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

KALIA - FANE

v.

POLICE.

J U D G M E N T.

The charge was laid under Section 70(1)(m) of the Police Offences Ordinance (New Guinea) as it stood on 29th April, 1959. The material allegation is that the Defendant was "in or on" a dwelling house.

The learned Magistrate took the view that "in or on" covered the case of a person underneath a dwelling house, standing on the ground, the ground directly underneath being part of the dwelling house.

I cannot accept this view, although I would in the absence of any indication to the contrary include the foundations and footings as part of the house. In the present case there was nothing to suggest that the ground surface was paved or adapted for use as part of the house, and I can see no justification for so treating it.

Evidence was given that the Defendant moved to the edge of the house and "cashed up" under the bearer a few times and looked in the window of a room. This suggests to my mind that his weight was wholly or partly supported by part of the structure of the house and that he was "on" the house in the sense that he was attached to and suspended from it. At this point of time in fact several times according to the evidence, I would therefore conclude that the Defendant was on the house within the meaning of the Section.

Counsel for the Appellant contended that I should not make a finding of fact on this point because the learned Magistrate might well have rejected this evidence and did not rely on it to support his conclusion. I think that the proper conclusion is that the learned Magistrate did not address his mind to the point because on what I think was an erroneous

interpretation of the Section, the question did not appear to be material. It is not a case of the prosecution failing to prove a point - rather evidence was given but no finding was made on it since it did not on the Court's view arise for determination.

I think the question should now be determined and that the proper order for me to make is that the matter be sent back to the Court for its determination.

ORDER:- Order for conviction set aside and matter referred back to the District Court at Rabaul for further consideration and determination.

CHIEF JUSTICE.

21/8/59.