COPY:

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

CORAM : SMITHERS, J.
SAMARAI.
11/3/1963.

THE QUEEN v. DOGURA

J U D G M E N T

The prisoner is presented upon an indictment charging him with the manslaughter of one TOBA.

The Crown has called as a witness for the prosecution one AWA TAWARA. AWA TAWARA has given evidence that the accused is her husband and at the time of that marriage the accused had no other wife. She states that he married the woman TOBA, his second wife, by native custom and that the accused has not had any other wife. AWA TAWARA lived with the accused alone until the second marriage and thereafter the three parties lived together. She said that her husband had paid bride price for her in the form of pigs and foods. It was paid to the brothers of AWA TAWARA. There was no ceremony but the brothers held a celebration at which they consumed all or some of the bride price.

The Crown seeks to adduce evidence from AWA TAWARA of some conversation of a nature incriminating to the accused. Mr. Rissen, for the accused, has objected to this evidence on the ground that AWA TAWARA is the accused's wife and as such is incompetent by reason of the principle of the Common Law that a wife and a husband are not competent witnesses as against each other. It is said that the rules of Common Law that for the time being are in force in England so far as the same are applicable to the circumstances of the possession are likewise the principles of Common Law in force and prevalent in Papua. See Courts and Laws Adopting Ordinance (amended) of 1889, Section 4.

This offence was committed in Papua. It is true that according to the Common Law of England for the time being a wife of the accused is incompetent to give evidence against him in a case of this nature.

The question is whether on the evidence AWA TAWARA is the wife of the accused.

There is in force in Papua an Ordinance called the Marriage Ordinance 1912-1958. By Section 11 it provides that no marriage shall be celebrated except by certain Ministers of religion, a District Registrar or an authorised Justice and only after certain formalities have been observed. Perhaps the more important provision in Section 18 which provides that every marriage which shall be celebrated by any such Minister, Registrar or Justice shall be a legal and valid marriage to all intents and purposes and no other marriage shall except as hereinafter provided be valid for any purpose. The exceptions do not touch the present problem. Section 32 provides that the Ordinance does not extend to any marriage between parties both of whom are Quakers or Jews and that every marriage celebrated between such parties shall be as legal and valid as if duly solemnised under the provisions of this Ordinance if when celebrated it was a valid marriage according to the usages of the Quakers or Jews as the case may be.

Provisions of this nature have been in force in Papua since 1889 when the Marriage Act of 1884 of Queensland was adopted.

During all this time innumerable "marriages" by native custom have occurred between native men and women. The bulk of the native population at present living is the result of such marriages. Such marriages vastly exceed those celebrated under the provisions of the Ordinance.

Unless there is some reason for excluding marriages by native custom from the operation of the Act all these marriages are invalid and the bulk of the native population is illegitimate.

One might feel that the Act was not intended to refer to marriages by native custom but I cannot discover any legal basis on which to justify such a view. It is to be noted that the Marriage Ordinance 1935-1936 of the Territory of New Guinea expressly provides that nothing in that Ordinance shall apply to any marriage both of the parties to which are natives. No such provisions can be found in the Papuan Ordinance. It is also to be observed that the Native Regulations 1924 applicable to the Territory of New Guinea provide that every marriage between natives which is in accordance with the custom prevailing to the tribe or group of natives to which the parties to the marriage or either of them belong or belongs shall be a valid marriage. These provisions appear in Part IV of the Native Administration Regulations headed "Marriage and Divorce." A provision corresponding to this Part IV is conspicuously absent from the Native Administration Regulations of Papua. There is ample authority for the making of a regulation in corresponding terms but it has not been made. See Section 5, Native Regulations Ordinance 1908-1952 (Papua) and Section 4, Native Administration Ordinance 1921-1938 (New Guinea).

Notwithstanding the invalidity of marriages by native custom the Native Regulations of Papua contain important provisions regulating the conduct of persons who are married by native custom. Thus Clause 77 empowers a Magistrate of a Court for Native Matters to make an order for maintenance of a deserted wife. However, it states expressly that "wife" for the purposes of that regulation "includes any woman that by custom of natives is regarded as or reputed to be the wife of a man." Also Clause 84 creates the offence of adultery by or with a "wife" but expressly states that "any woman that by the customs of natives is the wife of a man shall for the purposes of these regulation be deemed to be the wife of such man."

I have not discovered in the Ordinances and Regulations of Papua a provision which expressly or impliedly states or necessarily assumes that marriage by native custom creates a marital status. Various provisions create rights and duties as between parties to a marriage by native custom but this does not touch the question of status.

The Native Regulations remove natives from the Territory equivalent of the statutes of distributions. The Workmen's Compensation legislation, the scope of which was extended to cover native workers in 1958, is careful to state expressly that the word "wife" in relation to such a worker means a wife whether by native custom or otherwise, other than a wife of a polygamous union entered into after the date on which the worker entered into employment with the employer concerned.

The Compensation to Relatives Ordinance 1951 and its successor Part IV of the Law Reform (Miscellaneous Provisions) Ordinance 1958 are expressed in terms which provide no hint that marriages by native custom create any marital status in the parties.

The Native Employment Ordinance 1958 expressly states that wife of an employee means wife whether by native custom or otherwise other than a wife of a polygamous union entered upon after the date of commencement of any relevant employment.

The Native Labour Regulations refer to benefits to be extended to the wife of a native under contract of service who is granted

permission to allow his wife to accompany him to his place of employment.

The Native Taxes Ordinance 1917-1936 exempts from taxation a native who is supporting four children of any wife of his; provided that this exemption shall not apply to a native who has more than one wife unless each wife has four children whom the native is supporting.

In relation to these two last mentioned provisions it might be argued that they proceed on the basis that marital status exists in the "wife" who has become so by native custom but, for myself, I do not think this is so.

I am, therefore, unable to find any statutory modification of the invalidation by Section 18 of the Marriage Ordinance of all marriages other than those celebrated in accordance with Section 11 of the Ordinance and the marriages of Quakers and Jews entered into in accordance with their own usages.

Unless, therefore, it can be said that the Marriage Act is addressed only to persons not being aboriginal natives or such person who live according to native custom, then it seems to be it must follow that persons married according to native custom in Papua are not married at all.

The principle of the Common Law which makes husbands and wives incompetent witnesses relates only to husbands and wives who validly have that status by their appropriate law.

The Marriage Ordinance is certainly addressed to natives generally. Natives may marry non-natives and each other pursuant to its clauses. It is impossible for the Ordinance to say to the native population -

(a) that it may marry under the Ordinance;
(b) that no marriages other than a marriage celebrated in accordance with the Ordinance is valid for any purpose, and at the same time to be deemed to say that the status of married woman to married man is recognised notwithstanding that the marriage relied on is established by native custom alone.

It is true, of course, that the Common Law of England as "in force" or one might say "expressed" today recognises for some purpose marriages of a polygamous character and Common Law marriages. It may be argued that having regard to the domicile of the accused and AWA TAWARA and the customs of their native group, their marriage would be recognised by the Common Law for certain purposes. But the Common Law has never extended recognition to a marriage which by the statutes of the lex loci celebrations, and of the domicile is declared invalid. The difficulty about the accused's marriage is that it is rendered invalid by a statute of that kind.

If one were dealing with a statute creating incompetence on the part of a person described as the wife of another it might be possible to find indications in the statute that the expression "wife" was to be accorded a meaning wide enough to embrace persons merely regarded as wives. No such process can be resorted to with reference to a provision of the Common Law relating to wives. The only wives that can be comprehended by the Common Law in such a provision are women who are parties to a valid marriage. The result is that the evidence of AWA TAWARA is admissible.