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IN THE SUPREME COURT )
OF PAPUA NEW GUINEA )

CORAM: LALOR, J.
Thursday,
28th November, 1974.

NENK PASUL
Appellant

- and -

NICHOLAS ROBSON
Respondent

(Appeal No. 130 of 1974 (N.G.))

REASONS FOR DECISION

1974
20 Nov.
WABAG

28 Nov.
PORT MORESBY

Lalor, J.

The appellant appeared before the District Court at Wabag on 18th September, 1974 on a charge of escaping from lawful custody; an offence under s. 3 of the Criminal Law (Escapes) Act, 1968.

He was convicted and sentenced to two weeks' imprisonment.

He has appealed against this conviction and sentence on a number of grounds of which one only has any substance: namely that the appellant was not in lawful custody at the time of the alleged escape.

The facts on which the conviction was based were as follows. The appellant was arrested on 6th September, 1974 by A.D.O. Robson on a charge of unlawfully laying hold of one James Gigilma, an offence under the Police Offences Act. The incident and arrest took place at Kandep, which although administered from a New Guinea district headquarters, is geographically in Papua. Six other men were arrested on the same charge. D.O. Roberts, a Reserve Magistrate of the District Court, informed the appellant that he would allow him bail but that the other six men must remain in custody pending trial as they were unknown to the Kandep police.

The appellant, the M.H.A. for that area, refused bail because his friends were being kept in custody. The seven men were being taken by vehicle to the Corrective

Institution when the appellant jumped from the vehicle, ran some short distance away when he was recaptured.

It is submitted on behalf of the appellant that the arrest was not lawful since Robson did not have reasonable grounds to believe and in fact did not believe that

(1) it would not be practicable to obtain a warrant for the arrest of the appellant; and

(2) that proceedings against the appellant by summons would not be effective.

These two conditions are conditions precedent to a valid arrest as set out in s. 17C (1) (c) and (d) of the Police Offences Act of Papua.

It is, I think, quite clear that neither of the officers concerned nor the magistrate who heard the case adverted to the fact that the offence occurred in Papua. The New Guinea Police Offences Act does not contain similar conditions precedent to the power to arrest but gives a discretionary power of arrest to a police officer who has just cause to suspect a person of having committed an offence (s. 10).

There is no doubt that if there was no lawful arrest the charge should have been dismissed.

It was not disputed that D.O. Roberts was a reserve magistrate of the District Court and, as such, had power to issue a warrant of arrest. (See s. 58 District Courts Act). On the evidence he was present throughout the incident and there appear no grounds upon which it could reasonably be believed that it was not practicable to obtain a warrant. Nor that the arresting officer, in fact, did believe that it was not practicable to obtain a warrant. As I have said it appears clear that the requirements of s. 17(c) were not adverted to.

As regards the second condition precedent contained in s. 17C (1) (d) namely that the arresting officer has reasonable grounds to believe and, in fact, does believe that proceedings by summons would be ineffective,

the fact that Roberts was prepared to release the appellant immediately on bail without demur from Robson indicates clearly that both were of the opinion that the appellant would attend Court on the hearing of the charge. Again, as I have said, it is clear that this condition precedent was not adverted to and consequently Robson did not have an actual belief that a summons would be ineffective to ensure the appellant's attendance at his trial.

No argument was addressed to the Court on the application of s. 8A of the Crimes Act (Commonwealth), and on the facts as I have found, it would not affect the decision. (See Reg. v. Kakius-Isiura) (1).

I find therefore that at the relevant time the appellant was not in lawful custody and accordingly the appeal must be allowed and the conviction and sentence quashed.

I have mentioned that the officers concerned appear to have acted under the power to arrest given by the Police Offences Act of New Guinea, As I noted, this power, although without any express conditions precedent, is discretionary. Now any discretion given by law must be exercised according to law and for the purposes for which it is given. It may not be exercised capriciously or for extraneous purposes.

In the circumstances of this case, where the officers concerned acted upon information that an offence had been committed, it seems to me that the proper exercise of that discretion involved a consideration of whether a summons would have been effective to secure the attendance of the appellant at the hearing of the charge. And that there was no proper exercise of their discretion unless they had reason to believe and did in fact believe a summons would not be ineffective.

It may well be that if the matter were before the Court for decision it would be held that the arrest in these circumstances was not authorised by law. (See Rex v. Thompson) (2).

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(1) (1964) P. & N.G.L.R. 84
(2) (1909) 2 K.B. 614

In view of the large number of arrests which are made either for purposes not authorised by law or without any proper exercise of discretion it would appear desirable for the guidance of officers to bring the New Guinea legislation into line with the Papuan law and to spell out the considerations to be taken into account before an arrest is made.

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Solicitor for the Appellant : G.R. Keenan, Acting Public Solicitor.

Solicitor for the Respondent: P.J. Clay, Crown Solicitor.