SC 203

STANLEY TAGO
(Appellant)

And

ARURA

(Respondent)

KELLY, J

On appeal from the Court for Native Matters, District No. 7, Northern Division, Papua. Delivered Fourth September, 1950.

Stanley Tago convicted on 22nd July 1950 and sentenced to two weeks imprisonment with hard labour by W. Crellin, Esq., Magistrate for Native Matters in the Court for Native Matters at Gorosata, Northern Division, Territory of Papua, for an alleged offence against Regulation 115 of the Native Regulation 1939 which regulations are made under Native Regulation Ordinance 1908-1930.

On the hearing in the Court for Native Matters Stanley Tago pleaded guilty to the charge. He now appeals against his conviction and sentence on the grounds, briefly:-

1. That the complaint does not disclose any offence against Regulation 115 of the Native Regulations.

2. That the charge does not disclose any offence against any of the Native Regulations.

3. That the Magistrate in hearing the complaint acted contrary to Regulation 10 of the Native Regulations, as he himself was personally interested in the matter before him, in that he himself had ordered the appellant to take his child to hospital.

4. That he pleaded guilty to the charge in an erroneous belief as to the nature of the charged.

5. That he was not guilty of the charge on that, inter alia, he had a reasonable excuse for delay in taking the child to hospital.

6. That the Magistrate did not exercise great care, as required by Regulation 31 of the Native Regulations, to ensure that he, the appellant, understand the charge.

7. That the sentence was excessive.

Mr. Cahill of the Crown Law Department appeared for the appellant. No-one appeared for respondent.

Before dealing with the respective grounds of appeal I refer to the Native Regulation Ordinance and to the Native Regulations made there under.

The Ordinance comprises only eight sections, including provisions for appointment of Magistrate for Native Matters, appeal to the Supreme Court, and the making of regulations with regard to eight matters specifically mentioned and also "with regard to matters other than those before set out but bearing upon or affecting the good government and well being of the natives." Section 4 of the Ordinance provides that on appeal "The Supreme Court shall have full power to order any amendment to be made at any stage of the proceedings and no appeal shall be allowed unless it appears to the court that some substantial injustice and hardship will otherwise be caused to the appellant.

The Regulations, enacted in 1939 and amended to 1941, comprise one hundred and fifty-six regulations. They cover a very wide filed of the daily affairs of natives, embodying instructive assistance and guidance as well as punitive measures. They apply only to "natives" as defined by Section 1 of the Ordinance. Regulation 4 provides that only a native can be a complainant or defendant or compellable witness.

Coming now to the grounds of appeal.

Grounds 1 and 2:

I propose dealing with these together.
The complaint embodies in the Minute of Complaint reads:-

"On 15th July 1950 at Siai Village in the CNM District of the ND, native Stanley Tago of Siai village having been ordered by W. Crellin MNM in accordance with NRO 115 (1), to escort his male child David to hospital for medical treatment, willfully failed to comply with the Magistrate's order."

The record from the Court for Native Matters shows that on the hearing of the complaint the appellant was charged that he "Did fail to send his child David to hospital for medical treatment when ordered by W. Crellin MNM to do so."

The relative sub-regulations of Regulation 115 reads:-

"(1) If the child of any person is, or appears to a Magistrate or Village Constable to be, sick the Magistrate or Village Constable may order the father or mother, or other person who by native custom has charge of the child, to take the child to the government (medical Officer or other suitable person for examination and treatment and the Government Medical Officer or other suitable person may detain the child in the hospital for such a period as he may think fit.

(2) If the father, mother or other person who by native custom has charge of the child, refuses or neglects to take the child to the Government Medical Officer or other suitable person, when ordered as aforesaid, the Magistrate or Constable may himself have the child taken to the Government Medical Officer or other suitable person and the father, month or other person who has control over the child so refusing as aforesaid shall be liable on conviction to a fine not exceeding one pound or in default of payment to imprisonment for any period not exceeding two months, or to imprisonment in the first instance for my period not exceeding two months."

The record of the Court for Native Matters discloses that the Magistrate was on Patrol and visited the appellant's village Siai, accompanied by the respondent Arura, a Native Medical Orderly; and that the material evidence directed to the alleged offence is:- (a) By Arura – "I held a medical examination of all the people and found that a small male child named David, son of the man I see in court and know as Stanley, was suffering from yaws. I told Stanley he was to take his child to hospital for treatment, and was present when Taubada said to Stanley "you are to have your child taken to hospital, and leave no later than next Monday 17th July."
(b) By Kou, the Village Constable at Siai – "I was present when Mr. Crellin visited Siai Village on Saturday 15th July last and told defendant to take his son David to hospital on Monday 17th July. When Taubada returned to the District today, 22nd July, Stanley was still in the village and had not sent his son David to hospital as he had been told to do so."
(c) By Constable Ivau of the Royal Papuan Constabulary – "At Siai Stanley Tago did not come (to Gorisata) but gave me a note to give Taubada, it was the same note I see here, marked Exhibit

"A". The Exhibit A is a short letter from the appellant to the Magistrate dated Friday, 21st July 1950 and written in broken English. The first sentence reads "July 22 Saturday I go to Gona Hospital." The remainder of the letter is not admissible in evidence.
(d) By the appellant, quoted in full – "I decided to take my son David to Gona Mission Hospital and would have been ready to go next Saturday. I had a lot of other work to do and new roof to put on the church. I had only been back from Gona Mission a few days.
Q. Was there anything to prevent your wife or eldest daughter from taking the boy to Hospital? No answer."

Mr. Cahill submitted that the evidence does not disclose that the appellant "refused" or "neglected" to comply with the Magistrate's order; or, alternatively, that the words "willfully failed" in the complaint, and the words "Did fail" in the charge, do not meet the statutory requirements of Regulation 115, and that therefore both the complaint and charge are bad at law.

In reply to my inquiry Mr. Cahill did not feel disposed to submit that the magistrate did not have any power to order the appellant to take the child to hospital, but only to order the appellant to take the child to the "Government Medical Officer or other suitable person."

However, if I am asked to uphold this appeal on a highly technical point, as submitted, then I think it is my duty to follow the point to its conclusion. On my interpretation of Regulation 115(1) the Magistrate had power only to order the child to betaken to the Government Medical Officer or other suitable person and it was for the Government Medical Officer or the other "suitable person" to examine and treat the child and, if necessary, detain him in hospital for treatment.

If these two grounds were the only grounds of appeal I would consider ordering the necessary amendment to the complaint and charge, and remitting the matter back to the magistrate for re-hearing. But in view of Ground 3, I make no such Order.

Ground 3.

Regulation 10 reads: - "No Magistrate shall take part in any matter in which he is himself personally interested."

The law on this point is dealt with at length in Halsbury Vol. 2 at pp. 534-543; Stone's Justices' Manual (1948) Vol. 1 at pp. 195-201; Paul's Justices of the Peace (1936) at pp. 75 – 81. Quoting extracts from the letter at p. 76 - " Interest and Bias. – No complete list can be made of the kinds of 'interest' which will disqualify a justice from adjudicating. Interest is the cause,

bias, the effect. To cite only a single instance; a justice who presumes to adjudicate in a case in which he is also virtually a litigant or party, or the prosecutor, or the instigator of the prosecution, cannot ordinarily but be biased and disqualified by the personal interest which he has in the proceedings." Many cases can be cited wherein this subject of "personal interest", in its several aspects, has been considered. I refer to only one case; Gottle v. Gottle (1939) AllER 535, wherein it is laid down – "It is not necessary to show that the justice was in fact biased. It is sufficient to show that one of the parties might reasonably have formed the impression that the justice could not give the case an unbiased hearing."

In this case before me I consider that the magistrate was personally interest in the mater before him. Because of Regulation 4 he could not have been the complainant; but I consider that he was the virtual instigator of the prosecution in so far as he himself ordered the appellant to take the child to hospital; and the record from the Court for Native Matters shows that the magistrate ordered Constable Ivau to bring the appellant, on a basis of fair reasoning, arrive at any conclusion other than that the magistrate was biased, in that the magistrate was adjudicating a mater in which the magistrate himself had given an order which the magistrate himself knew had been disobeyed; and that therefore it could be reasonably presumed that the magistrate would have had no alternative, but to convict the appellant?

I therefore find that the magistrate was disqualified from hearing the action. I fully appreciate that this finding will embarrass a Magistrate for Native Matters who is the only such magistrate appointed for his particular District; as in most cases where the Regulations provide for an order to a native, the magistrate himself is the only person authorized to give that order. Perhaps some authority, other than I, will be able to solve that problem.

Ground 4;

The record from the Court for Native Matters does not show whether the charge was read in English to the appellant, or whether it was translated through the interpreter to the appellant in some native language or dialect. If the letter, I can only presume that the appellant would have understood the general portent of the charge as shown in the record. But even if not, he could easily have requested the magistrate to explain the nature of the charge; as it is evident from the appellant's letter to the magistrate, Exhibit A above mentioned, that the appellant has knowledge of English.

On the forgoing, the comprehending the duties of Magistrates for Native Matters to conduct their Courts on the basis of native understanding, I would hesitate to upset the decision of such a magistrate merely because the words "Did fail" were used in orally conveying the charge to the appellant instead of either "refused" or "neglected". This, apart from the fact

that if the complaint and charge had been correctly formulated the magistrate, buy virtue of Regulation 56, would be the "sole judge" as the whether the appellant understood that language or dialect used.

Ground 5:

Perhaps the appellant did have a reasonable excuse for delay in taking the child to hospital. In a document in the nature of a notice of appeal, dated 22nd August 1950, the appellant states - "I was too busy rooting my Church and I tried to persuade the Village Constable to accompany my wife and child to hospital. He refused and I was not able to send my child to hospital." This statement was not given in evidence by the appellant on the hearing in the Court for Native Matters. On the contrary the appellant did not answer the question put to him – "was there anything to prevent your wife or oldest daughter from taking the boy to hospital?"

Regulation 32 provides – "A defendant may go into the witness box and vie evidence in his own case if he chooses, -----. If he does so he must answer any question put to him." Regulation 34 reads: "Any of the Magistrates that form a Court may at any time put questions to the complainant or to the defendant (if he is in the witness box) or to any witness, which questions the person questioned must answer."

Regulation 69 provides as a penalty for refusal to answer a question a fine not exceeding £2 or imprisonment for any period not exceeding four months, which imprisonment, by Regulation 65, may be with hard labour. Had I been the Magistrate I would have pressed the appellant to answer the question. If the magistrate had pressed an answer to the question, and if the appellant had given in reply the excuse embodied in his statement, above mentioned, the magistrate might possibly have taken a more lenient view of the matter. However, that is speculation on my part.

Again, on this Ground, I would consider remitting the matter back to the magistrate for re-hearing on an order to call upon the appellant to answer the question and to decide the matter on the further evidence. But, again in view of Ground 3, I make no such order.

Ground 6:

The complaint and charge were not correctly formulated. Axiomatically then no matter how great care the magistrate exercised in-conveying the charge as shown in the record he could not have ensured that the correct charge was conveyed to the appellant. As to whether the appellant understood the charge; I refer to my comments under Ground 4.

Ground 7:

The penalty for breach of Regulation 115 is a fine not exceeding £1 or imprisonment for any period not exceeding two months, which imprisonment, by Regulation 65, may be with hard labour. The Regulation were enacted in 1959, under conditions when the fine of £1 had a greater punitive weight than today.

At Mr. Cahill's suggestion I have dealt with all the grounds of appeal rather than limit myself to Ground 3.

There is still the question as to whether the appellant, having pleaded guilty in the Court for Native Matters, can now retrace that plea. Although a Court of Appeal has the power, it is not usual to entertain an appeal after a plea of guilty. However, on all the circumstances of this particular case I consider it would be a miscarriage of Justice on my part to hold the appellant to his plea of guilty. For her, the magistrate had no power to hear the case; therefore he had no power to accept the appellant's plea of guilty.

The appeal is upheld. I order that the conviction be quashed.