Judgment 157.

KWALE-TAUWAN v. CONSTABLE IWAS

Port Moresby
Mann C.J.:
21/3/1960

This was an Appeal from a decision of the Court of Native Matters sitting at Rigo. I ... allowed the Appeal to proceed as a rehearing and having heard oral evidence I allowed the Appeal and set aside the order appealed from, which convicted the Appellant of behaving in a threatening manner and sentenced him to six weeks imprisonment.

On the hearing of the Appeal I had the advantage of having both parties represented by qualified officers of the Crown Law Department and I heard the evidence of a number of witnesses who were not called in the Court of Native Matters. Mr. Ivan Champion, Chief Native Lands Commissioner also gave important evidence before me. He could not have been required to give evidence in the Court for Native Matters. Upon the evidence called before me I reached the conclusion that the complaint could not be sustained and that the conviction should be set aside. At the conclusion of the hearing I indicated that there were some observations that I would like to make in the hope that they might be helpful to Magistrates for Native Matters who are I think charged with the task of carrying out very responsible duties which must frequently give rise to the utmost difficulty.

The Magistrate must himself carry out a thorough investigation of the particulars connected with the Complaint. He must then convene his Court, arrange for the evidence of the parties concerned and then at the hearing have regard to the interests of each party as well as determining the matter raised by the Complaint. At the same time it commonly occurs that the Magistrate acting as a Police Officer is required to investigate the case with a view to laying a charge should his investigation disclose that an offence has been committed. His activities therefore frequently involve him in a position of considerable conflict and embarassment.

In the present case a dispute arose between a large number of natives comprising people from Gaile and Manugoro, some of whom came into violent conflict in thecourse of a dispute as to the boundaries of native lands. On the evidence given in the Court for Native Matters it appeared that two people had thrown spears during the dispute and that these spears were obviously capable of inflicting serious wounds. The defence was a denial that a spear had been thrown by the Accused at all, and the preliminary enquiry appears to have been directed to ascertaining which of the people present saw the spear thrown. The result was that those who said that they did not see it thrown were not called as witnesses, from which it is apparent that the Defendant's purely negative case was not supported by evidence which was available at the Court hearing. Some of these witnesses were called on the hearing of the Appeal and their evidence carried enough weight to result in the conclusion indicated above.

Two witnesses who said that a spear was thrown by the accused were Manugoro natives who on their own evidence played a much more culpable part in the fighting and threw spears of a much more dangerous type. The only other supposed eye witness was the wife of one of these men, so that they were all partisan witnesses whose evidence must be viewed with considerable suspicion.

It appeared from the evidence therefore that at least two of the participants in the dispute had committed indictable offences of a quite serious character and the question must have presented itself to the magistrate whether he should proceed to deal with these people under the Native Regulations or whether they should be committed for trial to the Supreme Court. This raises directly the scope and effect of Section 8 of the Native Regulations which on the face of it appears to say that it is best that a person who has committed an offence should be tried by the Court of Native Matters and not under the General Law; but purports to give a Resident Magistrate power to try aggravated offences under the General Law. It is many years since Resident Magistrates had jurisdiction to try aggravated offences under the general law.

Regulation 8 is probably responsible for the common misapprehension that in the Territory there are two systems of law in operation, one of them administered by the Department of Law and the other administered in relation to natives by the Department of Native Affairs, and that either Department may deal with any matter which arises according to considerations of Administration policy.

Such a notion cannot be accepted today whatever the position may have been when the Native Regulation Ordinance was passed in 1908. The Court for Native Matters was established in order to introduce at the most elementary level possible a concept of the administration of law and order to a people of whom the late Sir Hubert Murray said "I do not know that I have ever heard or read of any tribe in Papua by whom anything even remotely resembling administration of justice has even been attempted."

The apparent purpose of the Regulations and of the jurisdiction conferred upon the Court was to deal with the simplest disputes between natives, such as the example given in Regulation 30 where Lohia accuses another native of stealing two bunches of bananas from his garden.

The Ordinance provides that nothing is to be taken to confer upon any Court for Native Matters any authority except as between natives (Section 6) and the Regulations guard against exceeding this limitation by providing in Regulations 3 and 4 that only a person who comes within the definition of a native can have the Regulations applied to him and that only such a person can be a Complainant or a Defendant in the Court of Native Matters or can be compelled to give evidence in such a Court. The Magistrate cannot derive any authority beyond the regulations. These serious limitations upon the effective jurisdiction of the Court must be taken into account by the Magistrate in arriving at any decision under Section 8.

Under the present Constitution there is only one system of Courts and one system of laws and it is only to the extent to which the Court for Native Matters can fully discharge the requirements of the present system that it can validly exercise jurisdiction today.

I say nothing as to the powers of the Administration in the first application of law and order to people who have not previously been in effective control in remote areas, for in such cases special considerations must apply and special discretions must be exercised by officers in the field; but in a dispute between the people of Gaile and Manugoro, who have been living in a state of law and order for very many years, it must be remembered that these people are not only natives, and are not only required to obey the law; but are entitled as citizens to the full protection of our legal system. It follows therefore in my view that in a case where the evidence discloses facts raising a strong probability that several persons would be found guilty of committing indictable offences, it is the duty of the Magistrate, regardless of the jurisdiction in which he is sitting, to institute proceedings to commit those persons for trial, unless the Crown in the appropriate manner exercises its discretion not to prosecute in respect of those offences.

It is not appropriate that such a discretion should be exercised by a Magistrate for Native Matters. Such a discretion is traditionally exercised by an Attorney General in his capacity as guardian of the public interest. It is exercised having regard not only to the interests of the offenders, or of the Crown, but to the protection of the community at large. In the Territory I think that such a discretion cannot be exercised without reference to the Department of Law.

Even so the Magistrate is still in the difficulty that he cannot properly ask for instructions as to what he should do, for this he must decide himself. I think that once he is satisfied upon the evidence that there is a prima facie case for a prosecution under the Criminal Code he should adjourn the Court for Native Matters and have committal proceedings taken. The responsibility then rests on the Department of Law to decide what course is to be taken.

In the present case I do not say that at this stage the parties concerned should be brought to trial. Having heard all the evidence I think that the facts warrant a decision by the Crown not to present them for trial.

There are two other matters to which I should refer although upon the evidence called before me these questions did not arise for decision.

The First is that the Complainant in the Court for Native Affairs was a native policeman who had nothing to do with the dispute and who had apparently been instructed to lay the Complaint as a policeman. The effect of the second paragraph of Section 6 of the Ordinance and of the Regulations 3 and 4 must be read in the light of the whole of the legislation and the purpose for which the jurisdiction was established. I think that it is at

least doubtful whether a native acting in an official capacity on behalf of the Administration can properly be a "Complainant" within the meaning of the Regulations, or whether a charge laid by him in such capacity constitutes a matter arising as between natives, particularly when indictable offences may be involved. If offences under the regulations are being dealt with it would at least be the safer course for the Complainant to be one of the natives directly affected by the conduct complained of in his capacity as a native, unless the Magistrate upon receiving information appropriate for the purpose decides to proceed under Section 23 of his own accord.

The other point to which I should advert is that the offence charged in this case was "behaving in a threatening manner" under Regulation 71(c). However the particulars of the offence indicate that it consisted of throwing a spear. The actual throwing of a spear could hardly constitute threatening behaviour unless the threat was communicated to the person threatened or in other words unless the person at whom the spear was thrown observed that it was thrown at him under circumstances that would cause him to know that he was under attack. Moreover the throwing of a spear does not of itself imply any threat to do any other injury if the spear misses. In the present case the evidence was not clear on the point, but on the Complainant's evidence it seemed likely that the spear was not observed until it had actually missed the intended objective. The throwing of the spear would undoubtedly constitute an assault under the Criminal Code but the Regulations do not expressly deal with an assault of this character and unless the general behaviour of the Defendant could have been brought within the terms of Regulation 71(e), I do not see that the Defendant could have been successfully prosecuted for any offence within the jurisdiction of the Court for Native Matters.

In the present case the validity of any of the Regulations did not arise for determination.