

THE QUEEN v. EBULYA.

The Chief Justice : I have reached the conclusion that the Indictment should be sustained and I am of the opinion, therefore, that the Motion to quash it should be refused.

Ollerenshaw, J. : I concur.
I publish my judgment.

Smithers, J. : I, too, concur and I publish my judgment.

Minogue, J. : I concur and publish my judgment.

The Chief Justice : The order of the Court is :
That the Motion to quash the indictment is refused and that the accused person be arraigned before a single Judge.

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

CORAM: MANE C.J.
OLLERENSHAW, J.
SMITHERS, J.
MINOGUE, J.

THE QUEEN

-v-

EBULYA, SON OF PILIMP

JUDGMENT OF
HIS HONOUR MR. JUSTICE OLLERENSHAW.

A Crown Prosecutor has presented to us an Indictment, signed by the Secretary for Law, and charging Ebulya under Section 348 of the Criminal Code, that on or about 2nd March, 1963, in the Territory of New Guinea, he committed rape upon one Ot.

Counsel for the accused person has taken a preliminary objection that the indictment is a nullity and he has, in effect, moved to quash it.

He relies upon these grounds :

- (1) That there is no authority for the presentation of the Indictment, it being, so it is submitted, an "Ex Officio" Indictment purporting to be presented under Section 561 of the Queensland Criminal Code, which section, so it is submitted, is not part of the law of the Territory of New Guinea, and
- (2) That no indictment may be presented to this Court against the accused because he has not been committed for trial but has been committed for sentence under what, so it is submitted, is an ineffective legislative provision, and, this Court has no jurisdiction to entertain any indictment upon such a committal or by any means concern itself with him.

It is admitted by both parties that a Magistrate did conduct a statutory investigation upon an information

charging the accused person under Section 350 of the Code with unlawfully and indecently assaulting Ot, that upon the completion of that investigation the Magistrate committed the accused for sentence before this Supreme Court upon that charge, and that, in the trial of the accused upon the present Indictment, if it be sustained, the Crown will rely upon the incident and facts upon which the charge of indecently assaulting was made and investigated.

Ground (1): That there is no authority for the Indictment.

This involves, in the main, consideration of two pieces of legislation.

The first in time is The Criminal Procedure Ordinance of 1889, which was enacted as an Ordinance of the Possession of British New Guinea on the 9th January, 1889, and came into force there on the 27th April, 1889. Such portions of this Criminal Procedure Ordinance as were in force in Papua on the 9th of May, 1921, were adopted by Section 15 of the Laws Repeal and Adopting Ordinance, 1921, of the Territory of New Guinea as an Ordinance of that Territory so far as the same were applicable to the circumstances of the Territory and were not repugnant to or inconsistent with the provisions of any Act or Ordinance or subordinate enactment having the force of law that had been or might thereafter be expressed to extend to or apply to or made or promulgated in that Territory.

The second piece of legislation is: The First Schedule of the Criminal Code Act, 1899, of the State of Queensland, known as "The Criminal Code of Queensland," which Code was adopted as and to be the law of the Possession of British New Guinea on and from the first day of July, 1903, by The Criminal Code Ordinance of 1902 of British New Guinea. Such portions of this Criminal Code that were in force in the State of Queensland on the 9th May, 1921, were adopted by Section 13 of the said Laws Repeal and Adopting Ordinance as laws of the Territory of New Guinea so far as the same were applicable to the circumstances of the Territory and were not repugnant to or inconsistent with the provisions of any Act or Ordinance or subordinate enactment having the force of law that had been or might thereafter be expressed to extend to or apply to or made or promulgated in that Territory.

In adopting for the Possession of British New Guinea The Criminal Code of Queensland, The Criminal Code Ordinance of 1902 also provided that:

" Any reference in the Code to Queensland or to persons places or subjects in Queensland shall be taken as references to the Possession or corresponding or analogous persons places or subjects in the Possession."

Unlike comparative adopting legislation it did not expressly declare the adoption to be dependent upon the applicability of the adopted to the circumstances of the place for which it was adopted, nor did it expressly exclude what in the adopted legislation was repugnant to or inconsistent with legislation that had been or might thereafter be enacted for or in the place of adoption.

In adopting for the Territory of New Guinea The Criminal Code of Queensland and The Criminal Procedure Ordinance of 1899 of the Possession of British New Guinea, known, since the Proclamation of the 1st September, 1906, as the Territory of Papua, The Laws Repeal and Adopting Ordinance, 1921, in the words which I have already cited, did expressly declare that their adoption was to be in so far as the same were applicable to the circumstances of the Territory of New Guinea and did expressly exclude what in them was repugnant to or inconsistent with legislation already, or thereafter, to be enacted there. The Laws Repeal and Adopting Ordinance also provided that:

" All or any references to authorities, persons, places, subjects, matters or things in any act, statute, law or regulation or rule heroby adopted shall be taken as referring to corresponding or analogous authorities, persons, places, subjects, matters or things in the Territory and for the purpose of facilitating the application of any of the aforesaid acts, statutes, laws, regulations or rules hereby adopted, it shall be lawful for any Court or Magistrate to construe the same with such verbal alteration not affecting the substance as may be necessary to render the same applicable to the matter before the court or Magistrate."

It is convenient now to cite the legislation around which argument revolved, namely Sections 3 and 12 of The Criminal Procedure Ordinance of 1899, and Sections 560 and 561 of The Criminal Code of Queensland:

The Criminal Procedure Ordinance of 1889:

"Section 3 - Except in cases of informations known to the law of England as ex officio informations and informations by the Master of the Crown Office no Criminal case shall be brought under the cognizance of the Central Court unless the same shall have been previously investigated by a Magistrate and the accused shall have been committed for trial at such Court."

"Section 12 - Whenever any person has been committed by a Magistrate for trial at the Central Court the Chief Magistrate shall consider the evidence taken in the matter by the Magistrate and at his discretion do one of the following things -

- (1) Lay or direct to be laid against the person committed any charge that the evidence appears to the Chief Magistrate to warrant.
- (2) Quash the committal.
- (3) Send the evidence and all papers back to the committing Magistrate and direct the Magistrate to obtain if possible further evidence. And if the Chief Magistrate sees fit directs the Magistrate to dismiss the case if no further evidence can be obtained.
- (4) If the alleged offence be one which the Magistrate has jurisdiction to try in a summary manner send the evidence and all papers back to the committing Magistrate and direct him to try to deal with the matter in a summary manner which directions the Magistrate shall be bound to obey."

The Criminal Code of Queensland:

"Nature of Indictments

Section 560 - When a person charged with an indictable offence has been committed for trial and it is intended to put him on his trial for the offence, the charge is to be reduced to writing in a document which is called an indictment.

The indictment is to be signed and presented to the Court by a Crown Law Officer or some other person appointed in that behalf by the Governor in Council."

"Ex Officio Informations

Section 561 - A Crown Law Officer may present an indictment in any Court of criminal jurisdiction against any person for any indictable offence, whether the accused person has been committed for trial or not.

An officer appointed by the Governor in Council to present indictments in any Court of criminal

jurisdiction may present an indictment in that Court against any person for any indictable offence within the jurisdiction of the Court, whether the accused person has been committed for trial or not."

Section 1 of the Code provides that, unless the context otherwise indicates: "The term 'Crown Law Officer' means the Attorney-General or Solicitor-General."

Argument, perhaps of necessity, was involved and it is merely to keep this judgment from undue proportions that I do not here entertain all the submissions which fell for our consideration.

Broadly, Counsel for the accused submitted that neither Section 560 or Section 561 ever became law in the Possession of British New Guinea, or the Territory of Papua, because neither of such Sections was applicable to the circumstances of that Possession in 1902 and they were repugnant to Sections 3 and 12 of The Criminal Procedure Ordinance of 1889, and particularly that Section 561 was repugnant to Section 3 of that Ordinance.

Broadly, Counsel for the Crown submitted that the enactment as the law of the Possession by The Criminal Code Ordinance of 1902 of Sections 560 and 561 of The Criminal Code of Queensland impliedly repealed or amended Sections 3 and 12 of The Criminal Procedure Ordinance of 1889 in so far as these sections stood in the way of an indictment by an appropriate Law Officer of the Crown under Section 560 or Section 561 of the Code whether or not the accused person has been committed for trial before the Central Court. He also submitted, alternatively, that neither Section 560 or Section 561 of The Criminal Code was so repugnant to either Section 3 and or Section 12 of The Criminal Procedure Ordinance that all these sections could not stand together.

It is to be observed that The Criminal Code of Queensland was adopted as and to be the law of British New Guinea without the qualification of circumstantial applicability. However, it seems tolerably clear that the adopting Ordinance did not mean quite all that it said, else, for instance, an accused resident of the Possession, later the Territory of Papua, pleading in the Central, later the Supreme Court, on or after the

27th April, 1889, any plea or pleas other than a plea of guilty or a plea to the jurisdiction of the Court, would have been entitled, pursuant to Section 604 of the Code, to have the issue raised by his pleas tried by jury, notwithstanding that Section 21 of The Criminal Procedure Ordinance of 1889 provided that trials before the Central Court shall be by the Chief Magistrate, later a Judge, sitting alone: Vide The King v. Bernasconi (1914-1915) 19 C.L.R. 629. So, too, certain matters arising after his conviction, such as the reservation of a question of law, would have been required to be heard and determined by a "Full Court" sitting at Port Moresby, pursuant to Section 668 et sequiter of the Code, notwithstanding that there was and could not be in the proper order of things as they were in 1902, and there is not yet provision for any such Court.

It may be said generally from the terms and provisions of The Criminal Code Ordinance of 1902 that what the legislator there was about was to introduce the body of substantive criminal law as it existed in Queensland.

Upon the conflict between Section 3 of The Criminal Procedure Ordinance and Section 361 of the Code, I would make these observations: The prohibition in Section 3 against the entertainment by the Central Court of any criminal case, other than in the case of the exceptions therein provided for, without previous magisterial investigation and committal, appears to have its historical derivation in the taking away from the English Grand Jury the power to present a man for trial on their own knowledge without any preliminary examination. There was never a Grand Jury in Queensland and the introduction there of Section 361 of the Code, with the functions thereby given to the superior Law Officers of the Crown, is explained in R. v. Webb (1960) St.R.Qd. 443.

In the Possession of British New Guinea there was neither a Grand Jury or such Law Officers of the Crown as an Attorney-General or Solicitor-General, or for that matter, any Officer of the Crown having the functions usually exercised by such officers except in so far as the representative, himself, of The Sovereign, the Lieutenant-Governor or Administrator, might be regarded as the person having the function of initiating criminal litigation on behalf of the Crown. I apprehend that Law Officers of the

Crown essentially are persons appointed to do for The King what he could do for himself as a prosecuting litigant and it is not inapt to recall that in "Pleas of the Crown" alleged criminals were summoned to the Curia Regis by a command in the form of a Writ from The King himself under his Royal Seal.

In fact in the Possession such functions had been delegated to the Chief Magistrate by Section 12 of The Criminal Procedure Ordinance of 1889, which Ordinance itself in its Section 18 contemplates the empowering by the Administrator of some person, other than the Chief Magistrate, to fulfil these functions.

The Criminal Procedure Ordinance of 1889 reserved from the operation of its Sections 3 and 12 "cases of informations known to the law of England as ex officio informations." The power to present such an information was not delegated to the Chief Magistrate, and, if there were no Law Officer of the Crown in the Possession, it would seem that the representative of The Sovereign would be the person to present such an information. There are now a Secretary for Law and a Crown Solicitor for these Territories.

Subsequently to the adoption of the Code, that is by The Criminal Procedure Amendment Ordinance of 1909, provision was made for the appointment of a Crown Prosecutor, permanently or temporary, in whose name crimes and offences cognisable in the Central Court might be prosecuted by indictment in the form set out in the Criminal Code. It would seem that no such Crown Prosecutor was appointed until many years later and, in the meantime, in 1914, the Lieutenant-Governor in Council, for the purposes of Section 560 of The Code appointed to sign and present indictments in the Central Court in its Criminal Jurisdiction the Judges of that Court, who included the Chief Magistrate, and its Registrar and Acting Registrar.

It does seem to me that at the time when The Criminal Code of Queensland was adopted for the Possession of British New Guinea there was an established procedure in operation there that left no room for the operation of Section 561 of the Code and in which it could not work in the circumstances of the

Possession. There was already the provision, contained in the exception with which Section 3 of The Criminal Procedure Ordinance opens, for the ex officio and the other informations, therein mentioned, according to the law of England. As I have said these were reserved from the operation of Sections 3 and 12 of The Criminal Procedure Ordinance. All other criminal cases to be entertained by the Central Court were provided for by Section 3 and by Section 12, whereby the Chief Magistrate was given the function, after committal, of considering the evidence taken in the committal proceedings and (inter alia) of laying any charge that the evidence appeared to him to warrant.

Although my mind has fluctuated I have come to some firm conclusions. I have had the advantage of reading the judgment that has just been delivered by Mann, C.J., in which he has made an amendment to the view which he expressed in R. v. Burges and Others, and I agree with his conclusion that the indictment now presented to us may be sustained as an indictment presented pursuant to Sections 3 and 12 of The Criminal Procedure Ordinance.

In my view, however, these sections were adopted into the Territory of New Guinea to the exclusion of Section 561 of the Code in any operative sense.

I have had some difficulty in understanding the reasons for the judgment of Dixon, J., as he then was, in Sutherland v. The King (1934) 52 C.L.R. 356. It was there argued (inter alia), on behalf of a person convicted by a Judge sitting without a jury, that Section 21 of The Criminal Procedure Ordinance of 1889, providing that criminal trials should be before the Chief Magistrate alone, had not been adopted for the Territory of New Guinea by Section 15 of The Laws Repeal and Adopting Ordinance, 1921. This was so, it was submitted, because Section 21 was not "in force", within the meaning of those words in Section 15, in the Territory of Papua on the 9th May, 1921, having been superseded by the jury provisions of the Queensland Criminal Code, adopted there in 1902, or affected by the Jury Ordinance of 1907 of the Territory of Papua, which was not adopted for the Territory of New Guinea, and had,

in effect, substituted a jury for the Chief Magistrate in the trial of a person of European descent charged with a crime punishable with death.

Although it was necessary for Dixon, J. to consider only whether a person charged in the Territory of New Guinea with a crime not punishable with death, that is with stealing, was entitled to trial by jury, His Honour's judgment commences with these words: "I think that it was never intended to introduce trial by jury into the Territory of New Guinea and that it has been excluded."

It is, of course, most important when reading a judgment to be mindful of the particular problem it purports to resolve and, where necessary, so confine it. However, I cannot qualify such a categorical statement of Dixon, J. to restrict it to the trials of persons charged with crimes not punishable with death. I would have thought that a section amended, impliedly or expressly, could be said to be "in force" only to the extent to which it was still operative as a law. Dixon, J. was of the opinion that these words in Clause 1 of The Jury Ordinance: "and that, save as aforesaid, the trials of all issues both civil and criminal shall as heretofore be held without a jury" did not altogether replace but confirm Section 21 subject, of course, to the amendment or alteration effected by the earlier words of Clause 1 of The Jury Ordinance as to trials of persons of European descent charged with a crime punishable with death. I would say, with respect, that I find no difficulty in comprehending that opinion. However, His Honour proceeded to say not that what was left of Clause 21 was in force but: "I think, therefore, that Section 21 was in force in Papua at the relevant date." Taking this statement together with the statement with which His Honour commenced his judgment, to which I have already referred, to the effect that trial by jury had been excluded from the Territory of New Guinea, I can but think that His Honour was of the opinion that, for the purpose of the words "in force" in Section 15 of The Laws Repeal and Adopting Ordinance, Section 21 should be considered to be in force in Papua as enacted there in 1889 and to have been adopted into the Territory of New Guinea by such Section 15. Perhaps this is so

because The Jury Ordinance of Papua, which impliedly amended Section 21, was not adopted into the Territory of New Guinea.

I do think that this case of Sutherland v. The King (supra) supports and illustrates the theory that in the consideration of the effect and operation of legislation, which has been adopted in bulk without discrimination by such methods as were employed for these Territories, a broad and common sense view must be taken and that we should not consider ourselves unduly restricted by the ordinary canons of construction for conflicting legislation and the like: vide (inter alia) Booth v. Booth, (1934-1935) 53 C.L.R. 1.

Having regard to the general circumstances at the time of the acquisition of the new Territory and to the object, structure and words of The Laws Repeal and Adopting Ordinance, 1921, I consider that the paramount intention of the legislator responsible for this Ordinance was to adopt from Queensland, subject to the Queensland amendments noted in the Second Schedule of the Ordinance, its body of substantive criminal law as contained in its Criminal Code, as had been done for the Territory of Papua, and, at the same time, to adopt from Papua its Criminal Procedure Ordinance as it existed there alongside the Code, in effect to introduce into the Territory of New Guinea substantially the same criminal law and procedure as then existed in the Territory of Papua.

At the same time, a Supreme, at first called The Central Court, was established for the Territory of New Guinea by the Judiciary Ordinance, 1921, its chief judicial personage being given the title of "Chief Judge" instead of the historically more magnificent "Chief Magistrate." The Laws Repeal and Adopting Ordinance and the Judiciary Ordinance came into force in the new Territory on the day on which civil administration replaced the military administration there. It must have been very soon after the commencement of such civil administration that provision was made for a Law Officer of the Crown because provision is found for a "Crown Law Officer" in the Regulations made in 1922 under the Public Service Ordinance Ordinance No. 14 of 1922 of the Territory of New Guinea. In 1924 to him

also were transferred the functions of the Chief Magistrate under Section 12 of The Criminal Procedure Ordinance, in its application to the Territory of New Guinea, to lay against a person committed by a magistrate for trial at the Supreme Court any charge that the evidence taken in the committal proceedings appears to him to warrant or to decline to lay a charge against such a person.

This, in my view, is the function which the Secretary for Law has exercised in signing the present Indictment and I do not consider that it is necessary to support it, or that it could be supported as an indictment under Section 561 of the Code. I do not think that that section is in operation as part of the law of the Territory of New Guinea. I think that much of the confusion, some of it in my own mind, has arisen because of the use of the term "ex officio" indictment. In a loose sense it may be called an "ex officio indictment" or "information" but in reality it is an indictment under Section 12 of The Criminal Procedure Ordinance of 1889 in pursuance of the power thereby conferred on the Crown Law Officer, now the Secretary for Law, to lay any charge that the evidence taken by the committing magistrate appears to him to warrant. I consider that the term "ex officio" indictment or information properly should be confined to those informations reserved by the excepting provisions of Section 3 of The Criminal Procedure Ordinance from the operation of the rest of that Section and of Section 12 of this Ordinance. In this way the confusion, which I think has arisen, would be avoided.

It will be observed that I have treated the committal for sentence, upon which the indictment is based, as if it were a committal for trial within the meaning of Sections 3 and 12 of The Criminal Procedure Ordinance and such I consider it to be, as should appear hereafter.

It will also be observed, from what I have already said, that I do not consider that Section 561 of The Criminal Code of Queensland is, or ever has been in operation in the Territory of Papua, where Section 12 of The Criminal Procedure Ordinance has not been amended as it was for the Territory of New Guinea and the power

to indict for, or present any charge that the evidence taken in the committal proceedings appears to warrant has been left to the Chief Magistrate, now the Judges of the Supreme Court.

Such an amendment never having been made in the Territory of Papua, where the power of Judges to indict or lay a charge under Section 12 of The Criminal Procedure Ordinance continues to exist alongside that of a Law Officer of the Crown pursuant to The Criminal Procedure Amendment Ordinance of 1909^{and Section 560 of The Code} although, for many years, it was exercised by a Judge only on circuit when he was not accompanied by one of the Crown Prosecutors, such as were available in Port Moresby and are now available for all circuits and it may be considered to have fallen into disuse, if it is not superfluous or even obsolete.

Up to the time of the cessation of civil administration in the Territory of New Guinea in 1942 it was not the practice of the Judges of that Territory to go on circuit and almost all indictments were presented and criminal trials were conducted at the seat of the Supreme Court in Rabaul, where there were a Crown Law Officer and Crown Prosecutors. In these circumstances there was no need to retain the power of the Judges to indict, a power which clouded the proper separation of the functions of the executive and the functions of the judiciary. It may well be that a similar separation would have expressly found its way into Papua had it not so happened that for so long a time its Chief Executive Officer was also its Chief Judicial Officer.

Section 12 of The Criminal Procedure Ordinance, in my opinion rightly, has always been assumed to have survived the introduction of The Criminal Code of Queensland and this assumption has been acted upon in the manner I have indicated. In the circumstances now existing, to which I have also referred, I consider that this section should be amended for the Territory of Papua to bring it into line with the section as it exists for the Territory of New Guinea.

I would observe in passing from this subject that, although it is submitted for The Crown that Section 561 of The Criminal Code is in operation as a law in both Territories, The Crown, as I understand its attitude,

is not contending for the unrestricted right to indict in all criminal cases without preliminary information, investigation and committal.

No case has come before me, nor have I heard of any case, in which an indictment has been presented where there has not been a magisterial investigation of the facts out of which the charge in the indictment has arisen. An indictment pursuant to Section 12 of The Criminal Procedure Ordinance of 1889, as amended for the Territory of New Guinea, is used by the Crown, as far as I am aware, when it is considered that there is something defective, wanting or inadequate in the committal and, e.g., that no further investigation would be fruitful or is otherwise warranted in the particular and sometimes peculiar circumstances, or, e.g., that the person performing the functions of a magistrate has under estimated the strength or gravity of the case and it is also considered that the accused person or persons should be put upon trial, a trial in which the defence will be conducted by counsel, and the criminal litigation in which he or they have become involved should be brought to a conclusion, one way or the other, without further delay. It seems to me, at present, that such an indictment serves a useful purpose in the circumstances of these Territories and I have not seen any reason why its use should be statutorily controlled. The good sense of the Crown Solicitor, under judicial guidance and control, should be sufficient to prevent any abuse in its employment.

Ground (2): That there can be no effective committal for sentence.

I do not think that there is any substance in any of the arguments submitted in support of this ground. I have read the judgment delivered by Mann, C.J., and the judgment about to be delivered by Smithers, J. and I do not spend time again tracing the relevant legislation which they have set out as applicable in each Territory. While I do not wish to be taken to agree with all their reasons, I do agree with Their Honour's main conclusions that magistrates in each Territory have full and effective statutory authority in a proper case to commit an accused person "for sentence" before this Supreme Court and that this Court has unquestionable jurisdiction to entertain

an Indictment presented to it upon such a committal. Section 600 of The Code is a law in both Territories and an appropriate provision for this purpose. I would add to what Their Honours say as to the construction to be put upon the phrase "committed for trial" that, by virtue of the relevant provisions of the Justices Ordinance, 1912 amended, of the Territory of Papua and the District Courts Ordinance, 1924 amended, of the Territory of New Guinea, Section 3 of The Criminal Procedure Ordinance of 1899 should now be read, if necessary, as if the words: "or sentence" appeared therein after the phrase "committed for trial" and Section 12 of this Ordinance as if the words "or sentence" appeared therein after the phrase: "committed by a Magistrate for trial."

Although, as I have said, I agree with the main conclusions of Smithers, J. upon a committal "for sentence", I do not agree that such committal results from anything in the nature of a bargain, or that it confers upon an accused person the right to be indicted, or imposes upon the Crown an obligation to indict him for the offence in respect of which he has been committed for sentence. The Crown Law Officer for the Territory of New Guinea, now the Secretary for Law, may, pursuant to Section 12 of The Criminal Procedure Ordinance of 1899, amended, lay any charge against a person who has been committed that the evidence appears to him to warrant. If he decides to indict upon a charge other than that upon which the person has been committed, nevertheless the charge laid in the indictment arises out of the evidence taken in the committal proceedings and is laid by virtue of the fact of committal. In such circumstances I do not think that it is necessary or desirable that he should enter a nolle prosequi and it may well be argued that by doing so he has exhausted his power. Such a process should be reserved for the case in which he declines to lay any charge as provided for in Section 12 of The Criminal Procedure Ordinance of 1899: (Vide generally, comparing and contrasting, Dooley v. Hartman (1960) 3 All E.R. 398.)

I would refuse the motion to quash the Indictment and I consider that we should direct that the accused person be arraigned and his trial proceed before a single Judge.

Although the matter was not fully argued, I would add that it seems tolerably clear that we may, sitting together, exercise the jurisdiction of this Court, which each of us may exercise singly. It is good common sense that what each of us may do singly any two, three or four of us may do together and this seems to be contemplated by Section 58 of the Papua and New Guinea Act, 1949-1963. Subsection (4) of this section provides :

"(4) The jurisdiction of the Supreme Court may be exercised -

- (a) by a judge or judges sitting in Court, and
- (b) to the extent and in the cases provided by or under Ordinance, by a judge sitting in chambers;
....."

The inclusion of the plural "judges" in (a) appears to be deliberate, particularly when it is alongside (b) providing for the exercise of the jurisdiction in chambers and limiting such exercise, as is usual, to a single judge.

Although the draftsmen was concerned to ensure that the jurisdiction could be separately exercised by Judges sitting contemporaneously, he provided for this in the concluding words of subsection (4) :

"..... and the jurisdiction of the Court may be so exercised notwithstanding that the jurisdiction is being exercised at the same time by another judge or judges."

It was unnecessary for this purpose to include the plural "judges" in (a) of the subsection.

There is a difficulty, however, in that no provision has been made for the case when there is not unanimity but disagreement between the Judges sitting together, although, of course, the decision of the majority of a Court, usually, if not universally, is the decision of the Court. Vide, e.g. the Commonwealth Judiciary Act, 1903 amended, Section 23.

Likewise there is no provision with respect to an even number of Judges sitting together, as in the section of the Judiciary Act, which I have just cited,

and is sometimes provided against, as in the case in England of The Court of Criminal Appeal: Vide Halsbury's Laws of England, Third Edition, Volume 9 page 448. We four are sitting together because it was thought that it would be of advantage if we all heard full argument upon the challenge to the Indictment.

It is true that there is no rule that a Court is bound to abide by the decisions of another court of co-ordinate jurisdiction and I would think that this applies to judges of co-ordinate jurisdiction such as we are: Vide Halsbury's Laws of England, Third Edition, Volume 22 page 801, where this paragraph appears :

"1689. - Decisions of co-ordinate courts.

There is no statute or common law rule by which one court is bound to abide by the decision of another court of co-ordinate jurisdiction. Where, however, a judge of first instance after consideration has come to a definite decision on a matter arising out of a complicated and difficult enactment, the opinion has been expressed that a second judge of first instance of co-ordinate jurisdiction should follow that decision and the modern practice is that a judge of first instance will as a matter of judicial comity usually follow the decision of another judge of first instance unless he is convinced that that judgment was wrong."

It was the practice there enunciated that I relied upon in declining to follow the separate decisions of all my brothers when I gave judgment in The Queen v. Manote-Kulang (Madang, 5th August, 1963) and see R. v. Manga Gabi (1963) P. and N.C.L.R.97 at p.106.

However, when we sit together as the Court and more particularly if the matter were one of practice and procedure rather than substantive law, it may be that the dictates of judicial comity require that we should accept the decision of a majority: I have not formed any conclusion.