EX OFFICIO INDICTMENTS: AN ASPECT OF CRIMINAL JUSTICE IN PAPUA NEW GUINEA

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In *Regina* v *Francis Topulumar and Ors.*, the Crown applied for a warrant of arrest against four people accused of the wilful murder of District Commissioner J. Emmanual.[1] The indictment presented before the court showed that of nine originally charged with the murder in Rabaul District Court, five had been committed for trial and four dismissed. These four, the subjects of this application, were then indicted *ex officio* by the Crown Prosecutor. Thus, after a magistrate had dismissed charges, the Crown sought the issue of warrants of arrest under section 562 of the *Criminal Code*, which provides:

> When an indictment has been presented against a person who is not in custody, and has not been committed for trial or held to bail to attend to be tried upon the charge set forth in the indictment, or who does not appear to be tried upon the charge set forth in the indictment, a Judge of the Court in which the indictment is presented may issue a warrant under his hand to arrest the accused person and bring him before a justice of the peace; and the justice before whom he is brought may commit him to prison until he can be tried on the indictment, or may, in a proper case, admit him to bail with sufficient sureties to attend to be tried on the indictment.

Although the procedure of *ex officio* indictment was not directly in issue in the case, it will be argued in this article, that Kelly J. should have questioned its use, since courts in Papua

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1 [1971-72] PNGLR 320.

New Guinea and Australia have held that *ex officio* indictments should issue only in unusual circumstances.[2] Judge Kelly himself expressed such a sentiment in *R.* v *Angoro Evu.*[2A]

The discharge at the committal proceedings was a factor which should have led Kelly J. to question the propriety of using an *ex officio* indictment. There appeared in this case to be no special circumstances other than the fact that the accused were charged with wilful murder, but on an objection by defence counsel that the Crown had failed to show anything that should cause the court to the warrants, Kelly J. said:

> ... However, I must have regard to the nature of the charge, which is one of wilful murder, and notwithstanding that these men have previously been brought before the District Court and subsequently discharged I would consider it appropriate, now that an *ex officio* indictment has been presented against them on such a charge as wilful murder, that they should be arrested and brought before a justice to be dealt with in accordance with sec. 562...

As a result the four accused were re-arrested in December 1972 and again imprisoned until February 1973. Subsequently the Crown dropped the charges against them without going to trial. One commentator observed that it was most remarkable that *ex officio* indictments were ever presented against these men.[3]

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2 *R* v *Dwyer* [1967-68] PNGLR 104, 110; *R* v *Ebulya* [1964] PNGLR 200, 216, 217 (Mann C.J.), 244-245 (Smithers, J.), 246 (Minogue J.). The procedure by way of *ex officio* indictment was regarded as appropriate to special cases as long ago as the time of Blackstone - *Blackstone's Commentaries* IV, 304. In *Ex Parte Marsh* [1966] QR 357 it was held that the use of *ex officio* indictments (with reference especially to s. 561 of the *Criminal Code*) should be reserved for unusual and extraordinary circumstances. See also *R* v *Webb* [1960] QR 443; *The Queen* v *Kent: Ex Parte McIntosh* [1971] FLR 65, 76; *R.* v *Durnin* [1945] QWN 35. But see *R.* v *McConnan* [1955] TasSR 1; *R.* v *Sutton* [1938] QSR 285.

2A Sup. Ct. (1970) No. 578.

3 Hamilton, "The Emmanual Trial," (1973) Seventh Waigani Seminar, unpublished.

The purpose of this article is to discuss through the case law the right of the Executive in Papua New Guinea to lay an *ex officio* indictment under section 561 of the *Criminal Code*.

I. Right of the Executive to Indict Ex Officio

The *Criminal Code* as in force in Queensland on 1st July 1903 was adopted in Papua by the *Criminal Code Ordinance 1902*. In New Guinea it was adopted as in force in Queensland on 9th May 1921 by the *Laws Repeal and Adopting Ordinance 1921*. The New Guinea ordinance was later repealed and reproduced with amendments by the *Laws Repeal and Adopting Ordinance 1924*. The other relevant ordinance is the *Criminal Procedure Act 1889* (Papua Adopted) which was adopted simultaneously with the *Code*.[4]

Section 561 of the *Code* provides:

> 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.
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> 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.

This section gives power to a Crown Law Officer to present an *ex officio* indictment in respect of "any indictable offence,"[5] but the extent of the right has not been fully considered in this country.[6] In *R.* v *Burusep*[7] the question was whether the Crown can present an *ex officio* indictment in order to avoid the faulty committals of a number of people on a charge of

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4 See *R.* v *Burusep & Ors.* [1963] PNGLR 182.

5 Section 8 of the *Acts Interpretation Act 1949-1963* defines "Crown Law Officer" as "The Secretary, the Department of Law of the Territory" (now the Secretary for Law). See also *R.* v *Burusep*, *supra*.

6 *Re Baker* [1971-72] PNGLR 78, 84 (Prentice J.).

7 *Supra*, footnote 4, at 181.

wilful murder.[8] It was held *inter alia* that section 3 of the *Criminal Procedure Act 1889* prevails over section 561 of the *Criminal Code*:

> ... The situation in the Territory of New Guinea is conditioned by the simultaneous adoption of the *Criminal Code* and the *Criminal Procedure Ordinance 1889* (Papua adopted). There is a conflict between s. 560 and 561 of the Code and certain provisions in the *Criminal Procedure Ordinance* requiring an examination of the scheme of the legislation as a whole. Bearing in mind the English practice concerning *ex officio* indictments it is clear that s. 3 of the *Criminal Procedure Ordinance* both in Papua New Guinea affords a greater protection to the individual and affords him a positive guarantee that he would not be placed in jeopardy by trial for criminal offences without a proper preliminary investigation before a magistrate.

Section 3 of the *Criminal Procedure Act 1889* provides that no criminal case will be brought under the cognisance of the Supreme Court unless there has been a committal for trial before a magistrate. The exceptions to this rule are cases "... of informations known to the law of England as *ex officio* informations and informations by the Master of the Crown Office..."[9]

The question of *ex officio* indictments in New Guinea arose again in *R.* v *Ebulya*.[10] The accused was charged with unlawful and indecent assault, and upon the completion of committal proceedings the magistrate committed the accused for sentence before the Supreme Court. The Crown presented an indictment charging the accused with rape, relying upon the same facts that produced the charge of indecent assault.

The Supreme Court comprising four judges sitting *in banco* was not unanimous in their opinion on the presentment of an *ex officio* indictment in New Guinea. Mann C.J., Smithers and

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8 The Magistrate had committed these people, relying largely on hearsay evidence.

9 *R.* v *Ebulya*, *supra* footnote 2 at 223-224.

10 *Ibid.*

Minogue JJ., took the view that section 561 of the *Code* does form part of the law of both Papua and New Guinea. Mann C.J., however, reasoned that section 561 is limited in its application by section 3 of the *Criminal Procedure Act 1889*. In this respect he was not disposed to follow *R.* v *Burusep*. Smithers and Minogue JJ. argued that section 561 of the *Code* prevails over section 3 of the *Criminal Procedure Act*, while Ollerenshaw J. took the position that section 561 does not form part of the law of Papua New Guinea.

It is not clear what weight should be attached to a decision of a four judge panel, especially in view of their division of opinion as regards section 561 of the *Criminal Code*. In subsequent cases, the judges have made reference to the opinions expressed in *R.* v *Ebulya* especially the relationship between section 561 of the *Criminal Code* and section 3 of the *Criminal Procedure Act*. Judge Frost in *R.* v *Dwyer* (considering the position in Papua) held that section 3 of the *Criminal Procedure Act* prevails over section 561 of the *Criminal Code*.[11] In *R.* v *Wewak Resident Magistrate; Ex Parte Dyer*, Minogue J. reiterated his view that section 561 of the *Criminal Code* prevails over section 3 of the *Criminal Procedure Act*.[12] According to Minogue J., a magistrate's error in assessing evidence on committal proceedings can be rectified by the presentment of an *ex officio* indictment under section 561 of the *Criminal Code*. He said, "... due principally to the tangled skein of legislation there is a division of opinion in this court, and I repeat what I said in [*R.* v *Ebulya*] ... that I think it desirable that the position with regard to indictments be clarified by legislation."[13]

In *R.* v *Angoro Evu*, a Papuan case, Kelly J. took sides with Smithers and Minogue JJ., saying that section 561 of the *Criminal Code* prevails over section 3 of the *Criminal Procedure Act*.[14]

As the cases reviewed indicate, the judges agree that there is a conflict between section 561 of the *Criminal Code* and section 3 of the *Criminal Procedure Act*, but they are divided on whether section 561 of the *Criminal Code* prevails

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11 [1967-68] PNGLR 104,110.

12 [1967-68] PNGLR 511.

13 *Ibid.*, at 519.

14 Sup. Ct. (1970) No. 578.

over or is limited by section 3 of the *Criminal Procedure Act*.

II. Section 3 of the Criminal Procedure Act 1889

Section 3 of the *Criminal Procedure Act 1889* prohibits any criminal case from being brought in the Supreme Court unless the person charged has been committed for trial in the Supreme Court. However, the exceptions to section 3 are cases of informations known "... to the law of England as *ex officio* informations." In England the power to bring *ex officio* informations was exercised only in cases of "... misdemeanours affecting the state of the sovereign ..."[15] and the power was virtually obsolete when the act of 1889 was adopted in New Guinea.[16] The last such indictment in England was in 1911 and involved a criminal libel against the king, whom the accused had said was bigamously married to the queen.[17]

Thus, if it were agreed that section 3 of the *Criminal Procedure Act* prevailed over section 561 of the *Criminal Code*, than an *ex officio* indictment or information could issue only after a magistrate had conducted a preliminary inquiry and had committed the accused for trial, except in a narrow range of special cases.[18] However, we do not know whether section 3 prevails in Papua New Guinea. Since the acts were introduced simultaneously, the rule that later statutes prevail is of no use, and, as I have described, the Supreme Court is in some disagreement on the issue.

There is little doubt that section 3 of the *Criminal*

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15 *R.* v *Webb*, *supra* at 446. See also *R.* v *Burusep*, *supra* at 190, 191.

16 *R.* v *Burusep*, *Ibid.* at 191.

17 *R.* v *Mylius*, reported in *The Times* (2 Feb. 1911). See Weigall & McKay, *Hamilton & Addison Criminal Law and Procedure* (1956) 335; see also *R.* v *Kent; Ex Parte McIntosh* [1971] FLR 65, 80. No information *ex officio* has been filed in England in recent years. For a summary of the English position see *Halsbury's Laws of England*, 3rd edition, vol.10, 380.

18 This may be the interpretation of Mann's statements in *R.* v *Ebulya*, *supra* at 217. Alternatively, he may have meant that *ex officio* indictments can be brought only in rare cases.

Procedure Act ought to prevail over section 561 of the *Criminal Code*, so that *ex officio* indictments could issue only rarely and in special circumstances. The foundation of our legal system in the concept of natural justice presumes that the accused will have an opportunity to hear the charges that will be laid against him and that consideration of whether to proceed to trial will be left to an impartial magistrate rather than to the prosecutor. In Papua New Guinea, these concepts are embodied in part VI of the *District Courts Act*, which provides that committals must normally be by a magistrate, and in the *Human Rights Act*, which generally protects the rights of accused persons against an aggressive government.

However, section 3 of the *Criminal Procedure Act* is not the only possible limitation on *ex officio* indictments. In the remainder of this paper, I shall assume that section 3 does not prevail, and shall discuss other grounds for limiting the power of the executive to issue indictments when magistrates have refused to commit people to trial.

III. Exercise of the Right Under Section 561 of the Criminal Code

Section 561[19] owes its origin to English legal history. When Australia was founded it had long been settled in England that an indictment for treason or felony could be presented after at least twelve men on a Grand Jury found a *prima facie* case against the defendant. The Attorney-General in England had power by virtue of his office to file *ex officio* informations, but in practice the power was limited to important misdemeanours.[20]

The Grand Jury was never introduced in Queensland, so the power remained in the Attorney General to present *ex officio* indictments and "... was the present law..." at the time of the enactment of the *Criminal Code 1889*. The effect of the

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19 *Carter's Criminal Law of Queensland*, 3rd ed. (1969) notes three cases decided under section 561 namely, *R.* v *Sutton*, *R.* v *Durnin*, and *R.* v *Webb*; but see *In Parte Marsh*, *supra* at footnote 2.

20 See *R.* v *Webb* and *R.* v *Ebulya*, *supra* at footnote 2; as to the differences between the prerogative power and statutory power to exhibit criminal informations, see *The Queen* v *Kent; Ex Parte McIntosh*, *supra* at footnote 2.

issue of such information was, until 1848, to overcome the need for Grand Jury indictments.[21] This power to file *ex officio* informations finds expression in section 561 of the *Code*.

The normal procedure in Papua New Guinea towards the indictment of an accused person is by committal proceedings before a magistrate as provided for by the *District Courts Act 1963*.[22] The general idea behind committal proceedings is to let the accused know beforehand the case he has to meet. When the magistrate is not satisfied that a *prima facie* case has been made out he may refuse to commit.[23] The magistrate therefore fulfils in part the function of a Grand Jury.[24]

Since in *R.* v *Topulumar* it was assumed that the right to present *ex officio* indictments is available under section 561 of the *Criminal Code* it is necessary to discuss the practice that should be followed in presenting an *ex officio* indictment. Is it possible to side-step committal proceedings by presenting an *ex officio* indictment under section 561 of the *Criminal Code*? The earlier cases supported the right of the Crown to present an *ex officio* indictment without any limitations.[25] In *R.* v *Sutton* it was held *inter alia*,

> ... that section 561 of the *Criminal Code* has universal application as to *ex officio* indictments and applies to all indictable offences, and is in no way limited to cases where without any preliminary enquiry, a prisoner may be indicted by a Crown Prosecutor.[26]

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21 *R.* v *Kent*, *Ibid.*

22 See, especially, Part VI of the *District Courts Act 1963*.

23 Section 102, 1 and 2 of the *District Courts Act 1963*.

24 The committal proceedings have been criticised on the ground that they have become a shield for the defence. They are time consuming and as a result the period between arrest and final determination of the case is considerably lengthened. The recollection of witnesses tends to become weaker with the passage of time.

25 *R.* v *McConnon*; *R.* v *Sutton*, *supra* at footnote 2.

26 *Ibid.* at 285.

But, while the earlier cases accepted section 561 as giving an uncontrolled power to the Crown to present an *ex officio* indictment, recent cases[27] have begun to put limits on the use of *ex officio* indictments.[28] A clear exposition of the situations when they can be used was presented by Philp J. in the leading cases of *R.* v *Webb*:

> Although s. 561 gives the Crown an uncontrolled power of indictment without prior committal proceedings, in practice the power is used for two purposes. The first use is when a man has been committed for trial for an offence and the depositions disclose evidence of a different offence or of other offences; in such circumstances it is convenient and just that an indictment charging the different or other offences should be presented by the Crown Prosecutor. Due notice of the new charges should be given and if it be not given the judge may adjourn the trial.
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> The second use which has become increasingly common is when a man consents to plead guilty to a charge in respect of which no committal proceedings whatever have been taken. To take an example - a man is committed for sentence for breaking and entering a particular house; he consents to plead guilty to breaking and entering other houses and without committal proceedings he is indicted accordingly; he has deprived himself of the protection of the magistrate and there being no depositions he has limited his protection by the Crown Prosecutor and the judge. In most of such simple cases there is no danger of injustice being done but many of those persons are juveniles who may be too easily persuaded to agree to the presentment of *ex officio* indictments in cases where their guilt is doubtful.[29]

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27 *R.* v *Durnin; Ex Parte Marsh, The Queen* v *Kent: Ex Parte McIntosh, supra* at footnote 2. Some Papua New Guinean cases are discussed in this part of the paper.

28 Perhaps a clear case of judicial legislation which may be open to criticism from some quarters.

29 *R.* v *Webb*, *supra* at footnote 2, 447-8.

Thus, the only real protection in Queensland against abusive use of section 561 is, as described by Philp J. in *R.* v *Webb*, the vigilance of judges.[30] Even Philp J. accepted that section 561 gave an unlimited power to the Crown to present *ex officio* indictments. The limitation on this power, therefore, is a limitation only in practice, and the question arises whether a judge can quash an *ex officio* indictment which falls outside the limitations expressed by Philp J. In *The Queen* v *Kent; Ex Parte McIntosh*, Fox J. argued that courts should have the right to quash indictments, on the principle that courts are vanguards of justice:

> ... The fact that the power is concerned with a matter of procedure, the very fact that it is so wide, and the fact that it could, in theory at least, be used in nearly all situations, all lend support, in my view, to the conclusion that it is intended that the courts be left with what after all is one of their most fundamental functions...[31]

The judiciary in Papua New Guinea have expressed sentiments limiting the right of the Crown to present an *ex officio* indictment to special cases. Mann C.J. took the view in *R.*v *Burusep* that section 3 of the *Criminal Procedure Act* is applicable in New Guinea:

> ... If I were of the opinion that the Queensland practice was applicable in New Guinea, I would, in the present case, be disposed to intimate from the Bench, following the example of *R.* v *Durnin* and having regard to the warning given by the Queensland Court of Criminal Appeal in *Webb's Case* that in my opinion proceeding by *ex officio* indictment in the present case would incur grave risks and injustice...[32]

Both Smithers and Minogue JJ., in *R.* v *Ebulya* argued that an *ex officio* indictment was possible under section 561 of the *Criminal Code* notwithstanding no committal for trial, but they

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30 Mann C.J. in *R.* v *Burusep, supra* at footnote 4, 188.

31 *R.* v *Kent, supra* at footnote 2, 89. He was considering section 53 of the *Australian Capital Territory Supreme Court Act 1933-1969* which is similar to section 561.

32 *Supra* at footnote 30, 192-193.

both expressed reservations about such a practice without full prior magisterial investigation.[33] Frost J. in *R.* v *Dwyer* went further and particularised the situations when section 561 can be used by the Crown:

> ... I consider that notwithstanding the apparent plain inconsistency of the two provisions, s. 561 can be given a limited but useful operation subject to s. 3 of the 1889 Ordinance to enable indictment to be presented for an indictable offence upon which, after an investigation by a magistrate, the accused was committed for trial.[34]

Kelly J. in *R.* v *Angoro Evu* suggested that, while *ex officio* indictments could issue, their use should be limited:

> In my view section 561 of the Code is operative in Papua and by reason of the provisions just referred to it is possible for a Crown Prosecutor to present an *ex officio* indictment. Having regard to the views of experienced Queensland judges,[35] on the practice under section 561 in that State I can see no reason why, in appropriate cases, use should not be made of it, particularly in Papua, where the depositions disclose evidence of a different offence or other offences from the offence for which the accused has been committed for trial...[36]

Kelly J. shared the views expressed in *R.* v *Webb* and *R.* v *Ebulya* "as to the dangers inherent in the use of *ex officio* indictments in cases where there have not been committal proceedings."[37]

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33 *R.* v *Ebulya, supra* at footnote 2, Smithers J. 244, Minogue J. 245.

34 *R.* v *Dwyer, supra* at footnote 11, 110.

35 Kelly J., earlier in the judgment, had discussed *R.* v *Sutton*, *R.* v *Durnin* and *R.* v *Webb*, and agreed with the decision in the last two cases.

36 Sup. Ct. (1970) No. 578, 5.

37 *Ibid.* at 5.

There is no doubt that the position relating to *ex officio* indictments in Papua New Guinea is far from clear. However, most of the judges in Papua New Guinea are agreed that an *ex officio* indictment can be presented only where there has been a committal for some offence.[38] Further, most of the judges in these cases have limited the instances when an *ex officio* indictment can be presented to those where evidence at committal proceedings suggests a charge different from the charge issued by the magistrate. This is in line with one of the situations referred to by Philp J. in *R.* v *Webb*. It is also reasonable to use an *ex officio* indictment in a situation where an accused person desires that other offences should be taken into account on committal proceedings on a similar charge,[39] and in cases where there has been a technical defect in the committal proceedings.[40]

IV. R. v Topulumar: "Bad Cases Make Bad Law"

When Judge Kelly allowed warrants to issue in the *Topulumar* case, he was going against his judgment in *R.* v *Angoru-Evu*. *Topulumar* vividly demonstrates the abuses inherent in the procedure of *ex officio* indictments. This became obvious when the Crown subsequently dropped the charges against the four accused, after detaining them for at least two months in prison.[41] The presentment of an *ex officio* indictment in this case deprived the accused of the protections afforded them by the normal procedure of commital hearings before a magistrate. It is arguable that the procedure used in *R.* v *Topulumar* was against the spirit, if not the principle of double jeopardy provided for in the *Human Rights Act 1971*.[42] It is also doubtful that the phrase "whether the accused is committed for trial or not" in section 561 of the *Criminal Code* includes a discharge on committal proceedings.[43]

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38 *Re Baker* [1971-72] PNGLR 78, 84, (Prentice J.).

39 The second situation highlighted by Philp J. in *R.* v *Webb*.

40 See *R.* v *Ebulya, supra* at footnote 2, 216 (Mann C.J.).

41 In some cases a writ of *habeas corpus* could be available to the accused. See *Re Taru Meria* Sup. Ct. No. 275 (date and name of judge not available).

42 S. 16(5) and (6). See also *R.* v *Durnin, supra* at footnote 2.

43 But see *R.* v *Gamble* [1947] VLR 491; the decision however was based on a different legislative provision.

Even if it were accepted that section 561 confers unlimited power to present an *ex officio* indictment, this does not deprive the court of its capacity to ensure that an accused person is not unfairly prejudiced. In *R.* v *Topulumar*, on an application for warrants of arrest, Kelly J. should have examined the depositions on committal proceedings before issuing warrants of arrest. The use of the word "may" in section 562 of the *Criminal Code* ("... a judge of the court in which the indictment is presented *may*[44] issue a warrant ...") lends support to the position that the matter was at the discretion of the judge.[45]

Section 168(1) of the *District Courts Act* provides that where the court "... dismisses an information, complaint or set off the court shall make an order of dismissal..." Such an action on the part of the court will be a bar "... to any other information, complaint or legal proceeding in any court in the Territory (other than proceedings on appeal) for the same matter against the same party..."[46] A discharge on committal proceedings, it can be argued, is an order of the court within section 168(2) of the *District Courts Act* to bar any other information in any court in Papua New Guinea for the same matter against the same party. In this respect the phrase "legal proceeding" in section 168(2) may include an application for the issue of a warrant of arrest based on an *ex officio* indictment on the same charge as committal proceedings against the same persons. This position is consistent with statements made by the judges of this country in relation to the use of *ex officio* indictments. It was held in the English case of *R.* v *Dawson* that the right to include in an indictment a count representing a charge which the examining magistrate has rejected ought to be very carefully used.[47] If this is the case, then what course is open to the Crown where the defendant has been discharged on committal proceedings?

Minogue J. in *R.* v *Wewak Resident Magistrate: Ex Parte*

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44 Emphasis supplied.

45 The word "may" should be given its natural meaning. See *Bowden* v *Bowden* (1960) 103 CLR 610. See also *R.* v *Kent; Ex Parte McIntosh, supra* at footnote 2.

46 S. 168(2) of the *District Courts Act*.

47 [1960] 1 WLR 163.

Dyer[48] said that where the Magistrate has erred in assessing evidence and has discharged the defendant, this error is rectified in other jurisdictions[49] by the presentment of an *ex officio* indictment. His position as regards Papua and New Guinea was not clear.[50]

Is it possible for the Crown to appeal against a discharge order on committal proceedings? Section 225(2) of the *District Court Act* generally prohibits the Crown and the Administrator from appealing against the dismissal of an information. However, under section 225(3) of the *District Court Act*, "where, in the opinion of the Supreme Court, the matter is one of such public importance that leave should be granted, the Secretary for Law may -

> (a) appeal against a decision of a District Court on behalf of a party..."

Section 5 of the *District Court Act* defines decision to include "a committal for trial and an admission to bail, and a conviction, order, order of dismissal or other determination."[51] Both "decision" and "other determination" include an order of dismissal on committal proceedings for the purpose of appeal under section 225(3) of the *District Court Act*. It is arguable that "... the matter is one of such public importance..." on three grounds. First, the procedure of presenting an *ex officio* indictment may have the effect of encroaching upon the freedom of an individual guaranteed by the *Human Rights Ordinance 1971*. Second, the position relating to the use of an *ex officio* indictment is far from clear, and needs to be considered carefully. And, third, the procedure by way of appeal will enable the Supreme Court to consider the evidence and reach the conclusion whether such evidence justifies a committal.

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48 See *supra* at footnote 12, 519.

49 Referring to New South Wales, Queensland, etc. See also *R.* v *Baxter* (1905) 5 SR (NSW) 134.

50 See *supra* at text accompanying footnote 12.

51 In *R.* v *McEachern* [1967-68] PNGLR 48 at 56, Clarkson J. while interpreting section 11 of the *District Court Act*, said "... The examination is a hearing and a committal or dismissal falls within the wide and general description of 'determination'".

Thus, if the Crown has the right to appeal against a magistrate's discharge, it has no need to issue indictments in defiance of his decision.

V. Conclusion

The position in relation to an *ex officio* indictment is far from satisfactory. As has been suggested by a number of judges, the matter requires immediate legislative action. If it is considered desirable to retain the power to present an *ex officio* indictment, then such power should be limited, as suggested by Philp J. in *R.* v *Webb*: where there has been a technical defect on committal proceedings, one should be able to present an *ex officio* indictment in the interest of the Crown and the accused, thus saving time and expense. Mann C.J. in *R.* v *Ebulya* suggested that where an *ex officio* indictment is used this should be done only subject to leave of the court.[52] This would require the court to consider the whole matter and decide on the basis of the best course in the interests of justice.

On the other hand, in relation to *ex officio* informations, it has been suggested that "... an early opportunity may be found of relegating this procedure to the expanding depository of archaic privileges once belonging to the Crown."[53]

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52 See *supra* at footnote 2, 216.
See also *Archbold Criminal Pleading Evidence and Practice*, 36th edition (1966) 60-61.

53 Edwards, *The Law Officers of the Crown* (1964) 266. See also Philp J. in *R.* v *Webb*, *supra* at footnote 2.