Lane, J 914

IN THE SUPREME COURT OF PAPUA NEW GUINEA

CORAM : FROST, S.P.J.
Wednesday,
8th November 1972

APP. 158 of 1972 (N.G.)

KORUA KERUA v. CONSTABLE KOLOMA VANUA

1972
Nov.8.
LAE
Frost, SPJ.

This is an appeal brought against the decision of the Local Court at Wau on 18th September 1972 whereby the appellant was convicted of an offence under the Fire Service Ordinance 1962, sec.23, to which he pleaded guilty, and sentenced to the maximum term of imprisonment thereunder, viz six months. The appeal is brought against both conviction and sentence.

At the hearing I granted leave to the appellant to add as a further ground of appeal that the information was defective and disclosed no offence in that it failed to allege that the offence was committed in an area declared under the Ordinance.

The relevant portion of sec.23 (supra) is as follows:

> "(1) No person shall burn off or set fire to or cause or permit to be burned off or set fire to any inflammable grasses, rubbish or other such materials in an area declared under the next succeeding section unless he has obtained the permission in writing of an officer, commissioned officer of the Police Force or District Officer.
>
> Penalty: One hundred pounds or imprisonment for six months."

Section 24 is as follows:

> "The last three preceding sections apply only in an area to which the Administrator applies the provisions thereof by notice in the Gazette."

1972

Korua Kerua v. Const. Koloma Vanua

Frost, SPJ.

It will be noted that an essential element of an offence under that section is that the material should have been set fire to in an area declared under sec.24 of the Ordinance. However, in this case the information stated merely that at Wau the appellant on the date stated had burnt off inflammable grasses without obtaining the requisite permission, and without any allegation that Wau had been declared as an area under sec.24. Thus the information did not disclose any offence under sec.23 of the Ordinance, and consequently the appellant's plea of guilty to the information did not constitute an admission of an offence under that section. Accordingly the conviction is bad unless it can be saved by the amendment provisions of the District Courts Ordinance, sec.40. The section is as follows:

> "No objection shall be taken or allowed to an information, or to a summons or warrant to apprehend a defendant issued upon an information, for an alleged defect in the information in substance or in form, or for a variance between it and the evidence in support thereof, and any such variance may be amended by order of the court at the hearing."

That section thus confers wide powers of amendment upon the District Court and as the Supreme Court has on appeal jurisdiction to exercise a power which the court which made the conviction, etc. might have exercised (sec.236 (1) (e)) this Court has the same jurisdiction to amend. But it has been held in Victoria upon a similar section of the Victorian Justices Act that in a case in which the defendant has pleaded guilty to that which is not an offence, the Supreme Court cannot by amendment make his plea of guilty apply to something which was not charged when he pleaded. <u>O'Donnell v. Gardener</u> (1), see also <u>Knox v. Bible</u> (2).

There is the same position in this case as the plea of guilty did not cover all the necessary elements of the offence. In my opinion this Court should adopt

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(1) (1902) 27 V.L.R. 718
(2) (1907) V.L.R. 485

the interpretation placed upon the similar section in O'Donnell v. Gardener (3) (supra) and accordingly the conviction must be quashed. I do not remit the case for hearing because the appellant was in custody for over a month before being released on bail.

I should add that in O'Donnell v. Gardener (4) (op.cit) it was pointed out that if an objection had been taken in the court below that the information was defective, and evidence had been gone into, the information might have been amended under the similar Victorian legislation, but this was not, of course, done in the present case.

The appeal is allowed, the decision reversed, conviction andorder for compensation set aside.

Solicitor for the Appellant - W.A. Lalor, Public Solicitor
Solicitor for the Respondent - P.J. Clay, Crown Solicitor

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(3) (1902) 27 V.L.R. 718
(4) (1902)27 V.L.R. 718