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JUDGMENT NO. 74.

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IN THE SUPREME COURT OF)
THE TERRITORY OF PAPUA)
AND NEW GUINEA.)

CORAM: MR. JUSTICE BIGNOLD
Friday, 28th October,
1955 at 9.30 a.m.

B E T W E E N

THE QUEEN

- v -

LOHIA-SALIA.

J U D G M E N T

In this case the accused LOHIA-SALIA is presented to the Court charged upon two counts, namely: -

- (1) That he broke and entered the dwelling house of one GEORGE EDMUND GILBERT in the night time with intent to commit a crime therein;
- (2) That he unlawfully and indecently dealt with one PATRICIA JANICE GILBERT a European girl under the age of fourteen years contrary to the provisions of the White Women's Protection Ordinance 1926-1934.

It will be observed that the two counts are, one laid under the provisions of the Criminal Code and one under those of the White Women's Protection Ordinance.

Because, I think, of the heavy penalties imposed by the latter Ordinance, I have never in a long experience of the Criminal Courts in the Territory, seen a charge under the White Women's Protection Ordinance joined with a charge under the provisions of any other Statute, but I am unaware of anything to prevent such a joinder, and in the present case, after anxious consideration, I have allowed the trial to proceed upon both counts together, as I could not see that the accused would be prejudiced, and it was not found objectionable by learned Counsel for the Defence.

The accused was represented by Mr. Peter Clay of Counsel. Pleas of "Not Guilty" were entered by the Court on account of the extreme gravity of the nature of both charges, and thus the Crown, represented by Mr. Greville Smith of Counsel, is put to strict proof of every element of each offence charged in the indictment.

The Crown, of course, is bound to prove every element of each charge beyond a reasonable doubt, and if it fails to attain that high standard of proof, the accused is entitled to be acquitted in respect of the charge or charges in relation to which it so fails.

There is no burden of disproof upon the accused, and the Court is only to return a verdict of Guilty if it is sure of the

guilt of the accused; otherwise the gravest injustice might follow.

There is, therefore, a heavy responsibility upon the Court to avoid an injustice of an irreparable kind, especially as the question of identification is involved.

The facts, as disclosed by the evidence, are as follows: -

The complainant, a girl of thirteen years of age and who will attain the age of fourteen years on 26th January, 1956, Patricia Gilbert, lives with her parents and their other children at the Six-Mile in a dwelling, where the accused had been employed as a domestic, for some months until about eleven days prior to the occasion the subject of the present case. The accused, as a domestic daily in the house, was therefore well known to the complainant.

On the night in question, she and her small brother had gone to the "pictures" in Port Moresby and returned home between 10.30 and 11.45 in the night; their parents had left the door unlocked so that the children could get in upon their return.

Upon their return, the parents had retired to bed and they let themselves in through the only door which gave access from outside to the house.

This door also opened directly into the dining-room, in which Patricia, the complainant, retired to bed. Nobody else slept in this area, her brother sleeping upon the verandah.

The complainant, who gave unsworn testimony, described how she took good care to see that that door was securely locked with a key that was left on a ledge near the door, and I am satisfied that she did so.

She then went to bed in the dining-room, lying in her pyjamas on top of the sheet and bedspread, as it was hot. It should be explained that her bed, much lower than the normal one, had at its foot a kerosene refrigerator, which threw a glow into the room from its back, which was against the wall and reflected from the fibro sheeting, and at the head of her bed there were a series of glass louvres in three columns going up about three feet high and each series being about a foot wide. These louvres were open and superimposed on them was a window, which was closed. The louvres and the window are enclosed by wire mesh.

Somewhere towards 2.30 in the morning her cat awakened the complainant by meowing and scratching her arm, a thing which had never previously happened, and she awoke to find a native mid-way along her bed bending over her. When she awoke, he had not attempted to touch her. She has testified that as she looked up she recognized the intruder as the accused, and screamed out a number of times - "Daddy, Daddy". As she did so, she says that the native made

to place his hand over her mouth, but he did not succeed, and that he then placed his hand half-way up her leg on top of her pyjamas, but she kicked, and his hand was taken off or removed, and that it was then replaced a little higher on her leg.

At this time, her father, who had been heavily asleep in the bedroom, called - "I'm coming" - and the intruder ran out the door, which she then saw was open, though she recalls locking it.

The complainant then told her father that there had been a native in. He at once ran out to see if he could see the native escaping from the house, but saw no one.

The complainant then told her mother that the native was PETER (the name by which she knew the accused) and her mother most properly queried the identification, and the daughter, Patricia, maintained that she was positively sure that it was the accused, because she had seen him and that he was wearing blue shorts and no shirt and had tried to put his hands upon her private parts.

Of course, this evidence of a complaint to the mother is not adduced as evidence corroborating the child; but is admissible upon the question of the credibility of the complainant, as was stressed by Counsel for the Defence when that evidence was led.

Counsel for the Defence urged that the circumstances were not propitious for identification for reasons he stated, but both the parents described the amount of light from the refrigerator, Mrs. Gilbert saying that it was surprising how much light was reflected from it, and I am satisfied that when the complainant says that she recognized the hair of the accused when he bent over her, and later as he stood up, saw his face and recognized him, she is not only speaking the truth, but that she was not mistaken as to this identity of the intruder.

Of course, in charges where indecency is in issue, especially when the unsworn testimony of a young girl is concerned, it is a wise rule of practice for corroboration to be required, and in this case, in my view, there is ample corroboration that that native in the house that night was the accused and no other.

The accused, as is his right, has refrained from saying anything in this Court, so that the case must be determined upon the evidence of the prosecution alone.

Returning now to the house at the Six-Mile, immediately after this unhappy incident the family dressed and drove in a truck down the road in which the Gilbert's house is situated, to report to Mr. Carroll, where a telephone call was made.

Immediately after this, the father drove to the boy-house of a Mr. Mumford, and upon entering it, he found two natives apparently asleep lying about three feet apart on mats. One of these

was the accused, who, upon being shaken by Mr. Gilbert, said he was sick. Close beside him were some blue shorts that seemed warm to Mr. Gilbert's touch, that is, warmer than if they had just been lying there all the time. Mr. Gilbert estimates that he called at this boy-house 10-15 minutes after the departure of the intruder from his house.

Mr. Gilbert asked the accused - "Have you been in my house?" - to which the accused replied - "No". He then asked him if he had a key to his house, and the accused replied - "No". The other native could throw no light upon the movements of the accused, as he explained that he had been asleep.

Later the accused was brought to the house at the Six-Mile and later was brought back again by Inspector Fisher, who said to Mr. Gilbert in the presence of the accused - "Peter has admitted that he was the native who came into your house". The accused, who understands English, remained silent. A third time the Police returned with the accused and they had with them a key, and Inspector Fisher said to the accused - "Now show us how you got in".

The accused took the key and tried the lock which was not turned by the key. The Inspector and Mr. Gilbert tried it in the front door lock, without success. Then Inspector Fisher asked the accused if he had another key, to which he replied - "No". "That is the key I opened the door with". This key, incidentally, was found in the grass near Mr. Mumford's house by the accused and a native police sergeant searching after the accused had said that he had thrown it there.

The policeman A/C Jack, who went to bring the accused to Inspector Fisher, says that the accused denied going inside the house, as of course he did when asked by Mr. Gilbert, the first person to make inquiry, but later at the Police Station, after a proper warning by Sergeant Janjirathe, the accused, according to the evidence of the Sergeant, confirmed by A/C Jack, admitted that he had gone inside the Taubada's house because his head was no good and went on to say that he wanted the little girl and touched her private parts and he further said that he had unlocked the door and later threw the key in the grass.

I am quite satisfied that, although the key tried after the event did not turn the lock, the accused, on the night in question, succeeded in unlocking the door with the key or some other key in his possession.

In spite of the early denials by the accused, both to Mr. Gilbert and A/C Jack later retracted, I am satisfied that the complainant did recognize the accused, who was well-known to her, and that after he made his escape after doing as she said, namely, touching her on the leg a little above the knee, went to Mr. Mumford's boy-house, a distance of about a quarter of a mile in a direct line, where he took

off his blue shorts and feigned sleep. During the conduct of the case, I took special care to observe the intelligence and truthfulness of the complainant, and as I have said, the Court feels no doubt at all about the guilt of the accused in respect of each count, and I think quite apart from any other matter of confession, that any Jury would have been impressed greatly to the detriment of the accused by the circumstances of the finding of the key and by what the accused undoubtedly said as to how he had used it.