

PAPUA NEW GUINEA
[IN THE DISTRICT COURT OF JUSTICE
SITTING IN ITS CRIMINAL (COMMITTAL) JURISDICTION]

COM 16 of 2016

BETWEEN

AREE KABILO
Informant

AND

SAMUEL BUAVA
Defendant

Vanimo: B. Fehi

CRIMINAL: *Hand – up brief – defendant charged with one count of sexual penetration with a child under the age of 16 years, s 229A (1) CCA. Inquiry into the Police hand-up brief, pursuant to section 95 of the District Court’s Act under consideration as to answer: whether evidences in the Hand up brief sufficient to commit the defendant to trial for the charges he stands charged.*

Cases cited:

- 1) *Review Pursuant to Constitution Section 155 (2) (b); Application by Herman Joseph Leahy [2006] SC855;*
- 2) *Regina v. McEachern [1967-1968] PNGLR 48;*
- 3) *The State v. Eddie (No1) [2009] N3782; and*
- 4) *Didei v State [1990] PNGLR 458.*

References:

- 1) *Constitutional and Law Reform Commission of Papua New Guinea; Issue Paper 1: Committal Proceedings.*

Legislation:

- 1) *District Court’s Act;*
- 2) *Criminal Code Act Chapter 262; and*
- 3) *The Constitution of the Independent State of Papua New Guinea*

Counsel:

First Constable Charles Manbo, for the Informant
 Defendant in person

RULING ON SUFFICIENCY

17th JUNE 2016.

1. FEHI, DCM: Samuel Buava the defendant in this matter has been charged with an indictable offence.
2. This matter was first mentioned before me on 09th of March 2016. Police Hand-up Brief was completed and presented to court on 10th of June 2016. During mention hearing on the 10th of June 2016, the following options were put to the defendant;
 - a) To give instructions to the Office of the Public Solicitors here in Vanimo to make representations on his behalf and advice court according; and/or
 - b) The court on its own consideration of the evidence before it, make ruling on whether to commit or not to commit him for trial in the National Court.
3. The defendant in the exercise of his rights to a fair hearing elected not to give instructions to the office of the Public Solicitors at this stage and opted for the court to make ruling on the evidence as they are, before it.
4. Upon the election of the Defendant, I have considered the evidence before me and this is now my ruling on evidence regarding the allegations against the Defendant.

CHARGE

(A) One count of sexual penetration of a child under the age of 16 years pursuant to s. 229A (1) of the CCA, ch. no. 262.

SUMMARY OF FACTS

5. On Sunday 26th July 2015, the defendant was at Ituly village, Bewani, Sandaun Province. In the morning part of the day at about 7am, the victim was on her way to collect greens to have them for breakfast. It was alleged that the defendant enticed the victim to his garden under the pretext of collecting greens for her.
6. Whereupon the defendant offered the victim K20.00 together with some greens he collected. The victim refused the offer of K20.00 suspecting it to be a bribe. Thereafter, the defendant with physical force put the victim down on the ground and removed her cloths.
7. Also it was alleged that the defendant threatened to kill the victim and hid her body should she wishes to cry out for help or struggle with him. It happened that the defendant removed his own cloths and forcefully opened the victim's two (2) legs and forced his erected penis into her vagina.

8. The victim experienced pain and bled from the forced penetration by the defendant, being her first experience of sexual intercourse. The defendant ordered the victim to clean her bleeding and thereafter, it was alleged that he repeatedly penetrated her until he ejaculated into her vagina. After this both defendant and victim got dressed and went their separate ways. The victim reported the matter to her uncle and was taken for medical check-up, thereafter; the matter was reported to Police.

COMMITTAL COURT FUNCTIONS

9. I am required by law and as a matter of practice to deliberate over the information brought against the defendant and now before me as part of the criminal practice. I acknowledge receipt of the Police hand-up brief containing evidences against the defendant. I am satisfied that the first stage of the committal proceedings has been complied with.
10. This is now the second stage of the committal proceedings where I am required to conduct an inquiry into the Police hand-up brief in order to satisfy myself on the questions of sufficiency and admissibility of the contents which make up the Police hand-up brief. I make reference to the Supreme Court's decision in the matter of a Review Pursuant to Constitution Section 155 (2) (b); Application by Herman Joseph Leahy [2006] SC855 at paragraph 111, 112 and 113.
11. My role is subject to the options provided under the District Court's Act, whereupon, I am only required to consider the evidence based on the election of the defendant, that is, whether to give instructions to the Office of the Public Solicitor to make submissions on his behalf or to allow the court to make its ruling on the evidence now before it. Whichever option chosen determines the cause I would take in conducting the inquiry. I make reference to Sections 94B, 95 and 100 of the District Court's Act.
12. I have also taken into consideration and alluded to certain factors which form the basic purposes of the necessity for such a preliminary examination conducted at this stage. I make reference to the findings of the Constitutional and Law Reform Commission of Papua New Guinea Issue Paper 1 covering the entire Committal Proceedings. Such inquiry is necessary in order to:
- a) Prevent hasty, malicious, oppressive or unjustified prosecution;
 - b) Protect the accused from open and public accusation of a crime;
 - c) To save the defendant from humiliation and anxiety involved in public prosecution;
 - d) To avoid both for the defendant and the public expense of a public trial;
 - e) To discover whether or not there are substantial grounds upon which a prosecution may be based; and
 - f) To disclose to the accused the details and extent of the charges against him or her so that he or she can then prepare their defence accordingly.

13. I am conducting this preliminary investigation in the form of an inquiry to best serve the interest of both the accused and the Police in ensuring that "weak" or "misconceived" charges do not proceed to trial. In order words, to inquire into the strengths and weaknesses of the charge brought by the State against the accused by scrutinizing the evidence available on the Police hand-up brief and considering this against the elements of the offence for which the accused is charged under.
14. Standard of proof required in this inquiry is less than that employed in a trial proper in the National Court, that is, proof beyond reasonable doubt. I am only required to form a bona fide opinion on the sufficiency of the evidence in the Police hand-up brief. I make reference to the pre-independence decision of the National Court in the matter of Regina v. McEachern [1967-1968] PNGLR 48.
15. Simply put, I am conducting an inquiry to determine whether there is present a "Prima Facie Case" against the defendant, in order to have him committed to stand trial in the National Court. I make reference to Section 95 and 100 of the District Court's Act.

ELEMENTS OF THE OFFENCE OF SEXUAL PENETRATION OF A CHILD UNDER THE AGE OF 16 YEARS

16. Section 229A (1) of the Criminal Code Act is in the following terms:

229A. SEXUAL PENETRATION OF A CHILD

- (1) A person who engages in an act of sexual penetration of a child under the age of 16 years is guilty of a crime.

Penalty: Subject to Subsection (2) and (3), imprisonment for a term not exceeding 25 years.

17. I refer to the National Court's decision in the matter of The State v. Eddie (No1) [2009] N3782 and adopt the following as the elements of the offence of sexual penetration of a child under the age of 16 years pursuant to Section 229A (1) of the Criminal Code Act:
- a) The accused engaged in the act of sexual penetration; and
 - b) The child is under the age of 16 years.
18. I further agree with the presiding judge's view expressed in-line with his observations on the elements of sexual penetration of a child under the age of 16 years when he made the following comments;

"the accused voluntarily committed the act, with the intention of doing it, and with honest and reasonable knowledge that it was not an innocent act."

OPINION ON THE CONTENTS OF THE POLICE HAND-UP BRIEF

19. The Police hand-up brief contains the following evidentiary documents:
- Written statement of Grace Kap, the victim of this allegations;
 - Written statement of LuxieKap, the victim's father;
 - Affidavit of EksonTegorok, the medical officer who examined the victim;
 - Written statement of Constable Adolf Lohia, the corroborator during the Record of Interview conducted between the arresting officer and the defendant; and
 - Written statement of Senior Constable AreeKabilo, the arresting officer and investigator
20. Other material evidence provided includes the following:
- Original Record of Interview;
 - Translation of Record of Interview; and
 - Victim's Medical Report.
21. It is my humble view that the crux of this inquiry is to consider which of the above evidence supports the elements as stated above. I must say at the outset that allegations of this nature are easy to make but difficult to refute, I make reference to the matter of *Didei v State* [1990] PNGLR 458. In saying this, I am of the opinion that, there are two crucial pieces of evidence that I consider would determine whether I commit the Defendant to stand trial in the National Court or have him discharge at this stage.
22. In my view, these crucial evidences must originate from the victim of the offence and from a qualified medical practitioner, independent of the victim. In saying that, it would be inappropriate for victims of such offence to speak through a second or third party, unless and only if the prevailing circumstances makes it impracticable to achieve such an outcome. For example, the victim is an infant or a person leaving with disability. On the contrary, it is, in my view of utmost importance the victim gave evidence and that evidence must be contained in the Police hand-up brief.
23. As alluded to above, the nature of the offence limits my role as a committal magistrate. Being that as it may, I direct my attention specifically to the above pieces of evidence and these are; firstly, the Victim's written statement and secondly, the Victim's Medical Report.
24. The victim's written statement clearly discloses the elements of her being sexually penetrated by the defendant (at this stage, it is only an allegation), she also discloses certain factors which forms the basis upon which the element of her being a child under the age of 16 years can be maintained. The victim's reference to her bleeding from the vagina after the first forceful penetration by the defendant (at this stage, it is only an allegation).

25. The Victim's Medical Report prepared by an independent source further strengthens the victim's case against the defendant, insofar as, the alleged penetration is concerned.
26. It is trite law that, the defence of consent is not available to the defendant, as such, I am of the opinion, by applying the appropriate standard of proof, that there is sufficient evidence against the defendant to have him committed to stand trial in the National Court.

FINDINGS

27. I find upon my inquiry that the Police hand-up brief contains evidence that are directly connected to what transpired on the 26th day of July 2015 at about 7am. I also find the evidence of the Police witnesses contained in their statements to provide a detailed description of what transpired at all material times.
28. I also find that the nature of the offence restrict my role as a committal magistrate insofar as the elements of the offence are concerned. I am confined to the evidences from the victim herself and those from any expert witnesses. The content of their evidences, in particular, the evidence of the victim determines whether to commit or not to commit.
29. I further find the victim's evidence to be sufficient as far as the maintenance of each of the elements of the offence is concerned and the independent expert witness's evidence to be directly related to the victim's evidence.
30. In saying the above, I find this matter to be properly investigated resulting in the production of such quality evidence before this Court. It is my humble view that such properly investigated criminal cases ensure smooth determination of it at this stage, and at the National Court where the matter is due to commence the next leg of the Criminal trial process. It is my humble view that the Defendant's right to a speedy trial provided under Section 37 (3) of the Constitution will not be affected as and when the matter is brought before the National Court for fresh mention and further deliberation.
31. In conclusion, I find that there are present overwhelming evidences in the Police Hand-up brief against the Defendant for him to be committed to stand trial in the National Court.

RULING ON SUFFICIENCY OF EVIDENCE

32. There is sufficient evidence for the charge of Sexual Penetration of a Child under the age of 16 years laid against the Defendant pursuant to Section 229A (1) of the Criminal Code Act contained in the Police Hand-up Brief to have the Defendant committed to the National Court for trial. The Police hand-up brief presented to court discloses a "Prima Facie" case against the Defendant and on that basis the Defendant is committed to stand trial in the National Court.

COURT ORDER

- A. Defendant is committed to the National Court to be further dealt with according to law; and
- B. Remand in custody at CIS Gaul Vanimo until the next sitting of the National Court here in Vanimo

I will now proceed to administer the Section 96 of the District Court's Act statement on the Defendant.