[HIGH COURT OF AUSTRALIA.]

SUTHERLAND . . . . . APPLICANT;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE CENTRAL COURT OF THE TERRITORY OF NEW GUINEA.

H. C. OF A. 1934.

SYDNEY, *Dec.* 14, 17.

Rich, Starke, and Dixon JJ.

Criminal Law and Procedure—Trial by jury—Territory of New Guinea—Criminal Procedure Ordinance 1889 (*British New Guinea*) (*No.* 11 *of* 1889), *cl.* 21—*Laws Repeal and Adopting Ordinance* 1921 (*N.G.*) (*No.* 1 *of* 1921)—*Judiciary Ordinance* 1921 (*N.G.*) (*No.* 3 *of* 1921)—*The Criminal Code* (*Q.*) (63 *Vict. No.* 9), *sec.* 604.

By the *Laws Repeal and Adopting Ordinance* 1921 (N.G.) clause 21 of the *Criminal Procedure Ordinance* 1889 of British New Guinea (Papua) is made applicable to the Territory of New Guinea and excludes trial by jury in that Territory.

APPLICATION for special leave to appeal from the Central Court of New Guinea.

Reginald James Vivian Sutherland was tried before a Judge without a jury in the Supreme Court of the Territory of New Guinea and was found guilty on two charges of stealing as a servant certain gold specimens, the property of his employer. He was sentenced on the first count to three months' imprisonment with hard labour, and on the second count to four years' imprisonment with hard labour, concurrent with the sentence on the first count.

From these convictions and sentences Sutherland now applied for special leave to appeal to the High Court. The principal ground was that he was entitled to be tried before a jury.

Further material facts appear in the judgments hereunder.

O'Sullivan, for the applicant. There is not any evidence directed to the value of the gold specimens, or of the gold amalgam said to have been stolen. The evidence as to the ownership of the gold, and that it had been stolen, is insufficient and inconclusive (*Trainer* v. *The King* (1)).

[DIXON J. referred to *Schiffmann* v. *The King* (2).]

The evidence is equally consistent with the applicant's innocence as with his guilt (*Peacock* v. *The King* (3)). As the applicant was not warned beforehand, statements relating to the gold, made by him to the police officers, are inadmissible (*R.* v. *Currie* (4) ; *Phipson* on *Evidence*, 7th ed. (1930), pp. 255-258).

[DIXON J. referred to *Ibrahim* v. *The King* (5).]

The applicant was not tried before a jury as was his right under the law in force in the Territory of New Guinea. The *Laws Repeal and Adopting Ordinance* 1921 (N.G.) made applicable to New Guinea (*a*) the Queensland *Criminal Code* ; (*b*) the *Criminal Procedure Ordinance* 1889, of Papua ; and (*c*) the common law of England.

[STARKE J. referred to *Jolley* v. *Mainka* (6).]

Clause 21 of the *Criminal Procedure Ordinance*, which provides that trials shall be taken by the chief magistrate alone, was not capable of being applied to New Guinea in 1921, because there was then no such person as a chief magistrate, nor any such office in New Guinea. The judiciary system set up in that Territory by the *Judiciary Ordinance*, No. 3 of 1921, provides for a Central Court constituted by a Chief Judge and other Judges. If the words " Chief Judge " be substituted for " chief magistrate " then it would exclude the jurisdiction of the other Judges provided for by the *Judiciary Ordinance*. The *Criminal Procedure Ordinance* was not capable of being incorporated in its entirety in the general scheme of the laws of New Guinea. The Queensland *Criminal Code* and the *Judiciary Ordinance* together provide a complete scheme for the administration of criminal law. If the *Criminal Procedure Ordinance* and the Queensland *Criminal Code* are in conflict, then to the extent of that conflict the *Code* must be deemed to have repealed the *Ordinance*, the former being later in point of time than the latter.

(1) (1906) 4 C.L.R. 126.
(2) (1910) 11 C.L.R. 255.
(3) (1911) 13 C.L.R. 619, at p. 634.
(4) (1912) 29 W.N. (N.S.W.) 201.
(5) (1914) A.C. 599.
(6) (1933) 49 C.L.R. 242.

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Clause 21 of the *Criminal Procedure Ordinance* was, in 1902, superseded in Papua by the Queensland *Criminal Code* (*R.* v. *Bernasconi* (1)), and it was also affected by the *Jury Ordinance*, No. 7 of 1907 ; it therefore was not in force when adopted in New Guinea and was incapable of being applied (see clause 15 of the *Laws Repeal and Adopting Ordinance* 1921-1927). By applying the common law of England, the jury system, which is embodied in the common law, became applied to the Territory by the *Laws Repeal and Adopting Ordinance*. The Crown has not discharged the onus of showing an express provision in a law of New Guinea which deprives the applicant of the right to trial by jury. There are not, and were not in 1921, any physical difficulties in New Guinea which operated to prevent the application of the jury system in that Territory. The trial Judge was in error in commenting upon the atittude adopted by the applicant at his trial (*Tuckiar* v. *The King* (2)). In the circumstances of the case the punishment imposed is excessive.

Sugerman, for the respondent, was called upon on the question of trial by jury, and as to the second count. In the absence of statutory provisions prescribing the qualifications of jurors, the summoning of jurors, the empanelling of juries and other relevant matters, the provisions of sec. 604 of the Queensland *Criminal Code* are not applicable to the Territory of New Guinea (*R.* v. *Valentine* (3)). The provisions of the *Central Court Assessors Ordinance* 1925 (N.G.) also support the view that sec. 604 does not apply to the Territory. The method of trial followed in this case is in accordance with the provisions of the *Judiciary Ordinance* 1921-1931 (N.G.). The procedure prescribed by that ordinance is the only one which is in force in the Territory. In the circumstances the matter is not affected one way or the other by clause 21 of the *Criminal Procedure Ordinance* 1889. The important point is that sec. 604 of the Queensland *Criminal Code* does not apply. Without that section there is nothing to support the jury system. The matter was, to some extent, discussed by *Griffith* C.J. in *R.* v. *Bernasconi* (4).

(1) (1915) 19 C.L.R. 629.
(2) *Ante* p. 335.
(3) (1871) 10 S.C.R. (N.S.W.) 113, at p. 122.
(4) (1915) 19 C.L.R., at p. 633.

Having regard to the exhaustive legislative provisions relating to the matter, it is doubtful whether there was in 1921, any common law applicable in England to trial by jury. The Court will be slow to interfere with the trial Judge's findings on questions of fact. The evidence against the applicant here is stronger than was the case in *Schiffmann* v. *The King* (1).

O'Sullivan, in reply.

The following judgments were delivered :—

RICH J. In this matter an objection was taken relating to the validity of the trial. The objection is that the trial should have been before a Judge and jury. A section of the *Criminal Procedure Ordinance* relating to Papua, which is applicable to New Guinea, provides that trials before the Central Court shall be before the chief magistrate. In my opinion that section has not been repealed and is applicable to New Guinea. I think there is no substance in the objection that the trial ought to have been before a jury.

The applicant was convicted on two counts of stealing. The first related to 19 gold specimens—the second to 47 ozs. of gold amalgam. On the first count Sutherland was sentenced to three months' imprisonment ; on the second to four years. The terms were made concurrent. The material which he was charged with stealing was found in his quarters—the specimens in a tin and the amalgam in a bag and in a pocket of a pair of his trousers. There was no independent proof of the theft of any of these materials. The Crown case rested on the probability of the accused having obtained them from the dredge upon which he was employed. That probability depended upon the nature of the amalgam and of the specimens, and the fact that another source was not, so far as it affirmatively appeared, accessible. In the case of the specimens the accused after his arrest said that he had obtained 75 per cent of them from a prospector and " these I took from the dredge." The admissibility of this evidence is now contested. I think the Judge was not bound to reject it. The law is fully stated by Lord

(1) (1910) 11 C.L.R. 255.

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Sumner in *Ibrahim* v. *The King* (1). In dealing with this passage *A. T. Lawrence* J., as he then was, said in *R.* v. *Voisin* (2):— "The point of that passage is that the statement must be a voluntary statement; any statement which has been extorted by fear of prejudice or induced by hope of advantage held out by a person in authority is not admissible. As Lord *Sumner* points out logically these considerations go to the value of the statement rather than to its admissibility. The question as to whether a person has been duly cautioned before the statement was made is one of the circumstances that must be taken into consideration, but this is a circumstance upon which the Judge should exercise his discretion. It cannot be said as a matter of law that the absence of a caution makes the statement inadmissible; it may tend to show that the person was not upon his guard as to the importance of what he was saying or as to its bearing upon some charge of which he has not been informed." I think this evidence sufficient to support the first count. As to the second count I think there is sufficient evidence to show that the gold belonged to the company and that it was improperly in the possession of the prisoner. For these reasons I think this application should be refused. As to the sentence, I do not think we ought to substitute our discretion for the discretion of the learned trial Judge.

Leave should therefore be refused.

STARKE J. I agree.

DIXON J. I agree. I think that it was never intended to introduce trial by jury into the Territory of New Guinea and that it has been excluded. The provisions of the *Laws Repeal and Adopting Ordinance* 1921-1927 provide for the incorporation in the law of New Guinea of five distinct laws. The ordinance incorporates, first, English statutes and laws in force in Queensland, second, certain Commonwealth Acts, third, certain Queensland Acts, fourth, certain ordinances of Papua and finally the principles and rules of common law and equity in force in England on 9th May 1921. In relation to

(1) (1914) A.C. 599, at p. 609.

(2) (1918) 1 K.B. 531, at p. 538.

each of those heads of law the incorporating provisions provide that they shall be in force in the Mandated Territory so far as they are applicable to the circumstances of the Territory and are not repugnant to or inconsistent with any Act, ordinance or law in force there. Amongst the ordinances expressed so to be introduced from Papua is the *Criminal Procedure Ordinance* of 1889. Clause 21 of that ordinance provided that trials before the Central Court of Papua shall be by the chief magistrate sitting alone. It thus excluded trial by jury in Papua. The question is whether it operates in New Guinea and excludes trial by jury in that Territory. The *Criminal Procedure Ordinance* 1889 is contained in a schedule of ordinances of Papua which clause 15 of the *Laws Repeal and Adopting Ordinance* of New Guinea introduces. But, in doing so, clause 15 provides that those portions of the ordinances contained in the schedule that are in force in the Territory of Papua at the commencement of the ordinance are adopted so far as the same are applicable to the circumstances of New Guinea. The first question which arises is whether clause 21 of the Papuan ordinance was in force in Papua at the material time or had been impliedly repealed. It appears that the *Jury Ordinance* of 1907 of Papua, which is not adopted in New Guinea, contains an express provision restating the position as to trial by jury. Clause 1 of that ordinance provides that the trial of a person of European descent, charged with a crime punishable with death, shall be before a jury of four persons and that, save as aforesaid, the trials of all issues both civil and criminal shall as heretofore be held without a jury. It is evident that the clause does make an alteration in the law. It does so in respect of capital offences. Does it altogether replace clause 21 of the *Criminal Procedure Ordinance* 1889 so that it ceased to be " in force " ? On the whole I have come to the conclusion that it does not effect a complete repeal by implication of clause 21 of the *Criminal Procedure Ordinance.* It operates rather to amend it, and, subject to the alteration or amendment to confirm it in other respects. I think, therefore, that clause 21 was in force in Papua at the relevant date. The question then is whether it was applicable. On that question, we have been referred to the Queensland *Criminal Code,*

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and it is suggested that certain provisions of that *Code* imply that trial by jury must exist. I think that they do not support that contention. They contain very many provisions which are directed to trial by jury and suppose its existence; but it must be remembered that all these laws are only incorporated in New Guinea in so far as they are applicable. Each incorporation of these conflicting laws is made subject to the provision that they are incorporated only in so far as they are applicable. It is impossible to use one by itself to exclude the other. The question of applicability must be considered by reference to what they all contain. Therefore I see nothing in clause 21 which is inapplicable to the circumstances created in New Guinea. The Court is a different Court. It has two Judges and there are various provisions of a procedural character which are duplicated in the law of Papua. But the ordinance is to be applicable wherever possible. It is quite possible to apply clause 21. I think, therefore, the prisoner was properly tried without a jury.

I do not wish to add anything to my brother *Rich's* remarks as to the first count. On the second count, the evidence appears to me to be very slender indeed. It amounts to this—that the prisoner, working upon the dredge, had in his possession amalgam which would be naturally produced by that dredge. There were two other dredges in the vicinity but they were ten miles away. The amalgam in his possession had associated with it steel balls, which would be broken off in the working of such a dredge. The prisoner, when called upon for an explanation, gave no intelligible explanation at all. No ordinary source from which the amalgam would lawfully come into his possession can be readily suggested. In these circumstances, I think the evidence, although slender, is sufficient to support the finding that he obtained it from his employer's dredge. The fact that no loss of gold was proved by evidence is not of positive importance, because the process by which the gold was recovered is one which does not admit of any assay of the materials before they go into the process and affords no means by which such proof could be made. It could not possibly be shown

that there was a deficiency of gold recovered from any of the material treated. I think the evidence was just sufficient.

In my opinion, therefore, leave should be refused.

Application for special leave to appeal refused.

Solicitors for the applicant, *E. J. McQuiggin & Thirlwell.*

Solicitor for the respondent, *W. H. Sharwood*, Commonwealth Crown Solicitor.

[NOTE.—The attention of the Court was not, during the argument, drawn to sec. 15 of the *Evidence Ordinance* 1934 (N.G.), which provides: "A confession tendered in evidence in any criminal proceeding shall not be rejected on the ground that a promise or threat has been held out to the person confessing unless the Court is of opinion that the inducement was in fact likely to cause an untrue admission of guilt to be made."]

J. B.