Mr Justice Raine

716

IN THE SUPREME COURT OF PAPUA NEW GUINEA

CORAM: PRENTICE, J.

Monday,

6th November, 1972.

TONNY IAMNAN v. GERARD TONDAMBI

1972

Nov 3 and 6.

RABAUL

Prentice J.

The appellant was convicted in the Local Court at Rabaul, of using obscene language within the hearing of another person (Sec. 30(c), Police Offences (New Guinea) Ordinance - the court papers in fact make reference to Sec. 30(d) of that Ordinance).

The grounds of appeal relied on were - (a) that a plea of guilty should not have been entered, (b) excess in punishment. The offence was alleged to have taken place in the Rabaul Police Station, and the circumstances appear only in the statement of facts which I set out:

"At about 9.00 p.m. that in the 17th of August 1972, the defendant used the obscene language within the hearing of the Duty Constables at Rabaul Police Station. When the defendant came into the Rabaul Police Station he was talking a lot and the duty constable couldn't understand what the defendant was talking about. Then the duty constable said I don't (sic) what you are talking about. So the defendant said 'Pakin Bastat' to the Duty Constables. After that I told him you are using the obscene language to the duty constables and I am going to charged (sic) you for that. Then the defendant said Yes I made a mistake. Then I charged him with the present charged and placed him in the cells.

The defendant is a single man and he is not working. He used to earn money by selling carving.

Deft. admit truth of facts.
Deft, no statement.
No prior conviction."

Counsel for the appellant, whilst accepting from the judgment of Lord Parker, C.J. (Reg. v. Stanley (1)), that the words "indecent and obscene" convey the idea of "offending against the recognised standards of propriety, indecent being at the lower end of the scale

(1) (1965) 2 Q.B. 327 at p. 333, C.C.A.

1972

Tonny Iamnan v. Gerard Tondambi

Prentice J.

and obscene at the upper end of the scale;" contended that circumstances can alter the legal character of words used. He instanced the Full Court of Queensland's ruling (Bradbury v. Staines (2)), that an appeal against a conviction for obscenity of speech, should be allowed in relation to the use of the words "fuckin' boong" in the play "Norm and Ahmed" presented on an Australian stage. He relied also on Hart, J.'s refusal to grant an injunction to restrain their repetition in stage performances (Attorney-General v. Twelfth Night Theatre (3)). As Hart, J. pointed out in the latter decision, though the use of the word "fuck" in some settings, for example, in argument in court or in a judgment, would not be obscene; its use in a public street in an abusive manner has generally been considered obscene. If I may be permitted to carry His Honour's discussion a little further; I can imagine, indeed I suppose many of us have many times heard, an Australian greet a familiar for whom he had great affection and respect with the words "How are you, you fucking old bastard" - perhaps followed by profanities and hugging or back-slapping gestures. This, though said affectionately and not abusively, could however in my opinion be ranked as "obscene language" if said in a public place in the presence of bystanders (children or women perhaps) who might be shocked, offended, annoyed, or disgusted thereat.

Mr. Baulch contends that the setting here of a police station staffed by presumably hardened policemen was such that the language used should not be construed as obscene without further investigation by evidence at least. He would seek to use R. v. Clayton (4) in aid - that being a decision where the experience of the police officers to whom certain objects were sold, was such as to prevent the sale to them thereof being a sale of an "obscene article". I consider however that to be a case special to the provisions of the Obscene Publications Act, 1959 (U.K.) and the test of obscenity laid down thereunder. To my mind it is distinguishable here.

I would not be prepared to lay down that the words as used in Rabaul in a police station in 1972,

(2) (1970) Qd. R. 76
(3) (1969) Qd. R. 319
(4) (1962) 3 All E.R. 500

were neither "filthy, bawdy, lewd or disgusting", to use Windeyer, J.'s words in Crowe v. Graham (5), but were merely offensive or indecent.

No doubt some policemen become hardened to dealing with drunken and abusive men. It is not I think however common experience that they become accustomed to treat with levity or affection or disdain, the words "fucking bastard" when said in their presence by a man they are about to or have arrested or are questioning. A number of cases have occurred in the courts in which policemen have experienced profound annoyance at being called merely "mug coppers". It is also regrettably the experience of these courts that in many cases short phrases of this kind "black bastard," "fucking bastard," have been received as so inflammatory and abusive to Melanesian language speakers as to lead to instant breach of the peace and murderous violence. It is more than possible that the learned magistrate's experience of such like cases is far more extensive than my own.

Counsel further contends that the words may have been used by the appellant perhaps in a muttered aside as a gesture of annoyance or irritation with himself, and not as an abuse of the police. The statement of facts however indicates the language was used to the duty constables, and that when upbraided for using abusive language the accused said, "I made a mistake."

The words used were in my opinion capable of being obscene if used in the presence of others, depending on their context. The statement of facts indicates that they were used abusively and offensively, they seem to have been received as such. I cannot accept that the learned magistrate has fallen into error in recording a plea of guilty. I consider the appeal should be disallowed on this ground.

No matter was put in opposition to the appeal being allowed on the ground of severity. The maximum punishment for this offence is $100 fine or six months' imprisonment. I note the appellant had no prior convictions, that immediately after using the words complained of, he made some sort of apology. The situation, inside the station, does not seem to have been one where others were likely to have been inflamed by the language into

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(5) 41 A.L.J.R. 402 at p. 409

attacking the police or impeding them in their work - the public reputation for fairness of the particular constables was not being attacked, and there appears to have been no suggestion of such a prevalence of abusive language to policemen in this locality at this time, as to have called for public deterrence. I should have thought that on the statement of facts (the only material before the court) His Worship would have at least had to consider whether he might have exercised his power under Sec. 20 of the Ordinance.

I am of the opinion that the penalty actually imposed, with all due respect to the learned magistrate, is so severe as to amount to "a substantial miscarriage of justice" within the meaning of the section. I therefore allow the appeal; I confirm the conviction; in lieu of the penalty imposed by the magistrate I impose a fine of $10 or ten days' imprisonment.

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

Solicitor for the Respondent: P.J. Clay, Crown Solicitor