Kaine, J
835

IN THE SUPREME COURT
OF PAPUA NEW GUINEA

CORAM: Prentice, ACJ.
Saturday,
12th April, 1975.

DINA BAGL v. KARL DOPE

Appeal 20 of 1975 (N.G.)

1975
11, 12 April
MOUNT HAGEN

Prentice, ACJ.

The appellant was convicted in the Local Court Mount Hagen on 24th February, 1975 of behaving in a riotous manner (s.30(e) Police Offences Act N.G.) the previous day.

Apparently the appellant's husband had danced with another woman the complainant, at a dance at St. Paul's Mount Hagen, the previous night. The appellant being near the complainant in the street, struck her. She was observed by police to do so and was arrested.

No evidence was given but a statement of facts read. This was as follows:-

> "That on the 23rd day of February 1975 at about 5 p.m. at Mount Hagen, the defendant who is now before the Court was (sic) strike the complainant, while the complainant walk along the road to Hagen Bakery with her mother. While they walk there the defendant who is now before the Court come after her and strike her on the face. Then the duty constable saw them and brought them to the police station. At the Police Station we cautioned questioned and charge her for unlawfully strike and was placed in the cell."

The defendant Dina admitted the truth of the charge. She stated:

> "the statement of facts is correct but I did not come after the complainant. I was standing beside the complainant and we fought. The complainant was dancing with my husband so I hit her.".

In Leonard Eliza & Ors. v. Mandina (1) Kelly, J. considered the meaning of the phrase "behaving in a riotous manner". At page 429 of the judgment (later agreed in by Clarkson, J. in Sapuro Masuve v. Harold Bryant and Pirinave Epehu v. Harold Bryant (Apps. 308 & 209 of 1973 (N.G.))) he stated -

> "'behaves in a riotous manner' means acting in so tumultuous a manner as to disturb the peace. (he referred to dictionary definitions) ... Consequently the conduct which disturbs the peace must be disorderly or noisy and cause a considerable degree of commotion."

I endeavoured to apply this test. From such knowledge as I have of altercations between women in Papua New Guinea they are almost invariably noisy affairs involving considerable name-calling and shrill abuse. The probabilities are almost overwhelming that such was the case in this incident. However such was not stated to be the fact. The short account is rather more that of a silent quick "king hit" to use the common phrase. One notices that the statement of fact itself indicated an intent to lay a charge of "unlawfully strike".

I consider the statement of facts and the appellant's statement do not support the charge of "behaving in a riotous manner", that a variance was disclosed, which should have been dealt with by the learned magistrate under s.27 of the Local Courts Act.

It is also argued that the appellant's words should have required the magistrate to enter a plea of not guilty, as a defence of provocation was disclosed by them. Firstly to this submission there is the

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(1) (1971-72) P. & N.G.L.R. 422
(2) (Unreported judgment 781)

difficulty raised by Kaporonovsky's case (3). It is perhaps anomalous that the reasoning of the High Court therein can be used against the application of the doctrine to the case of a simple assault, if it be charged as "unlawfully striking". But even setting that possibility aside - it does not appear to me that provocation in the sense of ss. 268 and 267 of the Code was being or could have been, raised by the defendant's words. Intent to punish as a motivation was being stated. But no deprivation of self-control was being suggested; nor could it reasonably raise the suggestion I think, of action upon the sudden (next day) before time for passion to cool. Nor was there I think material before the Court to suggest that the complainant's dancing with the appellant's husband constituted a wrongful act or insult. I accordingly reject this ground of appeal.

It is suggested further that a sentence of one month's imprisonment for a woman of no prior record for such an offence in such circumstances is plainly excessive. The learned magistrate should have been in a good position if he had been long in the town, to know of the prevalence or otherwise of such incidents and the volatility of the situations thereby created. Still I cannot escape the conviction that such a sentence is excessive in the circumstances. I feel that the case called properly for a fine - the woman having been in the cells overnight. However the appellant has served some days over two weeks of the sentence of one month. No purpose would be served, indeed injustice would be done, by my ordering payment of a fine now.

I allow the appeal on the ground that the "evidence" did not support the charge, and also on the ground of severity.

Being of the opinion that the magistrate should have regarded a variance as existing and dealt with the matter under s.77 of the Local Courts Act; and being satisfied that the offence of unlawfully striking Emri Tupilap (s.30 (a)) Police Offences Act was disclosed and admitted; I quash the conviction for

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(3) (1973) A.L.J.R. 472

"behave in a riotous manner" and enter a conviction for "unlawfully striking". I vary the sentence to one of fourteen days' imprisonment with light labour. The appellant having served that period is not required to surrender for further imprisonment.

Solicitor for the Respondent: B. Kidu, Crown Solicitor.

Solicitor for the Appellant : N.H. Pratt, Acting Public Solicitor.