



COURT FILE

12/3/18

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PAPUA NEW GUINEA
[IN THE NATIONAL COURT OF JUSTICE]

EP NO. 28 OF 2017

BETWEEN

BEDE TOMOKITA
(Petitioner)

AND

DOUGLAS TOMURIESA
(First Respondent)

AND

ELECTORAL COMMISSION
(Second Respondent)

Alotau: Makail, J

2018: 10th, 11th & 12th January & 5th, 6th, 7th & 12th March

ELECTION PETITION – No case submission – Grounds of – Lack of evidence establishing elements of offence of bribery – Multiple allegations of bribery – Elector – Name of elector not on Common Roll – Inducement of elector – Evidence of – Giving of cash of K10,000.00 – Defence of local custom – Money given as gift in performing a local custom – Organic Law on National and Local-level Government Elections – Sections 3 & 215 – Criminal Code – Section 103

Cases cited:

Bede Tomokita v. Dougals Tomuriesa & Electoral Commission (2018) N7120
Neville Bourne v. Manasseh Voeto [1977] PNGLR 298

Peter Waranaka v. Gabriel Dusava (2009) SC980
Ken Fairweather v. Jerry Singirok (2013) SC1293
Desmond Baira v. Kilroy Genia (1998) SC579
Robert Lak v. Pias Wingti (2003) N2358
Benny Diau v. Mathew Gubag (2003) N2354
Pawa Wai v. Jamie Maxton Graham (2005) N2768
Perry Zeipi v. Gabia Gagarimabu (1999) SCR No. 5 of 1999
Labi Amaiu v. Andrew Mald (2008) N3335
Philip Kikala v. Electoral Commission & Nixon Koeka Mangape (2015) N6278
Malakai Tabar v. Hon. Jelta Wong & Electoral Commission (2018) N7122
Glenn Tobewa v. Davis Steven & Electoral Commission: EP No 14 of 2017
 (Unnumbered & Unreported Judgment of 22nd February 2018 per Higgins J)
Aide Ganasi v. Sali Sumbam (2013) SC1277
John Warison v. David Arore (2015) SC1418
John Warison v. David Arore (2015) N5341
Bryan Kramer v. Nixon Philip Duban & Andrew Trawen (No.3) (2013) N5215
Leonard Louma v. Douglas Tomuriesa & Electoral Commission (2012) N4920
Isi Henry Leonard v. Gordon Wesley & Electoral Commission (2014) N5812
Leonard Louma v. Douglas Tomuriesa & Electoral Commission (2012) N4919
Jim Simitab v. Kevin Isifu & Electoral Commission (2018) N706..

Counsel:

Mr. R. Diveni, for Petitioner
Mr. A. Baniyamai, for First Respondent
Mr. J. Simbala, for Second Respondent

RULING ON NO CASE SUBMISSION

12th March, 2018

1. **MAKAIL, J:** On 10th January 2018 the Court ruled upholding the respondents' objections to competency in part, struck out four of the fourteen allegations of bribery against the first respondent and allowed the balance to proceed to trial: see *Bede Tomokita v. Dougals Tomuriesa & Electoral Commission* (2018) N7120.

2. Out of the remaining allegations, two were withdrawn during the petitioner's case. First is the bribing of eight named persons with cash and bags

of rice at Faiava village on Goodenough Island on 13th May 2017. Secondly, the bribing of Jimmy Miyoluna with 16 corrugated roofing irons at Ifwaya village on Goodenough Island on 30th April 2017. This left twelve (in fact, eleven) allegations committed either by the first respondent or by persons with his knowledge or authority to be tried: Section 215 of the *Organic Law on National and Local-level Government Elections* (“*Organic Law*”) and Section 103 of the *Criminal Code*.

Remaining Bribery Allegations

3. They are:

- Bribery of Kubomu Tuvalugwa with a motor vehicle Dyna Reg. No. BFC 218 at Tukwaukwa village on Kiriwina Island on 28th April 2017.
- Bribery of Mosibiya Motowaya with K20.00 at Kavataria village on Kiriwina Island on 1st June 2017.
- Bribery of Vakota Digilasi with K20.00 at Kavataria village on Kiriwina Island on 1st June 2017.
- Bribery of Andrew Noel with K20.00 at Kavataria village on Kiriwina Island on 1st June 2017.
- Bribery of Keigalavalu Steven with K20.00 at Kavataria village on Kiriwina Island on 1st June 2017.
- Bribery of Mwanabuma Toidaya with K20.00 at Kavataria village on Kiriwina Island on 1st June 2017.
- Bribery of Benedict Towawala with one 10 kg bag of rice at Debatutu village on Goodenough Island on 10th June 2017.
- Bribery of Steven Ilewana with materials for water supply system and food items at Eweli village on Goodenough Island on 11th June 2017.

- Bribery of Gumyogibu Ugwerisa with K100.00 at Kausara village on Kiriwina Island on 28th June 2017.
- Bribery of Saiguyau Tomnupolu with K100.00 at Liliu village on Kiriwina Island on 28th June 2017.
- Bribery of Tomnupolu Selubulobu with K100.00 at Liliu village on Kiriwina Island on 28th June 2017.

Principles of No Case Submission

4. To prove the offence of bribery, the standard of proof is higher than the ordinary civil standard of proof of on the balance of probabilities. A petitioner must prove bribery to the entire satisfaction of the Court: see *Neville Bourne v. Manasseh Voeto* [1977] PNGLR 298; *Peter Waranaka v. Gabriel Dusava* (2009) SC980 and *Ken Fairweather v. Jerry Singirok* (2013) SC1293.

5. Parties accept two basic propositions. First, a no case submission is permitted in an election petition proceeding. Secondly, that the Court has discretion to stop a petition from proceeding further where the evidence is lacking on a material aspect of the petitioner's case or even if there is evidence to enable such a finding, the evidence would be unsafe and unsatisfactory to base a conviction: *Desmond Baira v. Kilroy Genia* (1998) SC579; *Robert Lak v. Pias Wingti* (2003) N2358; *Benny Diau v. Mathew Gubag* (2003) N2354; *Pawa Wai v. Jamie Maxton Graham* (2005) N2768 and *Perry Zeipi v. Gabia Gagirimabu* (1999) SCR No. 5 of 1999 and *Labi Amaiu v. Andrew Mald* (2008) N3335; *Philip Kikala v. Electoral Commission & Nixon Koeka Mangape* (2015) N6278. See also the recent cases of *Malakai Tabar v. Hon. Jelta Wong & Electoral Commission* (2018) N7122 and *Glenn Tobewa v. Davis Steven & Electoral Commission*: EP No 14 of 2017 (Unnumbered & Unreported Judgment of 22nd February 2018 per Higgins J).

Application of Principles to Facts

6. One of the grounds of no case submission is that the persons allegedly bribed were not electors because their names are not on the Common Roll. In all criminal offences like the offence of bribery under Section 103 of the

Criminal Code, there must be a specific victim. Where bribery is alleged in an election petition, the facts pleaded must be specific as to the identity of the victim or identify the person bribed by name. Then, evidence must be adduced to prove the identity of the victim.

7. The petitioner adduced evidence from persons who claimed to be bribed by the first respondent and much has been said during evidence at cross-examination and submissions where a strong case was put forward by Mr. Diveni of counsel for the petitioner that the identity of the victims of the offence of bribery in each instance has been proved such that there is no merit in the no case submission and it should be dismissed.

8. That is, that the defence submission that the person who received either cash, food item or material goods from either the first respondent or an agent (campaign committee member) in each case has been identified by name and that he is an elector on the Common Roll.

9. It is further submitted that in cases where the names of the persons are inconsistent with or do not appear on the Common Roll, a copy of which was tendered by consent, the Court has discretion by virtue of Section 217 of the *Organic Law* to dispense with the strict requirements of the rules of evidence and accept their evidence as proof of them being electors.

10. The petitioner's invitation to invoke Section 217 of the *Organic Law* is indeed a request to dispense with the requirement under Section 3 of the *Organic Law* which provides that:

“elector means a person whose name appears on a Roll as an elector”.

11. I am of the view that by virtue of Section 3, a Common Roll of an electorate is the only document to verify that a person who claims to be an elector, is an elector. Secondly, where a person gives sworn evidence that he is an elector, it is open to the Court to accept that evidence unless the Common Roll proves otherwise: see also *Aide Ganasi v. Sali Sumbam* (2013) SC1277.

12. Having a name on the Common Roll is crucial to avoid uncertainty and abuse of the right to vote. The observation by late Kawi J in *Tony Waterupu*

Aimo v. Ezekiel Anisi & Electoral Commission (2012) N4870 at (6) of the head notes of the judgment is true:

“It is crystal clear, that if you have a different name on the Electoral Roll you cannot vote or stand for Parliament in another name or using another person’s name.”

13. Thirdly, where a petitioner calls for a Common Roll to be produced prior to and at trial and it is not produced, it is open to the Court to refuse a no case submission where the defence denies that the person bribed is an elector: see *John Warison v. David Arore* (2015) SC1418 which was a review of a National Court decision in *John Warison v. David Arore* (2015) N5341.

14. It is also worthy to note the decision in *Bryan Kramer v. Nixon Philip Duban & Andrew Trawen (No.3)* (2013) N5215 where a no case application was refused because no Common Roll for Madang Open electorate was produced to verify the defence submission that the persons who were allegedly bribed and unduly influenced were not electors. These persons gave evidence that they were registered voters. In the absence of the Common Roll, the Court accepted their evidence that they were registered voters.

15. Contrast the above cases to *Leonard Louma v. Douglas Tomuriesa & Electoral Commission* (2012) N4920 where a no case submission was upheld and petition dismissed on the ground that the petitioner failed to prove that the persons allegedly bribed were electors. The trial judge said that the Common Roll could have been produced to prove that they were electors. However, it is unclear from the facts of that case if the petitioner called for its production prior to and at trial.

16. In this case, as there is no contest to the correctness of the Common Roll, I find that it does not support the assertion by the petitioner that a good number of witnesses called and gave evidence, are electors. For this reason, the apparent inconsistencies in the names that appear on the Common Roll or missing or use of a different given name or surname is rejected.

17. Further, all these persons who claimed to be electors did not for once, state in their respective affidavits that they have different names or that they are

also known by another name and those names appear on the Common Roll. It was at trial during examination in chief, that each revealed that he had a different name or is also known by another name, which name appears on the Common Roll.

18. Furthermore, the evidence from the witnesses is that, it is a customary practice for one to have more than one name back in the village. If that is so, they did not state that in their respective affidavits. Moreover, none of their oral evidence in chief was corroborated by an independent and impartial witness, for example, a church elder or villager elder (chief) or member of the local level government council.

19. The revelation of this information is quite clearly recent and can be viewed as an attempt to patch up the serious flaw in the petitioner's case. As the Court observed in the recent case of *Malakai Tabar* (supra) at [37], the bottom line is that, the name by which the person has sworn his affidavit by does not appear anywhere on the Common Roll.

20. The above cited cases, both from the National Court and Supreme Court and reasons given above weigh heavily against the exercise of discretion under Section 217 of the *Organic Law*. A material aspect of the allegation of bribery in relation to the names of the electors is lacking or missing. It follows that for the allegations of bribery of the persons who claim to be electors but do not have their names on the Common Roll they, must fail on this ground alone and must stop here.

21. At this juncture, it must be mentioned that the task of the Court has been made no easier, hence the delay in the decision because parties and in particular the petitioner was unable to make specific reference to pages and names of polling locations in the two bound volumes of the Common Roll where names of persons could be located with ease to verify the assertion that they are electors. This was the point of the second respondent's submission where it submitted that even if the Common Roll is tendered, the person must still identify his name on the Common Roll.

22. Having gone through and verified the names on the Common Roll, the allegations that fail to meet the test are:

- Bribery of Kubomu Tuvalugwa with a motor vehicle Dyna Reg. No. BFC 218 at Tukwaukwa village on Kiriwina Island on 28th April 2017. The name Kubomu Tuvalugwa does not appear on the Common Roll. This allegation is dismissed.
- Bribery of Andrew Noel with K20.00 at Kavataria village on Kiriwina Island on 1st June 2017. The name Andrew Noel does not appear on the Common Roll. The name Noel Tovasana appears on the Common Roll. This allegation is dismissed.
- Bribery of Keigalavalu Steven with K20.00 at Kavataria village on Kiriwina Island on 1st June 2017. Keigalavalu Steven does not appear on the Common Roll. This allegation is dismissed.
- Bribery of Benedict Towawala with one 10 kg bag of rice at Debatutu village on Goodenough Island on 10th June 2017. The name Benedict Towawala does not appear on the Common Roll. In any case his assertion that he used the name Towalala Voter ID No: 10988862447 to vote must be rejected for two reasons. First, he did not state the missing given name in his affidavit. This missing information should be known to him because when he went to vote the presiding officer should have identified it and informed him. Secondly, his evidence that he was born on 22nd August 1978 contradicts his evidence that he is 36 years old. If he was born in 1978, by 2017 he was 39 years old. If he was 36 years old in 2017, he would have been born in 1981. This allegation is dismissed.
- Bribery of Steven Ilewana with materials for water supply system and food items at Eweli village on Goodenough Island on 11th June 2017. The name Steven Ilewana does not appear on the Common Roll. The name Elewana Awamoeta appears on the Common Roll. This allegation is dismissed.
- Bribery of Gumyogibu Ugwerisa with K100.00 at Kausara village on Kiriwina Island on 28th June 2017. The name Gumyogibu Ugwerisa does not appear on the Common Roll. This allegation is

dismissed.

23. The allegations below will be considered together:

- Bribery of Saiguyau Tomnupolu with K100.00 at Liliu village on Kiriwina Island on 28th June 2017.
- Bribery of Tomnupolu Selubulobu with K100.00 at Liliu village on Kiriwina Island on 28th June 2017.

Saiguyau Tomnupolu and Tomnupolu Selubulobu do not have names on the Common Roll. They assert that they voted using the name Tomnupolu. The name Tomnupolu appears twice on the Common Roll at Obowada village but does not have a given name. This is insufficient and they did not point this out in their respective affidavits. This missing information should be known to them because when they went to cast their votes, it should have been picked up by the presiding officer and he should have informed them. These two allegations are dismissed.

24. It should be mentioned that there were also witnesses such as Reuben Levi and Rosa Waiyabu who gave evidence that their names were on the Common Roll but were only witnesses to the bribery allegation at Eweli village on Goodenough Island on 11th June 2017. Similarly, the evidence of James Valetuwa and Philip Andiawae was in support of the bribery allegation at Debatutu village on Goodenough Island on 10th June 2017 and not proof of any further allegation of bribery.

25. This left the allegations of:

- Bribery of Mosibiya Motowaya with K20.00 at Kavataria village on Kiriwina Island on 1st June 2017.
- Bribery of Vakota Digilasi with K20.00 at Kavataria village on Kiriwina Island on 1st June 2017.
- Bribery of Mwanabuma Toidaya with K20.00 at Kavataria village on Kiriwina Island on 1st June 2017.

26. The element of inducement must be clear and specific. If it is to be inferred, it should be the only rational inference the Court is able to draw from all the circumstances in the evidence. The statement by Higgins J in *Glenn Tobewa* (supra) at [18] and [19] are pertinent where it is noted that as bribery is an allegation of criminal conduct, the material facts must be proved beyond reasonable doubt. That includes the fact that the statements made by the third party or agent of the successful candidate not only were uttered with the intention of influencing voters but were uttered with the prior knowledge or authority of the successful candidate: Section 215(3)(a) of the *Organic Law*.

27. The authority has to be specific. That is, that he was authorised by the successful candidate to convey to voters hearing it the offer allegedly conveyed by the third party or agent with the intent that they should vote for the successful candidate.

28. As to bribing of Mosibiya Motowaya, Vakota Digilasi and Mwanabuma Toidaya with K20.00 each at Kavataria village on Kiriwina Island on 1st June 2017, Mosibiya, Vakota and Mwanabuma, in their respective affidavits, they said that they were present at a gathering in the village where the first respondent attended. They saw him presented an envelope and heard him said that it contained K10,000.00. They were each given K20.00 by a third party. Thus, there is evidence on the gift. But is there evidence to procure or induce them to vote for the first respondent?

29. None stated in his affidavit if the presentation of the money was given to perform the customary practice of “Besa Katuyuvisa valu”. This evidence is crucial because it would be consistent with the pleadings at para. 2.7 (c) of the petition where it is alleged that when presenting K10,000.00 and a pig, the first respondent uttered in the Kiriwina dialect “Besa Katuyuvisa valu”, referring to a customary practice in the Trobriand custom of a person in mourning presenting a small gift as token to be allowed to speak at a gathering. They did not also explain what it was.

30. This evidence was elicited from these witnesses at cross-examination by Mr. Baniyamia of counsel for the first respondent. It can mean that these witnesses deliberately withheld the information and did not want the Court to

know the real purpose of the gifts or that it was an inadvertence on their part, such an inadvertence is apparent when their affidavits are almost in identical terms.

31. When cross-examined, Mosibiya stated that K10,000.00 was part of gifts presented by the first respondent to perform "Besa Katuyuvisa valu". "Besa Katuyuvisa valu" is a customary practice performed by a visiting family member or relations to reopen dialogue and relationship with family members of a deceased person who are mourning his/her death. He said that the presentation of K10,000.00 was considered a large sum of money and unprecedented regardless of the person's standing in the community such as a member of the Parliament. It was way beyond the standard type of gifts presented at past ceremonies. A pig was also slaughtered and shared amongst the villagers. He said that a gift of a pot of rice, yams or bunch of betel-nut would suffice.

32. Vakota and Mwanabuma also confirmed this when they were cross-examined. But there is no evidence that after the giving of the gifts, how are the gifts distributed and who should receive parts of the gifts. For example, are the gifts restricted to the immediate family or extended to the entire village. This evidence is crucial especially where these witnesses/persons said that each of them received K20.00 from an agent of the first respondent. It must be clear because it is apparent that the defence is raising custom in its defence of the allegations. The question is whether the evidence on procuring or inducing the voters is capable of proving it.

33. It is open to infer that the giving of a large sum of money at a gathering described by the witnesses at election time may be viewed as bribery. Equally, it may be perfectly normal and acceptable and is open to infer. The onus of proof is on the petitioner to close all possible inferences that may be available. For the petitioner did not call evidence from an independent source and person well versed with the local custom and traditional practices of the Kiriwina Island people, for example, the village elder or chief to support the contrary view.

34. Moreover, none of the witnesses Mosibiya, Vakota and Mwanabuma including the others who gave evidence professed to be an 'expert' on local

custom and traditional practices of Kiriwina Island people. Their evidence is insufficient and unreliable. For custom requires proof: Section 2 of the *Customs Recognition Act*, Ch 19 and Sch. 2.1 of the *Constitution*.

35. The independence and authority of a person to give evidence of custom cannot be overstated. This case reminds me of the recent case of *Jim Simitab v. Kevin Isifu & Electoral Commission* (2018) N706.. It was a case where bribery was alleged against the new member of the Parliament for Wewak Open electorate. The member, then a candidate offered and gave a pig to Poiam villagers before he was allowed to stage a gathering and speak as part of his campaigning. A villager elder, former provincial politician and prominent businessman by the name of Robert Ninikin gave evidence of the Selip custom of the Wewak West-Coast people in defence of the bribery allegations. The evidence was that before a visitor or outsider is allowed to enter and make a speech in the village, a stick must be laid by that person or on his or her behalf by the villager who invites him or her. The laying of one stick symbolises giving of one pig. If more than one stick is laid, more than one pig will be given. If the stick is accepted by the village chief, permission is given to the visitor or outsider to make a speech.

36. In dismissing the petition after a trial, Cannings J held that:

“But the Court needed some independent evidence from an independent and authoritative person that what happened was unethical or improper or wrong or contrary to some particular law. There is no such evidence. Of the 26 witnesses in this case, none was independent.”

37. The same applies in this case but no independent witness was called.

38. His Honour further held:

“I am not convinced that the first respondent was abusing the custom of laying a stick and promising a pig to allow an outsider into the village to make a speech. Nor I am convinced that he was manipulating or twisting the Selip custom, to buy votes.

If the first respondent had been excessively generous in his offerings of

pigs, for example if he had provided ten pigs to each village, there would have been a strong argument that that was an abuse or misuse of custom – as distinct from compliance with custom, done without improper or criminal intent”.

39. Similarly, it could be said that the first respondent was over generous when he gave K10,000.00 but there is no independent and authoritative evidence from a person to verify if according to Kiriwan custom, it is unacceptable. And the petitioner cannot expect the defence to call evidence so that he can improve on his case.

40. For these reasons, as the evidence stands, it is incapable of proving that the giving of K10,000.00 by the first respondent was to procure or induce the electors to vote for the first respondent. The remaining allegations are dismissed.

41. There were other grounds relied upon by the respondents in the no case submission. This finding renders it unnecessary to consider them.

Order

42 The orders are:

1. The no case submission is upheld.
2. The petition is dismissed.
3. The petitioner shall pay the costs of the petition, to be taxed, if not agreed.
4. The security deposit in the sum of K5,000.00 held by the Registrar of the National Court shall be paid to the respondents in equal shares towards settlement of their costs.

Divenis Lawyers :
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