Laws, 9

IN THE SUPREME COURT
OF PAPUA NEW GUINEA

CORAM : WILLIAMS, J.
Tuesday,
12th September 1972

THE QUEEN v. NAKARIN MANDIAM of BIRIP

1972
Aug.28
WABAG

Sep.12
PORT MORESBY

Williams, J.

At Wabag on 28th August 1972 an indictment was presented against Nakarin Mandiam charging that on 13th April 1972 he unlawfully did grievous bodily harm to one Nangawan Kiwi.

Counsel for the accused immediately moved to quash the indictment. The motion was made under Sec. 596 of the Criminal Code upon the ground that the indictment was formally defective. It was said that the committal proceedings were conducted in a manner not authorised by the provisions of the District Courts Ordinance and hence the purported committal of the accused for trial was a nullity. The argument proceeded that an indictment presented in consequence of the District Court proceedings was itself defective.

An examination of the record of the proceedings before the District Court shows that a number of witnesses were examined, either on oath or affirmation, in the presence of the accused. The opportunity was afforded to the accused to cross-examine the witnesses and in fact he did cross-examine some witnesses. But it appears that there was tendered and admitted in evidence through Mr. Brereton, an Administration officer, who instigated the matter, a Statutory Declaration by Dr. Cull concerning the injuries sustained by Nangawan Kiwi. Dr. Cull did not give evidence before the District Court; accordingly he was not examined in the presence of the accused who has had no opportunity of cross-examining him. This, it is said, vitiated the whole committal proceeding.

Counsel for the Crown contended that the motion to quash was not competent and that it was not open to me on a motion to quash the indictment to investigate and, in effect, act as an appeal tribunal from the

District Court proceedings which were administrative and not judicial in character. However an examination of the Papua and New Guinea Law Reports shows that at least four judges of this Court have entertained motions to quash indictments arising from alleged irregularities in the committal proceedings, (R. v. Burusep & Ors (1); R. v. McEachern (2); R. v. Little (3); R. v. Simbene Dandemb (4)).

The authorities cited by counsel for the accused in support of the motion were R. v. Arthur Gee & Ors. (5); R. v.Shakeshaft & Ors. (6); and R. v. Burusep & & Ors.(7) (supra). In Gee's Case (8) (supra) it appears that witnesses were examined from prepared typed statements analogous to proofs. A copy of each statement was handed to the magistrates and their clerk but not to the prisoner. Nothing was taken down by the magistrates or their clerk in writing but each statement was checked by the clerk and ultimately signed by the witness. Under Sec.17 of the Indictable Offences Act 1848 the magistrates were required to take the statements of witnesses on oath or affirmation and to "put the same into writing and such depositions shall be read over to and signed respectively by the witnesses who shall have been so examined and shall be signed also by the justice or justices taking the same ....." The Court held that the irregularities in the taking of the depositions rendered the proceedings so defective that there had been no lawful committal for trial and that no lawful bill of indictment could be preferred against the appellants.

In Shakeshaft's Case (9) (supra) the accused were charged before the committing magistrate with an offence unknown to the law. In quashing the indictment Gee's Case (10) (supra) was followed.

In Burusep's Case (11) (supra) the accused were committed for trial largely on hearsay evidence and the charges before the District Court were bad for duplicity. The Crown apparently recognised difficulties

(1) (1963) P. & N.G.L.R. 181
(2) (1967-68) P. & N.G.L.R. 48
(3) (1967-68) P. & N.G.L.R. 63
(4) (1969-70) P. & N.G.L.R. 207
(5) (1936) 25 Cr.App.R. 198
(6) (1960) Crim. L.R. 206
(7) (1963) P. & N.G.L.R. 181
(8) (1936) 25 Cr. App.R. 198
(9) (1960) Crim.L.R.206
(10) (1936) 25 Cr.App.R. 198
(11) (1963) P.& N.G.L.R. 181.

arising from the committal proceedings and presented an "ex officio" indictment. Mann, C.J. ruled that the case was not an appropriate one for the presentation of an "ex officio" indictment and discharged the accused from custody. In the course of his judgment he expressed the view that the committal was bad and in this respect appears to have followed Gee's Case (12) (supra) and Shakeshaft's Case (13) (supra).

In R. v. Frederick Grant & Ors. (14) a motion to quash an indictment was allowed in circumstances where, in the committal proceedings, the prosecution called as witnesses three defendants to give evidence against their co-defendants. It was held that it was not competent for the prosecution to call as witnesses persons who were themselves concerned in the charge on which they were called and in consequence the committal was bad. In R. v. Sharrock & Others (15) where Grant's Case (16) (supra) was followed an indictment was quashed again in circumstances where an incompetent witness gave evidence for the prosecution.

However the reasoning in Grant's Case (17) (supra) and Sharrock's Case (18) (supra) was disapproved in R. v. Norfolk Quarter Sessions (19). In that case an order had been made in Quarter Sessions quashing an indictment where it was said that an incompetent witness had been examined before the committing justices. Lord Goddard, C.J., at p. 506, said: "But this case has great importance because if we had to give effect to Mr. Head's submission and uphold the Norfolk quarter sessions it would mean, so far as I can see, that if any inadmissible evidence is given before justices when they are acting as examining justices, that vitiates the committal. It is true that a judgment given on circuit by Birkett J. in Rex v. Grant ((1944) 2 All E.R. 311), when he had not, I should think, had the advantage of as full an argument with cases being cited as we have had, seems to have been to that effect, and his judgment was followed by Lewis J. in Rex v. Sharrock ((1948) 1 All E.R. 145). But just consider what it means. If a committal is to be vitiated because an incompetent witness has given evidence, which means that the evidence was wrongly admitted, it would follow that a committal could always be objected to if it could be shown that there was something on the depositions which could not be legally admitted as evidence.

(12) (1936) 25 Cr.App.R. 198
(13) (1960) Crim.L.R. 206
(14) (1944) 30 Cr.App.R. 99
(15) (1947) 32 Cr.App.R. 124
(16) (1944) 30 Cr.App.R. 99
(17) (1944) 30 Cr.App.R. 99
(18) (1947) 32 Cr.App.R. 124
(19) (1953) 1 Q.B. 503

I think Grant's case ((1944) 2 All E.R. 311) is perhaps to be explained by the fact that Birkett J. strongly disapproved of what had been done in that case and thought that the witnessess who had been called were very likely called in a way that was unfair, or it might have been that they were put in the position of having to incriminate themselves." Later, at p.508, (after referring to the Indictable Offences Act of 1848) he said: "If the provisions of section 17 of that Act are not complied with, then, as the Court of Criminal Appeal decided in Rex v. Gee ((1936) 2 K.B. 442), the committal is bad. In that case, instead of taking depositions in the way prescribed by the Act, statements had been obtained from witnesses and they were read over in court. ..... Therefore, as long as it is shown that justices have acted in accordance with the Indictable Offences Act, 1848, a committal by them is a good committal. Whether the evidence that has been given before the justices will be admitted at the trial is quite another matter."

In the present case it appears that five witnesses appeared before the District Court. They were examined in the presence of the accused, their statements reduced to writing and signed by them and by the magistrate, the accused was afforded the opportunity to and did in fact cross-examine witnesses. Upon this evidence (which appears to have been taken in strict accordance with the relevant provisions of the District Courts Ordinance) it was open to the magistrate to form the view that the accused struck Nanguwam four times with an axe causing a number of injuries. She was taken by emergency charter to Mt. Hagen hospital.

The facts in this case are, I think, clearly distinguishable from those in Gee's Case (20) (supra). In the latter case the whole of the evidence before the justices was taken in a way which the the statute did not authorise. In the present case there was a very substantial body of evidence taken in the manner directed by the District Courts Ordinance. It is true that the magistrate received in evidence a document, namely a report of Dr. Cull, which was legally inadmissible. However, I see nothing in Gee's Case (21) (supra) read with the Norfolk Quarter Sessions' Case (22) (supra) which is authority for the proposition that in the circumstances of this case the acceptance of inadmissible evidence vitiates the whole committal.

Accordingly I refuse the motion to quash the indictment.

Solicitor for the Crown - P.J. Clay, Crown Solicitor

Solicitor for the Accused - W.A. Lalor, Public Solicitor

(20) (1936) 25 Cr. App.R. 198
(21) (1936) 25 Cr. App.R. 198
(22) (1953) 1Q.B. 503