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PAPUA NEW GUINEA

[IN THE NATIONAL COURT OF JUSTICE]

EP NO 40 OF 2017

**IN THE MATTER OF A DISPUTED RETURN FOR THE
WEWAK OPEN ELECTORATE**

JIM SIMITAB

Petitioner

V

KEVIN ISIFU

First Respondent

ELECTORAL COMMISSION

Second Respondent

WEWAK : CANNINGS J

17, 18, 19, 20, 22, 23, 24, 25, 26, 29 JANUARY 2018

Elections – petitions – “bribery”: Organic Law on National and Local-level Government Elections, Section 215 – elements of offences of bribery (Criminal Code, Section 103) – relevance of adherence to customary practices and obligations during election campaign period.

The petitioner challenged the return of the first respondent as sitting member on five grounds of bribery under Section 215(1) of the *Organic Law on National and Local-level Government Elections*. It was alleged that the first respondent committed bribery under Sections 103(a)(iii) and 103(d) of the *Criminal Code*. Four grounds alleged that three days before the scheduled polling day the first respondent went to four villages with his campaign team and at each village staged a campaign event which involved him promising a pig to the villagers and making a campaign speech in which he said that the villagers should eat the pig he was giving them and vote for him. The petitioner argued that on each of these occasions the first respondent was abusing a local custom to hide what he was really doing: providing an inducement to electors to vote for him, ie bribing them. The other ground alleged that the first respondent met with three of his campaign committee

members and handed K5,000.00 cash to each of them and instructed them to go out and use the cash to buy votes.

Held:

- (1) The election of a candidate will be declared void under Section 215(1) of the Organic Law if the Court finds that he has committed bribery.
- (2) “Bribery” in Section 215 mean one of the offences of bribery in Section 103 of the *Criminal Code*. The petitioner must prove beyond reasonable doubt that one of those offences was committed by the successful candidate.
- (3) The grounds of the petition alleging abuse of custom by providing a pig to villages failed as the petitioner was unable to prove that the first respondent made statements linking the pig he provided to his call to the electors to vote for him. It was not proven that pig was provided in order to induce electors to endeavour to procure his return at the election or the vote of the village electors at the election. Further, it was not proven that the first respondent acted with criminal, corrupt or improper intent. There was no law in place that prevented custom applying during the campaign period. This was a legitimate case of complying with custom during the course of an election campaign.
- (4) The ground of the petition alleging that the first respondent paid cash to his campaign committee members with an instruction to use it to buy votes for him failed due to lack of evidence.

Cases cited

The following cases are cited in the judgment:

Allan Ebu v Roy Aua Evara [1983] PNGLR 201
Benny Diau v Mathew Gubag (2004) SC775
Daniel Tulapi v Aiya James (2013) N5323
Paru Aihi v Peter Isoaimo (2013) SC1276
Peter Isoaimo v Paru Aihi (2012) N4921
Peter Wararu Waranaka v Gabriel Dusava (2009) SC980
Pila Niningi v Francis Awesa (2013) N5322
Powes Parkop v Wari Vele (No 3) (2007) N3322
Raymond Agonia v Albert Karo [1992] PNGLR 463

Robert Kopaol v Philemon Embel (2003) SC727
Sir Arnold Amet v Peter Charles Yama (2010) SC1064

TRIAL

This was the trial of an election petition disputing the validity of an election.

Terminology and dates

In this judgment:

- ‘the Organic Law’ refers to the *Organic Law on National and Local-level Government Elections*
- dates refer to the year 2017 unless otherwise indicated.

Glossary

The following persons and places were referred to in evidence.

Persons

Albert Kongomori – first respondent witness # 5
 Arapesh – language of But ring villages
 Bruce Samban – former Premier, ESP
 Caspar Miesi – petitioner witness #5
 Chris Snowol – petitioner witness #10
 David Saranduo – first respondent supporter
 Electoral Commission – second respondent
 Esther Igo – another candidate
 Ezekiel Aki – first respondent supporter
 Henry Wosem – first respondent witness #1; campaign committee member
 Jack Solomon – petitioner witness #1
 Jackson Kwaigau – petitioner witness #8
 Jacob Kwaigau – petitioner witness #9
 James Seiyam – first respondent witness #12
 Jeffery Bial – petitioner witness #4
 Jeffery Blasagi – petitioner witness #2
 Jim Simitab – the petitioner, witness #11
 John Samut – first respondent supporter
 John Tobi – petitioner witness #6
 Joiclyn Blasagi – petitioner witness #3
 Joseph Gabut – another candidate
 Joyce Wato – first respondent supporter
 Julius Aki – first respondent witness #6 aka Julius Wawojin

Kevin Isifu – the first respondent, witness #3, successful candidate
 Lilian Kwaigau – first respondent witness #4
 Moses Manwau – another candidate
 Nancy Abial – woman referred to in evidence
 Petrus Budul – first respondent witness #7
 Robert Bagimeja – first respondent witness #8
 Robert Ninikin – first respondent witness #2; campaign manager
 Samson Kabu – petitioner witness #7
 Sopa Chimi – first respondent witness
 Stalen Yagera – first respondent witness #13
 Stanley Mutz – another candidate
 Stanley Mutz Samban – another candidate
 Sylvester Pokojam – another candidate
 Theo Wimbu – first respondent witness #10
 Tobias Narun – supporter of first respondent
 Tony Malafen – first respondent witness #9
 Weihigin Naimini – first respondent witness #11

Places

Aitape – town, West Sepik Province
 Arohimu – village re ground 4 of petition
 Banak – village
 Benjen – village in Boikin-Dagua LLG area
 Boiken-Dagua – Local-level Government area
 Boikin – village
 Boutique Hotel – hotel in Wewak
 But – village
 But Ring – village group
 Chamba – village in Boikin-Dagua LLG area
 Dagua – village
 Dogu – village
 Hareng – village in Boikin-Dagua LLG area
 Hawain – Local-level Government area
 Hawanumbo – village
 Karkar Island – island, Madang Province
 Kauk – village
 Kreer Heights – place in Wewak
 Kuberem – village
 Lowon No 1 – village re ground 2 of petition
 Lowon No 2 (aka Poiam) – village re ground 1 of petition
 Magobin – village
 Maprik – town, District, East Sepik Province
 Neimengua – village in Boikin-Dagua LLG area

Passam – place, Wewak District
 Poiam (aka Lowon No 2) – village re ground 1 of petition
 Pos – village
 Sapauaim – village
 Siro – village
 Sowom – village, near Ex-servicemen's settlement
 Sowom Ex-servicemen's Settlement – place re ground 5 of petition
 St Xavier's – school
 Supaim – village
 Surenou – village
 Surumba – village, polling place
 Umamum – village re ground 3 of petition
 Wainjo – village re ground 6 of petition
 Wewak – town, District
 Woginara No 1 – village
 Yangoru – District, East Sepik Province
 Yawasoro – village

TRIAL

This was the trial of an election petition disputing the validity of the election of the sitting member at a general election.

Counsel

M Murray for the petitioner
A W Jerewai for the first respondent
H Nii (& M Ninkama) for the second respondent

CANNINGS J: The petitioner Jim Simitab filed a petition disputing the election of the first respondent Kevin Isifu as member for Wewak Open in the 2017 general election. He seeks a declaration that the election of the first respondent, Kevin Isifu, be declared void on the ground that the first respondent committed bribery. The declaration is sought under Section 215(1) (*voiding election for illegal practices*) of the *Organic Law on National and Local-level Government Elections*, which provides:

If the National Court finds that a candidate has committed or has attempted to commit bribery or undue influence, his election, if he is a successful candidate, shall be declared void.

The petition contains seven grounds of bribery. Prior to the trial the petitioner abandoned the first and seventh grounds, leaving the petition with five

grounds, numbered 2 to 6. No errors or omissions are alleged to have been committed by the second respondent, the Electoral Commission. Objections to competency of the petition by both respondents have been dismissed (*Simitab v Isifu* (2018) N7068).

Grounds 2 to 5 allege that on 21 June the first respondent went to four villages with his campaign team and at each village staged a campaign event which involved him promising a pig to the villagers and making a campaign speech in which he said that the villagers should eat the pig he was giving them and vote for him. The petitioner argues that on each of these occasions the first respondent was abusing a local custom (providing a pig to pave the way for a visitor to make a speech in the village) to hide what he was really doing: providing an inducement to electors to vote for him, ie bribing them. Ground 6 alleges that on 24 June the first respondent met with three of his campaign committee members and handed K5,000.00 cash to each of them and instructed them to go out and use the cash to buy votes. The first respondent refutes all the allegations of bribery.

UNDISPUTED FACTS

A number of undisputed facts have emerged from the evidence:

- The writ for the election was issued on 20 April. Nominations closed on 27 April. The petitioner and the first respondent nominated within time, with 38 other candidates. Polling was originally set for Saturday 24 June.
- On the afternoon of Tuesday 20 June the first respondent went with his campaign team (committee members and supporters), including his campaign manager, Robert Ninikin, to Poiam (also known as Lowon No 1) village. The events at Poiam village were the subject of the abandoned ground 1 of the petition, but evidence of what happened at Poiam was given in the trial and is relevant to determination of grounds 2 to 5.
- Mr Ninikin is from that area of the electorate, and is a former provincial politician and is a prominent businessman and community leader. Also accompanying the first respondent's campaign team was another candidate, Jack Solomon, and Mr Solomon's campaign manager, Jeffery Blasagi. Mr Solomon is from Lowon No 1 village.

- Upon entering Poiam village Mr Ninikin laid two sticks on the ground. According to the local custom of the Arapesh language group, which is the *Tok Ples* in the But Ring villages, laying two sticks signified that two pigs (each stick representing one pig) would be provided by the visitors. One pig would be for the villagers generally and the other pig would be for Mr Solomon, he being a community leader in Lowon No 1 village and the candidate from the Arapesh language group. It is in dispute what, if anything, Mr Ninikin said and what the first respondent said (apart from making, a campaign speech, which is undisputed, in which he outlined his policies and what he would do if he were elected).
- It is a local custom that if a visitor wishes to enter a village and stage an event or make a speech, the visitor or a big man on his behalf should lay a stick on the ground in a public area in the village, symbolising an undertaking that a pig would be provided to the villagers as a mark of respect and as payment for the privilege of being allowed to speak or stage an event in public in that village. A village chief will then decide whether to accept the stick. Acceptance of the stick means that the visitor has permission, it paves the way and it provides a passage for the visitor, to enter the village and make the speech or stage the event. It imposes an obligation on the visitor to provide a pig, not necessarily on the same day, but within a few days after the visit. If the stick is not accepted, the visitor should not enter the village and stage any public gathering. The parties dispute whether that custom applies during the campaign period for an election. The petitioner argues that it does not apply as it amounts to bribery and corruption. The first respondent argued that it applies at all times including in the campaign period.
- There is another local custom, called "Selip", involving presentation of pigs. A man who wants to become a leader in the village must present a pig to the village chief. That pig is called the Selip. The village chief will then pass the pig to the next neighbouring village chief, who will pass it to the next village chief and so on until the pig reaches the chief of the last village. The chief of the last village will slaughter the pig, cook it and distribute the pork to the people of his village. Only people in the last village will eat the pork. Only one pig is given. The parties dispute whether Selip custom was being invoked by the first respondent. The petitioner argues that he was manipulating the Selip custom to bribe electors. The first respondent argues that it was not the Selip custom that he applied but the other rule of custom requiring him as a visitor to lay a stick, representing a pig, to obtain a right of passage into a village to make a speech.

- The first respondent was a visitor as he is generally regarded as being from another part of East Sepik Province, Yangoru District.
- In the days following 20 June a pig was duly provided to the Poiam villagers. It was slaughtered and the pork was distributed amongst the villagers.
- The next day, Wednesday 21 June, the first respondent and his campaign team went for campaign purposes, to at least six villages or settlements within the But Ring area, starting in the morning and continuing to late in the night. It is what happened at the first four places visited which are the subject of grounds 2 to 5 of the petition:
 - Lowon No 1 village (ground 2);
 - Umamum village (ground 3);
 - Arohimi village (ground 4);
 - Sowom Ex-servicemen's settlement (ground 5).
- The places were visited in the order shown and one or two hours was spent at each place.
- The order of proceedings was the same at each place:
 - The first respondent and his campaign team including Mr Ninikin would go to the village, accompanied by Jack Solomon and his campaign manager, Jeffery Blasagi;
 - Mr Ninikin would lay a stick on the ground, symbolising that the first respondent was seeking permission to enter the village to hold a public gathering and make a speech and undertaking to provide a pig for the villagers;
 - A village chief would accept the stick, making a passage for the first respondent to enter the village;
 - In accordance with the program which had been planned in conjunction with village leaders, the first respondent would

proceed to a podium built for the occasion and from there he would make his campaign speech.

- Within two or three days after 21 June, Mr Ninikin, acting on behalf of the first respondent, provided a pig, as promised, to each of the four places visited, and in each case the pig was, soon after its receipt, slaughtered and the pork distributed amongst the villagers, who understood that the pig had been provided by the first respondent.
- For much of the campaign period, from April to June, the first respondent was staying in room 55 at the Boutique Hotel, Wewak, and using it as his campaign headquarters. Campaign committee members would visit him there from time to time to brief him on campaign matters and on occasions he would give them cash for expenses incurred during the campaign.

“BRIBERY”

It is settled law that “bribery” in Section 215 of the Organic Law means one of the offences of bribery created by Section 103 of the *Criminal Code* respectively. The petitioner has the burden of proving, according to the criminal standard of proof of beyond reasonable doubt, that the offence of bribery was committed or attempted to be committed by the successful candidate (*Robert Kopaol v Philemon Embel* (2003) SC727, *Benny Diau v Mathew Gubag* (2004) SC775, *Peter Wararu Waranaka v Gabriel Dusava* (2009) SC980, *Sir Arnold Amet v Peter Charles Yama* (2010) SC1064).

Section 103 (*bribery*) of the *Criminal Code* states:

A person who—

- (a) gives, confers or procures, or promises or offers to give or confer, or to procure or attempt to procure, to, on, or for, any person any property or benefit of any kind—
 - (i) on account of anything done or omitted to be done, or to be done or omitted to be done, by an elector at an election in the capacity of an elector; or
 - (ii) on account of any person acting or joining in a procession during an election; or
 - (iii) in order to induce any person to endeavour to procure the return of any person at an election, or the vote of any elector at an election; or

- (b) being an elector, asks, receives or obtains, or agrees or attempts to receive or obtain, any property or benefit for himself or any other person on account of anything done or omitted to be done, or to be done or omitted to be done, by him at an election in the capacity of an elector; or
- (c) asks, receives or obtains, or agrees or attempts to receive or obtain, any property or benefit for himself or any other person, on account of a promise made by him or any other person to endeavour to procure the return of any person at an election, or the vote of any person at an election; or
- (d) advances or pays any money to or to the use of any other person with the intent that the money will be applied for any of the purposes referred to in Paragraph (a), (b) or (c) or in discharge or repayment of money wholly or in part applied for any such purpose; or
- (e) corruptly transfers or pays any property or money to any person for the purpose of enabling that person to be registered as an elector, and so influencing the vote of that person at a future election; or
- (f) is privy to the transfer or payment referred to in Paragraph (e) that is made for his benefit; or
- (g) being a candidate at an election, convenes or holds a meeting of electors or of his committee in a house licensed for the sale of fermented or spirituous liquors,

is guilty of a misdemeanour.

Penalty: A fine not exceeding K400.00 or imprisonment for a term not exceeding one year.

The petitioner alleges that the first respondent committed bribery under Sections 103(a)(iii) and 103(d) of the *Criminal Code*. The petition contains allegations that the first respondent also committed other *Criminal Code* offences: treating (Section 101(1)), undue influence (Section 102(b)) and other illegal practices (Section 106(1)(a)). But those allegations were abandoned.

Section 103(a)(iii)

As I explained in *Peter Isoaimo v Paru Aihi* (2012) N4921, to prove an offence under Section 103(a)(iii) the petitioner must prove that the first respondent:

- 1 *gave, conferred or procured*, or promised or offered to give or confer, or to procure or attempted to procure, to, on, or for, any person;

- 2 *any property or benefit* of any kind;
- 3 *in order to induce* any person to endeavour to procure the return of any person (the first respondent) at an election or the vote of any elector at an election.

Section 103(d)

To prove an offence under Section 103(d) the petitioner must prove that the first respondent:

- 1 *advanced or paid any money* to or to the use of any other person;
- 2 *with the intent* that the money will be applied for any of the purposes referred to in Paragraph (a), (b) or (c) or in discharge or repayment of money wholly or in part applied for any such purpose (ie the money must be applied for the purpose of endeavouring to procure the return of any person (the first respondent) at an election or the vote of any elector at an election (paras (a) and (c)) or doing or omitting to do something at an election in the capacity of an elector (para (b)).

METHOD

I will now address each of the five live grounds of the petition. I will deal with ground 2 first, by explaining the allegation underlying the ground, then I will set out the evidence for the petitioner and for the first respondent. No evidence was presented by the second respondent. Witnesses have been given numbers according to the order in which they gave evidence, eg witness No P1 refers to the first witness for the petitioner, Jack Solomon. I will weigh the evidence and make findings of fact before determining whether it has been proven that the first respondent committed bribery. Then I will deal with grounds 3, 4 and 5 as they are very similar to ground 2. The final ground to be determined is ground 6.

GROUND 2: LOWON NO 1 VILLAGE

Allegations

The first respondent made a statement just before his campaign speech:

Yupela olgeta kaikai dispela pik na givim mi namba wan vout bilong yupela.

[You can all eat this pig and vote me as your first preference.]

Furthermore:

- with the first respondent's knowledge, one of his campaign managers, Henry Wosem, paid K1,000.00 cash for a pig owned by an elector, Joiclyn Blasagi, which was an artificially inflated price as the pig was only worth K500.00, and paid another K1,000.00 cash for a pig owned by another elector, Jeffery Bial, which was also an artificially inflated price as the pig was a small one;
- Jack Solomon was a running mate of the first respondent and during the activity, a few days later, of dividing the pork and giving it to "all houses" in the village, stated:

Yupla olgeta kaikai displa pik na givim mi ol Namba wan vout bilong yupla l na ol Namba tu vout givim long Kevin Isifu.

[You can all eat this pig and vote me as your first preference and your second preference to Kevin Isifu.]

- by reason of those actions, at least three electors (Jeffery Blasagi, his wife Joiclyn Blasagi, and Jeffery Bial cast their votes for the first respondent.

As a consequence, the first respondent committed the offence of bribery, in that:

- he gifted the pig to the villagers, on the pretext that he was complying with custom, but he was in reality inducing or bribing them with pork, so that the electors amongst them would vote for him; and
- he encouraged them to enjoy the food he was providing and to think that they should vote for him; and
- he paid double the market value of the pig that was purchased, thereby bribing Joiclyn Blasagi and Jeffery Bial with K500.00 cash handouts.

Evidence for the petitioner

Four witnesses gave evidence as summarised in the following table.

P1	Jack Solomon	Candidate, Lowon (No 1) village
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Evidence: The first respondent said 'eat this pig and give your number 1 vote to me, but if you have another candidate you can give your second preference to me' – presenting a pig to the villagers was not part of the local custom of laying a stick to seek a passage to make a speech – that custom does not apply in the election campaign period – it was bribery.

The first respondent was bribing people on the pretext that he was adhering to custom – he was not using the Selip custom properly as he is not a leader from that area.

He (the witness) received the pig that was promised to him on 20 June at Poiam – he was put in an awkward situation by the first respondent who, by giving him a pig, bribed him to say to the Lowan No 1 villagers when the pork was distributed: 'You can all eat this pig and vote me as your first preference and your second preference to Kevin Isifu.' The first respondent had not sought his permission to give him the pig.

He (the witness) was a candidate and he did not donate any pigs during his campaign – the first respondent was the only candidate to bribe electors with pigs in that area.

Distributing the pork to the villagers was in itself bribery because when the villagers were eating the pork they were aware that the pig had been donated by the first respondent and it changed their mind about who to vote for – they felt obliged to vote for the first respondent.

In cross-examination he reiterated that the custom that the first respondent purported to rely on did not apply in the campaign period as it only amounts to bribery. On the issue of whether Robert Ninikin spoke after laying the stick, the witness said 'no, he did not' – the first respondent did all the talking.

P2	Jeffery Blasagi	Campaign manager for Jack Solomon, Lowon (No 1) village
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Evidence: He was present - there were about 200 people at the gathering - the first respondent said 'eat this pig and give your number 1 vote to me, but if you vote for Jack Solomon you can give your second preference to me' – presenting a pig to the villagers was not part of the local custom of laying a stick to seek a passage to make a speech – that custom does not apply in the election campaign period – it was bribery.

Henry Wosem (a committee member for the first respondent) was present and gave him K1,000.00 for his wife's pig – that was obviously a bribe as the pig was only worth K500.00.

P3	Joiclyn Blasagi	Wife of Jeffery Blasagi, Lowon (No 1) village
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Evidence: She asked Henry Wosem to pay her K500.00 for her pig but he gave her (through her husband, Jeffery) K1,000.00 – she took the K1,000.00 but is of the view that it

was a bribe – her pig was slaughtered on the polling day, 29 June – she gave her #2 vote to the first respondent and her #3 vote to the petitioner – she was not going to vote that way but because she had received cash and pork from the first respondent she changed her voting pattern – when her pig was slaughtered, Jack Solomon was present and he told the Lowon No 1 villagers to give their #2 votes to the first respondent as he had donated the pig.

P4	Jeffery Bial	Villager, Lowon (No 1) village
<p>Evidence: He was present on 21 June – the first respondent was welcomed by a sing-sing group and carried on chair to the grandstand – Robert Ninikin laid the stick and the first respondent did the talking. The first respondent said ‘eat this pig and give your number 1 vote to me, but if you have another candidate you can give your second preference to me’.</p> <p>Henry Wosem paid him K1,000.00 for his pig - it was not worth nearly that much as it was a very small pig – the witness indicated that the pig had a height of only 30 cm – the extra cash he received was a bribe and presenting a pig to the villagers was not part of the local custom of laying a stick to seek a passage to make a speech – that custom does not apply in the election campaign period – it was bribery.</p>		

Evidence for the first respondent

Three witnesses gave evidence as summarised in the following table.

R1	Henry Wosem	A campaign committee member for the first respondent
<p>Evidence: Robert Ninikin laid the stick and made a short speech, calling out to the community to please accept the stick and allow the first respondent to take the stage – the village chief, John Samut, got the stick and welcomed the first respondent and invited him to speak – the first respondent did <i>not</i> tell the people to eat the pig and vote for him – he only told them if they agreed with his policies they should vote for him and if they had another candidate in mind then they could give him their #2 or #3 vote.</p> <p>He denied the claim by Joiclyn Blasagi that he paid her a bribe when purchasing her pig – he gave her the price she asked for – it was a big, mature pig, as it had to be as it was being used as part of custom, and it was worth K1,000.00.</p> <p>In cross-examination he reiterated that the custom that the first respondent was using applied at all times, including during the campaign period – the first respondent was obliged to comply with custom, otherwise he would not have been allowed to give his speech in the village.</p>		

He agreed that there was a custom called Selip but said that Selip is only used when a clan leader dies and a replacement needs to be appointed: that is when the pig is passed along the villages – Selip is different to the custom complied with by the first respondent, which is about clearing a passage to give a visitor or outsider the right to hold a gathering and speak.

R2	Robert Ninikin	A campaign manager for the first respondent
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Evidence: He is a customary and community leader in the But Ring area – he was obliged to comply with the local custom and so was the first respondent – he had laid two sticks the previous day at Poiam, which were received by the village chief, Petrus Budul, who accepted them, and this paved the way for the first respondent to give his campaign speech.

The same custom was followed at Lowon No 1 – he laid a stick and made a short speech seeking permission from the village chief, John Samut, for the first respondent to speak – the first respondent gave his campaign speech – the first respondent did *not* tell the people to eat the pig and vote for him – the first respondent only spoke about his policies.

He ensured that the pig was provided to the village within a few days after their visit – he was not involved in slaughtering the pig or distribution of the pork.

In cross-examination he reiterated that he and the first respondent were obliged to comply with custom – it was not a matter of providing a pig and expecting something in return, such as votes for the first respondent; it was a matter of compliance with custom – if they had gone empty-handed to these villages, the first respondent would not have been allowed to speak – he denied that he and the first respondent had devised this scheme of bribing voters on the pretext of complying with custom – he had no choice: if he did not comply with custom he would not have been allowed to bring his candidate into the village – the electors gave him their votes because of his policies, not because of the pig.

R3	Kevin Isifu	First respondent
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Evidence: He relied on Robert Ninikin, his campaign manager for the But Ring area, to advise him on what had to be done to comply with local custom – Mr Ninikin explained that the local people do not accept people from outside easily, so Mr Ninikin arranged his visits to the villages and it was his job to see that the customary rituals were followed – he (the witness) was not really interested in the customary rituals, he wanted to comply with them but his main focus was on his campaign – pigs are an important part of custom in all parts of East Sepik Province but in the But Ring area pigs are especially important, he was informed, as without promising a pig you will not go into a village to campaign – he did not at any stage tell the people to eat the pig and think of him or vote for him – he gave an awareness session on the limited preferential voting system as part of his speech and told the villagers how important it was to fill out their ballot papers with 1, 2 and 3.

Mr Ninikin provided the pigs but he (the witness) is responsible for the ultimate cost of the pigs – in that sense it is true to say that he donated the pigs - he is very much aware of the law on bribery and if he thought that what he was doing was bribery he would not have done it – he consulted Mr Ninikin and other customary leaders who advised him on what had to be done to comply with custom – it was the only way for him to campaign in the But Ring area – he put to the villagers ‘if you agree with my policies, give me your #1, #2 or #3 votes’ but he made no reference to the pigs – he was not bribing anyone and it did not occur to him that what he was doing might be regarded by some people as vote-buying.

Findings of fact

On the question of whether Robert Ninikin spoke after laying the stick, I find his evidence persuasive that yes, he made a short speech as he was a customary leader and he was bringing an outsider into the village to campaign. The evidence of the petitioner’s witnesses that Robert Ninikin said nothing and left all the talking to the first respondent was difficult to believe.

As to whether the first respondent said the words attributed to him in the petition ‘You can all eat this pig and vote me as your first preference’, I found the emphatic denial by the first respondent convincing. I thought he was an impressive witness. His evidence was corroborated by that of Henry Wosem and Robert Ninikin. I thought Robert Ninikin was an impressive witness and that his evidence of the first respondent focusing on his campaign speech and leaving the customary rituals for him to sort out, was more convincing and credible than the evidence of the petitioner’s witnesses on this point.

I did not find convincing the evidence of the petitioner’s witnesses on the allegedly excessive prices paid for the pigs purchased from Joiclyn Blasagi and Jeffery Bial. There is conflicting evidence as to whether the price of K1,000.00 for Joiclyn Blasagi’s pig was set by the vendor or whether it was an inflated price, being a K500.00 cash handout – and therefore a bribe – for the vendor. There was no independent evidence to go by, so I take judicial notice of the fact that pigs in most parts of PNG are valuable cultural and economic commodities. K1,000.00 does not sound like a grossly unreasonable amount to pay for a pig, at least a mature, fattened pig, purchased as part of a customary ritual (or to bribe voters, for that matter). I thought that Jeffery Bial’s evidence as to the size of his pig was ridiculous. Impossible to believe. The size of the pig he described was that of a piglet. It cannot be believed that a piglet was provided as part of a customary ritual (or to bribe voters, for that matter). Such evidence tarnished the credibility of his evidence, irretrievably.

As to the other alleged acts of bribery, the facts are non-contentious: the stick was laid, a pig was promised, it was delivered a couple of days later (on the polling day as it turned out), it was slaughtered and the pork was distributed amongst the villagers, a number of whom were electors and voted for the first respondent.

Did the first respondent commit bribery under Section 103(a)(iii) of the Criminal Code?

It must be proven that the first respondent:

- 1 gave, conferred or procured ... to, on, or for, any person;
- 2 any property or benefit of any kind;
- 3 in order to induce any person to endeavour to procure the return of the first respondent at the election or the vote of any elector at the election.

The first two elements are established in that the first respondent (1) conferred on the villagers (2) property (the pig) and a benefit (they were able to enjoy fresh pork).

As to the third, it is necessary for the petitioner to prove beyond reasonable doubt that the pig was provided in order to induce:

- the village electors to endeavour to procure his return at the election; or
- the vote of the village electors at the election.

Furthermore, it is necessary to prove (though it is not expressly stated as an element of the offence) that the first respondent acted with criminal, corrupt or improper intent (*Raymond Agonia v Albert Karo* [1992] PNGLR 463, *Powes Parkop v Wari Vele (No 3)* (2007) N3322, *Pila Niningi v Francis Awesa* (2013) N5322, *Daniel Tulapi v Aiya James* (2013) N5323).

I am not persuaded beyond reasonable doubt that these latter elements have been established. I appreciate clearly the petitioner's argument that providing a pig to the villagers was a vote-buying exercise, to gain favour with, to grease the electors, to link the electors' thoughts as to who to vote for with the first respondent and to think of him in favourable terms at the critical time when they were about to cast their votes. However there is sufficient evidence to show that providing a pig in these circumstances was a legitimate case of complying with custom. I am not entirely convinced by the evidence of Mr

Ninikin and the first respondent that laying the stick and providing a pig was an essential prerequisite to the first respondent being allowed into the village to make his campaign speech. But I did not have to be convinced that that was the fact. It is the petitioner's case and he has the burden of proof. The standard of proof is onerous: the criminal standard of beyond reasonable doubt and he is falling short.

In taking this view on the issue of application of custom during an election campaign I have had close regard to the cautionary words of two members of the Supreme Court in the recent case of *Paru Aihi v Peter Isoaimo* (2013) SC1276. Kandakasi J said this:

Taking into account the seriousness of the offence of bribery and its serious adverse consequence on our society, and the purpose of enacting the provisions of s. 103 of the Criminal Code and s. 215 of the Organic Law on Elections, I am respectfully of the view that the decision and approach in *Genia v. Temu* and *Thompson v Pokasui* are correct. Just because a culture or custom as come into existence, does not necessarily follow that it is right. It is time now to identify what kind of conducts or activities are acceptable in our country during election times and which kinds of conduct and behaviour are not acceptable. As noted campaigns outlining a candidate's qualifications, experience preferably as managers as well as their good standing and integrity and what are their visions for their respective electorates and our nation as a whole should be encouraged. There should be an encouragement of debates on policies such those we often see take place in the USA and our closest neighbour, Australia.

101. There should be a total eradication of giving of any gifts or a throwing up of big feasts and parties around election and campaign periods. For regardless of how convincing an argument is presented to the contrary, most if not all of these are intended to promote the giver's election. Those who seek elections know that if they do not give these so called gifts, parties and feasts or the so called discharge of a customary obligation, they would not be elected. So their giving is because of the wish and desire to being elected. If it were not for that, they would not be engaged in such activities at the first place, unless they are under some short of compulsion, which they should be required to establish by appropriate evidence. Then once elected because of the gifts and favours they have extended to people, there is always the temptation in the elected member looking for ways and means of recovering the substantial amounts of money he has outlaid to secure his election victory so much to the point of neglecting his electorate's and his electoral duties. The end result unfortunately, is resulting in once upon a time, good local and district townships and government posts and even bigger towns and cities being neglected. Potholes, tall grass, broken down bridges and public buildings abound because no attention is being given to them by the elected leaders who are most of the time living outside their electorates. The whole system of public services from the headquarters in Port Moresby down to the rural communities appear not to be in existence save only for those who are able to

bribe their way through. Voters have now smartened up, although something, we as a nation ought not to be proud of but denounce it in the strongest terms possible. The voters know that, once a person is elected, he or she would be careless about the people and hence the electorate's needs and he or she would go and make his home in Port Moresby or elsewhere. Given that, it is quite a common place now for electors to vote for whoever pays them the highest price.

102. Giving gifts and throwing up of big or small parties and feasts are good. However what makes them wrong is when they are employed to influence an election outcome in the case of an election setting. If people want to give gifts or throw up parties there should be no problem if they take place well before an election year and certainly not immediately before the issuance of writs, commencement and during campaigning and election periods. We should be encouraging better planning by those who wish to seek to lead our nation and allow for a clean election period where the integrity of those standing for elections and their policies or plans for their respective electorates and how they propose to achieve those plans should be left to be the focus during the election period. Allowing this so called culture or custom of festivities, parties and giving of gifts will continue to allow for a muddying up of the election period and divert attention away from the important issues of a candidate's, integrity, policies or plans for his electorate and how he or she proposes to achieve them. This is the only way to prevent what has fast become a cash based election where the more money a person is prepared to throw away in cash handouts, parties, festivities and other benefits, the more likely they are to get elected.

103. I appreciate that, our cultures and customs are preserved under our Constitution by virtue of Schedule 2.1 (1). However, I note this is not an open license. It is subject to Schedule 2.1 (2) which qualifies that a custom that is inconsistent with the Constitution or a written law and the general principles of humanity is not to be adopted. In the case of the custom of giving of gifts, parties and festivities and other benefits with eyes fixed on being elected at an election during election periods are clearly outlawed by s. 103 of the Criminal Code and s. 215 of the Organic Law on Elections, for the serious impact this has against the development and advancement of our nation. This is thus not a good custom which is rightly being proscribed by the provisions in question.

Yagi J stated:

111. The custom and practice of staging feasts, handing out gifts, pigs, shell monies or other forms of traditional wealth during ceremonies is an integral and entrenched part of culture in many of our traditional communities and societies. This custom is practiced mainly during ceremonies such as marriage, death, mediation, compensation, initiation, etc. It had tremendous value and benefit to individuals, families, and clan groups and the larger communities and societies in general in terms of strengthening and harnessing relationships, peace and good order.

112. Unfortunately and sadly, with the advent of modernization and our desire for change and to adopt a new order in our constitutional system of government through the electoral system and process some of our good culture, tradition and practice have been misapplied or misused. One such culture is the practice of big man handing out goodies during ceremonies and festivities. Sadly this culture has found roots and become entrenched during the electoral period.

113. A review of National and Supreme Court decisions relating to election petitions makes it plain that there are indeed many cases involving bribery, undue influence and illegal practice. It appears the number of these cases, in particular bribery cases, is on the rise following each election period. This is indeed a very worrying trend. In many of these cases the big man culture of handing out monies and other goodies during the election period continue to feature strongly and it seems despite the Court's emphatic rejection and criticism of such practice, it continues to flourish and in some cases adopted new styles and forms. Such practice is a serious threat to citizen's right to participate in a free, fair and democratic electoral process. It has huge potential for diminishing the credibility and integrity of the election process. In this regard, I respectfully agree with Kandakasi J that such practice is inconsistent with the Constitution, the Organic Law and the Criminal Code and therefore should be condemned and rejected outright. In my view, unless the circumstances and context clearly suggest otherwise, a Court hearing a petition is entitled to form its own view based on the available evidence on such practice with a degree of suspicion and cynicism.

Mr Murray consistently put to the first respondent's witnesses that the custom did not apply during the campaign period and they consistently replied that custom applies all the time. And Mr Murray extracted from the petitioner's witnesses the view that the custom did not apply during the campaign period and that what the first respondent did amounted to bribery. These were reasonable views, and it is easy to understand that some people would regard what happened as bribery. 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 was no such evidence. Of the 26 witnesses in this case, none was independent.

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.

I am persuaded by the submissions of Mr Jerewai that this was a legitimate case of complying with custom during the course of an election campaign. Though provision of the pig and the pork might have had the effect of inducing some voters to cast their vote for the first respondent, I am not convinced that that was the purpose of providing the pig. I am not convinced that the first respondent acted with criminal intent. If the first respondent were charged with an offence under Section 103(a)(iii) of the Criminal Code it is in my view unlikely that he would be found guilty.

No offence under Section 103(a)(iii) has been proven to have been committed or attempted.

Did the first respondent commit bribery under Section 103(d) of the Criminal Code?

Section 103(d) is concerned only with the payment of "money" (which is not defined in Section 98, the definition provision of Division III.3 (corrupt and improper practices at elections) of the Criminal Code). A pig does not fall within the normal meaning of the term "money", so Section 103(d) is relevant in the present case only to the K1,000.00 cash that was paid to Joiclyn Blasagi and Jeffery Bial for purchase of their pigs. It must be proven that the first respondent:

- 1 advanced or paid any money to or to the use of any other person;
- 2 with the intent that the money will be applied for any of the prescribed purposes, eg endeavouring to procure his return at the election or the vote of electors at the election.

The first element has been proven in that the cash money was paid to Joiclyn Blasagi and Jeffery Bial. The second element is not proven as the cash was paid for legitimate business transactions: purchase of pigs for use in a customary exchange. The prices paid were not excessive, but even if it were above market price, it was not so obviously excessive as to be regarded as a bribe or an inducement to vote for the first respondent. There was an absence of criminal intent.

Conclusion re ground 2 of the petition

This ground fails as it has not been proven that the first respondent committed bribery.

GROUND 3, 4 & 5: UMAMUM VILLAGE, AROHIMI VILLAGE AND SOWOM EX-SERVICEMEN'S SETTLEMENT

Allegations

The allegations underlying these grounds were very similar to those underlying ground 2. In fact the allegations were less complex than those in ground 2 as there was nothing about cash being used to bribe voters. The alleged vehicle of bribery was a pig. It was alleged that the first respondent provided a pig which was duly slaughtered and eaten by the villagers in the days leading up to the polling. It is alleged that as part of his campaign speech the first respondent said words to the effect that:

Yupla olgeta kaikai displa pik na givim mi ol Namba wan vout na sapos yu stap wantaim Jack Solomon orait givim ol Namba wan vout bilong yupla long em na ol Namba tu givim i kam long mi.

[You can all eat this pig and vote me as you first preference and if you are supporting Jack Solomon, then vote for him as your first preference and vote for me as your second preference.]

It is alleged that by reason of those actions, at least one elector at each place cast a vote in favour of the first respondent. It is alleged that as a consequence, the first respondent committed the offence of bribery, in that:

- he gifted the pig to the villagers, on the pretext that he was complying with custom, but he was in reality inducing or bribing them with pork, so that the electors amongst them would vote for him; and
- he encouraged them to enjoy the food he was providing and to think that they should vote for him.

Evidence for the petitioner

It was similar to the evidence in support of ground 2 in that Jack Solomon and Jeffery Blasagi said that the same things happened and were said at Umamum village, Arohimi village and Sowom Ex-servicemen's settlement as happened and were said at Lowon No 1, resulting in their view of the happenings being that the first respondent had committed bribery.

Their evidence and their view of the happenings were supported by the evidence of an elector, at each of the places, who testified that:

- the first respondent stated the words he is alleged in the petition to have said (linking the pig he donated to the casting of votes and allocation of preferences); and
- he (the witness) had eaten the pork provided by the first respondent; and
- he had changed his voting pattern and voted for the first respondent because of the pig he provided; and
- he had formed the considered view that the first respondent had bribed the voters.

Those witnesses were Caspar Miesi (Umamum village), John Tobi (Arohimu village) and Samson Kabu (Sowom Ex-servicemen's settlement).

The petitioner himself, Mr Simitab, gave evidence at one point (leave having been granted to reopen his case) to rebut an allegation by a witness for the first respondent on ground 3. The Umamum village chief, Weihigin Naimini, alleged in his evidence that the petitioner had campaigned at the village and provided a pig to the villagers, just as the first respondent did. The petitioner denied the allegation vehemently, saying that he did not provide any pigs during his campaign as he knew it was wrong. It was bribery. He also stated that during the campaign period the custom that the first respondent had used and abused, did not apply. The petitioner indicated that during the campaign period he did not respect the village leaders and what they were doing, accepting pigs, as they were just encouraging abuse of custom and corruption of the electoral process.

Evidence for the first respondent

It was similar to the evidence in support of ground 2 in that Henry Wosem, Robert Ninikin and the first respondent said that the same things happened and were said at Umamum village, Arohimu village and Sowom Ex-servicemen's settlement as happened and were said at Lowon No 1, resulting in their view of the happenings being that the first respondent had done the right thing by the local people and complied with their custom and had not committed bribery.

Their evidence and their view of the happenings were supported by the evidence of a village leader or chief at each of the places who testified that:

- the first respondent did *not* state the words he is alleged in the petition to have said (linking the pig he donated to the casting of votes and allocation of preferences); and
- he (the witness) had eaten the pork provided by the first respondent; and
- he had *not* voted for the first respondent because of the pig he provided; and
- he had formed the considered view that the first respondent had *not* bribed the voters, but had complied with their custom which was the right and proper and respectful thing for him to have done.

Those witnesses were Weihigin Naimini (Umamum village), James Seiyam (Arohim village) and Sopa Chimi (Sowom Ex-servicemen's settlement).

Findings of fact

None of the evidence of the various witnesses who gave evidence in relation to grounds 3, 4 or 5 – being those who gave evidence only on one of those grounds and not on ground 2 – was so different and compelling as to lead me to make findings of fact different to those made under ground 2. I find therefore that:

- Robert Ninikin spoke after laying the stick, he made a short speech as he was a customary leader and he was bringing an outsider into the place to campaign.
- The first respondent did *not* say the words attributed to him in the petition 'You can all eat this pig and vote me as your first preference', or words to that effect.
- The stick was laid, a pig was promised, it was delivered a couple of days later (just before or on the scheduled polling day, 24 June), it was slaughtered and the pork was distributed amongst the villagers, a number of whom were electors and voted for the first respondent.

Did the first respondent commit bribery under Section 103(a)(iii) of the Criminal Code?

No, because the pig was not provided in order to induce:

- the village electors to endeavour to procure his return at the election; or
- the vote of the village electors at the election.

Furthermore, it has not been proven that the first respondent acted with criminal, corrupt or improper intent. There was no law in place that prevented custom applying during the campaign period. It has not been proven 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. He was not manipulating or twisting the Selip custom, to buy votes. This was a legitimate case of complying with custom during the course of an election campaign. Though provision of the pig and the pork might have had the effect of inducing some voters to cast their vote for the first respondent, it has not been proven that that was the purpose of providing the pig. No offence under Section 103(a)(iii) has been proven to have been committed or attempted.

Did the first respondent commit bribery under Section 103(d) of the Criminal Code?

No, as it is an element of this offence that “money” be advanced or paid to an elector. Pigs are not money.

Conclusion re grounds 3, 4 & 5 of the petition

These grounds fail as it has not been proven that the first respondent committed bribery.

GROUND 6: BRIBERY, BOUTIQUE HOTEL-WAINJO VILLAGE, 24 JUNE 2017

Allegations

On 24 June in room 55 of the Boutique Hotel, where the first respondent was staying in the campaign period:

- the first respondent met with three members of his campaign committee, Albert Kongomori, Julius Aki (aka Julius Wawojin) and Tobias Narun, and gave each of them a bundle of K5,000.00 cash in K50.00 notes; and
- made a statement to them, which had the effect of being a directive to them to give money to voters to induce them to cast their vote for him:

Yupla kisim moni na go baim Namba wan vout blong mi. Sopus yupla no nap baim Namba wan vout blong mi orait yupla mas baim Namba tu vout blong mi.

[You can take this money and go buy the number 1 vote for me. If you cannot buy the number vote for me then buy the second vote for me.]

It is further alleged that:

- at 4.00 pm on 24 June at Wainjo village, Albert Kongomori gave K100.00 in two K50.00 notes to Jacob Kwaigau who kept one note for himself and gave the other to his wife Lilian Kwaigau; and
- by reason of those actions, Jacob Kwaigau and Lilian Kwaigau, who are electors, cast their votes for the first respondent.

It is claimed that the first respondent thereby committed bribery under Sections 103(a)(iii) and 103(d) of the *Criminal Code*.

Evidence for the petitioner

There was only one witness for the petitioner, Jackson Kwaigau, who testified in support of ground 6. He said he was a registered scrutineer for the first respondent and that he was taken with the three named committee members of the first respondent in a Toyota Landcruiser to the Boutique Hotel at 11.00 am. He said he went into room 55 with the three named persons and he was present at the brief meeting in the room and witnessed the events alleged in the petition. Later that day he went to Wainjo village, his village, and was present when Albert Kongomori gave the cash, as alleged, to the witness's brother, Jacob Kwaigau, who shared it with his wife, Lilian Kwaigau.

Evidence for the first respondent

All allegations underlying ground 6 were emphatically denied in evidence by the first respondent and by the other persons implicated: Lilian Kwaigau, Albert Kongomori, Julius Aki (aka Julius Wawojin) and Tobias Narun. Jacob Kwaigau, who had sworn an affidavit in support of the petitioner, disavowed his affidavit and became and remained a hostile witness, despite strong cross-examination by Mr Murray, the result being that he gave evidence for the first respondent.

Findings of fact

A judge in PNG is entitled and obliged, as the tribunal of fact, to make an assessment of the credibility of a witness based on a number of considerations, especially the demeanour of the witness, the logic and common sense and believability of his or her evidence and whether the witness's evidence is consistent with other evidence given on behalf of the party calling that witness and whether the evidence is corroborated.

I thought Jackson Kwaigau's demeanour was sound. He did not appear to be lying or be histrionically telling a tall tale. His answers were direct. He was calm under pressure. He appeared to be an intelligent person and seemed able to recall details of what happened on 24 June in an orderly and coherent manner.

However his evidence was entirely uncorroborated and it was denied absolutely and resolutely by a platoon of witnesses for the first respondent, including the first respondent himself who I assessed earlier as a convincing witness. I had difficulty believing that if there were to be a cash handout by a candidate to his committee members it would not be done at 11.00 am on the scheduled day of polling, 24 June. So Jackson Kwaigau's evidence, though given by an apparently credible witness, does not rate highly on the logic and common sense quotient.

I find that the allegations of fact underlying ground 6 have not been proven.

Did the first respondent commit bribery under Section 103(a)(iii) of the Criminal Code?

No, because none of the elements of the offence have been proven to exist.

Did the first respondent commit bribery under Section 103(d) of the Criminal Code?

No, because none of the elements of the offence have been proven to exist.

Conclusion re grounds 6 of the petition

This ground fails as it has not been proven that the first respondent committed bribery.

OTHER MATTERS

In the course of the trial, allegations arose that some of the first respondent's witnesses had been 'paid off' by representatives of the petitioner. In particular

that four of them (Albert Kongomori, Julius Aki (aka Julius Wawojin) and Tobias Narun, plus John Samut (who swore an affidavit in support of the first respondent but did not appear to give oral evidence) had received K2,200.00 cash each to encourage them to go to Maprik and stay away from the Court. Evidence was called by both sides on this issue, which I will not summarise as on reflection I am not in a position to decide who was telling the truth. Moreover the evidence was essentially irrelevant to determination of the grounds of the petition.

CONCLUSION

All grounds of the petition have failed. That is a just and sufficient reason, pursuant to Sections 212(1)(i) and 212(3) (*powers of court*) of the Organic Law, to dismiss the whole the petition. Costs will follow the event: the petitioner will pay the first respondent's costs. The second respondent played a minimal role in the proceedings, so it will bear its own costs.

ORDER

- (1) The petition is wholly dismissed.
- (2) The petitioner shall, subject to any specific order for costs made during the course of the proceedings, pay the first respondent's costs of the petition.
- (3) The second respondent shall bear its own costs.
- (4) The Registrar shall forthwith refund to the petitioner the security for costs deposited under Section 209 of the *Organic Law on National and Local-level Government Elections*.
- (5) The Registrar shall under Section 221 of the *Organic Law on National and Local-level Government Elections* promptly forward to the Clerk of the National Parliament a copy of this order.

Judgment accordingly.

Lawyers for the petitioner	:	Murray & Associates Lawyers
Lawyers for the 1 st respondent	:	Jerewai Lawyers
Lawyers for the 2 nd respondent	:	Harvey Nii Lawyers