

IN THE SUPREME COURT  
OF THE TERRITORY OF  
PAFUA AND NEW GUINEA

CORAM : CLARKSON, J.  
Friday  
17th May, 1968

THE QUEEN on the Prosecution of ANTHONY JOHN  
NOEL O'CONNOR, Deputy Registrar of Companies

Against

ANTHONY JIMPHREY GERMALIN,  
MAGISTRATE AT FORT MORESBY

1968  
May 16, 17  
PT MORESBY  
Clarkson, J.

This is an application by the Deputy Registrar of Companies as Prosecutor for an order calling upon the Magistrate of the District Court at Port Moresby to show cause why a writ of Mandamus should not be issued requiring the Magistrate to make an order for the substituted service of a summons issued by the Magistrate on the 19th December 1967 against Karamang Plantation Pty Limited.

Counsel for the prosecutor indicated that the application was made under section 21 of the District Courts Ordinance sub-section (1) of which provides:-

" Where a Magistrate refuses to do an act relating to the duties of his office as a Magistrate, the party requiring the act to be done may apply to the Supreme Court or a Judge, upon affidavit of the facts, for an order calling upon the Magistrate and the party to be affected by the act to show cause why the act should not be done, and if, after due service of the order, good cause is not shown against it, the Court or Judge may make the order absolute, with or without payment of costs. "

Whether the application is under section 21 or as the Motion states is for a writ of Mandamus is probably a question involving nothing more than procedure. The section was apparently introduced to remove some of the inconvenience involved in the older practice. ( See R. v. Thomas Paynter (1). The protection forearl

(1) 119 E.R. 126B, Coleridge J. at 1271.

obtained by calling upon the prosecutor to indemnify the Justices is now provided by the Ordinance itself, see section 256. Section 21 of the Ordinance does not extend the limits of the prerogative Writ of Mandamus but merely gives a cheaper and more summary remedy.

Counsel for the prosecutor properly raised before me the doubt whether or not the relief sought could be granted in the circumstances of the present case and after considering the relevant authorities I have decided that this doubt is well founded.

The Motion seeks an order requiring the Magistrate to show cause why he should not be required to make an order for substituted service. As I pointed out during the hearing the most that could be obtained would be an order requiring the Magistrate to hear and determine the application for substituted service.

At this stage I am not concerned with the merits of the case but with whether the remedy now sought is open to the prosecutor. In my view it is not. This is not a case in which the Magistrate has refused to deal with the application. There was no refusal to adjudicate. On the contrary, the Magistrate considered the application for an order for substituted service and in the course of exercising that jurisdiction he may or may not have made an error in construing sections 55 and 56 of the District Courts Ordinance. (See Ex Parte Milk & Chapman Engine Distributors Pty Ltd (2)).

The distinction is between on the one hand this Court's commanding a lower Court to exercise its jurisdiction and on the other hand its saying that his jurisdiction has been wrongly exercised. cf. The King v. Railway Appeal Board ex Parte Cushing (3).

I further note, although this would not be decisive, that there appears to be an alternative effective remedy available to the prosecutor, namely a right of appeal under section 225 of the District Courts Ordinance.

The real problem which the prosecutor seeks to bring before this Court is one of some importance which affects the administration of the Companies Ordinance in the Territory. It seems to me that the course most

(2) 39 S.R. N.S.W. 42, Jordan C.J. at 44.

(3) 1947, St. R. Qd. 81, Philip J. at 89.

likely to result in an early decision of the problem on the merits  
is for me at this stage to order that the Motion be dismissed.

Order accordingly.