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

CORAM : MANN C. J.
Wednesday,
3rd April, 1968.

BETWEEN THE SECRETARY FOR LAW
EX PARTE DENIS ELIAS GROVE.

AND STIPENDIARY MAGISTRATE AT
RABAUL.

IN RE. PENNINGTON TUBAWI.

1967
October
13, 31.
November
21, 27, 28,
29, 30.
December 1.
1968
April 3.

PT MORESBY.

Mann C. J.

This was an application by motion and petition for leave to appeal under Section 225(3)(a) of the District Courts Ordinance, 1964-65. The matter had been previously adjourned and during the November sittings the case was mentioned several times.

The respondent applied for the application for leave to be dealt with as a matter of urgency, since the dismissal of the charges brought against him occurred on the 31st July, 1967. It was submitted that it would be unjust for the cases to be re-opened so many months after they had been heard and determined in favour of the defendant.

On the other hand, the appellant contended that the Court should deal not only with the application for leave, but should proceed to a hearing of the whole case. A further adjournment was sought so that the whole case could be thoroughly gone into. It was contended that the issues involved were of great public importance.

I indicated that owing to the pressure of circuit work outstanding and the lack of available facilities to enable several Judges to sit in Port Moresby at the same time, it would not be possible for an additional Judge to determine the case before the Christmas vacation. Since I was about to go on circuit I agreed to hear the case but intimated that I would not be in a position to deliver judgment before the vacation.

The case presented many difficulties and a good deal of uncertainty, chiefly because the charges

raised very simple issues of fact, but in subsequent proceedings the whole case appears to have run off the rails to such an extent that the issues have become highly elaborated and obscured.

Stating the facts very broadly, it appears that on the 1st July, 1967, at Rabaul, a person, whom we may identify for the moment as A, was in the Ascot Hotel at Rabaul. There was clear evidence from several witnesses that he was sprawling across the bar, apparently intoxicated. The employees at the hotel said that they sent for the Police and required Sub-Inspector Grove, when he arrived at the hotel, to expel from the premises A. on the ground that he was intoxicated. He was required to take this action by virtue of the provisions of Section 131(5) of the Liquor(Licensing) Ordinance, 1963-4.

When Sub-Inspector Grove arrived at the hotel, he saw a person, whom we may for the present identify as B., standing near a table and behaving in a manner indicating intoxication. Sub-Inspector Grove purported to arrest this man for being drunk and disorderly contrary to Section 29 of the Police Offences Ordinance, 1912-66 (N.G.). B. was removed from the part of the hotel premises in which Sub-Inspector Grove found him and was taken to a Police van. At this point there was a considerable disturbance amongst the crowd of people at the hotel and B., struggling with a Policeman and tearing his shirt, escaped into the crowd and was lost to sight.

On the 4th July, 1967, three informations were laid and proceedings were taken in the District Court upon the charges :

(a) of having wilfully and maliciously damaged a shirt;
(b) of being found drunk and disorderly in a public place; and
(c) of having escaped from custody.

The person described as the defendant, whom we may identify as C. for the time being, was presented in custody at the Court and the cases proceeded to a hearing.

It was essential for the cases of the prosecution to succeed that the evidence should establish affirmatively that the persons I have referred to as A. B. and C. were in fact one and the same person. A number of witnesses were called by the prosecution and if one assumes that the same person was involved throughout the separate incidents which occurred, there could be little doubt that the prosecution case was entitled to succeed. However, the Magistrate hearing the evidence was very doubtful on this point of fact and expressed his doubts. He then took a course which may well be regarded as something of a short cut.

The defendant was not represented in Court and it clearly became the duty of the learned Magistrate to explain the situation to the defendant and help him to understand what course of action he might take. It appeared that the defendant had three witnesses available at the Court and he himself was prepared to give evidence. The learned Magistrate put the defendant in the witness box and, in effect, invited him to tell his story. The defendant did so, stating that he and his three friends were at a table some distance away from the bar and in a position in which he could not have been the same man as either A. or B. At this point the learned Magistrate intimated that he would not take any more notes of evidence. He allowed the defendant to leave the witness box.

The learned Magistrate called two of the three witnesses who were to give evidence on behalf of the defendant and put to them a question to ascertain whether their evidence would support that of the defendant. The witnesses were then thoroughly cross-examined by the prosecuting Police Officer. At this point the learned Magistrate appeared to act somewhat abruptly in dismissing the charges and allowing the defendant to go.

In spite of the fact that he has had long experience in Courts of all jurisdictions, the learned Magistrate entirely overlooked the fact that the defendant at the conclusion of his short evidence had been allowed to go back to the dock, so that the prosecuting Police Officer had not been given any

opportunity to cross-examine him on the issues of fact raised. At the same time the learned Magistrate delivered a very short judgment referring to the conflict of evidence and saying, with a good deal of emphasis, that he deplored these cases because they placed the Police in an invidious position.

It is apparent that he was expressing a strong disliking for the somewhat arbitrary provisions of Section 131(5) of the Liquor (Licensing) Ordinance.

It appears that after the hearing the prosecuting Police Officer protested that cases of this kind gave rise to technical difficulties for the Police in the exercise of duties which were mandatory, and that the Court should state reasons which would be of assistance to the Police by affording them guidance. At about this time the objection was raised that the Police had not been given an opportunity to cross-examine the defendant and the learned Magistrate at this point realised that a slip had occurred. Apparently in an endeavour to assist the Police by clarifying the matter, the learned Magistrate then embarked on the drafting of a highly elaborate "judgment" which was really an essay on the provisions of the Ordinance, coupled with an explanation of how he had reached the conclusion that the charges should be dismissed.

From this "judgment" it appears that it was not without difficulty that the learned Magistrate did arrive at a legal determination which coincided with his earlier dismissal of the cases which had been based on a simple issue of fact and the application of the rule as to the *onus of proof*.

From this point the matter became more and more complicated. The facilities available in Rabaul to all jurisdictions are hopelessly inadequate. Up to three Magistrates normally sit daily, and the Supreme Court and the Land Titles Commission hold substantial sittings in alternate months, all in one unsuitable building with only one room big enough for the conduct of Court proceedings. Incidental facilities are quite inadequate and the pressure of work on the learned Magistrate was so unreasonable as to be conducive of

the kind of slip that occurred in the present case.

The learned Magistrate drafted some five pages of his "judgment" and disclosed the draft to the Police Inspector for his guidance, because several other similar cases were pending. The Deputy Crown Solicitor in Rabaul was so over-burdened with other work that he was not able to spare the necessary time to examine the cases with a view to lodging appeals. He requested the Crown Solicitor in Port Moresby to undertake this work, but the Crown Solicitor's available professional staff was also over-burdened, and the result was that no appeal was initiated until the time for proceedings was on the point of expiring. This caused a notice of appeal to be sent by urgent telegram in the name of the Secretary for Law, addressed to the learned Magistrate.

In the telegram the grounds for appeal included the allegation that the learned Magistrate had acted in an unjudicial manner in dismissing the charges against the defendant. This telegram came at a time when the learned Magistrate had been under great pressure to make available for the Clerk of Courts and for the Deputy Crown Solicitor copies of the documents on file, but the typing facilities available to him led to a statement by him to the effect that the papers could not be made available, (except for inspection), for some months.

On receipt of the telegram setting out the grounds of appeal, the learned Magistrate became highly agitated, because the assertion that he had acted in an unjudicial manner, having been made by his Departmental Head, (acting in another capacity), might, as he thought, prejudice the learned Magistrate's career in the Public Service. Specifically he thought that an understanding which he had made with the Departmental Head which would enable him to withdraw from the magistracy at any time at his option, might be lost if the Departmental Head had already committed himself to the expression of an unfavourable conclusion as to the behaviour of the learned Magistrate in Court. Moreover, the learned Magistrate's commission was shortly due for renewal. In fact the learned Magistrate need not have become so disturbed, but he did not realise at the time that the telegram had been sent, not in plain language but by

Telex equipment, so that it could not be intercepted by the public at large as he thought. This in turn led to the learned Magistrate filing for the guidance of the Supreme Court an even more highly elaborated report dealing with the original hearing and the questions of law, which were by now building-up into a state of considerable complexity.

Meanwhile, although the appeal had been lodged, the Crown Solicitor's staff had been unable to give the appeal the necessary attention, and so it remained in the list and was adjourned, and would have been adjourned until some time this year, had not the Public Solicitor pressed for an early hearing of the application for leave to appeal.

The appellant declined to make a separate application for leave and declined to rely on the possible argument that the terms of the telegram itself, setting out the claim for leave as the first ground of appeal, might constitute sufficient notice.

In the absence of Rules of Procedure specifically applicable to this kind of appeal, I would have thought that such an argument might have substance, but since it was rejected by the appellant it is now necessary for the appellant to apply out of time for leave, and seek the exercise of this Court's discretion both as to the time at which leave might be sought and as to whether the subject matter of the appeal complies with the specific requirements of Section 225 of the District Courts Ordinance 1964.

Section 225 of the District Courts Ordinance is the statutory provision which confers on aggrieved persons the right of appeal to the Supreme Court. Sub-section 2 provides :

> "(2) Except as provided in the next succeeding sub-section, nothing in the last preceding sub-section contained shall be deemed to authorise an appeal by the Crown or the Administration against the dismissal of an information.
>
> (3) Where, in the opinion of the Supreme Court, the matter is one of such public importance that leave should be granted, the Secretary

for Law may -

(a) appeal against a decision of a District Court on behalf of a party; or

(b) intervene in an appeal to the Supreme Court."

It would appear to be clear on principle that the special right of appeal here conferred upon the Secretary for Law would exclude any more general right of appeal which might otherwise have been conferred on him under the provisions of Section 225(1). Thus, in the present case if the informant himself had appealed, he might have been entitled to do so without leave, whereas the Secretary for Law, having exercised his special right of appeal, subject to leave, the leave of the Court is a condition which must be satisfied. The question which I have just mentioned as to whether this special provision in favour of the Secretary for Law should be taken to exclude any right of appeal on the part of the informant on the ground that he is acting on behalf of the Crown, is a question which is not now before me for decision and I expressly state that I am not now deciding the point.

The learned Magistrate, because of the effect that he supposed that the proceedings might have upon his position as a Magistrate, joins with the appellant in asking this Court to grant leave of appeal so that the whole matter can be gone into and clarified.

In my opinion this is not a consideration of public importance within the scope of Section 225 because it is a matter which is not relevant to the subject matter of the charges made against the respondent. Although the fact that a mistake was made during the hearing and that the case miscarried to the extent that the Police Prosecuting Officer was inadvertently deprived of his right to cross-examine, I think that this is a matter where objection should have been raised at the hearing and before the case was concluded. The learned Magistrate must surely have accorded the right to cross-examine if his attention had been directed to the point, because a refusal would clearly have been wrong. It seems to me that both the prosecuting officer and the learned Magistrate entirely overlooked the point at the appropriate time, probably because the proceedings terminated somewhat abruptly at a stage at which the

learned Magistrate had already decided that there was such a conflict of evidence before him that his mind could not be really satisfied on the essentially simple questions of fact involved.

The learned Magistrate's wish to have the case re-opened appears to be partly based upon a desire to have his own position investigated in order to dispose of any allegation against him of unjudicial conduct, and also to protect the Police from what the learned Magistrate regards as an unfair onus and responsibility placed on the Police Officer by virtue of Section 131(5) of the Liquor (Licensing) Ordinance. Since both of these questions give rise to considerations of conditions of service by officers coming into contact with the public, they are matters of public interest and importance but, having no bearing on whether the defendant in the original proceedings was guilty or not-guilty of the offences charged, they appear to me to be irrelevant to the appeal and therefore fall outside the scope of Section 225.

As I understand the case for the appellant, the ground of appeal in question does not raise any issue as to the general fitness or otherwise of the learned Magistrate to carry out his duties. In the situation prevailing, an accidental oversight, and a strongly expressed desire to avoid injustice to an individual arising out of a quite arbitrary statutory provision would afford scant evidence to support a general conclusion of this kind.

In considering the question of whether conditions should now be dispensed with and leave granted, I should bear in mind the probable future course of these proceedings should the appeal proceed. The main point put forward by the Police is that questions touching the arrest and removal from the premises of a person in the circumstances of this case are matters of great public importance upon which this Court should give an authoritative ruling. Whilst I agree that there is force in this argument, I think that this is not a suitable case for this Court to determine the elaborate issues raised after the hearing by the learned Magistrate. The lack of notes of evidence at the most vital point of the

hearing would leave this Court in a position in which it could not resolve the conflict between what was said and recorded and what was said by other witnesses and not recorded. Further, to arrive at a stage of final determination of the facts the Court would need to allow the defendant to be cross-examined. Thus it seems clear at this point of time that the only result of the appeal would be that the case should be sent back to the District Court to be entirely re-heard, so that the evidence might be fully recorded and specific findings of fact arrived at by that Court. Then, should a question of law be reached, it would be necessary for a further appeal to be brought to this Court to enable it to determine the law on specific findings of fact. These cases are apparently common, and I think that this is not the appropriate case for all these questions to be resolved.

The circumstances suggest strongly that the Police did not attend the hotel with a prison van merely to remove one individual. There appears to have been a general state of unrest at the hotel at the time, and that when the Police took one individual into custody the rowdy crowd became excited and enabled the first prisoner to escape. In spite of the danger implied in such a situation, very little damage appears to have been done, and the incidents involving the defendant should not be regarded as in themselves constituting matters of substantial public importance. The questions of law are not clearly raised upon the evidence available or the findings of the District Court, and I think that it is much more substantially in the public interest that there should be a finality in Court proceedings of this kind which have been determined upon a simple basis of fact.

Accordingly, I refuse leave to appeal and decline to extend the time for an application for leave, or to dispense with conditions.

There is substance in the learned Magistrate's views as to the dangers inherent in Section 131 of the Liquor (Licensing) Ordinance. Whilst I do not express any agreement with the view that the Police Officer is necessarily bound to comply with any demand of the licensee, whether reasonable or not, and do not accept the view that a Police Officer expelling a person under Sub-Section

5 is fully occupied in carrying out the provisions of Sub-section 5 to the extent of being incapable in law of arresting the person simultaneously for an alleged offence, the wording of Section 131 does appear on the face of it to confer on both the licensee and the Police Officer such apparently arbitrary powers as to place an uneducated person who might object to the Police action in an invidious risk of suffering injustice.

I am not called upon to interpret these provisions in the present case, but I think it right to point out that the person whom the Police Officer is required to expel is a person referred to in Sub-section (1) or (2) of Section 131, so that the licensee has not power to require a member of the Police Force to take action against a person who is not in fact intoxicated, violent, quarrelsome etc. Thus, a member of the Police Force is not required to act on the demand of a biased, unreasonable or ulteriorly motivated licensee, and he is at least in a position of contesting in Court the question of whether the licensee's demand was supported by the facts. Nevertheless, I agree with the learned Magistrate that the provisions of the Section should be revised with a view to overcoming a situation in which an arbitrary injustice might be done not to a member of the Police Force, but to the person who is sought to be expelled.

Solicitor for the appellant : S. H. Johnson
Crown Solicitor.

Solicitor for the respondent: W. A. Lalor,
Public Solicitor.