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IN THE SUPREME COURT)
OF THE TERRITORY OF)
PAPUA AND NEW GUINEA)

CORAM : MANN, C.J.

Appeal No. 27 of 1964 (P)

BETWEEN:

BAMUDI KARIAGO

Appellant

and

GERALD JAMES ANDERTON

Respondent.

REASONS FOR JUDGMENT.

This was an appeal from the decision of the Resident Magistrate sitting as a Court of Petty Sessions at Port Moresby on the 9th July, 1964, to the effect that the cash bail of £25 paid by the defendant should be estreated.

For a long time it has been a common practice for Courts of Petty Sessions to receive money in cash as a security for the appearance of a person charged with some offence.

Upon the hearing before me it was argued on behalf of the appellant that the word "recognisance" as used in Section 76 should be given a narrower and more technical meaning than it to be found in the dictionary. The essence of the dictionary meaning is that a recognisance involves a recognition or an acknowledgement of the existence of a present debt to the Crown with a conditional undertaking to discharge that debt in certain specified events. There appears to be no express requirement that a recognisance should be in writing but the language used in the Justices Ordinance and particularly in Section 83, suggests that the Ordinance is referring to a transaction which is in writing.

For the respondent it was argued that I should not limit the common and somewhat loose meaning attached to the word "recognisance" and that I should read it as including either a written or an oral transaction. It was argued that the practice of giving oral recognisances is really based upon the express provision of the Vagrants Act of Queensland (15 Vic. No. 4), which was in force for many years in Papua as

adopted legislation pursuant to the Courts and Laws Adopting Ordinance of 1889. By virtue of this Queensland act, police officers are expressly empowered to release persons in custody upon payment of a cash deposit. The section appears as Section 40 of the Vagrants, Gaming and Other Offences Acts 1931 in Vol. 9 of the reprinted Public Acts of Queensland. The section confers power under certain conditions upon a police officer to take bail by recognisance and then goes on to say : ".....or by way of bail may accept such reasonable deposit of sterling money as such officer deems sufficient.....". This section is not relied upon in the present case before me as being directly applicable but it was argued that it gives some indication of the origin of the practice of granting cash bail. It was further argued that there is some authority giving recognition to the practice of a Magistrate taking cash as security from a surety, and it was contended if it is proper to take cash as security from a surety, surely it can be taken from the principal party. I was referred to a note of a case reported in the "Times" newspaper. The note appears in Vol. 3 of the Queensland Justices of the Peace published in June, 1909, at page 74.

I think that this brief note does not help me in deciding the present case. In that case an alderman had already agreed to take two sureties of £100 each for the appearance of a person charged, and one surety was accepted and one was rejected on the ground that she was not a householder. Thus, the question was only one of justification by the surety, and Sir James Ritchie, who finally determined the question, decided that he could properly accept the surety's offer of a cash deposit. It seems to me that this was merely to resolve the question of whether the surety could sufficiently justify. From the brief report it appears likely that she did, in fact, enter into a written recognisance.

In the present case it does not appear to me to be necessary to go into all the questions which appear to arise. The substance of this case is that a person in custody personally undertook to the Court to appear on a certain date and paid into Court the sum of £25 as security for his appearance on that date. Pursuant to this transaction, the defendant was released from custody. He did not appear on the specified date and therefore the sole question is what should the Magistrate do with the money which has remained in Court.

It is probably not correct in the technical sense to say that the appellant was on bail, for the essence of bail is that the person remains in custody but is in the custody of

friendly sureties instead of being in gaol, and the sureties (if any) have specific powers in relation to the person charged. When there are no sureties the position may be different. The defendant was released from custody and allowed to go free in return for a specific undertaking on his part. The money deposited by him in Court and the official receipt identifies the broad nature of the transaction. There is no written recognisance which needs to be estreated. The word "estreat" is not appropriate to the enforcement of the appellant's obligation in these circumstances. It is not appropriate to cover an oral transaction. I think that the learned Magistrate was not obliged to make the words fit the circumstances.

The only question was to whom the money be paid out of court. It came into court pursuant to an oral transaction entered into whilst the Court was in session. Whether this amounts to an oral recognisance or not does not appear to me to matter. A clear obligation or undertaking or consent or whatever it may be called was given to the Court by the appellant in person. The transaction was no longer executory on the part of the appellant after the money was paid into court. In the event of his non-appearance, the money was to go to the Crown. If he did appear the money was to come back to the appellant. I think that it was open to the Magistrate in the event simply to make an order that the money in court be paid out of court to the Treasury. I think that the only obscurity arises from the fact that words such as "bail" are, undoubtedly, in common use today in a non-technical sense, and from the use of the words "estreat" and "recognisance". I do not think there is any need to set aside the learned Magistrate's order, but to make it clear I propose to vary it by adding :-

"Order that the sum of £25 deposited in court
be paid out of court to the Treasurer."

Otherwise appeal dismissed.