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

Appeal No. 63 of 1962 (N.G.)

IN THE MATTER of the Native Administration Ordinance 1921-1951,

-and-

IN THE MATTER of an Appeal from the Court of Native Affairs

BETWEEN JOHN TEOSIN Appellant

-and-

TOHIAN Respondent.

PORT MORESBY

MANN C.J. : This is an appeal against the conviction of the Appellant by the Court of Native Affairs at Sohano, upon a charge of escaping from custody while under legal arrest.

The ground of appeal is that the verdict was unreasonable and cannot be supported having regard to the evidence.

The evidence shows that Teosin, upon the occasion in question, was walking in front of a large number of native men and women and children, who came to meet the force of Police Officers and native police who had taken up a position at Hahalis, the place where the appellant and most of the other natives were living.

The Appellant came up and addressed the officer in charge of the police, by saying "I am very happy to see you all". The police officer told the Appellant that he was to be arrested and brought before the Court for non-payment of tax, and asked the Appellant to tell the women and children to go back to their village. The Appellant apparently complied with this request and told the women and children to go home, and told the men who had not paid their tax, to come to the front, presumably so that they could be arrested by the police. The officer in charge of the police then formally arrested the Appellant. It appears quite clearly from all the evidence, that up to this stage, the Appellant's conduct was entirely peaceful and that he showed no sign of wanting to avoid arrest. In fact, according to the evidence of Senior Inspector Burns, he said as part of the explanation which he was asked to make to his own people - "If a Judge can hear what we have to say and he will decide whether we are in the right or if we are in the wrong". It is clear that at this stage the Appellant was prepared to go to Court with the police, with the other people who were to be tried for non-payment of tax.

At this point of time, the large number of women who were in the crowd of natives, came forward and surrounded the Appellant, and Senior Inspector Burns, and carried off the Appellant bodily, so that he was quickly lost in the crowd. Some of the women were carrying small infants, and one of them in particular, pressed her baby against Mr. Burns, so that there was an obvious risk that the child would be suffocated. This compelled Senior Inspector Burns to retreat a short distance, to avoid harm to the baby and by the time he was able to recover his position, there was no sign of the Appellant.

The evidence so far is substantially supported by all the witnesses called on behalf of the Informant. There was no evidence that the Appellant was subsequently released at any particular time or that he was free to surrender himself into the custody of the Police. There is no evidence showing what steps, if any, the police took to resume custody over the Appellant.

It appears that on the day after these incidents, a letter was sent to the District Commissioner, Mr. Gow. Mr. Gow received the letter on the 8th February, and recognized the writing as that of the Appellant. The letter was in effect an appeal to the District Commissioner to explain what had been going on and alleging that many injuries had been suffered by the native people. Mr. Gow, in response to this letter, went to meet about thirty natives who were known to him to be leaders of the Mahalie Welfare Group. Amongst them was the Appellant. He spoke to these natives for approximately three-quarters of an hour.

The general tenor of Mr. Gow's advice was that the only solution to the problem was for the people to surrender to the Police and go to Sohano to attend the Court and that the matter could only be dealt with by the proper legal procedure. There was no conversation about outstanding charges against the Appellant, nor did Mr. Gow refer to the fact that the Appellant was under arrest. Nevertheless Mr. Gow said that he was certain the Appellant was not under any form of restraint.

The Appellant himself gave evidence upon the hearing of the case in the Court of Native Affairs. His evidence shows a good deal of conflict between his own position and that of the head-men of the Welfare Association and indicates the existance of a good deal of confusion in the mind of the Appellant, as to the true relationship which existed between the Mahalie Welfare Society and its various leaders and the Administration.

The Appellant specifically said that he was in fact being restrained by the head-men, who were the people exercising real authority on behalf of the Society. This appears to be the only evidence on this point and it seems to me to be not improbable. Nevertheless, upon the hearing of the proceedings, the Magistrate was at liberty to disbelieve this evidence and if he did so the situation is that there is no evidence one way or the other to show whether the Appellant was at liberty to surrender himself to the Police, until at any rate the evening of the 8th February when Mr. Gow stated that he saw the Appellant in the presence of the native leaders, and expressed the opinion that the Appellant was not under any form of restraint. At the stage of the trial when Mr. Gow gave this evidence, this point may not have appeared to be of great importance, but as this evidence stands, and when considered in the light of social conditions affecting natives, I would be disposed to doubt whether this evidence were enough to satisfy the onus of proof on this question of restraint. In any case it appears to me from the arguments which I have heard, that the point is not now vital.

There was no evidence which would support any inference that the Appellant was in any way responsible for the actions of the group of native women who carried him out of the custody of the Police or that he subsequently adopted or ratified their conduct. Therefore as far as the evidence stands, there is no basis of fact upon which the appellant could be convicted of the offence charged.

To sustain the conviction, Counsel for the Respondent presented a most interesting argument, to the effect that since escape from custody is a continuing offence, his continued absence from police custody, after he regained freedom of movement, rendered him guilty if he did not promptly submit himself to the Police to enable them to assume custody of him. Of course on the evidence as it stands, and assuming that the Appellant was under a duty to surrender himself to the Police, the offence could not have been committed by him on the 6th February, and so far as the evidence shows, the offence would arise some time on or after the 8th February.

In support of this argument, Counsel referred to the 11th Edition of Russell on Crime at page 359, where are set out Common Law definitions for terms such as "Escape", "Prison Breaking" and "Rescue". The main distinction is between prison breaking and rescue which were at common law felonied and escape which was a misdemeanour. With reference to escape, it is stated as a general principle that all persons are bound to submit themselves to the judgment of the law and that those who when lawfully arrested on criminal process, free themselves

from custody before they are put in prison or other legal place of detention, are guilty of the misdemeanour described. Escape is a lesser offence with which a prisoner may be charged when, in the circumstances of the case, he would be guilty of the more serious offence of prison breaking, except that he took the opportunity when it was presented to him, to walk out of his prison without committing any further action which would from this general statement of the obligation to submit to the due processes of the law, I am invited to infer that a prisoner is guilty of escape if, when he is in a position of freedom of choice, he fails to present himself to the Police so that they may assume lawful custody of him.

In Hale's "Pleas of the Crown" Vol. 1, page 611 in paragraph III examples are given in relation to the felony of prison breaking, which imply a notion of obligation on the part of the prisoner not to break out of his lawful custody or imprisonment. The point at issue here, is whether the actions of the prisoner constitute a felony or not. It appears that if a person is rescued, the rescuers are in any event guilty of felony, but the person rescued is not, unless he were a part to the action taken, in which case he commits not the felony of rescue but the felony of breach of prison, (or presumably if he had not been imprisoned, the misdemeanour of escape).

The curious case of Alfred George Hinds 41 CRR page 143, relates to a person who was serving a sentence of twelve years preventive detention and escaped from prison simply by walking out of it. He was subsequently recaptured and charged with breach of prison and on a second count of escaping from prison. With all the accent on breach of prison in the earlier authorities, the accused put up the argument that there was no offence of escaping from prison and it was apparently submitted to the Court that the felony at Common Law was prison breaking and that the misdemeanour of Escape did not cover cases of escape from prison. This argument was rejected by the Court.

In an Indian text-book "The Law of Crimes" by Ratanlal and Dhirajlal Thakore 19th edn. p.565, the learned authors comment that lawful custody is not determined by the fact that the constable in charge of the accused became insensible.

In Regina v. Tommy Ryan, 11 N.S.W. L.R. p.171, the prisoner was charged with malicious wounding. He was a convicted felon who escaped from gaol and was later arrested by a police constable without a warrant, on a charge of escaping from gaol.

The prisoner attacked the arresting constable, seized his revolver and shot him and struck him with the butt of the revolver and caused considerable injuries. The real question

that arose was whether the arrest of the accused for escape, without a warrant, was legal, or not, for if his arrest were illegal he would have the right to defend himself from it. Upon the trial Judge's direction, the accused was found guilty, the jury having found that he had used excessive force in avoiding the illegal arrest. The substantial question which fell for consideration upon the Crown case reserved, was whether the arrest was legal or not, for if it were not, it would constitute an assault against the accused who would be entitled to defend himself, and the further question would then arise, whether the violence used was excessive. The conclusion of the Court was that the arrest was lawful and that therefore the accused had no right to defend himself and the question of the force used by him was immaterial. A distinction is drawn between cases of prison breach and escape and it was pointed out, particularly by Foster J. at Page 216, that the offence of prison breach, which was not the offence charged in this case would probably have been completed upon the prisoner emerging from the gaol, so that at a later stage, although he had committed felony, he would not be any longer in the act of committing it and Foster J. then cites the same passage from Sergeant Hawkins as is referred to in Russell on Crime at page 359. From this the conclusion is drawn that in the case of an escape which does not involve any breaking of prison to complete the offence, the process of escape consists of the evasion of restraint or custody imposed by the law. It amounts in other words to a refusal to undergo imprisonment or an evasion of its infliction, it is therefore to be regarded as a continuing offence and that the person is continually committing offence as long as he avoids the penalty of his sentence.

This is perhaps putting the element of responsibility to comply with a duty to submit to the processes of the law at its highest but it must be remembered that the question involved in the case was whether, the offence charged being a misdemeanour, the accused was still in the process of committing it so as to justify his arrest without warrant. In the judgment of Windeyer J. at pages 195-197 appears an analysis of the offence of escape, demonstrating that the accused in that case was properly arrested without a warrant, under the provisions of a statute authorizing such an arrest whilst the person is in the act of committing or immediately after having committed an offence punishable under the act. The analogy given to the theft of goods constituting a continuing offence in cases where the asportation of the goods takes place over a considerable distance.

In Griffith v Taylor there cited, Cockburn C.J. illustrates the case of the theft of a box at Oxford, and the box being put in a railway carriage. Although the offence of stealing is complete as soon as the journey commenced, so that the thief could properly have been arrested at Oxford, still the process of asportation continued right throughout the journey and the thief could as properly have been arrested at Reading, for in law and in fact he would have been there found committing the offence of larceny.

I think that the principle revealed here is clear. Asportation is the essential element of theft, and is not a thing which must occur instantaneously. The Asportation may comprise a journey of any distance and so long as this essential element of the crime continued, the commission of the crime as a whole was still taking place, or in other words the criminal conduct involved in the commission of the offence was still continuing. Nevertheless the conduct performed up to the time of the arrest of such a person at Oxford, would have been sufficient to constitute an asportation, because although the goods had only been carried part of the distance involved, they had already been carried out of the possession and control of the owner. There is no suggestion in Griffith v Taylor that the processes of theft would, after the train journey was completed, continue so long as the thief withheld the goods from their true owner, although a legal obligation might well be asserted to oblige him to restore them at any time.

The question is not whether the conduct of the accused was lawful or proper in any way, it is simply a question of whether the actions which constituted the specific offence charged, were still continuing so that it could be said that the person concerned was still committing the offence.

In applying these considerations in Ryan's case, I think with very great respect, that Windeyer J. carried the principle too far. He speaks of the offence having been committed as soon as the person escaping gets outside the gaol gates, but he goes on to add that the offence of escape is a continuing offence as long as the person escaping is keeping out of imprisonment. It seems to me that the true analogy with Griffiths' case, is that the person escaping from prison may be punished as soon as he gets outisde the gaol gates, because at that stage the ingredients of the offence are complete and he has in fact escaped. If he continues to travel away from the gaol, the act by which he escapes also continues, and in that sense he is still committing the offence; that is, committing an act which is an ingredient of the offence, so long as that journey continues, regardless of how far he goes.

At the end of that journey the fact that the man eludes his pursuers would not in my view support a charge of escape. His conduct is not related to his purpose in leaving the gaol. It is related now to a new purpose of avoiding recapture which may or may not involve him in other offences.

A New Zealand case Rex v Keane 1921 N.Z.L.R. 581 appears to me to express the true position more accurately. There a prisoner walked away from the quarry in which he was working, and at a later stage met another man and exchanged clothes with him. The other man was charged with assisting him in escaping or attempting to escape from lawful custody, and the question was whether at the time when the clothes were exchanged the prisoner was still in the process of escaping.

The Court unanimously came to the conclusion that he was not, because the process involved in escaping from custody was completed as soon as the prisoner had regained his liberty. This in the facts of that case involved no more than getting himself out of the sight of the officer in whose custody he was supposed to be. It was not necessary in that case, to determine over what period or distance the process of escape might continue.

In Keane's case it is clear that the prisoner, having got himself out of sight of the authorities, was in fact at large, and at the time he was exchanging clothes, he was not on a journey designed to withdraw himself from his custody. He was engaged in a transaction designed to prevent himself from being recognized and recaptured.

I think that the principle applicable to these cases is clear and that the analogy to larceny given by Cockburn C.J. in Griffiths v. Taylor is the correct one.

This being in my opinion the state of the law, it is not possible to find that the Appellant in the present appeal was continuing to perform any act, or that he was engaged on any journey designed to carry him out of the custody of the police officer who had arrested him. Presumably, when the women who carried him away put him down, his journey was completed, as was his rescue. Whatever happened after then whether it constituted an evasion of the police or an avoidance of recapture, would not constitute part of the offence of escaping.

In my opinion, it is not correct in law to imply some further act of escape based on a duty to go back and surrender himself into the custody of the police. For one thing, such a constructive escape would not be from lawful custody which by this time had terminated by the act of rescue. In addition it seems to me that the act of escape cannot be constituted by mere failure to carry out some duty, even if it can be established to be a duty in specific terms, to seek out and find the police.

For these reasons, it appears to me that the evidence fails to show any conduct on the part of the Appellant or for which he could be shown to be responsible, which would constitute the offence charged.

The appeal must be allowed, the conviction quashed and the sentence set aside.

Order accordingly.