IN THE SUPREME COURT)
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OF THE TERRITORY OF)
)
PAPUA AND NEW GUINEA)

CORAM: CLARKSON, J.

Thursday,

13th March, 1969

THE QUEEN v. B.

1969

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Clarkson,J.

(The accused was charged with committing an act of gross indecency with A. At the trial, the Crown called A as a witness).

Counsel for the defence says I should warn the witness A that he need not answer any question if the answer would tend to show he was a party to the offence with which the present accused is charged.

The Crown has produced a Certificate of Conviction under section 54 of the Evidence and Discovery Ordinance which has been identified as relating to this witness and this offence. But Mr. O'Regan's submission is that the conviction is a nullity because the proceedings leading to the conviction were held in camera and not in open court.

This is an unusual situation which raises a number of problems and before dealing with such of them as must be dealt with before this trial can proceed I think it desirable to summarise the position as I see it.

Prima facie this witness has been convicted and dealt with for his part in the relevant events. The certificate given under section 54 of the Evidence and Discovery Ordinance shows that the witness pleaded guilty to the offence of performing an act of gross indecency with the present accused, that he was convicted and placed on a good behaviour bond for two years.

Under section 54 the certificate is evidence at least of the conviction and of the particulars of the offence for which the witness was convicted. Sub-section 9 of the section provides that a conviction is presumed not to have been appealed against or quashed or set aside until the contrary is shown. If nothing more were known the witness would not have any privilege of the sort referred to in section 65 of the Evidence and Discovery Ordinance in respect to questions relating to the offence referred to in the certificate.

But Mr. O'Regan's argument is that the proceeding in which the witness was convicted was a nullity and therefore cannot support the certificate and this notwithstanding that the conviction has not been appealed against, quashed or set aside.

He maintains that A's trial was held in camera and he is supported in this by statements from the Bar by Mr. Steele, Crown

Prosecutor in these proceedings, who prosecuted at A's trial. There appeared to be some doubt as to exactly what happened in those proceedings and I therefore indicated to Mr. O'Regan that if he desired to rely on events which then occurred and which were not in dispute he should file an affidavit of the facts. This he has now done.

I pause here to say that the guilt or innocence of the accused seems to be somewhat removed from what is now occurring, namely an enquiry whether the present witness, who is not Mr. O'Regan's client, has a privilege which, if he has, he has not yet indicated he desires to invoke. But I have thought it best to allow Mr. O'Regan to proceed.

It appears from the affidavit that after the indictment against A had been presented counsel for A for reasons then stated made application that the trial be heard in camera. The trial judge ordered inter alia that the Court be closed to the public and that proceedings be held in camera.

I accept the facts as stated from the Bar that after the events recounted in the affidavit A was charged, that while represented by counsel he pleaded guilty and that the Chief Justice after seeing the depositions convicted A and then discharged him under section 19 sub-sec 9 of the Criminal Code. I also accept that the Crown did not oppose the application that A's trial should be in camera.

There is a considerable body of authority to say that in the absence of express statutory provisions a trial shall be conducted in public. The only relevant statutory provision in this jurisdiction to which I have been referred is section 594 of the Criminal Code. This makes it clear that the accused is to be arraigned in public although the Code does not go on to provide expressly that the remainder of the trial should be so held.

This matter has been considered in England by the House of Lords in Scott (1) to which reference has been made by the Privy Council in Mahlikilili (2), and there is the further case of B. v. The Attorney General (3). Archbold (36 ed) at para 541 states that at common law a trial on indictment or criminal information must be held in a public court with open doors.

In Australia there are a number of decisions including that of Dickason (4) in the High Court. In that case the High Court summarised the effect of Scott's case as being: "that there is no inherent power in a Court of justice to exclude the public inasmuch as one of the normal attributes of the Court is publicity, that is admission of the public to attend the proceedings."

(1) 1913 A.C.417.
(2) (1943) 1 All E.R. 463.
(3) (1965) 3 All E.R. 253.
(4) 17 C.L.R. 50.

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In Kerr (5) the Full Court of Victoria said: "We think that justice may properly be said to have miscarried when it has not been carried on in public."

Dean J. in Dando (6) took the same view and referred to the quotation in Scott's case (supra)(7) by Lord Shaw of Jeremy Bentham: "Where there is no publicity there is no justice. Publicity is the very soul of justice." Dean J. said, "It is of the highest importance that all cases should be heard in circumstances which make plain that the public have a right of free access." Apparently at A's trial defence counsel relied on the statement by Viscount Reading in the Lewes Prison Governor's case (8). This was a general statement that the Court may be closed or cleared if such precaution is necessary for the administration of justice. It was made in relation to a court martial held in the immediate aftermath of a rebellion in Ireland. The statement was based on the authority of certain dicta of Lord Loreburn in Scott's case(supra) which have been doubted in B. v. The Attorney General (supra)(9).

In view of the course I propose to follow it may be unnecessary for me to decide whether in my view the order of the trial judge, the Chief Justice, can be supported. All I need say is that prima facie the material before me would not bring the case within the very narrow exceptions to the requirement that justice should be administered in public, nor could the procedure stand against the express provisions of section 594 of the Code. Similarly, it may or may not be necessary for me to determine, depending on what happens now in the course of the trial, whether the conviction of A if it could be challenged was a nullity, or if it were, whether the position was changed by the issuing of the certificate under section 54 to which I have referred.

The difficulties inherent in this situation are shown in such cases as Kerr (supra) in the Full Court of Victoria and Thomas (10) in the Court of Criminal Appeal in Western Australia.

Mr.O'Regan has raised an arguable case and I am prepared for the present to assume in favour of his argument that A technically remains in peril of conviction for the offence referred to in the certificate. I point out however that the privilege of a witness to decline to answer questions because his answers might tend to incriminate him while well established is also well limited. It is recognized by section 65 of the Evidence and Discovery Ordinance. It is a privilege of the witness and it may be waived. In addition as I understand it the privilege must be claimed by the witness although a judge will often warn a witness of his rights. It must be a bona fide claim by the witness to protect himself and not to assist others and it appears the claim will not be accepted

(5) 1951 V.L.R. at 242.
(6) 1951 V.L.R. 235.
(7) 1913 A.C.417.
(8) (1917) 2 K.B.254.
(9) (1965) 3 All E.R. 253.
(10) 1960 W.A.R.129

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as bona fide if the witness has already by other admissions made himself liable to prosecution for the offence. I do not at this stage refer to the various authorities for these propositions but I think they make it clear that the claim by the witness to privilege is not alone sufficient. It must be shown from the circumstances and from the nature of the testimony sought to be led that there is reasonable apprehension of the witness being implicated in an offence by his answers. (11)

I propose therefore that the witness re-enter the box and continue his evidence. I will warn him in the terms which I have already expressed. If he claims privilege then, taking account of the submissions made and the considerations I have mentioned, I will determine on the voire dire whether he should be compelled to answer.

I have in mind a number of considerations for adopting this course; principally that evidence that would go to establish whether the claim was bona fide or not would not be admissible in the trial against the accused and one obvious line of enquiry as to bona fides is that the witness appears to have made a prior statement or an admission which may be sufficient to implicate him.

[The witness re-entered the witness box and was warned that he need make no statement which incriminated him and was told that if he claimed privilege his right to do so would be determined on a voire dire. The witness then gave his evidence without claiming privilege.]

Solicitor for the Crown : S.H. Johnson, Crown Solicitor.

Solicitor for the Accused: R. O'Regan, Esq.

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(11) Brebner, (1961) S.A.S.R.177.