CREIGHTON

v.

THE QUEEN

DIXON C.J.
WEBB J.
TAYLOR J.

HIGH COURT JUDGMENT

This is an appeal by leave from a conviction and sentence for rape alleged to have been committed at Ambunti in the Territory of New Guinea on or about the 1st May 1952. The appellant was indicted before the Supreme Court of Papua and New Guinea and was convicted by a jury of the alleged offence on the 29th August 1952. In view of the opinion which we have formed concerning two submissions made on behalf of the appellant, it is unnecessary to make any particular reference to the other grounds argued on the appeal beyond saying that they did not appear to us of such a nature as to justify any interference with the conviction.

The first of the two grounds which appear to us to be substantial is concerned with the learned judge's charge to the jury, but before discussing the questions which arise in relation to it it is desirable to refer in a general way to the nature of the charge and the circumstances in which the offence was alleged to have been committed.

The appellant was indicted under Section 347 of the Criminal Code of Queensland (as adopted and in force in the Territory). This section provides that: "Any person who has carnal knowledge of a woman, or girl, not his wife, without her consent, or with her consent, if the consent is obtained by force, or by means of threats or intimidation of any kind, or by fear of bodily harm, or by means of false and fraudulent representations as to the nature of the act, or, in the case of a married woman, by impersonating her husband, is guilty of a crime, which is called rape". In this case the question for the jury was whether the accused, with consent obtained by means of threats or intimidation, had carnal knowledge of the native woman in question. The transcript of evidence in the case is somewhat confusing but it is clear that the complainant came to Ambunti about the 8th March 1952, for the purpose of seeking hospital and medical attention for her child, an infant of tender years. The child remained in hospital until the 15th May, and the complainant lived at the hospital during the intervening period. The accused was a medical assistant at this hospital and saw the complainant shortly after her arrival. The evidence of the complainant and another native woman is to the effect that within a few days of the complainant's arrival the accused requested sexual intercourse with her and when it was refused said "the child would die". The complainant goes on to say that the child "got medicine for one month" but thereafter for two

months "got no more medicine". There is, it should be stated, no real evidence that the child, which apparently had contracted pneumonia, was not properly treated for that complaint and it should be further stated that it was discharged on the 15th May as cured, though some four days later was found to be suffering from tuberculosis. For part of the period during which the child was in hospital the accused was said to have been absent from Ambunti and there seems no doubt that he was so absent from about the 1st to 20th April, 1952. There is no evidence of any further "intimidation" of the complainant until the beginning of May, and she swears that on Monday, 5th May - and not on May 1st as alleged in the indictment - sexual intercourse took place between herself and the accused. This she says was the result of a further message conveyed to her from the accused by a native called Anson. The latter said in evidence that the accused had said to him: "You go and tell this woman from Korugu to come to me for intercourse and if she doesn't come and have intercourse with me I will kill the child with bad medicine". There is considerable doubt as to when this conversation is alleged to have taken place but the complainant appears to claim that the message was conveyed to her a few days before the 5th May, and it was on the last-mentioned date at about 8 p.m. that the complainant swears that intercourse took place. Thereafter, she says, she sent a message to her husband at their native village and he came to Ambunti within a day or two. There is evidence which strongly corroborates the complainant's evidence but it is abundantly clear that reports that "the doctor and some of the native staff had been making trouble" with the complainant, reached the husband's village before the 5th May. Indeed, on the afternoon of the 4th May, the complainant's brother-in-law reached Ambunti apparently to render some assistance or protection to the complainant or her child or both. It is not clear whether he saw the complainant before the evening of the 5th May, but her complaint was first made to him and thereafter to her husband after his arrival in response to the message which she sent subsequently to the evening of the 5th May.

Whilst we have not attempted to traverse the whole of the evidence what we have said is sufficient to indicate that the intimidation alleged is of a very special nature. It was not a threat to harm the complainant personally. The threats alleged concerned the safety of her child. No doubt a consent to sexual intercourse extorted by threats to the life of the woman's child or threats to cause it serious harm would amount to a consent by means of threats or intimidation within sec. 347. But to establish a charge of rape based on threats or intimidation, of such a kind, it is necessary to satisfy the jury beyond reasonable doubt that the accused did in fact threaten that unless the woman submitted he would bring about the death of the child or cause it serious harm; that the woman believed that it was in his power to carry out his threats and that unless she submitted to him

he would do so and that it was in order to save the child that she suffered the accused to have intercourse with her. It is apparent that in order to arrive at a conclusion on these matters an examination was necessary of the evidence of the circumstances leading up to the occasion of the alleged offence as well as the evidence of what then occurred. In this, the time factor was a matter for substantial consideration in the evaluation of both the force and effect of the alleged threats. Again, the question of the complainant's belief that any threat of harm to the child was real, or, whether over the period involved, grounds developed for regarding the threat as real were very material matters for the consideration of the jury. Moreover, the arrival of her brother-in-law and the purpose for which he came to Ambunti on the 4th May may have been regarded as not without some significance in the case.

We have no doubt that the jury should have been told that the first matter for their consideration was whether intercourse, as alleged by the complainant and denied by the accused, took place. If satisfied on this issue, their next task was to consider whether the complainant's version of the matters which preceded it, as corroborated, was correct and if satisfied on this point they were bound to consider whether what had taken place led to a belief entertained by the complainant, that unless she consented to intercourse the accused would take steps which might seriously endanger the child. On each of these issues the onus of proof beyond reasonable doubt lay upon the Crown. It was not a case in which the fact of intercourse was not in issue, nor was it a case in which the jury, upon rejecting either wholly or in part, the evidence of the accused, was by reason of that circumstance alone bound or even entitled to find against the accused on each of the issues referred to above. It was for the jury to weigh the evidence adduced by the Crown and to determine whether that evidence in all the circumstances satisfied them beyond reasonable doubt on these issues. In this sense it was not, as the learned judge indicated it was, "a contest in the matter of truth" such as might be decided by accepting the complainant's version because of the jury's disinclination to accept that of the accused. It was quite open to the jury to reject the accused's assertion that intercourse had not taken place and to accept the complainant's evidence that it had and yet to hold that the complainant's consent had not been obtained by any, or any real and operative, intimidation. Bearing in mind the confused state of the evidence and the fact that it was given over a period of some three or four days, we are of the opinion that the jury's attention should have been directed to the various possibilities. Further, the question whether the complainant submitted to intercourse as a consequence of threats or intimidation was of such importance in the case as to call for full directions as to what would amount to a threat or intimidation within the meaning of Section 347 of the Code and as to the application of those terms as defined by the learned trial judge to the facts ultimately found by the jury for without such instruction it was difficult, if not impossible, for the jury to give proper consideration to the case or to apply the general directions which were given concerning the onus of proof. In these respects we think the charge to the jury was inadequate and that in the special

circumstances of this case there should be a new trial.

The second ground upon which we think a new trial should be ordered is concerned with questions asked of the accused during his cross-examination. The accused gave evidence on his own behalf and was thereafter asked the following questions and made the following replies:

Q. You, Gilbert and Cahill were very close together and always going to each other's house?

A. Yes. They were mainly at my house. It was the meeting house.

Q. And as a result of Inspector Hardwicke's investigation, you were charged with rape and so was Gilbert and Cahill.

A. Yes, that is so.

Gilbert and Cahill subsequently gave evidence for the accused in corrobation of his denial that intercourse had taken place as alleged, and it is apparent that the questions, as asked, could have seriously prejudiced the accused upon his trial. The questions were not relevant on any ground in the cross-examination of the accused, and even if they tended to show that the accused was a person of bad character, they were not in the circumstances of this trial admissible. Nevertheless, it is obvious that they may well have been gravely prejudicial to the accused and they should not have been asked. The fact that they were asked might not have constituted a ground for directing a new trial if some proper direction had been given to the jury on this point, but, in the absence of any such safeguard we think "it is impossible to say that the jury could not have been affected by the inadmissible cross-examination containing such highly prejudicial suggestions (Burrows v. The King 58 C.L.R. per Dixon J. at p. 257) and that the conviction should be set aside.

In the circumstances, and for the reasons which we have given, we are of the opinion that the conviction and sentence should be quashed and that a new trial should be ordered.