R. *v.* UNA.
R. *v.* KAUFI & ORS.
R. *v.* BONUNGA & ORS.
R. *v.* ALFRED.

(HIGH COMISSIONER'S COURT FOR THE WESTERN PACIFIC.)

[Appellate Jurisdiction (Maxwell Anderson, C.J.) July 20, 1933.]

High Commissioner's Court for the Western Pacific—procedure in Court held by Deputy Commissioner—Pacific Order in Council, 1893—*Arts.* 67, 68, 69, 70—*Rules* 91 - 96—*when trial should be with assessors —necessity for preliminary inquiry and committal for trial in certain cases.*

Three cases of simple larceny (Larceny Act, 1916, s. 2) and one of breaking and entering (Larceny Act, s. 27) were dealt with by a Deputy Commissioner sitting at Gizo under the Pacific Order in Council 1893. The record of the proceedings in each case consisted of :—(1) A form " G " headed " First page of Minutes of Proceedings At Trial with Assessors " which recited that a preliminary examination having been held and the accused having been put on his trial before the Court sitting with assessors and the crime charged being punishable with imprisonment for twelve months or upwards and less than a maximum of seven years " the Court therefore assumes jurisdiction to try the case under Articles 67, 68, and 98 of the Pacific Order in Council, 1893 " and one assessor, being the only one available, having been duly sworn to sit with the Court the accused was brought before the Court and the charge having been read and explained to him he pleaded guilty.

(2) Attached to the abovementioned form was a " certified copy of evidence " which was undated and contained nothing to show whether it was evidence taken at a preliminary inquiry or otherwise.

(3) In the case of *Kaufi & Ors.* only, a form headed " Statement By the Accused " showing that the accused had been cautioned by the Deputy Commissioner in terms of the Indictable Offences Act, 1848, 11 and 12 Vict. c. 42 s. 18 and had made a statement. This was dated the same day as the form referred to in (1) above.

(4) A form of conviction and sentence (Rule 102 Form c. 9). The accused in each case was sentenced to twelve months imprisonment.

The forms c. 6 and c. 7 (Rule 94) were not attached.

The cases came before the Supreme Court of Fiji (being the Court of Appeal) for review under Art. 80 of the Pacific Order in Council, 1893.

HELD.—(1) A preliminary examination must be held in all cases except those dealt with summarily under Art. 69 and the result of the examination must be embodied in an order of the Court. Unless it is decided to deal with the case as one where a punishment not exceeding six months imprisonment or a fine of £50 will meet the ends of justice

(Art. 67) or that there is not reasonable ground for putting the accused on his trial an order for trial must be made in accordance with Rule 94 in the Schedule to the Pacific Order in Council, 1893 (or order for removal and for trial ? ED.).

(2) In cases under Arts. 66 and 67 where the Court is empowered to try with or without assessors trial should be with assessors unless the attendance of assessors cannot reasonably be secured or unless the accused consents to trial without assessors.

(3) When trial with assessors is directed in summary cases under Art. 69 there should be a committal for trial before the Court itself.

[**EDITORIAL NOTE.**—As to review of cases *vide* also Criminal Procedure (Review of Causes) Rules, 1934 published in W.P.H.C. *Gazette* 1934, P. 73 and the amending Rules of 1937 published in W.P.H.C. *Gazette* 1937 P. 8.]

REVIEW BY THE SUPREME COURT OF FIJI of criminal cases determined by a Deputy Commissioner of the High Commissioners Court for the Western Pacific.

There was no appearance of parties.

MAXWELL ANDERSON, C.J.—These four cases come before the Court for review of the proceedings therein at the trial of the different accused before the Court of H.B.M. High Commissioner for the Western Pacific sitting at Gizo, British Solomon Islands Protectorate, and holden before a Deputy Commissioner sitting with assessors. As in the main the necessary comment on the proceedings as a whole is the same in each case, it will be convenient to deal with the cases together in one judgment.

Now the Pacific Order in Council provides for the trial of accused persons in four different cases, which may be summarized as follows :— Case 1—where if the charge be proved the accused would be liable to a sentence of seven years or more he must be tried before a Judicial Commissioner : Case 2—where if the charge be proved the accused would be liable to a sentence of not less than 12 months nor more than seven years he must either be removed for trial as in Case 1 or committed for trial before the Court at some future date : Case 3—where in the course of an investigation into a case coming under Case 2 the Court is satisfied that even if the charge be proved a punishment not exceeding six months imprisonment or a fine of £50 will meet the ends of justice the Court may try the case summarily : Case 4—where if the charge be proved the accused would not be liable to twelve months imprisonment the Court may try the case summarily with or without assessors.

In charges which come under Case 1, 2 or 3 there must be a preliminary examination in order to ascertain the nature of the charge, and whether there is reasonable ground for putting the accused on trial for the offence with which he is charged, and the result of such investigation must be embodied in an order of the Court (cf. Rules 91 to 96). In all cases an order for trial is necessary unless in Case 3 the Court decides to deal with the charge summarily, and I may add in passing that when a charge is so dealt with the preliminary investigation should in my view be adjourned for the attendance, if practicable, of assessors unless

the accused consents to be tried without assessors. Article 68 of the Pacific Order in Council obviously contemplates trial by assessors in all cases whenever practicable, and I construe that Article to mean that when the Court is empowered to try with or without assessors, trial without assessors can only be had when the attendance of such cannot be reasonably secured unless the accused consents to such mode of trial. I would add further that in my view even in a charge to be dealt with summarily under the provisions of Article 69 of the Order (Case 4) if the Court should think fit to direct trial with assessors then the provisions of Article 70 will apply, and there should be a committal for trial before the Court itself (cf. Rule 94).

Having set out the general principles which should be applied in dealing with charges I proceed to apply them to the cases now before the Court. In no single case is there evidence of a preliminary investigation or of the committal for trial except the mere statement of fact contained in the first page of the proceedings, and it is essential that the order of committal be mentioned in the proceedings in order to show jurisdiction. In the case of Alfred it would seem clear that no preliminary investigation was held since the alleged offence was committed on 5th January, the accused was arrested on the 6th, and placed upon trial on 7th January. In the other cases, none of the depositions being dated, it is impossible to tell whether the documents are depositions or copies of the evidence adduced at an actual trial. It cannot be too strongly impressed upon officers exercising judicial functions that the procedure and rules laid down in the Pacific Order in Council must be strictly followed otherwise the proceedings of the Court over which they preside may be quashed for informality if an injustice to the accused has been occasioned thereby.

Dealing first with the case of Una (26/1932), the charge is vague and indefinite, and the accused could not have had knowledge as to what he was pleading guilty of stealing. From his statement the most that he pleaded guilty of was the theft of three bottles of whisky and four bottles of beer, and there is no evidence that he in fact stole all the articles found by the police corporal or enumerated by the witness Lillie. Further, the evidence of the witness Lillie is unsatisfactory. He was allowed to give evidence of a presumed attempt by Una to steal two shillings. This evidence was irrelevant and should not have been admitted; it could only have been given for the purpose of making it probable that the accused stole all the articles lost from the store during the period he was employed therein. The whole of the proceedings are unsatisfactory, and the Court is of opinion that the conviction on the charge preferred cannot stand.

Passing next to the case of Alfred (1/1933), I have already stated that there is doubt as to whether there had been a preliminary investigation, but apart from any question of procedure the evidence is unsatisfactory. The evidence of the witness Lillie is pure hearsay and should not have been admitted, nor should he have been allowed to give evidence of a previous conviction of the accused. Such evidence is contrary to every rule of justice and equity, and is in itself sufficient to vitiate the proceedings. Still further, the story of the accused appears to this Court at least as creditable as that of Wawa and Langi,

but in any event the evidence of the witness Lillie is, as I have said, a sufficient ground in itself for quashing the proceedings, and acordingly in this case also the conviction will be set aside.

The other two cases (48/1932 and 42/1932) can be dealt with together. In both cases it is somewhat difficult to arrive at a clear understanding of the nature of the proceedings, but in these cases, and especially in 48/1932 where Form E has been inserted, it would appear, that even if he did so intend and there is no note of his reasoning, the Deputy Commissioner was in fact acting as in what I have termed Case 3, and in consequence his powers of punishment were limited to a sentence of six months imprisonment. But if this should not be so this Court is clearly of opinion that in the absence of evidence of previous convictions the sentences imposed are much too severe, and accordingly the Court reduces the sentence on each of the six accused to one of six months imprisonment with hard labour.

In the hearing of cases, if a conviction results, evidence of previous convictions, if any, should be given before sentence is passed. This is especially so when a case is likely to come before this Court for review, as in the absence of any such evidence this Court will be bound to assume that the conviction is for a first offence.

I add in conclusion that even if this Court had been able to sustain the convictions of Una and Alfred, the punishments inflicted would have been reduced since they appear to be much too severe. It is always a difficult matter to arrive at a just determination in awarding a sentence and it follows that it is impossible to lay down any rule, but as a guide to Deputy Commissioners this Court would advise that in the case of a first offence, a sentence should not, in the absence of special considerations, exceed six months imprisonment. It is an universal experience that heavy sentences are not *per se* deterrent in the prevention of crime, and the first object of imprisonment is reformative and educative.

KRIPA MASIH *v.* SUSANNA & OR.

[In Divorce (Maxwell Anderson C.J.) December 6, 1933.]

Divorce—covenant in deed of separation contemplating adultery—whether evidence of connivance—whether s. 45 of the Marriage Ordinance 1918[1] *is a reason for special covenants.*

A petitioner (who petitioned on grounds of adultery) produced a deed of separation containing the covenant " the husband raises no objection to his wife living or cohabiting with any man and consents to his wife acting accordingly." It was contended that this clause was necessary in Fiji in the case of Indians to meet the " special menace " of s. 45 of the Marriage Ordinance, 1918.

HELD.—(On the facts). That there was no evidence of connivance.

Obiter dictum.—A covenant and consent for a wife to cohabit with another man contained in a deed of separation is against public policy and not excusable on account of s. 45 of the Marriage Ordinance 1918.[1]

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[1] *Vide Marriage Ordinance Cap.* 118 *s.* 46 (*Revised Edition Vol.* II *p.* 1190).