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

CORAM : MINOGUE J.
Thursday,
3rd October, 1968.

BETWEEN LEMU MARIBUI
Appellant

AND JAN KATERINE CROFT
Respondent

REASONS FOR JUDGMENT

1968

August 30,
October 3.

PT MORESBY

Minoque, J.

APPEAL

This is an appeal by the appellant against his conviction and sentence by the Local Court Magistrate at Garaina on a charge that on the third day of May 1968 at Education Department, Garaina, between 2.00 am and 3.00 am he played a record player and shouted out behaving in such a manner as to be offensive towards the respondent. The charge was laid under Section 30 (d) of the Police Offences (New Guinea) Ordinance 1925-1963, whereby it is enacted that: "a person who - .....(d) behaves in an indecent, offensive, threatening or insulting manner towards any other person..... is guilty of an offence..... Penalty: £50 or imprisonment for six months or both. " The appellant was fined $5.00 in default two weeks' imprisonment.

The grounds relied on in support of the appeal were that the magistrate was wrong in law in that the information disclosed no offence and that the penalty was excessive.

Whilst in point of form some criticism may be levelled at the wording of the complaint I do not think it could be said that it disclosed no offence. The substance of the argument addressed to me by Mr. O'Neill, for the appellant, was that the section does not contemplate the sort of behaviour in which it was said the appellant was indulging. The real ground of appeal is that there was no evidence upon which the appellant could be convicted, and it is to this ground which I direct my attention.

The Court Record shows that the charge was read over to the appellant in English following upon which the magistrate said, "Do you understand the charge", to which the appellant replied, "Yes, I did it". Thereupon the respondent gave evidence on oath to which evidence in reply, also on oath, was given by

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the appellant. This latter evidence, according to the magistrate's notes, was taken as evidence of guilt and the magistrate convicted him as charged. I think it desirable to set out the evidence in some detail. The respondent deposed that she went to sleep at 9.30 pm and was wakened about 1.00 am by the sound of screaming and shouting and of a record player which was playing the one tune over and over, louder and louder. The noise continued for what she considered to be an hour and a half. She called out, "Shut up", but the noise was so great that she could not be heard. She went outside her living quarters and tried to read but could not stand the noise any more. At 2.25 am she sent a boy over to ask that the noise cease. The shouting stopped but the record player went on and did not cease until 3.00 am. At some time later in the morning she sent for two boys whom she knew to have been in the house which belonged to one Uhe who was a teacher. These boys admitted to her that the noise had been made and apologized, stating that it was a farewell as they were leaving that morning for Popondetta. They said to her, as did Uhe, that the reason the record player was continuously being played was to enable the appellant to take down the words of a particular song. The evidence as taken down by the magistrate then reads: "The lad whom I sent over was threatened, and this it was admitted to me by Mr. Uhe, and told that anyone who came near that house again would be pelted with stones or an axe. The evening it occurred I said to the boy, 'They must be having quite a party over there, did you see any bottles lying around'. After my questioning the two boys of the Malarial Control and having spoken to Mr. Uhe I was satisfied that it had only been a farewell party and was satisfied with the apology given. "

I pause to note that on this evidence there was no case whatever for the appellant to answer. There was no evidence whatever that the appellant had been shouting out nor was there any evidence given by the respondent that he had been responsible for the continued playing of the record player. The only thing to connect him at all with the behaviour complained of was the statement later that day made to the respondent by Uhe that the reason the record player was going was to enable the appellant to get the words of a particular song down. But even that of course does not in any way connect the appellant with the loudness of the record player which could have been the only cause for complaint by the respondent. It may be that the appellant's words, "Yes, I did it", were regarded by the magistrate as accepting responsibility for or authorization of what was subsequently complained of by the respondent. But it seems to me that this would have been a most unsatisfactory basis upon which to convict the appellant.

The appellant gave evidence on oath to the effect that after he had retired to bed he heard music being played and he went over to Uhe's house about 1.30 am. He asked to have his favourite record played and this and others were played for him, but eventually his favourite was played several times. This was done until the emissary from the respondent arrived who, according to him, told the people in Uhe's house that it was 2 o'clock and that they were to stop playing the record. In his view he could do nothing about the request as it was not his house. However, they did stop, the respondent's messenger left and he followed at some unspecified time afterwards. I cannot see how on these facts the magistrate could have made a finding of guilty.

If the behaviour complained of is the composite behaviour of shouting out and playing a record loudly there is no evidence whatever to connect the appellant with any shouting which may have taken place. There is an admission that he requested the repetition of a particular record but there is nothing to show that he had control of the machine or that he requested it to be played at any particular volume. I am not to be taken as saying that the playing of music loudly in the early hours of the morning could not be offensive behaviour, particularly if a complaint has been made, and of course there may be a lot to be said for the view that if there was some ill feeling involved it would be easier to come to the conclusion that the behaviour was offensive. But clearly on the evidence before the magistrate there was nothing to connect the appellant, who was out of his own house and with no control over the situation alleged against him, with such offence as may have occurred.

Accordingly on this narrow ground I would allow the appeal. I need hardly say that in the circumstances I have set out it is clear that there has been a substantial miscarriage of justice. The form of order I should make has given me some concern. The order quashing a conviction has a long and respectable history and power to quash is generally given by statute in appeals from inferior Courts. cf. The Justices Acts of the States of Australia and the District Courts Ordinance 1963-1965 of the Territory. But the Local Courts Ordinance in section 43(5) confers what is probably the same thing under the guise of the words "the Supreme Court may .....(b) reverse the decision" (scil. of the Local Court) and by section 43(6) decision includes an order or a sentence. It seems to me then that the order I should make is that the decision of the Magistrate is reversed and I so order. I should add that it also seems to me that it would avoid confusion if the powers of the Supreme Court on appeal were stated as uniformly as possibly and consequently if section 236(1) of the District Courts Ordinance and section 43(5) of the Lower Courts Ordinance were expressed in similar terms.

Solicitor for the Respondent: S.H. Johnson, Crown Solicitor.
Solicitor for the Appellant: W.A. Lalor, Public Solicitor.