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IN THE SUPREME COURT
OF PAPUA NEW GUINEA

CORAM : RAINE, J.
29th November 1972

MADUM TOWEL v. KEPAS TUNDUAL

(Appeal No.149 of 1972(NG))

1972
Nov. 24
RABAUL

Nov.29
PORT MORESBY.

Raine, J.

This is an appeal from a decision of a Local Court which fined the appellant the sum of Thirty dollars ($30.00) for stealing an amount of cash on 2nd April, 1969. The complaint was not laid until 18th September, 1972, well over three years later.

Thus counsel for the appellant says that there was no jurisdiction to hear the complaint because of the provisions of sec. 21 of the Local Courts Ordinance of 1963. It reads:-

"21. A Local Court has no jurisdiction over an offence which took place more than three months before the complaint was made unless it is of the opinion that the complainant had no reasonable opportunity to make the complaint within that period."

In his report of 14th November, 1972 giving his reasons the learned Magistrate made no reference to sec. 21, He did not indicate that he had directed his mind to the long delay between offence and complaint. In the unsworn statement of facts in the court record this appears:-

> "After the defendant had stolen the money the defendant escape(d). Few years past (sic) by the complainant couldn't find the defendant."

The statement goes on to say that later, in 1972, the appellant was located and arrested. The record states that the "defendant admits the truth of fact(s)." The appellant pleaded guilty in the Local Court.

In Puloayasi Daniel v. Stuckey (1) sec. 21 was referred to. At pp. 4 and 5 Williams, J. said :-

(1) (unreported, Williams, J., 2 June 1972, No. 681)

"In this case the offence was alleged to have occurred between 14th June, 1970 and 31st March, 1971. The complaint in this matter was made on 9th December, 1971. The alleged offence, therefore, took place more than 3 months before the complaint was laid. In the terms of Section 21 the Local Court did not have jurisdiction unless it formed the opinion that the complainant had no reasonable opportunity to make the complaint within the 3 month period.

In a report furnished by the Magistrate to this Court (presumably pursuant to Rule 7 of the Appeal (Local Court) Rules 1967) he stated that he was of the opinion that the complainant had no reasonable opportunity to make the complaint within the 3 month period prescribed by Section 21. The basis for the formation of the Magistrate's opinion does not appear from his report and so far as the record of the proceedings before the Local Court is concerned, it seems that no evidence was called directed to this point.

Section 21 expressly declares that the Local Court has no jurisdiction in the circumstances therein mentioned unless the Court forms the requisite opinion. It seems to me that in cases where the 3 month period has expired the formation of the opinion is a condition precedent to the exercise of jurisdiction by the Court. The opinion must, in my view, be formed in a judicial way after hearing evidence directed to the point. It does not seem that this was done in this case and that, probably, the Magistrate relied upon statements made in the "Statement of Facts" appearing on the reverse side of the information. There it is stated that on 24th May, 1971 an audit was conducted of the Society's books which revealed a deficit which was thought to have been brought about by malpractice on the part of employees of the Society. The matter was reported to the police (no date is specified) and in December 1971 police investigated the matter. What happened to the matter between May and December, 1971 is left unexplained. On the material contained in the

"Statement of Facts" I do not think that the opinion could properly be formed that "the complainant had no reasonable opportunity" to make the complaint within the 3 month period. But, in any event, what ever was alleged by the prosecution in the Statement of Facts, it was, in my view, incumbent upon the Court to make a judicial examination of the matter before forming an opinion."

With respect, I entirely agree with His Honour. I would not have bothered to circulate this judgment were it not for the fact that the portion of my brother's judgment I have quoted was obiter, and further, because I believe I can add something which may be helpful.

Williams, J. said "The opinion must, in my view, be formed in a judicial way after hearing evidence directed to the point." In my opinion it would be quite sufficient for a Magistrate to form an opinion from admissions made by a defendant, provided that the defendant was in a position to make admissions. In some cases he might be able to do so, for instance, if he had made himself scarce and spread a rumour that he was dead. But in some cases a defendant might not have any knowledge of the reasons for a complainant having "no reasonable opportunity to make (a) complaint." In the latter case I entirely agree with Williams, J. as to the need for evidence to be led. It is not a difficult matter, in many cases it would probably only involve the complainant going into the box and swearing that he had been ill for some months, or out of his home area for reasons beyond his control.

In my opinion the facts disclosed here are insufficient to support the proposition that "the complainant had no reasonable opportunity to make (a) complaint" within the period of three months after his money was taken. The disappearance of the appellant gave the complainant no chance of bringing the offender into court, but it did not prevent a complaint being laid.

Sec. 443 of the Code does not apply as it might have done in Queensland, where there is a proviso that a court of summary jurisdiction may deal summarily with a matter notwithstanding that more than a year has elapsed since the offence. This proviso has not been reproduced in either Papua or New Guinea.

Sec. 566 of the Code was also raised by counsel for the respondent. As to this, at pp. 5 and 6 of the judgment I have referred to, Williams, J. said :-

"The other matter to which I wish to advert arises from the provisions of Section 556 of the Code. Under that section a prosecution for an indictable offence in order to the summary prosecution of the offender must, unless otherwise expressly provided, be begun within six months after the offence is committed." .....
.....
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"It will be seen that this prosecution was not commenced within six months after the alleged offence was committed. It is well settled that provisions like Section 556 do not deprive a court of jurisdiction but provide a defendant with a defence against an information which is out of time. (Parisienne Basket Shoes Pty. Ltd. v. White ((1937-8) 59 C.L.R. 369); Adams v. Chas. S. Watson Pty. Ltd.((1938) 60 C.L.R. 545). It appears, on the face of the record in this matter, that the proceedings were not in time for summary prosecution. The appellant was unrepresented before the Local Court and obviously would have been unaware of the defence open to him on a summary prosecution arising from Section 556 of the Code. The court should not in the circumstances have accepted the plea of guilty and proceeded to hear and determine the matter summarily."

With respect, I agree in this. However, in my opinion there is a further reason why the respondent should not be permitted to rely on sec.556. Sec.21 of the Local Courts Ordinance was enacted in 1963, subsequent to the Code. That section is in quite different terms to sec. 556 of the Code. Sec. 556 provides a possible defence, but in effect sec. 21 forbids a Local Court to embark on a hearing where the complaint is made more than three months after the offence except in the circumstances referred to. A question of jurisdiction is involved, quite a different thing to the opportunity to raise a defence under sec. 556 where a complainant is out of time.

Thus is appears to me that the second paragraph of sec. 556 of the Code, to the extent that it seeks to attach itself to Local Courts, cannot stand with sec. 21 of the Local Courts Ordinance. Of course, until 1963 there were no Local Courts at all. Thus it seems clear to me that the second

paragraph, at least, of sec. 556 of the Code is impliedly repealed, so far as Local Courts are concerned, by the 1963 enactment. Leges posteriores priores contrarias abrogant.

Counsel for the respondent also relied on sec. 43(3) of the Local Courts Ordinance which says, inter alia, that "an appeal shall be allowed only if it appears to the Supreme Court that there has been a substantial miscarriage of justice." Obviously, if a court acts without jurisdiction and imposes a penalty, there is a substantial, indeed very substantial miscarriage of justice.

I allow the appeal. I quash the conviction and sentence.

Solicitor for the Appellant - W.A. Lalor, Public Solicitor
Solicitor for the Respondent - P. J. Clay, Crown Solicitor