[HIGH COURT OF AUSTRALIA.]

OFU-KOLOI

AGAINST

THE QUEEN.

ON APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF PAPUA AND NEW GUINEA.

H. C. OF A. 1956.

SYDNEY, *Aug.* 17;

MELBOURNE, *Oct.* 15.

Dixon C.J., Fullagar and Taylor JJ.

Criminal Law—Offence on child—Unlawfully and indecently dealing with European girl—"European"—Meaning—Evidence and Discovery Ordinance 1913-1952 (*Papua*), *s.* 71A—*White Women's Protection Ordinance* 1926-1934 (*Papua*), *s.* 5 (2).

Section 5 (2) of the *White Women's Protection Ordinance* 1926-1934 (Papua) provides that any person who unlawfully and indecently deals with a European girl under the age of fourteen years shall be guilty of a crime.

Held, that the word "European" refers to racial origin in or derivation from stock or stocks associated in ordinary understanding with the continent of Europe and a person derived from European stocks without known admixture of African, Asian or other stocks is properly regarded as European.

Section 71A of the *Evidence and Discovery Ordinance* 1913-1952 (Papua) provides: "In any prosecution, if the court, judge, magistrate, justice or justices do not consider that there is sufficient evidence to determine the question whether a person is a native, part-native or European, the court, judge, magistrate, justice or justices having seen the person may determine the question". In the course of a trial for an offence under s. 5 (2) of the *White Women's Protection Ordinance* and before any evidence had been given as to whether the child was a European the judge inspected the child and found her to be a fair white child. At a later stage the child's parents gave evidence of their origin and the place of birth of the child.

Held, (1) that, having regard to the evidence of the parents, the section had no application; (2) that the words "European" and "native" are not used in any scientific or technical sense but in a broad and vernacular sense as understood by the persons to whom they are addressed.

Decision of the Supreme Court of the Territory of Papua and New Guinea (*Bignold* J.), affirmed.

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APPEAL from the Supreme Court of the Territory of Papua and New Guinea.

Ofu-Koloi was on 27th February 1956 charged before the Supreme Court of the Territory of Papua and New Guinea with having on 7th February 1956 unlawfully and indecently dealt with a named girl being a European girl under the age of fourteen years contrary to the provisions of s. 5 (2) of the *White Women's Protection Ordinance* 1926-1934 (Papua).

At the close of the Crown case it was submitted on behalf of the accused that there was no case to answer as the Crown had not brought any evidence that the girl was a European girl and it was impossible for the court to determine whether this was so pursuant to s. 71A of the *Evidence and Discovery Ordinance* 1913-1952. It was further submitted that the wording of s. 5 (2) was vague and indefinite in that no indication was given as to the ambit of the term "European" and the legislation was thus not possessed of that certainty required in a penal statute.

The trial judge, *Bignold* J., ruled against the accused on both submissions, and, in relation to the first, held that the word "European" as used in the *White Women's Protection Ordinance* 1926-1934 should be construed to mean "white" and that from the evidence of her parents, who were Australians, and the production of the girl, who was a fair white child, he was satisfied that there was evidence from which he might conclude that the girl was a European girl within the meaning of the Ordinance. The accused was duly convicted and sentenced to five years imprisonment with light labour for the first two years and thereafter with hard labour.

On 18th May 1956 the accused moved the High Court for special leave to appeal against the judgment of *Bignold* J., which leave was granted.

The relevant facts and statutory provisions appear in the judgment of the Court hereunder.

W. J. Holt, for the appellant.

C. Shannon, for the Crown.

Cur. adv. vult.

Oct. 15.

THE COURT delivered the following written judgment:—

This appeal comes by leave from the Supreme Court of the Territory of Papua and New Guinea. At the criminal sessions of that court at Port Moresby the appellant was convicted under sub-s. (2) of s. 5 of the *White Women's Protection Ordinance* 1926-1934 (Papua) of unlawfully and indecently dealing with a European girl

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under the age of fourteen years. It is from that conviction that he appeals. Section 5 (2) of the *Ordinance* provides that any person who unlawfully and indecently deals with a European girl under the age of fourteen years shall be guilty of a crime, for which it proceeds to affix the punishment. There is no contest here as to the commission by the appellant of the criminal act relied upon by the prosecution as amounting to indecently dealing with the girl the subject of the charge. Nor is there any doubt that the girl was under fourteen years of age.

The appeal is concerned wholly with the element of the offence which requires that she must be "a European girl".

Evidence was given by the father and mother of the girl from which, notwithstanding some inexactness, it sufficiently appeared that they had come from Australia where they had been born and lived and that the girl was their child born at Port Moresby. They were seen, of course, in the witness box and the judge was entitled to take their appearance into account as that ordinarily borne by the white inhabitants of this country. The child was tendered as a witness but her evidence was rejected on account of her immaturity. The judge, however, noted that upon inspection she was a fair white child.

One might have supposed that without recourse to any special provision this was enough to authorise the judge to find that the child was a European girl. There was no evidence to the contrary and it is not easy to see why he should not have been persuaded beyond reasonable doubt that within the ordinary acceptation of the word "European" she was a European girl. But two difficulties have been felt at so simple an approach to the matter. In the first place it leaves without logical definition the meaning of the word "European". In the second place there is a special provision dealing with the basis upon which a judge may determine the question whether a person is European. It is convenient first to deal with this provision. It is s. 71A of the *Evidence and Discovery Ordinance* 1913-1952 (Papua) and is as follows:—"In any prosecution, if the court, judge, magistrate, justice or justices do not consider that there is sufficient evidence to determine the question whether a person is a native, part-native or European, the court, judge, magistrate, justice or justices having seen the person may determine the question." It is to be noticed that the authority given by s. 71A arises when the judge considers that there is not sufficient evidence to determine the question whether the person is of the racial character in question.

At the stage of the trial in the present case when the judge inspected the child there was no evidence on that question. The evidence of the father and the mother was subsequently given. It may be that the learned judge meant to act under the provision. But it became difficult after that testimony to regard the evidence as inadequate for the purpose and accordingly the better view is that in the end s. 71A did not apply to the case. None the less there was no reason at common law why the judge should not look at the child and take her appearance into account with the father and mother's evidence.

In the next place, it may be remarked that s. 71A refers to two racial groups under the familiar terms "native" and "European" and employs what doubtless is an equally familiar term "part-native". It is evidently assumed that broadly speaking these terms have an accepted meaning in Papua and New Guinea and they will be applied by the Court accordingly. What *Higgins* J. said in *Muramats* v. *Commonwealth Electoral Officer* (*W.A.*) (1), about the word "aboriginal" affords a guide. Such expressions have, as he said, a "vernacular meaning". "Whom would Australians treat as aboriginal natives of Australia or of Asia?" (2). The terms do not call upon the courts to make an ethnological inquiry of a scientific, historical or scholarly character. They are used from the point of view of the people to whom they are addressed, in that case Australian, in this case of people living in Papua and New Guinea.

The first-mentioned problem must be dealt with in the same manner. Who is a European girl depends upon the common use of the expression "European". The fact that at, so to speak, the edges of the racial classification there is an uncertainty of definition cannot make it difficult to apply it in the common run of cases. There can be no doubt that it refers to the racial stock or stocks associated in ordinary understanding with the continent of Europe. People derived from European stocks without known admixture of African, Asian or other stocks are regarded as European. It may be true that geographers are not agreed upon the exact boundary of Europe and that there may be a doubt about the claim of special ethnic groups to the title European because, for example, they have spilled into Europe in historical times. But that cannot matter in the general application of the term "European". If and when persons are in question who are, so to speak, on or near the boundaries of the racial classification as

(1) (1923) 32 C.L.R. 500, at pp. 506, 507.

(2) (1923) 32 C.L.R., at p. 507.

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ordinarily understood, there will, of course, be a question of denotation and it may depend on the establishment by the courts of a more exact connotation of the expression than is customary in its use in vernacular speech. But that kind of difficulty is familiar in courts when inexact terms from common speech are employed in legislation. But courts may well be content to go on applying the legislation without anticipating the day when, if ever, the difficulty will arise. No doubt "European" is not literally the equivalent of "white". Pigmentation is not the chosen test. Racial origin or derivation is the criterion. But, of course, pigmentation is a characteristic of race and may be of cogent evidentiary significance. In the present case it is apparent that the conclusion of the learned judge was correct in fact and law.

The appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant, *J. Irwin Cromie*, Port Moresby, by *Allen, Allen & Hemsley*.

Solicitor for the Crown, *H. E. Renfree*, Crown Solicitor for the Commonwealth.

R. A. H.