt that at LUGOS, on Sunday the 25th of January, 1948, four Chinese, whoever they were, entered the hut in which Pondranei was resting; that one of those Chinese carried "pitpit" reed, another a "plank" and also some wire-cable coiled round his forearm, another a piece of telephone wire, and the fourth a flexible piece of brass-rod or brass-cored cable; that Pondranei was asked by them to descend and did so; that he was accused by Chinese in the party of stealing cigarettes and protested his innocence; that two of those Chinese seized his hands and, with the help of a third Chinese pushing, took him outside the hut to a point about eight paces from its entrance; that there, two of the Chinese held his wrists behind his back while a third fastened them - first with a piece of cloth and then with wire-cable of which one end hung free; that one of the Chinese at that time hit him with a "plank"; that it was suggested by the Chinese that they take Pondranei to the "Service Police" at LORENGAU, and that he led the way, with one of the four Chinese immediately behind him holding the free end of the wire cable that bound his wrists and the other Chinese following; that on the road, the Chinese who was holding the free end of the wire cable beat Pondranei on the back with it and another Chinese threatened him with a knife; that the Chinese did not take him to the "Service Police" at LORENGAU as had been proposed, but took him into a "Quonsett" hut instead; that there he was fastened by the wire-cable to a part of the building's structure in such a way that he was trussed up with his hands drawn up behind his back, his body bent forward, and his toes (but not his heels) resting on the ground; that one of the four Chinese slapped him across the face; that this was followed by another slap across the face and then by Pondranei's being beaten with the "pitpit" reed and the "Plank" on his back, buttocks and legs; that he quickly became unconscious and, when he again became conscious, found himself alone and lying on the floor, with his wrists still bound by the "laplap" binding but not with the wire cable (which had disappeared); that he found his way to a village where an old native cut the "laplap" binding from his wrists; and that next morning a European Medical Officer examined him and found he was suffering from what that officer described as "minor" injuries, but which consisted of a pair of black eyes, bruises in the right side of the chest and left buttock from which blood had escaped, and abrasions on both wrists that looked to the doctor as if they might have been caused by something rubbing against them with "fairly considerable force". Such injuries, in my opinion, amount to "bodily harm", (which is defined in section 3 of our Criminal Code as meaning "any bodily injury which interferes with health or comfort"). The evidence shows, I consider, that the four Chinese, whoever they were, either committed, or aided in committing, an unlawful assault on Pondranei that occasioned him bodily harm, and also unlawfully deprived, or aided in unlawfully depriving, him of his liberty - in other words, that they were all principal offenders: (see s. 7, Queensland Criminal Code: (adopted)). Even if he had stolen their cigarettes - and there is no evidence whatever that he had done so - their counter measures were so excessive that they were unlawful. I also consider that the evidence shows beyond reasonable doubt that those four Chinese, whoever they were, unlawfully assaulted Pondranei in that manner and unlawfully deprived him of his liberty in prosecution of an unlawful common purpose, so that each of them must be deemed to have committed those offences: (see section 8, Queensland Criminal Code (adopted)).

But the vital question remains:- Does the evidence establish beyond reasonable doubt that the two accused were two of those four Chinese? Here again I must remind myself, as Court to jury, of the contention of the defence and the arguments put by the defence, that the evidence does not sufficiently identify the two accused, especially the accused Chow Hung Ching, as being two of those four Chinese. The evidence shows that no native,

at the first identification parade that was held on the day after that of the alleged offences, identified any Chinese on the parade as being one of the four Chinese who had molested Pondranei on the previous day. Now the circumstances of that parade were, that 200 to 300 Chinese were massed, at the time, in a small space, and very greatly outnumbered the visiting party, which consisted only of Mr. White, ten native police, and about a dozen natives brought by him for the purpose of possible identification. Captain Kuo says that this large number of Chinese were not jumping about or shouting. Mr. White, on the other hand, says that the Chinese were truculent, jumping from rank to rank, and shouting, and that, as the position looked "ugly", he had put the natives brought for possible identification purposes under the protection of the handful of native police. I have seen and heard Captain Kuo and Mr. White give evidence and I accept Mr. White's version of what the behaviour of the Chinese, at that parade, was like, and of what the conditions at that parade were like. They were hardly the conditions that would be conducive to cool and deliberate identification by natives. It is true that no Chinese were picked out by the natives that day, but it is also true that there is no evidence that the two accused were present at that parade. For these reasons, I consider the fact that no Chinese was identified at that parade as being inconclusive either way. The second identification parade occurred on the 25th March, 1948, two months after the date of the alleged offences, and one would expect an identification to be more difficult after that lapse of time. I have already recounted the evidence about that second parade. It amounts to this:- that no native identified both of the accused at that parade; but that Pondranei identified the taller accused (Si Pao Kung) and Nowan identified the shorter accused (Chow Hung Ching) while Hapkas and Sinyenyam say that they saw and recognised the shorter accused on that parade, but did not tell Mr. White that they had done so. Now most of the native witnesses at this trial have said in their evidence that both of the accused were members of the party of four Chinese who molested Pondranei on 25th January, 1948, and they have said this, even though they may have identified or recognised only one or the other of the two accused at the second identification parade. The defence, in effect, contends that this shows that the minds of these witnesses and their recollections were influenced by having seen the two accused taken into police custody after the second parade or in police custody later on at INRIM. That is a contention that, as I have already indicated, may not be overlooked or ignored: it stresses a possibility that is opposed to another possibility that, although none of the native witnesses was able to identify both of the accused at the second identification parade (where, no doubt, there was that certain tenseness of atmosphere that is usual at such parades), those natives may, on a later view of the accused in quieter surroundings, have honestly remembered the two accused as being two of the four assailants of Pondranei. It not infrequently happens, in cases where a number of offenders have acted in concert, that one onlooker may be able to identify one or several of the offenders, but not all of them, whereas another onlooker may be able to identify yet others of the offenders, but not all of them. In the present case, however, although none of the native witnesses identified both of the accused at the second parade, virtually all the native witnesses at the trial gave evidence that both accused were implicated in the offences charged.

I have had the advantage of both seeing and hearing those witnesses give their evidence and I have carefully studied the notes of the evidence they gave. I may say that the native witnesses for the prosecution did not strike me as being deliberately untruthful witnesses, though of course even honest witnesses may be mistaken. They gave their evidence frankly and were not shaken, or impelled into contradicting themselves, under cross-examination. They gave their evidence, I thought, with a restraint not always encountered in native witnesses. Pondranei, for example, (though

one might have thought he would be tempted to make certain deductions from the happenings of which he spoke), did not attempt to specify which of the four Chinese first took hold of him in the hut at LUGOS, or which of them fastened his hands outside that hut, or which of them beat him on the road with the wire cable, or which of them trussed him up in the second hut, or which of them beat him with the "pitpit" and "plank" there - because (he said) he could not see them as they were behind him. He did say he saw the shorter accused holding the free end of the wire cable that bound his wrists. He did say he saw the taller accused slap him once, but he could not say who gave him the second slap because, (he said), he had shut his eyes after receiving the first slap, for protection's sake. He said he picked out the taller accused only, at the second parade, because he did not wish to identify anyone he was not quite sure of: and it will be remembered he is the witness who testified that he saw the taller accused among the four Chinese at LUGOS on the 25th January and saw the taller accused slap him. Hapkas says he recognised the shorter accused at the second parade but that he did not mention this to Mr. White; and he is a witness who has testified that he saw the shorter accused among the four Chinese at LUGOS; that he noticed that that accused had wire coiled round his arm and carried a "plank"; and that he saw that accused help in the fastening of Pondranei's wrists and at that time strike Pondranei with the "plank". Sinyenyam says he recognised the shorter accused at the second parade though he did not tell Mr. White of this; and he is the witness who has testified that that accused was one of the four Chinese at Lugos and was the one he saw carrying a "plank" and wearing wire cable coiled around his arm. Nowan identified the shorter accused at the second parade: and he is the witness who has given evidence that he saw that accused among the four Chinese at Lugos, and saw him beat Pondranei, later on along the road, with the wire cable. The evidence of Pondranei (who should know), corroborated as it was by the evidence of the elderly Pokowi, leaves no doubt in my mind that Pondranei's wrists were fastened, first with some "laplap", and then with whire. But Hapkas, Sinyenyam, Sirip and Nowan have only spoken of seeing Pondranei's wrists fastened with "wire". Mr. Jones, for the defence, has contended that their evidence is therefore inconsistent with Pondranei's on this point. I am unable to agree that this is necessarily an inconsistency. It will be remembered that the quiet of the hut in which these natives were sheltering from the rain was suddenly disturbed by the entry of four Chinese, some of whom shouted accusations at Pondranei and hustled him out of the hut. Although some of those natives followed to the entrance of the hut, it would seem a remarkable coincidence if they all arrived at the entrance at the same instant and all had an equally good view of what happened eight paces outside the hut. It would have been easy for Hapkas, Sinyenyam, Sirip and Nowan to have yielded to the temptation of adopting Pondranei's story of the "laplap" fastening, and from a long experience of native witnesses, I think many native witnesses might have done so. But these four natives did not yield to that temptation: they said they only saw the binding with wire and I am satisfied that, though "laplap" was first undoubtedly fastened around Pondranei's wrists, they did not see that done and therefore have not said that they saw that done.

As for the second identification parade, I am satisfied on the evidence that the officers concerned took all reasonable precautions to see that it was a fair identification parade. Having regard to the evidence and what may fairly be inferred from the evidence given, I see no reason that warrants a finding by me that those officers were so grossly careless as to permit the natives who had been brought to Lorengau for identification purposes to see beforehand the four Chinese who were interviewed by Colonel Grimshaw. At that parade, Pondranei identified the taller of the accused (Si Pao Kung); and Nowan identified, and Hapkas and Sinyenyam (those two say) recognized, the shorter accused (Chow Hung Ching). Each of the native witnesses in this case who identified one or other of the two accused at that parade has testified that the particular accused he identified was one of the four Chinese who molested Pondranei at Lugos on the day in question:

and each of those witnesses should at least have been sure of that. In my opinion, the evidence establishes (and it has not been contradicted) that the four Chinese who molested Pondranei that day were acting in concert and in prosecution of an unlawful purpose: they were armed with various implements and were obviously bent on inflicting punishment and did inflict unlawful punishment on a native they suspected of stealing cigarettes. The identification or recognition, by the native witnesses already referred to, of one or other of the two accused at the second parade, occurred two months after the date of the offences charged in this case. Such of the natives who identified one or other of the two accused at that parade, as being a member of the party of four Chinese, did so before the two accused were taken into police custody and the identification by such natives cannot therefore be attributed to their subsequently seeing the two accused in such custody.

Must I, then, hold that the identifications or recognitions which occurred at the second identification parade, should (as the defence has suggested) be ruled out of consideration because none of the natives at that parade identified or recognized both accused? Should I find, (as the defence has contended), that there are such inconsistencies in the evidence of the witnesses for the prosecution, and such an insufficiency, in their evidence, of reliable evidence of identification, as must leave me with a reasonable doubt whether either, or both, of the two accused was, or were, included in the party of four Chinese who molested Pondranei?

Having heard and seen all the witnesses give their evidence in this case, having closely studied the notes of their evidence, and having borne in mind the contentions and arguments advanced by learned counsel for the prosecution and defence (particularly those advanced on behalf of the two accused by Mr. Jones, who has fought their case assiduously), I have come to the conclusion, and do find, that each of the two accused was a member of the party of four Chinese who unlawfully assaulted Pondranei at or near Lugos on 25th January, 1948, and thereby occasioned him bodily harm and who also, at or near Lugos on that date, unlawfully detained him in a hut against his will; and I find that each of the accused took an active part in that concerted unlawful assault and unlawful deprivation of Pondranei's liberty. Those being my findings, I further find that each of the two accused is "guilty" of each of the two counts charged in the indictment.

VERDICTS -

As to CHOW HUNG CHING -

: on 1st count - Guilty

: on 2nd count = Guilty

As to SI PAO KUNG -

: on 1st count - Guilty

: on 2nd count - Guilty