DAVID J. BORJA and PEDRO B. SABLAN, Appellants

v.

TRUST TERRITORY OF THE PACIFIC ISLANDS, Appellee

Criminal Appeal No. 47

Appellate Division of the High Court

Mariana Islands District

May 31, 1974

Appeal from denial of motion to dismiss criminal complaint. The Appellate Division of the High Court, Brown, Associate Justice, held the denial proper.

Appeal and Error—Motion to Dismiss—Denied

There was no right to preliminary examination of arrested person brought before court competent to try him for offense charged, and habeas corpus was properly denied where denial of preliminary examination was alleged as the ground for seeking it; thus court properly denied motion to dismiss based on alleged denial of right of habeas corpus. (1 TTC § 11; 9 TTC § 108; 12 TTC §§ 202, 204(1))

Counsel for Appellants: BENJAMIN M. ABRAMS
Counsel for Appellee: WILLIAM S. AMSBARY

Before BROWN, *Associate Justice*, BENSON and PEREZ, *Designated Justices*

BROWN, *Associate Justice*

The appellant-defendants appealed to this Court the denial of their motion to dismiss the criminal complaint by the Trial Division of the High Court. One ground for

the motion to dismiss was the failure of the trial court to act in any way upon the application for a writ of habeas corpus filed by the defendants. We find that the trial court's denial of the motion to dismiss is appealable to the court because the inaction of the trial court for several weeks was in effect a final order denying the application, (9 TTC § 108), and it is appealable because of the serious constitutional contention of the defendants that the failure to act on the application suspended the privilege of the writ of habeas corpus. (1 TTC § 11.) The order denying the motion from which the defendants appealed is as follows:—

> Defendants move for dismissal, grounded first on denial of demand for preliminary examination, and, secondly, failure of the court to entertain application for writ of habeas corpus.
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> The offense charged is arson, 11 TTC § 151(1), and is within the jurisdiction of the District Court, where it was first filed. Penal summons was issued on July 27, 1973; defendants appeared on the same day and were released on personal recognizance. At this point they demanded preliminary examination, and were denied by the District Court.
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> There is no doubt that our statute contemplates a preliminary examination only when ". . . an arrested person is brought before an official authorized to issue a warrant who is not a court competent to try the arrested person for the offense charged. . . ." 12 TTC § 202. Section 204(1), cited by defendants, necessarily relates to Section 202. *Pugh v. Rainwater*, 332 F.Supp. 1107, is not in point, the ruling there being concerned with those who had been arrested and incarcerated solely upon authority of the police or the prosecutor. See *Richardson v. Gerstein*, 336 F.Supp. 67. The District Court consequently did not err in following the statute and denying demand for preliminary examination.
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> The first application for habeas corpus filed August 9, 1973 recites, in addition, failure of the District Attorney to comply with an order for discovery entered July 31, and calling for full discovery by 5:00 P.M. of the following day. Aside from the fact that the motion for discovery appears over-broad, it was pre-

sented to the court, and the order obtained, ex parte. This was clearly in error; the District Attorney was entitled to be heard.

Nothing appears of record to show that an early trial date could not have been set, other than defendants' desire to be tried in another court, by a judge of their choosing. Thereafter, on August 2, again ex parte, defendants obtained an order by the District Court "transferring" the matter to the High Court. No good cause appears to warrant the Court's divesting itself of jurisdiction, particularly without giving the government an opportunity to be heard.

On August 16, defendants again applied for the writ, High Court Civil Action No. 48-73, reciting denial of the preliminary examination, the lack of action on the August 9 application, and detention for an unreasonable period of time "since no trial date has been set". A third application, based upon the same grounds, was filed in the Appellate Division on August 17.

No action appears to have been taken on any of the three applications. It should be noted, however, that the writ does not automatically issue. Section 104, Title 9, TTC provides for issuance of an order to show cause "unless it appears from the application that the person detained is not entitled thereto". Certainly the better practice would have been for an order to have been entered so finding, since I assume that was the basis for not acting. In any event I do not consider myself precluded from examining the question at this time, since that is the principal ground for the present motion to dismiss.

Accordingly, I hold that the District Court properly denied the demand for preliminary examination, that subsequent delays in proceeding to trial resulted from the acts of the defendants and that the writ should not issue.

The motion to Dismiss is denied. The matter will be set for trial at the earliest possible date, either here or in the District Court.

No fact recited in the order has been contested by either the government or the defendants. We find that the trial court correctly applied the law to those facts and we adopt the trial court holdings as the decision of this court. In doing so, we wish to emphasize one point: no right to a preliminary examination exists, where the arrested person is

brought before a court competent to try the person for the offense charged. As the trial court clearly pointed out the defendants were brought before the District Court accused of arson. That court has jurisdiction to try that offense and therefore no right to a preliminary examination existed.

The order of the Trial Division is affirmed.