Kaine, J. 674

IN THE SUPREME COURT
OF PAPUA NEW GUINEA

CORAM : FROST, SPJ.
Tuesday,
21st March, 1972

TOWARLI TOKOI
Appellant

- and -

HAROLD BRYANT
Respondent

REASONS FOR JUDGMENT

1972
Mar.17,
21.
RABAUL
Frost,SPJ.

In this appeal the appellant appeals against his conviction on the 30th September, 1971, for an offence under Section 11 of the Sorcery Ordinance 1971 in that he committed an act of forbidden sorcery and was sentenced to nine months' imprisonment. The grounds of appeal are as follows:

(1) That the Magistrate should have entered that the appellant did not admit the truth of the information, and

(2) that the sentence was manifestly excessive.

From the Record of Proceedings it appears that the defendant admitted the truth of the information and was on that basis convicted of the offence. Accordingly, at the outset I refer to the procedural provisions of the District Courts Ordinance 1964, the relevant sections being Sections 134 and 135. These Sections are found within Part VII, Division 2 which sets out the procedure for the hearing of cases of simple offences. The Sections are as follows:-

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"134. Where the defendant is present at the hearing of an information, the substance of the information shall be stated to him, and he shall be asked if he has cause to show why he should not be convicted or why an order should not be made against him, and if he has no such cause to show the court may convict him or make an order against him accordingly".

"135(1). If the defendant does not admit the truth of an information, the court shall proceed to hear the complainant and his witnesses and the defendant and his witnesses and also such witnesses as the complainant examines in reply, if the defendant has given evidence other than as to his general character".

"135(2). The court, having heard what each party has to say and the evidence adduced, shall consider and determine the whole matter, and shall convict or make an order upon the defendant, or dismiss the information, as justice requires."

Section 134 is in unusual terms as it does not provide for any plea of guilty or not guilty to be taken, but it is clear that whatever form of words is used by the court under Section 134 to ascertain whether the defendant has any cause to show why he should not be convicted, unless the defendant thereupon admits the truth of the information, under Section 135 the court is to proceed in effect to hear and determine the case. A defendant who does in fact admit the truth of the information would seem to have brought himself within the words of Section 134, in that he has failed to show cause why he should not be convicted or why an order should not be made against him. Accordingly, the practice of Magistrates to enquire of the defendant whether he admits the truth of the information or otherwise is aptly designed to meet the requirements of both Sections 134 and 135. The important issue in this appeal is what is involved

in the requirement that the defendant must admit the truth of an information before he can be convicted, without the Magistrate proceeding to hear and determine the case. It is a fundamental principle that for the court to act upon an admission by a defendant of the truth of an information it must be plain that the defendant has admitted every element in the charge.

In the Territory all persons exercising judicial authority meet practical difficulty where the defendant or an accused person is, as in the majority of cases he is, an indigenous person who does not understand English and has no knowledge of the law or of the legislation under which the charge is brought. Such a person could not be expected to comprehend the question "Do you admit the truth of the information", and no court would act on his affirmative answer. Thus, in practice a special plea is taken in the sense that the Magistrate puts to the defendant the various elements of the charge and obtains an answer whether each such element is admitted or denied. I now turn to the provisions of the Sorcery Ordinance under which the charge is laid.

Under the heading "Criminal Acts of Sorcery" Section 11 provides "no person shall do any act of forbidden sorcery....." The seriousness of the charge is shown by the penalty upon conviction on indictment of imprisonment for five years, and upon conviction summarily of imprisonment for one year. It is necessary to turn to Section 4, the interpretation section, for the definition of an act of sorcery which is therein defined to mean any act (including a traditional ceremony or ritual) which is intended to bring, or purports to be able or adapted to bring, powers of sorcery into action or to make them possible or carry them into effect. The term "forbidden sorcery" is defined to mean "sorcery other than innocent sorcery", and "innocent sorcery" is defined to mean sorcery of a kind referred to in the First Schedule to the Ordinance. There is no precise definition of an act of forbidden sorcery but it is plain from Section 4 of the Ordinance that an act of forbidden sorcery means an act of sorcery other than innocent sorcery.

Thus, for the defendant to admit the truth of an information under Section 11 it must be shown that he admits first, that there was an act of sorcery within the meaningof that definition and, secondly that the sorcery was other than innocent sorcery as defined in the lengthy definition of that term contained in the five paragraphs of the First Schedule.

From the record of the proceedings the Magistrate accepted that the defendant admitted the truth of the information, and the reasons for judgment set out the circumstances which led to that. First of all he asked the appellant, "It is said that on the 18th August at Volavolo you with other men made sorcery (poison), is this true?" The defendant replied "Yes". Stopping there it is plain that all that the defendant has admitted was that he with other men made sorcery. There is no admission of a forbidden act of sorcery within the meaning of the Sorcery Ordinance. The learned Magistrate then said to the appellant, "The Police Officer says that you were with a group of men and that a known sorcerer from another village came in and spoke to you. He marked feathers which were given to some of the men and he made a mixture of Kamban which he gave to you to paint your face with. You placed the feathers in your hair and painted your face". The appellant said, "Yes, that is true". Stopping there, the appellant at that stage made another admission that in the circumstances outlined he had marked feathers and made a mixture of Kamban, placed the feathers in his hair and painted his face. But for the element to be made out that this was an act of forbidden sorcery a further admission was required that that act fell within the definition of that term as defined by the Ordinance. This accounts for the final question asked, "Why did you place these feathers in your hair and paint your face?" The answer was, "It was to help me in the fight we were to have with the police the following morning". I say immediately that in the context in which the question was asked, in my opinion, the learned Magistrate went beyond his function in seeking to ascertain whether the appellant admitted that he had committed the necessary element of an act of sorcery. All that the appellant was obliged to answer, if it was not practicable for him to be asked simply whether he admitted the truth of the information or not, was whether he admitted the truth or not of the various elements of the charge which should have been stated in specific terms. When I put this to counsel

at the hearing, counsel for the appellant, who has had long experience as a Magistrate in this Territory, informed me that in fact it is the usual practice in the District Court to put such a question to a defendant with a view to discovering whether there might be any defence on which he was relying. However, that does not seem to have been the purpose of the learned Magistrate in this case. No accused person can be asked, nor is he bound to answer, any questions put to him except in accordance with the statutory procedure of the District Court, and that procedure requires the Magistrate at the outset of the hearing only to inquire whether the charge is admitted. To ask any other questions (except for the assistance of the defendant in the circumstances I have referred to) is entirely contrary to the spirit of the common law. However, assuming in favour of the respondent that that question could properly be asked, whilst it elicited the reason for the acts admitted by the appellant and that reason might be taken as showing that the appellant's acts were intended to bring powers of sorcery into action within the meaning of the term "act of sorcery", there was no admission by the appellant that the acts so admitted by him were acts of sorcery other than innocent sorcery, within the meaning of the Ordinance. Upon the admissions made by the appellant it may have been a simple matter to decide whether such acts were acts of forbidden sorcery within the meaning of that term, but this element was not admitted and remained for determination.

Thus, in the result the appellant did not admit a necessary element of the charge and accordingly the learned Magistrate should have proceeded to hear and determine the charge pursuant to Section 135 (supra). As the appellant was denied a trial of the charge, it cannot be said that there was no substantial miscarriage of justice. Accordingly the conviction must be set aside.

This appeal shows that except in cases of offences, the elements of which are simple statements of fact or states of mind, the difficulty in obtaining a plea from most indigenous persons in this country is such that in practice the court is left with no real alternative but to enter a plea of not guilty and to proceed to try the case.

It is a most unfortunate thing that the appellant should have been in custody for a period as long as five and one-half months awaiting the determination of this appeal. Application for bail was made to the District Court but refused. In February the court was fully occupied in other matters, but whilst that was a special circumstance, in future the Registrar should be promptly informed of cases such as this so that arrangements could be made for a special sitting of the court. In the circumstances I do not remit the charge for rehearing.

Appeal allowed. Conviction and sentence quashed.

Solicitor for the Appellant - W.A. Lalor, Public Solicitor

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