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SHANTI WATI & ANOTHER

v.

B

REGINAM

[SUPREME COURT, 1977 (Grant C. J.), 11th March]

Appellate Jurisdiction

C *Magistrate—jurisdiction—binding over—procedure—Criminal Procedure Code (Cap. 14) ss. 33, 35(2), 37, 39, 40, 42, 43, 44,—Summary Jurisdiction Act 1879 (42 & 43 Vict., c.49) s.25—Magistrates Courts Act 1952 (15 & 16 Geo. 6 & 1 Eliz., 2, c.55) s.91—Justice of the Peace Act 1361.*

D If, after the proper service of a summons on the person concerned accompanied by a copy of the order to show cause why he should not be ordered to enter into a recognisance to keep the peace, the truth of the information is accepted the order to give security can be made. If the application is opposed, the magistrate is obliged to conduct a proper and full enquiry into the truth of the information by hearing witnesses for the informant and the defendant and then making an adjudication.

E *Per curiam:* Where a substantive offence has been committed giving rise to fears of a future breach of the peace, it is preferable to charge the substantive offence and at the end of the case invite the magistrate to exercise his powers under Penal Code s. 35(2) by binding over the defendant and complainant.

Cases referred to:

Everett v. Ribbands [1952] 1 All E.R. 823; [1952] 2 Q.B. 198.
Sheldon v. Bromfield Justices [1964] 2 All E.R. 131; [1964] 2 Q.B. 573.
R. v. Wilkins [1907] 2 K.B. 380.
 F *R. v. Aubrey—Fletcher ex parte Thompson* [1969] 2 All E.R. 846; 53 Cr. App. R. 380.

Appeal against an order for binding over imposed in the Magistrate's Court.

GRANT C. J.: [11th March 1977]—

G This is an appeal against an order that each appellant give security for good behaviour made under the provisions of section 43(1) of the Criminal Procedure Code, a right of appeal being specifically provided by section 43(2) of the Criminal Procedure Code.

H On the 28th December 1976 the appellants and three other persons were ordered by Navua Magistrate's Court to enter into a recognisance each in the sum of \$50 to be of good behaviour and to keep the peace for twelve months. The proceedings were brought under that part of the Criminal Procedure Code headed "PREVENTION OF OFFENCES—Security for keeping the Peace and for Good Behaviour"; and in the circumstances of this case the procedure is governed by sections 33, 37, 39, 40, 42, 43 and 44 of the Criminal Procedure Code.

Put as simply as possible, the procedure which should be strictly complied with is as follows:

1. An information on oath should be laid before a magistrate describing the alleged conduct of a person (hereinafter called the respondent) which gives rise to apprehension that he will commit a breach of the peace or do a wrongful act likely to result in a breach. **A**
2. If and only if the contents of the information are sufficient to satisfy the magistrate that the alleged conduct of the respondent is likely to result in a breach of the law, the magistrate may require the respondent to show cause why he should not be ordered to enter into a recognisance for keeping the peace. **B**
3. The Magistrate should then make an order in writing setting out the substance of the information received, and in addition the amount of the recognisance, the term for which it is to be enforced and, if he thinks fit, the number and type of sureties required. **C**

The use of the word "order" at this stage is misleading, as not only is it not a final order, it is not even an order nisi. It is simply a document notifying the respondent of the allegation made against him and the course of action contemplated by the magistrate. **D**

4. The magistrate then issues a summons requiring the respondent to appear, which summons must be accompanied by a copy of the order referred to above.
5. Upon the appearance of the respondent, the magistrate should ensure that the respondent understands what is alleged and what the magistrate proposes to order. **E**
6. If the respondent accepts the truth of the information, an order to give security for good behaviour may be made.
7. However if the respondent opposes the application, the magistrate is obliged to enquire into the truth of the information upon which he has taken action, such inquiry to be conducted in accordance with the usual procedures for conducting criminal trials and recording the evidence. **F** Consequently this entails hearing the evidence of the informant and any other witnesses that the informant wishes to call; and hearing the evidence of the respondent and any witnesses that he wishes to call. There must then be an adjudication, and only if it is proved beyond reasonable doubt that it is necessary for keeping the peace or maintaining good behaviour that the respondent should enter into a recognisance is the magistrate entitled to make an order. If it is not proved beyond reasonable doubt, the respondent must be discharged. **G**

As to what must be established in order to prove that it is necessary for keeping the peace or maintaining good behaviour that the respondent should enter into a recognisance, this has been clearly stated by Lord Denning as follows: **H**

"The substance of the matter is not only fear of what the accused man may do, but also a complaint of something he has already done—some

- A** words or conduct which give rise to apprehension of disorder or other breach of the law. An order can only be made against him if two things exist:
- (i) a threat by words or conduct to break the law of the land or to do something which is likely to result in a breach, and
 - (ii) a reasonable fear that this threat will be carried into effect. The order, once made, will result in imprisonment if the accused man has no friends to stand by him. This imprisonment must be founded on something actually done by him. It would be contrary to all principle for a man to be punished not for what he has already done, but for what he may hereafter do. Hence there must be something actually done by him, such as threats of violence, interference with the course of justice, or other conduct which gives rise to the fear that there will be a breach of the law. It is this conduct which is the subject of the complaint and which must be proved before an order for sureties can be made." (*Everett v. Ribbands* (1952) 1 All E.R. 832 at 826 and 827).

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C It will be seen from the requirements which I have enumerated that this is a cumbersome procedure, and it is not to be recommended unless there is no other way of dealing with a situation. Where a substantive offence has been committed by one or more persons giving rise to fears of a future breach of the peace it is preferable to charge the substantive offence in the usual way, and to invite the magistrate at the conclusion of the trial to exercise his powers under section 35(2) of the Penal Code, whether or not the complaint be dismissed, to bind both the complainant and the defendant to keep the peace and be of good behaviour. In such circumstances it is only necessary for the trial magistrate to inform the complainant that on the evidence he is considering binding him over, and to give the complainant the opportunity of being heard on the matter by calling on him to shew cause why he should not be bound over (proviso (b) of section 35(2) of the Penal Code; and *Sheldon v. Bromfield Justices* (1964) 2 All E.R. 131 at 133 and 134). Indeed, the power conferred by section 35(2) of the Penal Code could with advantage be extended by the legislature to include any witness at the trial which would bring the law into line with that in England (*Sheldon v. Bromfield Justices* supra).

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E

F So far as the proceedings the subject matter of this appeal are concerned, they are wholly defective as the statutory provisions were not complied with. In particular, the information laid was utterly inadequate and should have been rejected by the Magistrate; no written order was made by the Magistrate and consequently the summons was not accompanied by a copy of the order; the appellants and the three other persons who were summonsed all opposed the application; the Magistrate heard no evidence and accordingly failed to enquire into the truth of the information; and without any proof or adjudication but simply on the strength of the information he purported to bind over the appellants.

G

H It may be that confusion as to the procedure to be followed has arisen in Fiji from the fact that in England justices have power, pursuant to their commission or pursuant to the justices of the Peace Act 1361, to bind over a person without proof of the matters complained of, although the order cannot be made capriciously (Lord Alverston in *R. v. Wilkins* (1907) 2 K. B. 330 at 383 and 384). This is analogous to the power conferred in Fiji by section 35(2) of the Penal Code above referred to; but is far removed from the provisions of the Criminal Procedure Code under which the pro-

ceedings the subject matter of this appeal were brought. The latter bear a close relationship to proceedings for a bind-over brought under section 25 of the English Summary Jurisdiction Act 1879, which Lord Denning has pointed out are analogues to a criminal proceeding (*Everett v. Ribbands* supra at 827). Although section 25 of the English Summary Jurisdiction Act 1879 has been replaced by section 91 of the English Magistrates Courts Act 1952, it has been held that for a bind-over to be made under the latter section there must be a complaint, the case must be heard out completely, and the complaint must be adjudged to be true (per Lord Parker in *R. v. Aubrey-Fletcher* (1969) 2 All E.R. 846 at 847; or as succinctly put by Edmund Davies L.J. at 848 "there must be proof").

The appeal is allowed and the order is set aside.

The position of the three other persons who were similarly bound over will be rectified by way of review.