Kanie, J. 673

IN THE SUPREME COURT
OF PAPUA NEW GUINEA

CORAM : FROST, SPJ.
Tuesday
21st March, 1972

THOMAS MIDIMNION IKIAP
Appellant

- and -

DANIEL LINGNOGE
Respondent

REASONS FOR JUDGMENT

1972

Mar.13,21

RABAUL

Frost,SPJ.

This is an appeal brought by the appellant against his conviction on 23rd November, 1971 by the District Court at Rabaul that he did behave in an indecent manner towards another person, to wit, Quime Elizabeth Kigio, contrary to the provisions of Section 30(d) of the Police Offences Ordinance, whereby the appellant was sentenced to be imprisoned for three months.

The grounds of appeal are that the Magistrate wrongly entered in the record that the appellant admitted the offence, the conviction was wrong in law, and the sentence was excessive.

The complaint was made by the respondent, a constable of police, under Section 30(d) of the Police Offences Ordinance, the relevant words of which provide that a person who behaves in an indecent manner towards any other person is guilty of an offence. The record of the proceedings discloses that in the District Court the charge was read over and translated and that the appellant admitted the offence. The words used by the appellant, were "Yes. It is true". The alleged facts were then read over and translated. The Statement of Facts is as follows:-

1972

Thomas Midimniom Ikiap

v.

Daniel Lingnoge

Frost,SPJ.

" At about 12 midnight on the 19th November, 1971 the complainant who is aged approximately 14 years left Tavilo Primary T. School and walked towards the Gazelle Timber Sawmill. The defendant met her on the road and asked to have intercourse with her. The complainant at first said no, but later she went with him and they had intercourse. The complainant states that penetration was not achieved. He attempted to have intercourse with her.

The matter was reported to the Police on the 22/11/71 and the girl was subsequently medically examined but there was no evidence of penetration.

The defendant was arrested on the 22nd November, 1971 and admitted the offence."

The substance of the facts is thus that the appellant attempted to have intercourse with the complainant, a girl aged approximately 14 years, in circumstances in which it was to be inferred that the act took place with the girl's consent.

The appellant then stated -

"We both wanted this. The trouble was that her brother got to hear of it. Otherwise there would be no fuss".

The court's finding was "Guilty - 3 months with hard labour".

From the Magistrate's Reasons for Decision, which were forwarded to this Court, it appears that in accordance with the usual procedure properly applied in the District Court, the Magistrate took the appellant's admission of the offence as provisional

only, depending upon his later statements. When the appellant's later statement showed that he claimed that the acts were done with the girl's consent (the girl not having suggested to the contrary), the Magistrate stated that he considered whether a defence was open to the defendant. He then asked for the girl to be brought into court and observed her and her manner. Relying on the case of Anderson v. Kynaston (1) he came to the conclusion that the behaviour of the appellant to the female complainant was, because of her age, per se indecent behaviour towards her, irrespective of consent or otherwise, lack of consent being irrelevant to the present charge. Alternatively, he considered that no valid consent could be obtained from the child (sic) to the act of intercourse as agreed between them. Accordingly, he allowed the plea to remain as admitting the offence, and presumably upon this basis convicted the appellant of the offence.

It is unfortunate that the Magistrate was not aware of the case before me of Kari Tau v. Pike (case No. 461, 1st March, 1968) in which it was held that in an appeal against a conviction under the Police Offences Ordinance Section 30(d), an act of intercourse consented to by a woman is not indecent behaviour towards her. Similarly in the Queensland case of R. v. Brombey (2), a case properly brought to my attention by Mr. Ross for the respondent, Philp, S.P.J. held that intercourse in itself is not indecent dealing. The case of Anderson v. Kynaston (3) (supra) referred to by the Magistrate arose under the very different provisions of the Victorian Police Offences Act 1915, the appellant having been convicted of having behaved in an offensive manner in a public place, and it was because that section was thus directed to protecting the public from such behaviour, that the Full Court of Victoria stated, "... ..... we do not decide that the mere fact that the person to or against whom the conduct may be said to be directed was not 'offended' would of itself exculpate a person charged under the section". (ibid, at p.218). The words "in a public place", upon which that case turned, do not appear in the Territory Ordinance. It thus followed that upon the Statement of Facts, the appellant could not have been convicted, and the fact of consent raised by him also disclosed a complete defence to the charge.

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(1) (1924) V.L.R. 214
(2) (1952) Q.W.N. 32
(3) (1924) V.L.R. 214

The course which the Magistrate should then have adopted, (assuming that the complainant still desired to proceed), was for the Magistrate to withdraw the appellant's provisional admission of the offence and then to proceed to hear the female complainant and her witnesses, and the defendant and his witnesses, as set out in Section 135 of the District Courts Ordinance 1964, and having heard what each party had to say and the evidence adduced, to consider and determine the whole matter.

For the Magistrate to reject the appellant's statement as raising any defence was not only mistaken, but also, as the appellant was not given any opportunity of being heard upon the matter, a serious breach of procedure. Indeed the Magistrate's resort to determining the age of the girl, having seen her, went beyond the power conferred by Section 208 of the Evidence Ordinance 1934, for that section provides that the power is to be exercised if in any proceedings, a Court or Magistrate etc. does not consider that there is evidence or sufficient evidence to determine the age of a person, and the Magistrate did not first direct his mind as to the availability of any such evidence. Indeed the Statement of Facts is consistent with there being such evidence.

Accordingly, the Magistrate erred in entering, in effect, a plea of guilty, and in then proceeding to convict and sentence the appellant. It is a most unfortunate consequence that the appellant served over two months imprisonment before being released on bail. Accordingly, I do not remit the case for rehearing.

The appeal will be allowed and the conviction and sentence quashed.

Solicitor for the appellant - W. A. Lalor, Public Solicitor

Solicitor for the respondent - P.J. Clay, Crown Solicitor