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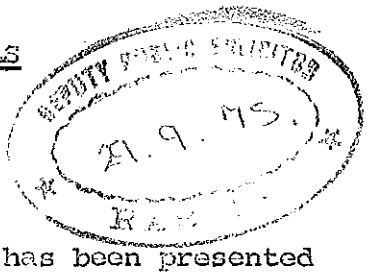
IN THE NATIONAL COURT)
OF PAPUA NEW GUINEA)

CORAM: PRENTICE, DEPUTY C.J.
Tuesday,
23rd September, 1975.

THE STATE v. KOBA PUMAS

Ruling



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In this matter an indictment has been presented apparently at the direction of the Public Prosecutor, in the name of "the State" instead of the form hitherto used - "The Queen". This and other indictments in similar form constituting all the matters on the Southern Highlands circuit, were actually formally presented at Port Moresby on Saturday morning last. I then endeavoured to dissuade Mr. Roberts-Smith, who attended in person, from the course proposed. I pointed out that on Monday, the 22nd, four judges would be commencing at widely separated points on the periphery of Papua New Guinea, the first circuits of the National Court. I suggested that it would be highly inconvenient that challenges to the form of the indictment should be raised before four separate judges in different towns, who would not be able to confer; and that argument should be presented by the most junior counsel without proper briefs, without the aid of books, possibly without even copies of the Constitution and the accompanying organic laws. It was apparent at that time that the Public Solicitor had only that morning been advised of the Public Prosecutor's intentions in this regard and had had no opportunity to consider the complicated issues that might be involved. The Public Solicitor had stated that in the interests of any clients he might have, he would have to instruct his officers to move to quash all such indictments. Three such motions have now been made to me. I was also informed that the Secretary for Law was unaware of Mr. Roberts-Smith's determination. It seems apparent that this decision to so proceed, which may well have political overtones, was taken without discussion with the Minister or the National Executive Council.

I cannot conceive that any person would have had the interest or the wish to have challenged

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indictments presented in the ancient form in the name of Her Majesty. I suggested to the Public Prosecutor that if it were desired, a test case should be presented in Port Moresby and a reference to the Supreme Court to test the validity of the proposed course sought therein. Mr. Roberts-Smith was quite inflexible on the subject and refused to alter his stand. I can only express the greatest regret at the embarrassment which the Public Prosecutor's decision has caused to all on this circuit. I imagine it has caused equal difficulties on the other circuits. It is apparent from counsels' submissions to me that whatever action I may take, may prove unsatisfactory and may create uncertainty to Government and subject, and cause considerable expense and loss of time which could have been avoided.

May I say, I am most grateful for the spirited way counsel have endeavoured (one of them has been ill for many days) to cope with this quite difficult problem thrust upon them with minimal notice.

The course which I have taken in this and other cases already begun, has been to note the submissions and reserve my decision on the motion to quash. I have then continued to arraign the accused and to record their pleas. In two cases I have conditionally entered pleas of guilty and convictions thereon, and have administered the allocutus and heard addresses. More formidable problems arise in a case of a plea of not guilty, of course. Defence Counsel has already objected to my proceeding as far as I have done without deciding the issue raised on motion. I have considered that with the inherent powers this Court has over its own procedures, that what I have done is the most practical course, and is not likely to prejudice the prosecution or the defence. The time to be possibly lost in proceeding to hear a number of defended cases on indictments possibly later to be held invalid is a matter of grave concern to me, if not to the Public Prosecutor. It is to be noted that the position may well be different in Papua from that in New Guinea until their laws are identical. It is, of course, a matter of indifference to the Court in what name prosecutions are brought, provided the prosecutions are properly brought. Many countries use

the form "The Republic of X against Y". No doubt an analogous heading here, if authorized or required by law, would be "The Independent State of Papua New Guinea against Y".

It has been argued that the heading is unimportant - that the mere signature of a purportedly authorized prosecutor is sufficient to validate an indictment. I find myself quite unable to accede to such an argument. I do not see how this can be proposed by a Public Prosecutor who contends that he is forced by law to adopt the term "The State" as the prosecuting body. If the heading is a matter of indifference, why did he elect to substitute "The State" for "The Queen"? It is a matter of cardinal importance, I consider, for an accused person to know which person or authority is purporting to prosecute him, in order that he may challenge any unauthorized or illegal proceedings.

No doubt some confusion has been caused by the last minute engrafting into a proposed republican-type constitution, of the Royal Institution. At the outset I note the ancient position to be noted succinctly in Archbold, 38th Edition, p. 1, that:-

> "A bill of indictment is a written or printed accusation of crime made at the suit of the Crown against one or more persons."

Halsbury's Laws of England, 3rd Edition, Volume 10, p. 385 states:-

> "An indictment is in form an accusation at the suit of the Queen that one or more persons named or otherwise identified have committed one or more crimes specified. Every indictment must contain, and is sufficient if it contains, a statement of the specific offence or offences with which the accused person is charged, together with such particulars as may be necessary for giving reasonable information as to the nature of the charge. There are three parts to an indictment. (1) the commencement;

(2) the statement of offence; (3) the particulars of offence. The forms of indictment are set out in the appendix to the Indictment Rules, 1915, and those forms or forms conforming thereto as nearly as may be are to be used in cases to which they are applicable, and in other cases forms to the like effect, or conforming thereto as nearly as may be, must be used, the statement and particulars of offence being varied according to the circumstances in each case. The commencement sets out the name of the case, as a suit between the Queen and the accused, the court of trial and that the accused is charged with the offence or offences then following. The indictment may be on parchment or durable paper, and may be either written or printed, or partly written and partly printed. The names of the witnesses on the depositions are endorsed on the back of the indictment.

Notwithstanding any rule of law or practice and subject to the provisions of the Indictments Act, 1915, an indictment is not open to objection in respect of its form or contents if it is framed in accordance with the rules made under that Act." (Emphasis is mine).

The presentation of an indictment in the Royal name would seem to involve the Queen's power as Head of the Executive (Head of State). I do not understand how the power to initiate a prosecution can be said to be an exercise of "judicial power". Apart from legislative enactments to the contrary, I know of no justification for bringing indictments in other than the Queen's name.

The argument in support of the State as prosecuting authority, was based principally on s.158 of the Constitution, which states, in paragraph 1, "Subject to this Constitution, the judicial authority of the People is vested in the National Judicial System". It will be noted that the National Justice Administration", which includes the Minister and the law officers, is not the

"National Judicial System". S.177, on the other hand, makes special reference to the "prosecution function" of the Public Prosecutor, including power "to control the exercise and performance of the prosecution function". I can see no warrant for assuming that s.158(1) touches the matter at all. There may indeed be some argument in favour of the power of the Public Prosecutor to bring prosecutions in his own name. The Constitution generally, it is said, justifies the use of the words "The State". I do not think this argument of any value in this context. The argument continues that justice is no longer to be seen as flowing from the Crown. It is sought to include within the connotation of justice, the prosecution power. One finds this argument unacceptable when one considers the references to the power of the Head of State as to mercy in s.151; and the provisions of ss. 82 and 86 of the Constitution. The latter provides that "the privileges, powers, functions, duties and responsibilities of the Head of State are as prescribed by or under Constitutional Laws and Acts of Parliament." Lacking any specific reference in the Constitution and Acts of Parliament, and none has been pointed out to me, I must assume that in appointing the Queen the Head of State the people of Papua New Guinea were intending the Monarch to retain such privileges, powers, functions, duties and responsibilities for the time being, as she exercised immediately before Independence as then Royal Head of State. I see no positive indication that it was the intention of the Legislature to remove the power of preferring prosecutions from the hands of the Queen. It has, of course, not been possible for counsel to explore the difficult Constitutional argument involved in the question of what prerogative powers remain in the Queen as Queen of Papua New Guinea under Schedule 2.2., paragraph 2 of the Constitution, which makes direct reference to the subject.

The only other proposition in support of the indictment advanced before me, was that by virtue of s.98 of the Interpretation (Interim Provisions) Act 1975, the use of the term "The State" instead of "The Queen" in the heading of an indictment became justified.

S.560 of the Criminal Code (Queensland) provides that an indictment be in writing. S.564 of that Code does not prescribe any particular form of writing. The adoption of this Code in Papua was worked by the Criminal Code Ordinance of 1902. The schedule to the Criminal Practice Rules of 1900 (Queensland) was adopted in Papua by the Criminal Forms Rules 1922, (Statutory Rule No. 9 of 1922). These Rules provide that -

> "The forms contained in the schedule ... may be used in several cases and for the several purposes for which they are respectively applicable and when so used shall be sufficient".

These Rules were made under the Criminal Code Ordinance of 1902. The forms in the schedule provide for the use of the Title "The Queen against AB" and references are made to prosecuting "for Our Lady the Queen". (See judgment of Kelly, J. in Reg. v. Ongasi Josis (1). I am informed that this Interpretation Act of 1975 of the House of Assembly has been assented to and is in force. I have not its number, or the date on which it was so effectuated. It is provided thereby that "s.90 and the remaining provisions", (other than certain mentioned provisions), "came into force on 16th September, 1975." By s.98 thereof, it is provided that "In relation to anything done or to be done on or after Independence Day, each expression ... set out in column 1 of the Table to this section, when it appears in a provision of a former Territory or a document shall be read as a reference to the person, authority, matter or thing set out in column 2 opposite that expression." Opposite the "Crown" in the schedule appears the "State" and opposite the "King" appears the "State". A "provision", including as it does "a law or instrument referred to in s.1(1)" (see s.2), includes a "regulation or other instrument made under an act or adopted foreign law" - s.1(1). A "provision", therefore, I consider, includes a "Rule". Reading the Criminal Forms Rules of 1902, therefore, with the Interpretation Act of 1975 in relation to the presentation of indictments (that is "something to be done after Independence Day"), it would seem that the

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(1) (1971-72 P.N.G.L.R. 476 at 480

forms which may be used include forms containing the phrase "the State" in lieu of "the Queen". However, the situation is complicated by the enactment in s.3 of the said Interpretation Act 1975 that -

> "In any provision unless the contrary intention appears - ... "the Queen" means Her Majesty Queen Elizabeth II and includes Her Majesty's heirs and successors ..."

It is possible that in certain contexts "The Queen" shall mean "Queen Elizabeth the Second", and that in others the phrase may mean "the State". It appears to me that either interpretation would be apposite to the entitlement of an indictment and that accordingly I should rule that "the State" may be used for this purpose or "the Queen". As mentioned above, I apprehend the position may be quite other in New Guinea, where if I can recall correctly, the Criminal Rules of 1902 (Queensland) were not adopted.

I therefore rule the indictment valid.

(The arraignment, plea and conviction in this case were then confirmed; and the Court proceeded to sentence).

Solicitor for the Public Prosecutor	: B.W. Kidu, Public Prosecutor.
Counsel for the Public Prosecutor	: B.J. McDade.
Solicitor for the Accused	: N.H. Pratt, A/Public Solicitor.
Counsel for the Accused	: I.C. McWalters.