IN THE SUPREME COURT)
OF PAPUA NEW GUINEA)

CORAM: Lalor, J.
Thursday,
20th February, 1975.

R. v. KAPON TOP and PINGANA EKI

1975
19, 20 February
Mount Hagen
Lalor, J.

The two accused were charged that about the 8th October, 1974 they murdered one Iki Kiso.

At the commencement of the proceedings the Crown Prosecutor informed the Court that no evidence would be offered against Pingina Eki and he was accordingly found not guilty.

From the Crown opening against the other accused and from the evidence in the case, it was obvious that there had never been any evidence upon which the accused Pingina Eki could be charged or found guilty of any offence.

I am concerned at the procedure adopted in this case and another case on the same circuit, viz. the presentment of an indictment followed immediately by a notification of intention not to offer evidence or the entry of a nolle prosequi. My concern was not alleviated by the statement of the Crown Prosecutor that in his view this is the proper manner in which to proceed.

The procedural facts of the case were as follows.

On the 29th day of September 1974 the two accused were committed for trial on a charge of unlawfully killing one Iki Kiso. Both defendants were remanded in custody. On 7th February, 1975 an indictment charging the two defendants with the murder of one Iki Kiso was drawn. The case came on for trial on the 19th February, 1975 and no evidence was offered against Pingina Eki on that day and he was acquitted.

If the contention of the Crown Prosecutor is right there follow two extraordinary consequences both

opposed to the basic principle of the common law. Firstly it means that a person against whom there is no evidence to the knowledge of the indicting authority can be kept in gaol until the time of his trial. Secondly, an indictment in the Queen's name must be presented against a man who has in fact committed no crime and who is known to have committed no crime. In other words, the Crown must be made a party to a prosecution without any reasonable or probable cause - a malicious prosecution.

If that were in fact the state of the law it would indeed call for immediate legislative action. But an examination of the law shows that it proceeds on an entirely wrong basis.

Historically, as far back as the twelfth and thirteen centuries, the Judges of the King's Court had interposed between the accusation and the trial an institution by which it was ensured that no man could be held for trial unless there was evidence of guilt. This device was the presentment to the grand jury of a Bill of Indictment. After advice by the presiding judge as to whether or not there was evidence to put the accused upon his trial, the jury retired and found either that there was "probable evidence" in support of the offence charged in the Bill in which case a "True Bill" was found, or if they thought there was no such evidence then a "No True Bill" was endorsed on the indictment which was then said to be ignored. (See Holdsworth 'A History of English Law', Volume 2 pages 611-23 and Volume 5 page 169, also Halsbury's Laws of England, Second Edition, Volume 9 pages 140-1).

In the mid-nineteenth century the Summary Jurisdiction Acts 1848 and the Indictable Offences Act 1848, provided a further safeguard against a person being held for trial without adequate evidence against him. These Acts replaced the earlier Acts of 1553 and 1555 which required accused persons to submit to examination by Justices of the Peace. These earlier statutes were concerned primarily with examinations of prisoners when bail was applied for, although the depositions taken were available on the trial. The major innovation of the Summary Jurisdiction Acts of

the nineteenth century was to enable the Justices of the Peace to refuse to commit a person for trial if there was insufficient evidence against him.

The grand jury system was retained after the Summary Jurisdiction Acts and there was thus from that time onwards a double safeguard against a person being held for trial without evidence against him. The system remained in force in England until well on in the present century.

With the founding of the Australian Colony it became necessary to adapt these principles to the circumstances of the Colony. And so by the Imperial Act 9 Geo. IV Chapter 83 of the 25th July, 1828, provision was made for the Attorney-General to perform the function of the grand jury until such time as they were established. The effect of this and subsequent provisions is set out by the High Court in Commonwealth Life Assurance Society Ltd. v. Smith (1), as follows:

> "The present case is not one where the proceedings were terminated by the entry of a nolle prosequi. They ended by the refusal of the Attorney-General to file an indictment. Under the law of New South Wales tthere is no grand jury, and the Attorney-General discharges a duty analogous to or replacing that which, under the common law, was performed by a grand jury. See s.5 of 9 Geo. IV c.83; Crimes Act 1900, s.572 and Justices Act 1902-1931 (N.S.W.), secs. 39, 41(6) and 42 and R. v. McKaye to which Rich, J. has referred us. When an accused person is committed for trial it is for the Attorney-General to consider whether the accused should be put on his trial and for what precise offence, and this he does by filing or refusing to file an indictment. This is an entirely different function from that of entering a nolle prosequi upon an indictment after it has been filed, which does no more than non. pros. the indictment."

(1) (1937-38) 59 C.L.R. 527 at 543

The fact that this procedure which substituted the discretion of the Attorney-General for that of the grand jury was retained, was not accidental. In 1885 Martin, C.J. in R. v. McKaye (2) said:

> "In our mode of instituting criminal prosecution I think we are infinitely in advance of the practice of the mother country. There can be no question that the power of determining whether there shall be a prosecution or not is in much safer hands when entrusted to a lawyer, of the eminence of which an Attorney-General appointed under our present system of government must always be, than in the hands of a Jury most - perhaps all - of whom are ignorant of the law, and who conduct their inquiries without a tythe of the deliberation which an Attorney-General must exercise when reading the deposition in order to determine whether he should prosecute or not."

Upon the creation of a separate Colony of Queensland the provision of the Australian Courts Act set out above, remained in force. (See the Queensland Statutes Volume 4 Payne & Woodcock 1889). This remains the present law in Queensland and the discretion to file a No True Bill remains with the Attorney-General. (See R. v. Webb (3).

The Australian Courts Act 9 Geo. IV Chapter 83 became part of the law of the Territory of Papua on 17th September, 1888 and in the Territory of New Guinea from 9th May, 1921. (See Laws of the Territory of Papua 1888-1945 Volume 5 page 93, and Laws of the Territory of New Guinea 1921-1945 page 71). This application in both Territories of course depended on the possibility of them being applied within the Territory.

Obviously in British New Guinea where there was no Attorney-General and in fact no law officers of the Crown, it became necessary to adapt the procedure

(2) (1885(6)) L.R.(N.S.W.) 123 at 130
(3) (1960) Qd. R. 443 at 446 and 447

which had been proven to be so satisfactory in New South Wales, to the conditions of the new Colony. As a result the Criminal Procedure Ordinance 1889 placed the function of deciding whether a charge should be laid or not, in the Chief Magistrate who was then the only judicial officer and lawyer within the Possession. S.12 required the Chief Magistrate to consider the evidence taken by a magistrate when he committed a person for trial and either to lay or direct to be laid, a charge, or alternatively to quash the committal. In other words he was to perform the function performed by the Attorney-General in New South Wales and Queensland. With this exception under the Ordinance it became a mandatory duty upon him to perform. Under s.18 the Administrator of the Possession could empower some other person to perform this duty, in which case the obligation rested upon him to the exclusion of all other persons including the Chief Magistrate. With the appointment of a Crown Law Officer this duty was delegated to him and was performed by him.

The Criminal Procedure Ordinance of Papua was adopted in New Guinea on 9th May 1921, and the provisions regarding the grand jury function were placed in the Crown Law Officer.

Under both pieces of legislation provision is made for a notification to the Court of a decision to quash the committal as soon as conveniently can be done and the release of the prisoner.

If these mandatory provisions were followed the situation arising in the present case could [illegible] occur.

Solicitor for the Crown: B. Kidu, Crown Solicitor.

Solicitor for the Defence: N.H. Pratt, Acting Public Solicitor.