SC 181

IN THE SUPREME COURT OF THE]

TERRITORY OF PAPUA NEW GUINEA]

REG. v. HALL

EX PARTE: DAHILL PLANTATIONS LIMITED

JUDGMENT

This is an application to make absolute an Order Nisi for a writ of Prohibition directed to G.F. Hall Esquire, Stipendiary Magistrate of the District Court Holden at Kavieng, New Guinea. The facts appear in the Affidavits filed in the application and the record of the proceedings before the Magistrate. The Complaint which came before the magistrate was for an offence under the provisions of Section 9 (1) (a) of the Natives' Contracts Protection Ordinance 1921 as amended to date.

There are two grounds submitted as the foundation of the application for the issue of the prerogative writ.

The first ground is that Sections 136 and 137 of the District Courts Ordinance (New Guinea) were not complied with and since they are peremptory and substantive Sections the Magistrate had no jurisdiction.

Apparently there was no statement of the charge made and no plea taken. This is not disputed. Nor was there any entry of a plea on the record.

Sections 135, 136 and 137 were taken from the Queensland Justices Act Sections 144, 145 and 146 and they are on all fours with those Sections. Any case law or text-book observations in Queensland are applicable to Sections 135, 136 and 137.

Enactments regulating the procedure in Courts seem usually to be imperative and not merely directory and when an enactment contains expressions of a peremptory nature in procedure relating to penal sanctions I should say that the conditions laid down are to be adhered to and there can be no waiver. The provisions of Sections 136 and 137 are certain, and it would be strange if they could be departed from the whim of presiding Magistrate in

summary jurisdiction. Such a departure would be flying in the race of the intention of the legislature as disclosed by the wording of the Sections.

Kennedy Allen the learned author of a work on the Justices Acts, Queensland, in an observation on Section 145 says,

"The Section deals with procedure only and it seems does not apply when the defendant appears by Counsel or Solicitor and there is an admission of guilt made on his behalf." It seems to me that that observation relates only to the statement of the charge and it is perhaps true to some extent because Counsel or Solicitor appearing often announces that he takes the information as read and then pleads. There is no waiver of the provisions of the Section in reality, it is merely that the complaint or information being known there is a desire to obviate the necessity of reading it. From the observation the Section is to be applied when the accused is appearing in person. In any event it has no relation to the taking of a plea which is a prerequisite to any trial summary or otherwise whether it be plea by the accused, necessary upon a trial upon indictment, a plea by the accused himself or his Counsel in summary jurisdiction or a recording of a plea in any jurisdiction.

There is no direct authority on the question of the non-observance of the statutory requirement as disclosed in the Sections, no doubt because such a position has never arisen or if it has, it has not been challenged in Superior Courts the decisions of which are reported or it may be that a neglect to comply with the provisions of the Section is resolved without application to a Court.

The nearest I can advert to are those quoted by Mr. Quinlivan for his own purpose, i.e., Trebbin v. Turner and Heisner v. Turner (1944) S.R.Q., p. 62. In Heisner's case at page 68 in the judgment of the Court appear the following words: "It must be borne in mind that the object of the sections" (144, 145 and 146)" is not as permit the magistrate to obtain admissions from the defendant but merely to discover whether the defendant puts the truth of the complaint in issue."

There are cases which though not decided on the provisions of the Sections give some assistance. In Ridley v. Whipp, 22 C.L.R., 382 it was held that the production of the evidence prescribed by Section 4 of the Infant Protection Act 1904 was a condition precedent to the jurisdiction to issue a summons and a summons issued without the production of the evidence, prohibition was the proper remedy. In r. v. Hughes, 4 Q.B.D., p. 614 it was held that the illegality of a warrant did not deprive the Court of jurisdiction because it was only a means of getting the defendant before the Court and its irregularity was cured by appearance. The dicta in this case all presuppose a charge and plea.

Section 135 of the District Court Ordinance provides that if both parties appear either personally or by Counsel or solicitor then the Justices shall proceed to hear and determined the complaint.

If the defendant pleads not guilty then issue is joined and that follows is a hearing. Tunniscliffe v. Tedd 1848, E.R. 995. This agrees with what was said in Heisner's case.

In the matter under review there was no plea of not guilty and the case proceeded. It appears to me that there was no hearing and the proceeding was a nullity. The failure to state the charge and take a plea was fatal to the Magistrate's jurisdiction. I look upon the provisions of the Sections as clearly mandatory and their observance is a condition precedent to a hearing and determination.

I do believe that the failure by the magistrate to act in accordance with the Sections was purely an oversight probably due to the magistrate having his mind directed to the taking of evidence from one witness and the adjournment to allow counsel to appear.

As to the second ground I desire to say little. It was a submission that there was a denial of natural justice because of the absence of counsel, with the consequent admission of certain documentary evidence, which it is supposed counsel would have objected to. On the facts as disclosed in the record and affidavits, to my mind this ground is ill-founded for I see no denial of justice in the matter. I would not have granted the order Absolute on this ground.

The result is that on the first ground the failure to observe the peremptory provisions of Sections 136 and 137, the Writ must issue.

As to costs I feel that the application for the Writ had little merit. The exercise of the right to seek the process of the Court with a view to the issue of the prerogative writ was piffling.

The magistrate tried to satisfy the parties; when objection are take to the proceedings by counsel the magistrate offered to expunge the proceedings already had and start de novo. This offer was not accepted. The conduct of the magistrate does not warrant an order for costs against him. I make no order.

Order Absolute for Writ of Prohibition.

R.T. GORE

J.

19/11/55