

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

JC No. 107 of 2017

BETWEEN

POLICE
Informant

AND

NAIME RAUKA
Defendant

Port Moresby: T. Ganaii
 2018: 03rd March

COMMITTAL PROCEEDINGS - Defendant is charged with three counts of: Sexual Penetration, contrary to section 229 A (1); Deprivation of Liberty, contrary to section 355 (a); and Intent to Carnally Know; contrary to section 350 (1) of the *Criminal Code Act (and Sexual Offences and Crimes Against Children's) Act- The Charges was read to the defendant* where he heard and understood both charges. No plea was taken on all charges – Note: Section 96 statement - Issue is whether the evidence in the Police Hand up Brief is *prima facie* sufficient to commit the defendant to stand trial in the Trial Court

COMMITTAL PROCEEDING – The legal requirements for considering *prima facie* sufficiency of the evidence is the presence of the elements of the charges Sexual Penetration; Deprivation of Liberty and Intent to Carnally Know – Elements of all the offences of are present in the hand up brief - Evidence is sufficient to commit the defendant to stand trial on the three 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. Philip Aeava*

*For the Informant
For the Defendant*

RULING on SUFFICIENCY of EVIDENCE

03rd of March, 2018

INTRODUCTION

Ganai, 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 24th of August 2017, at Laloki Bridge, Central Province, in Papua New Guinea, the Defendant [Juvenile] did:

Count 1: Sexually penetrate a Child namely Eleshanty Baloiloi, child under the age of 16 years then aged 13 by inserting his penis into her mouth and vagina thereby contravening section 229 A of the Criminal Code Act (Sexual Offences and Crimes Against Children's Act) and ;

Count 2: Unlawfully detain the victim namely Eleshanty Baloiloi in a place namely a 15 seater bus against her will thereby contravening section 355 (a) of the Criminal Code and

Count 3: Take away the victim namely Eleshanty Baloiloi against her will with intent to carnally know her thereby contravening section 350 (1) of the Criminal Code Act.

THE POLICE CASE

7. At the outset the evidence collated by the Police against the juvenile is in the form of 09 witnesses' statements and 03 documentary evidence namely the Medical Report; Photographic evidence; the Record of Interview in the English versions; and the Antecedent Report which is not considered at this stage but 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 can be categorized as follows:-

Statements of:

8.1 ELESHANTY BALOILOI – This witness is the child victim. She stated that she was tied up to the seat in the bus and blind-folded. When the blind-fold became loose, she saw the juvenile and others in close proximity in the bus and could identify them. She stated that the juvenile Naime Rauka was the first suspect to force her to suck his penis and later forcefully inserted his penis into her vagina.

8.2 ELISABERTH BALOILOI - This witness is the victim's mother. She stated that she was heading to Gordons market from Goldie Barracks where they resided when the victim wanted to follow her. She told the victim to stay and she went ahead to the market. She later came home to find that the victim was not home and enquired. She stated that the victim was carried to them and the victim told her about the alleged incidents of sexual penetration.

8.3 STEVEN BALOILOI– This witness is the victim's father. He stated that he was looking for the victim after his wife returned home without her. The victim was then carried to the house

after some hours of search. He stated that he asked the mother to take care of her and later took the victim to the hospital and Police.

8.4 MAGGIE MAIANI – This witness is the victim’s aunt. She stated that she lives in the same village as the juvenile offender Naime Rauka. She stated that Naime Rauka made some statement and indicated it was relating to the alleged sexual penetration case on the victim. She also stated that due to the alleged sexual penetration case, her family almost had a fight with the juvenile Naime Rauka’s family.

8.5 OLIVIA-SHARON EPHRAIM - This witness is a registered Health Extension Officer at the Port Moresby General Hospital, Family Support Centre. His evidence is based on her examination of the victim; preparation of an affidavit attesting to her qualifications and experience, and annexing to it a Medical Report on the victim.

8.6 DABADA KOBUA – This witness is a Forensic Science Officer, attached to the Photographic Section. His evidence is based on his qualifications and experience, and his attendance at the different alleged crime scenes, interview with the victim; taking of 9 photographs; labeling and identification of them.

8.7 ROBIN SLIM – This witness is the Police arresting officer. His statement is based his initial attempt to interview the victim and in obtaining of her statement. He stated that the victim was shy and he called Police Women Sergeant Fiona Kakarere to assist. He stated that in his investigation, he learned of previous alleged similar incidents by the same juvenile on the same victim. He conducted the Interview with the juvenile where the juvenile denied the allegations. His evidence is relevant for purposes of establishing that the ROI was done properly and without fear or favour.

8.8 FIONA KAKARERE – This witness is the Police corroborating officer in the interview conducted with the Juvenile. Her evidence is based on her involvement in assisting the victim settle through counseling. She stated that she was also involved in the conduct of the interview with the Juvenile as a corroborator. The relevance of her evidence on the conduct of the interview is as stated above.

Documents:

9. The documentary evidence is listed as follows:

9.1 The Medical Report – Dated 25th August 2017. This is relevant for showing results of examination on the victim. Among others, medical reports show injuries and bruises on knees and head and also blood stains on private parts. Also shows type of medication and treatment given.

9.2 Photographs – 9 photographs were labeled and identified as follows:

Photograph 1 – Depicts the general view of first alleged crime scene

Photograph 2 – Depicts a close up view of first alleged crime scene where victim was at before the alleged abduction.

Photograph 3 – Depicts a close up view of the scene where the bus stopped and victim was allegedly abducted.

Photograph 4 – Has similar descriptions to those in Photograph 3, but depicts victim showing direction of where the bus going after she was allegedly abducted

Photographs 5 and 6 – Depicts a general view of the road leading to the alleged scene at Laloki Bridge

Photographs 7, 8 and 9 – Depicts mid and close up views of the alleged crime scene where victim was sexually penetrated.

Record Of Interview (ROI) – The ROI in the English version is relevant for showing that process involved is fair and proper. It also shows whether or not the admissions were made and if made that they were made voluntarily.

9.5 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; Deprivation of liberty and Abduction to carnally know someone or to sexually penetrate someone?

THE LAW:

CHARGE/ELEMENTS

11. The charges in which the juvenile has been charged with are Sexual Penetration, contrary to section 229 A (1); Deprivation of Liberty, contrary to section 355 (a); and Intent to Carnally Know; contrary to section 350 (1) 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: Deprivation of Liberty

355. DEPRIVATION OF LIBERTY.

A person who unlawfully–

(a) confines or detains another in any place against his will; or

(b) deprives another of his personal liberty,

is guilty of a misdemeanour.

Penalty: Imprisonment for a term not exceeding three years.

In *State v Kapris [2011] PGNC 24; N4232 (22 March 2011) N4234*, Justice Canings stated, the State relied on the first limb of Section 355(a), which means the elements to be proven are:

- that the accused;
- confined a person;
- against his or her will; and
- unlawfully (i.e. without any lawful justification or excuse).

Third Charge: Abduction/Intent to carnally know

350. ABDUCTION.

(1) A person who–

(a) with intent–

(i) to marry or carnally know a woman; or

...

takes her away, or detains her, against her will; or

(b) from motives of gain, and with an intent referred to in Paragraph (a), takes or entices away, or detains, a woman who is under the age of 21 years,

is guilty of a crime.

Penalty: Imprisonment for a term not exceeding seven years.

In the case of *State v Yali [2005] PGNC 17; N3014 (13 December 200) N3014*, Justice Canings stated that:

To obtain a conviction under count 1 the prosecution must prove the following matters beyond reasonable doubt:

- the accused took the complainant away;
- against her will; and
- with intent to carnally know her.

Justice Canings further stated and I quote:

“There used to be a definition of "carnally know" in Section 6 of the Criminal Code that stated that the element was "complete on penetration". However, that provision was repealed by Section 2 of the Criminal Code (Sexual Offences and Crimes Against children) Act 2002 and replaced by a new Section 6 that defines "sexual penetration" (see below). The ordinary meaning of carnal knowledge as "sexual intercourse" would therefore be apposite (see The New Oxford Dictionary of English, Oxford University Press, 1998, p 287)”.

DISCUSSION OF THE ELEMENTS OF THE CHARGE

RELEVANT ISSUE

13. 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 a child under the age of 16; Depriving a person of their liberty; and Taking a person away with intent to carnally know her/him or sexually penetrate her/him?

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

14.1. Did the juvenile sexually penetrate the victim?

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

14.3 Did the juvenile confine the victim against her will without proper and lawful excuse?
and

14.4 Did the juvenile take the victim away against her will with the intent to sexually penetrate her (or carnally know her)?

DISCUSSION OF THE ELEMENTS OF THE CHARGE(S)

RELEVANT ISSUE

13. The issues of law that arises in the present case is therefore: whether or not the evidence presented by the prosecution discloses sufficient evidence to put the defendant juvenile on trial for the offences for which he has been charged with?

ASSESSMENT OF THE EVIDENCE

15. The evidence collated by Police against the juvenile in the form of 09 witnesses statements and 03 pieces of documentary evidence are in support of their assertion that the juvenile did commit the three offences as charged.

16. Police has presented mostly direct and some circumstantial evidence and seek to prove that three different offences did occur and that the juvenile was involved.

Findings:

19. I find sufficient *prima facie* evidence that the juvenile did commit the acts of sexual penetration of a child under the age of 16; did deprive a person against her will and did and abduct with intent to commit sexual penetration (or carnally know a person).

DETERMINATION

22. The relevant issue is whether or not on the evidence presented; the Police brief discloses sufficient evidence to put the juvenile on trial for the offences for which he has been charged with on the 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 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 charges of Sexual Penetration; Deprivation of liberty and Abduction with intent to sexually penetrate (or carnally know). 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 offence of Sexual Penetration, contrary to section 229 A (1); Deprivation of Liberty, contrary to section 355 (a); and Intent to Carnally Know; contrary to section 350 (1) of the *Criminal Code (and Sexual Offences and Crimes Against Children's) Act*.

23. I make the following orders:

23.1 I commit the juvenile to stand trial in the National Court on the charges Sexual Penetration, contrary to section 229 A (1); Deprivation of Liberty, contrary to section 355 (a); and Abduction with Intent to sexually penetrate (or to carnally know); contrary to section 350 (1) of the *Criminal Code Act*

23.2 I order that the Juvenile is to appear on the following **Monday 12th of March 2018, at 9.30 am at the Waigani National Listings Court**

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

Police Prosecution
AMPS Logohus Lawyers

For the Informant
For the Defendant in person

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