

PAPUA NEW GUINEA
[IN THE DISTRICT COURT OF JUSTICE
SITTING IN ITS CRIMINAL JUVENILE COURT (COMMITAL) JURISDICTION]

JC No. 172 of 2017

BETWEEN

POLICE
Informant

AND

SIMON NAUA
Defendant

Port Moresby: T. Ganaii
 2018: 07th February

COMMITTAL PROCEEDINGS- Defendant is charged with one count of Sexual Penetration, contrary to section 229 A (1); and one count of Sexual Touching contrary to section 229 B of the *Criminal Code (Sexual Offences and Crimes Against Children's Act)* - *The Charges were read to the defendant where he heard and understood both charges. No plea was taken on both charges* – Note: Section 96 statement – Defence Counsel filed and made Submissions on Sufficiency of Evidence – Whether the evidence in the Police Hand up Brief is *prima facie* sufficient to commit the defendant to stand trial in the Trial Court on both Information

COMMITTAL PROCEEDING – The legal requirements for considering *prima facie* sufficiency of the evidence is the presence of the elements of the charges of Sexual Penetration and Sexual Touching of a Child under the age of 16 years - Elements of all the offences of both charges are present in the Police hand up brief - Evidence is sufficient to commit the defendant to stand trial on the two charges in the Information presented to Court

Cases cited

Regina vs. McEachern [1967-68] PNGLR 48
Maladina v Principle District Magistrate [2004] (25/06/04) Injia DCJ
 SCR No 34 of 2005 – Review Pursuant to Constitution, Section 155(2) (b) Application by Herman Joseph Leahy

Overseas Case

Barca v The Queen [12] [\[1975\] 50 ALJR 108](#) at p.117.

References

Hill E R Powles G; Magistrates Manual of Papua New Guinea, Lawbook Co. (2001). Sydney NSW 2009.

Legislation

*Criminal Code Act, (and Sexual Offences and Crimes against Children Act) Chapter 262
District Court Act, Chapter 40*

Counsel

*P/W Senior Constable Rebecca Malken
Mr. Oala Moi*

*For the Informant
For the Defendant*

RULING on SUFFICIENCY of EVIDENCE

05th of March, 2018

INTRODUCTION

Ganaii, M. This is a ruling made pursuant to s.95 (1) of the District Courts Act, Chapter No. 40, after the receipt of all the evidence offered on the part of the police prosecution where this court sitting as a committal court is required by this provision to consider whether the evidence as it stands at this stage of the proceedings is sufficient to commit the defendant to trial in the National Court.

TWO-PHASE COMMITTAL PROCESS

2. In the matter of *Maladina v Principle District Magistrate*¹ Injia DCJ (as he then was) outlined the committal process in the following terms:-

"These issues arise from what I would describe as a two-phase committal process prescribed in Ss. 95, 96 and 100 and 103. It is convenient to set out these sections:

...In my opinion, the first phase of the committal process (apart from s.94B procedure on committal for trial without consideration of the evidence) takes place under S.95. The Magistrate "receives" or "hears" evidence offered by the prosecution only, considers the evidence, and decides whether the evidence "is sufficient to put the defendant on trial." If the Court is of the opinion that there is insufficient evidence, the Court discharges the defendant on the information. That is the end of the matter. If the Court is of the opinion that the evidence is sufficient to put the defendant on trial, then the Court proceeds with the examination of the defendant under S.96.

Phase two is the examination of the defendant by the Magistrate under S.96. The prescribed wording of S.96 statement, which the Magistrate puts to the defendant, is part of that provision. The Statement implies that the defendant has "heard" the evidence for the prosecution, which the Magistrate has considered, and made his decision under S.95. The Magistrate gives the defendant an opportunity to give evidence and to say anything in relation to the charge, if he so wishes to.

In my view, there is no express provision in S.95 giving the defendant a right to be heard, before an opinion on the evidence is formed by the Court. There is also no provision for the defendant to give evidence and/or to make oral and/or written submissions. Likewise, there is no duty imposed on the Magistrate to afford a defendant or his counsel any such opportunity. His opinion on the sufficiency of the evidence is formed purely on the basis of the evidence offered by the prosecution. At this stage where the Magistrate has formed an opinion that there is sufficient evidence for the defendant to stand trial in the National Court, the determination is preliminary only. No decision is yet made on whether to commit the defendant to stand trial.

In my view, under phase two (2) provisions under S.96, there is no question of the defendant's right to be heard, before a final decision is made under S.100 or 103. This would be the time for him or his counsel, to stand up and present his written submissions and speak orally or even give evidence."

FUNCTIONS OF THE COMMITTAL COURT

3. The role of committal Court in our jurisdiction is well established and is inter alia as stated:

(i) The Magistrate's decision is a judicial act, requiring that proper consideration be given to the matter required by statute - *Magistrate's Manual of PNG* at paragraph 11.2.3²

(ii) The committal proceeding is an investigation into the strength of the case being mounted by the prosecution, and it is not an act of adjudication – *Magistrate's Manual*.³

(iii) Committal Proceedings do not determine the innocence or guilt of a defendant and cannot result in an acquittal. – SCR No 34 of 2005 – Review Pursuant to Constitution, section 155(2)

(b) Application by *Herman Joseph Leahy*.⁴

(iv) The committal court is not required to weigh the evidence for its credibility, as it does not have the jurisdiction to determine the guilt of the defendant in the circumstances and it can only form its mind as to whether a prima facie case from the evidence gathered does exist – section 95 and *Magistrate's Manual of PNG*.⁵

STANDARD OF PROOF

4. The standard of proof in committal proceedings is stated in *Regina v McEachern*⁶ where it held:-

"To decide that the evidence offered by the prosecution in committal proceedings is sufficient to put the defendant on trial...The Court has only to form a bona fide opinion that there is a sufficient prima facie case against the defendant."

5. This measure of sufficiency is less than the trial standard of proof beyond reasonable doubt.⁷

BACKGROUND

6. I adopt the statement of facts and the Police Information laying the charge in the Police hand-up brief and state the allegations as follows: that on the 11th of June 2017, at Lamana Gold Club, in Papua New Guinea, the Defendant [Juvenile]:

Count 1: Did sexually penetrate with his penis the vagina of a child under the age of sixteen (16) years, namely, Allana Mana, then aged fifteen (15) years old

Thereby contravening section 229A (1) of the Criminal Code Act (Sexual Offences and Crimes Against Children's Act) 2002 and;

Count 2: Did sexually touch with his penis the vagina of a child under the age of sixteen (16) years, namely, Allana Mana, then aged fifteen (15) years old

Thereby contravening section 229B (1) of the Criminal Code Act (Sexual Offences and Crimes Against Children's Act) 2002

THE POLICE CASE

7. At the outset the evidence collated by the Police against the juvenile is in the form of 23 witnesses' statements and 10 types of documentary evidence in the order of how they appear in the Committal Police Brief, namely: Certificate of Translation of Record of Interview; The Record of Interview (English Version); (Note: Pidgin Version not part of Committal Brief); Total of 36 Crime Scene photographs; a Sketch Map of Lamana Club; Lamana Room plan; the Medical Report and Doctor's Affidavit; Birth Certificate of Allana Mana; a CCTV footage downloaded onto flash drive; CCTV typed summary of timing and event; and the Antecedent Report which is not considered at this stage but can be after conviction. Police say these evidence are all in support of their case that the Juvenile committed the various offences as alleged.

8. The Police evidence collated in the Police hand-up brief are as follows:-

Statements of:

8.1 ALLANA MANA – This witness is the child victim. She stated that she was sexually penetrated in the toilet in room 8 at Lamana. She identified the juvenile Simon Naua as the one who was present with her in the toilet.

8.2 DIONNE RAGEAU - This witness was a Grade 12 POMIS student who was at Lamana. She stated that she met the victim first at Holiday Inn and later at Lamana in the room where she was in with Shaquille. She observed victim to be noisy; crying and talking about Tyson.

8.3 DEBORAH SIMON– This witness is a Grade 12 POMIS student who booked a room at Holiday Inn. Her evidence is based on her meeting of the victim at Holiday Inn and their

proceeding to Lamana and how she escorted the victim to Room 8, at Lamana and left her there with Dionne and Shaquille.

8.4 SHAQUILLE ONNO – This witness is a Grade 12 POMIS student who had booked a room at Lamana with his friends. He and his girlfriend Dionne were in the room. His evidence is based on his presence in Room 8 and the victim's presence looking for Tyson. He told her that Tyson was in the club. He said the victim left only to be returned later to the room by Georgiana. He observed that she was crying and complaining about seeing Tyson with another girl. She fell asleep on a bed and Georgiana left. He then fell asleep but was awoken on intervals and had observed the victim until eventually she was taken away.

8.5 GEORGIANA CHEEBOAS - This witness is a POMIS student who booked a room with school mates at Lamana. Her evidence is based on her surprise meeting of the victim in the club. She made observations of the victim's behavior and how she escorted the victim to the room. She observed that Tyson and ex-girlfriend Meseta were in the room with Shaquille and girlfriend. She left the victim sleeping and went back to the club. She observed Tyson and Meseta joining them later. Then she went back to the room and Shane came and took the victim to go leave her at her home. Thereafter, it was daybreak and the victim's father came looking for the victim.

8.6 TYSON ONNO – This witness is a Grade 12 POMIS student who booked a room at Lamana with friends. His evidence is based on his meeting of an ex-girlfriend and how they went the room. He also made observations of the victim and how he went about his business and sending Meseta off. He then observed Shane taking the victim away. He awoke to find the victim's father looking for her.

8.7 TROY ROAI – This witness is a Grade 10, 15years old student at POMIS who booked a room with his school mates at Lamana. His evidence is based on his activity at Lamana and how he met the victim in the room they booked. He observed that the victim was drunk and gave evidence of her behavior and movement. He was falling asleep when he saw the victim leave. After she left he noticed the juvenile (Simon Naua) and others in the room.

8.8 ALEX YEWEH – This witness is a POMIS student who was at Lamana with friends. His evidence is based on his presence at Room 8 and his observations of the victim with a person unknown to him.

8.9 ROGER RONDEAU – This witness is a Grade 11 POMIS student who was taken to Room 8 by Troy to rest after clubbing, at Lamana. His evidence on his observations of the victim in Room 8 is similar to that of Alex Yeweh's.

8.10 LEO FOIEKE – This witness is a security guard at Lamana. His evidence is of what he observed in the early hours of the movements of the students and victim with a male into a taxi and leaving.

8.11 ROBIN NAEMBO – This witness is a Lamana Security Guard. His evidence is as above observing the victim and Shane walk onto the walkway.

8.12 ANDREW POKA – This witness is the concierge at Lamana. His evidence is based on his observations of the activities of the students and more particularly the victim. He observed that the victim was taken to room 8. He also saw Shane walking past.

8.13 JAMES SIMET – This witness is the Night Shift supervisor. His evidence is based on him taking the victim to the club. And his observations of the students in the early hours of the morning. He saw Shane take the victim afterwards.

8.14 SHANE HORN – This witness is a close family friend of the victim's father. His evidence is based on his observations of and interaction with the victim in the Gold Club and later after the club closed. He also stated that he was with the victim between 4 - 5 am and they went from Lamana to Tokara and to Holiday Inn when her father went to Holiday Inn and got her.

8.15 SUSAN AGE – This witness is a family friend of the victim's father. Her evidence is based on her detailed observations of the victim up until she was taken to the room by her friends. She contacted the victim's father via text message to inform him of her presence in the club. She also stated about how she kept eyes on the victim.

8.16 JOB BALAGUAN – This witness is a friend of Shane Horn. His evidence is based on how he was at home asleep, when he was woken by Shane Horn and the victim at about 4:45 am. They then left at about 5am.

8.17 YIANNIS NICOLAU – This witness is the Lamana Hotel Manager. His evidence is based on his release of the CCTV footage to the Police.

8.18 JUSTIN KELLY YANGA – This witness is the Medical Doctor whose evidence is based on his examinations on the victim and findings. He deposed an affidavit attaching the Medical Report, stating blood stains and tear on vaginal wall of victim.

8.19 SAMUEL KOI – This witness is a Police Forensic Officer. His evidence is based on his qualifications and experience in Photography. His evidence is also based on his attendance at the crime scene; taking of photographs; labeling and identifying them.

8.20 MARTHA MARAGA – This witness is the Police Corroborating Officer whose evidence is based on her presence during the conduct of the Interview with the juvenile.

8.21 RACHAEL PINDA – This witness is the Police Arresting Officer. Her evidence is based on her investigations and conduct of the interview with the juvenile.

Documents:

9. The documentary evidence is listed as follows: Certificate of Translation of Record of Interview; The Record of Interview (English Version; Note that the Pidgin Version does not form part of the Committal Brief); Total of 36 Crime Scene photographs; a Sketch Map of Lamana Club; Lamana Room plan; the Medical Report and Doctor's Affidavit; Birth Certificate of Allana Mana; a CCTV footage downloaded onto flash drive; CCTV typed summary of timing and event; and the Antecedent Report

9.1 Confessional Statement – of the Juvenile Simon Naua, 11:56 am, dated 11th July 2017. Answer to Question 4 contains admission to sexual activity;

9.2 Certificate of Translation of Record of Interview – 9:40 am, dated 11 July 2017

9.3 ROI- English version (no mention of Pidgin version) – 9:40 am, dated 11th July 2017. Stated being present in the room with victim but denies sexual activity.

9.4 Photographs – A total of 36 photographs were labeled and identified as follows:

Photographs 1 and 2 – Depicts the general views of South side of top floor of DJ Balcony.

Photographs 3 - 7 – Depicts the views of the various locations of the North side of the DJ Balcony

Photographs 8-15 – Depicts the general views of the route the victim was carried from the north side of the balcony, around the west side, and onto the south side, to the stairs and down to the ground floor.

Photograph 16 – Depicts a view of the reception area

Photographs 17-18 – Depicts the general views of the route taken by male and female youths to stairway and up to the Top Floor of DJ Balcony.

Photograph 19 – Depicts a view of the foot path outside the reception to Room 8

Photographs 20-23 – Depicts the general and close up views of the route where James Simet, led the youth from Room 8 to the Reception.

Photographs 24 -25 – Depicts the general views of where a staff sighted the victim and friends along the foot path before reaching the reception.

Photographs 26-28 – Depicts the general views of seat beside the foot path between the reception and the Room 8, where the victim rested.

Photographs 29-32 – Depicts the general views of Room 8, the bed where victim rested;

Photographs 33-34 – Depicts the general and close up view of the toilet and shower facilities of Room 8

Photograph 35 – Depicts a close up view of the toilet area where victim is alleged to have dropped a glass

Photograph 36 – Depicts a close up view of the area between the toilet and the shower and the door where victim is alleged to have been laying down, when sexually penetrated.

9.5 Sketch Map – Shows the premises of Lamana

9.6 Lamana Room Plan and Rates - Shows the plan and design of the rooms, indicating Room 8 on the ground floor

9.7 The Medical Report and Doctor's Affidavit – Dated 25th August 2017. This is relevant for showing results of examination on the victim. Among others, medical reports showed: blood stain and cloth in vagina; hymen was open and graze or tear on vaginal wall. Also shows type of medication and treatment given.

9.8 Certificate of Birth- Shows the victim's date of birth to be 23rd November 2002, indicating that the victim was 14 years and 7 months old at time of the alleged offences.

9.10 Lamana CCTV Timings – Shows timing of events according to captions on CCTV

9.11 Antecedent Report – This report is irrelevant at this time as it only becomes useful at trial proper after the establishment of the elements of the offence and once the defendant is found guilty and convicted. Prior convictions are matters that impact on the kind of penalty courts can impose and hence should be left to the time after a verdict is reached and submissions on penalty is being considered. For now, this document is irrelevant.

RELEVANT ISSUE(S):

10. The relevant issue is:

Whether or not there is sufficient evidence to show that the juvenile committed the acts of sexual penetration and sexual touching?

THE LAW:

CHARGE/ELEMENTS

11. The charges in which the juvenile has been charged with are Sexual Penetration, contrary to section 229 A (1); Sexual Touching contrary to section 229B of the *Criminal Code Act (and the Sexual Offences and Crimes Against Children's) Act*.

First Charge: Sexual Penetration of a child

229A. SEXUAL PENETRATION OF A CHILD.

(1) A person who engages in an act of sexual penetration with a child under the age of 16 years is guilty of a crime.

Penalty: Subject to Subsection (2) and (3), imprisonment for a term not exceeding 25 years.

12. In the matter of *State v Eddie* (No. 1)8 Makail, J, outlined the essential elements of the offence contrary to s. 229A that must be proven beyond reasonable doubt as follows:-

1. The accused;
2. Engaged in an act of sexually penetration;
3. With a child under the age of 16 years

Second Charge: Sexual Touching of a Child

229B. SEXUAL TOUCHING.

(1) A person who, for sexual purposes –
 (a) touches, with any part of his or her body, the sexual parts of a child under the age of 16 years;
 or
 (b)
 is guilty of a crime.

Penalty: Subject to Subsection (4) and (5), imprisonment for a term not exceeding seven years.

(2) For the purposes of this section, “sexual parts” including the genital area, groin, buttocks or breast of a person.

.....
 (5) If, at the time of the offence, there was an existing relationship of trust, authority or dependency between the accused and the child, an offender against Subsection (1) is guilty of a crime, and is liable to imprisonment for a term not exceeding 12 years.

Elements:

13. In *State v Giroro* [2009] PGNC 88; N3683 (25 June 2009) N3683; it was held that the **elements of sexual touching are:**

- (a) a person,
- (b) for sexual purpose,
- (c) touches,
- (d) with any part of his body,
- (e) the sexual parts of a child,
- (f) under the age of 12 years.

DISCUSSION OF THE ELEMENTS OF THE CHARGE

RELEVANT ISSUE

14. The issues of law that arise in the present case are therefore as follows: whether or not the evidence presented by the prosecution discloses sufficient evidence to put the defendant on trial for the offence of sexually penetrating and sexually touching a child under the age of 16?

15. I highlight this issue by posing the following questions:-

15.1. Did the juvenile sexually penetrate the victim?

15.2 Did the juvenile sexually touch the victim?

15.2. Was the victim a child under the age of 16 years?

ASSESSMENT OF THE EVIDENCE

16. The evidence collated by Police against the juvenile in the form of 23 witnesses' statements and 10 types of documentary evidence are in support of their assertion that the juvenile did commit the two offences as charged. The *prima facie* evidence show that the juvenile and the victim were in a room at Lamana. The juvenile then sexually penetrated her vagina with his penis and also attempted to sexually penetrate her vagina or sexually touched her vagina with his penis.

17. Police has presented mostly direct evidence of sexual penetration and sexual touching including a confessional statement and seek to prove that the two different offences did occur and that the juvenile was involved.

THE ORIGINAL CHARGES ON THE POLICE INFORMATION:

18. The Police hand up brief or submission on sufficiency of evidence does not indicate as to whether or not the charge of Sexual Touching is laid in the alternate to the charge of Sexual Penetration. The Defence submission at paragraph 1 of the introduction of their submission states that it is. If there is any proper and legal way to indicate this, section 29 of the *District Court Act (DCA)*, stipulates that an Information laying out the charge should be for one matter only unless for an indictable matter, the matters or charges could be charged on one indictment; and where the matters relate to the same act or omission. I restate s 29 of the *DCA* as follows:

29. INFORMATION TO BE FOR ONE MATTER ONLY.

Information shall be for one matter only, except that—

(a) in the case of indictable offences, if the matters of the information are such that they may be charged in one indictment; and

(b) in other cases, if the matters of the information are substantially of the same act or omission on the part of the defendant,

those matters may be joined in the same information.

19. In my view, where the Police has laid two separate information, and has not precisely stated whether the lesser charge is laid in the alternative to the more serious charge, the Court cannot interpret that to be so. This committal process has treated both as separate charges. And will rule on both as separate charges. The Public Prosecutor is at liberty to prefer an indictment that best suits his assessment of the charges.

DETERMINATION

20. The relevant issue is whether or not on the evidence presented in the Police hand-up brief discloses sufficient evidence to put the juvenile on trial for the offences for which he has been charged with on the two Police information. On the basis of the above answers, this court as a result of the performance of its committal function as an investigator into the strength of the case being mounted by the prosecution and not as an adjudicator, has assessed the evidence in totality and makes the following final finding that there is *prima facie* sufficient evidence on the essential elements of the charge of Sexual Penetration and Sexual Touching. Consequently, I form a *bona fide* opinion against the juvenile that there is sufficient case against him in order to commit him to stand trial for the offences of Sexual Penetration under sections 229A and Sexual Touching under section 229B of the *CCA SOCAC Act*.

Findings

21. I find sufficient *prima facie* evidence that the juvenile did commit the acts of sexual penetration and sexual touching of a child under the age of 16.

22. I make the following orders:

22.1 I commit the juvenile to stand trial in the National Court on the charges of: Sexual Penetration, contrary to section 229A (1) and Sexual Touching contrary to section 229B of the *CCA SOCAC Act*.

22.2 I order that the Juvenile is to appear on the following **Monday 19th of March 2018, at 9:30 am at the Waigani National Listings Court**

22.3 Bail is extended and to be reviewed by the National Court.

Police Prosecution
Young and Williams Lawyers

For the Informant
For the Defendant in person

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1. [2004] (25/06/04)
 2. Hill E R Powles G; Magistrates Manual of Papua New Guinea, Lawbook Co. [2001]. Sydney, NSW 2009.
 3. [Supra note 2]
 4. SCR No 34 of 2005 – *Review Pursuant to Constitution, Section 155(2) (b) Application by Herman Joseph Leahy*.
 5. [Supra note 2]
 6. *Regina vs. McEachern* [1967-68] PNGLR 48
 7. [Supra note 2]
 8. [2009] PGNC 173; N3782 (23 October 2009), N3782