



Court FILE

18/1/18

NXXXX

PAPUA NEW GUINEA
[IN THE NATIONAL COURT OF JUSTICE]

EP NO. 11 OF 2017

BETWEEN

MALAKAI TABAR

(Petitioner)

AND

HON. JELTA WONG

(First Respondent)

AND

PATILIAS GAMATO

in his capacity as the ELECTORAL COMMISSIONER

(Second Respondent)

Kokopo: Makail, J
2018: 17th & 18th January

ELECTION PETITION – PRACTICE & PROCEDURE – Trial – No case submission – Allegation of bribery – Bribery of elector – Identity of elector – Proof of – Name of elector inconsistent with name on Common Roll – Inconsistent dates of nomination of candidate elected – Date of nomination recorded on nomination form – Nomination form official electoral record – Oral evidence contradicts date on nomination form – Purpose of giving money – Conflicting evidence – Matters for consideration after close of all evidence – Organic Law on National and Local-level Government Elections – Section 215 – Criminal Code – Section 103

Cases cited:

Malakai Tabar v. Hon. Jelta Wong & Electoral Commission: EP No. 11 of 2017 (Unnumbered & Unreported Judgment of 17th January 2017 per Makail J)
Desmond Baira v. Kilroy Genia (1998) SC579
Robert Lak v. Paias 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
Neville Bourne v. Manasseh Voeto [1977] PNGLR 298
Peter Waranaka v. Gabriel Dusava (2009) SC980
Aide Ganasi v. Sali Subam (2013) SC1277
Allan Ebu v. Roy Evara [1983] PNGLR 201
Jerry Singirok v. Ken Fairweather (2014) N5577
Bede Tomokita v. Dougals Tomuriesa & Electoral Commission: EP No 28 of 2017 (Unnumbered & Unreported Judgment of 10th January 2018 per Makail J)
Bryan Kramer v. Nixon Philip Duban & Electoral Commission (2013) N5213
Bryan Kramer v. Nixon Philip Duban & Andrew Trawen (No.3) (2013) N5215

Counsel:

Mr. J. Holingu, for Petitioner
Mr. M. Nale, for First Respondent
Mr. L. Okil, for Second Respondent

RULING ON NO CASE SUBMISSION

18th January, 2018

1. **MAKAIL, J:** This is a ruling on a no case submission against a petition disputing the election of the first respondent as member for Gazelle Open electorate in East New Britain Province.
2. On 17th January 2018, ruled that one out of three allegations in the petition was competent and allowed to proceed to trial. It was the allegation of bribery: see *Malakai Tabar v. Hon. Jelta Wong & Electoral Commission*: EP No. 11 of 2017 (Unnumbered & Unreported Judgment of 17th January 2017 per

Makail J).

3. After the close of the petitioner's case, the first respondent supported by the second respondent made a no cases submission.

Principles of No Case Submission

4. There is no contested that the no case submission was based on case precedents where it was held that the defence may invite the Court to exercise its discretion to stop the case after the close of the petitioner's case.

5. That invitation is made in a case where there is no evidence on a material aspect of the petitioner's case: *Desmond Baira v. Kilroy Genia* (1998) SC579; *Robert Lak v. Paias Wingti* (2003) N2358; *Benny Diau v. Mathew Gubag* (2003) N2354; *Pawa Wai v. Jamie Maxton Graham* (2005) N2768 and *Perry Zeipi v. Gabia Gagarimabu* (1999) SCR No. 5 of 1999 and *Labi Amaiu v. Andrew Mald* (2008) N3335.

Bribery

6. The allegation of bribery is that on Saturday 22nd April 2017 at about 9:00 am at Tagitagi No. 1 Village, Toma, Vunadirdir Local Level Government, Gazelle District, East New Britain Province at the late Balsius Midir's house, the first respondent gave K100.00 to a voter, one August Punion.

7. When he gave the money, he told Mr. Punion that "*yupla baim kaikai na putim mi namba wan*" (In English "*Buy food for yourselves and give me your primary vote*"). Present at that time were Henry Minalom and Lawrence Gogome.

Onus of proof

8. I will apply the standard of proof applied in *Neville Bourne v. Manasseh Voeto* [1977] PNGLR 298 adopted in *Peter Waranaka v. Gabriel Dusava* (2009) SC980 and *Aide Ganasi v. Sali Subam* (2013) SC1277. That is, the petitioner must prove the allegation to the entire satisfaction of the Court.

Evidence

9. The evidence to prove the allegation came from six witnesses called by the petitioner. They were Peter Rauka Oa, Thecla Warpin, Joseph Topung, August Punion, Lawrence Gogome and Henry Minalom. Mrs. Warpin ace oral evidence and was cross-examined. The others tendered their sworn affidavits and were cross-examined.

9. Mr. Rauka Oa produced a copy of the Common Roll for Gazelle Open electorate contained in four bound volumes. He also produced a copy of Form 23 which is a nomination form of the first respondent. It is dated 24th April 2017 as date of its receipt by the Returning Officer.

Grounds of No Case Submission

10. The grounds of no case submission are:

10.1. The first respondent was not a candidate when the alleged offence of bribery was committed.

10.2. The person bribed was not an elector.

10.3. Lack of evidence on purpose for giving of money.

Candidate

11. The issue is whether the first respondent was a candidate when the alleged offence of bribery was committed within the meaning of Section 215 of the *Organic Law on National and Local Level Government Elections* (“*Organic Law*”).

12. There are two aspects to this issue. First is the meaning of candidate and second is date when the first respondent became a candidate.

13. For the first aspect, parties put forward two propositions. The respondents submitted that a person is a candidate when he has nominated:

Allan Ebu v. Roy Evara [1983] PNGLR 201 and adopted in *Jerry Singirok v. Ken Fairweather* (2014) N5577 and *Bede Tomokita v. Dougals Tomuriesa & Electoral Commission*: EP No 28 of 2017 (Unnumbered & Unreported Judgment of 10th January 2018 per Makail J).

14. In response, the petitioner adopted the definition of a candidate under Section 3 of the *Organic Law*.

15. It was submitted that the definition of a candidate included a person who, within three months before the first date of the polling period, announces himself as a candidate for election as a member of the Parliament: *Bryan Kramer v. Nixon Philip Duban & Electoral Commission* (2013) N5213.

16. The reason for giving the term “candidate” a wide definition will cover persons who deliberately delay their nominations to commit the offence of bribery to avoid being penalised.

17. As to the second aspect, based on the date of 24th April 2017 recorded on Form 23, the respondent contended that it is when the first respondent nominated.

18. The Form 23 is an official record of the second respondent and should be accepted as proof of the date of nomination of the first respondent and no amount of extrinsic evidence can change or disprove it.

19. In response, the petitioner submitted that the date of nomination of the first respondent was 21st April 2017.

20. This date is based on the oral evidence of Mrs. Thecla Warpin who said that she saw and was part of the first respondent’s party being escorted in a convoy of motor vehicles on that date to Gazelle District Office where the first respondent nominated.

21. I uphold the proposition that a person is a candidate when he has nominated. My reasons for upholding this proposition is based on the reasons given in those cases which are sound and need no further explanation.

22. Just one observation to make in response to the petitioner's submission on public policy consideration. It may be the case that giving a very strict definition to the term "candidate" may and will give persons who intend to nominate to delay their nominations until the last date in order for them to bribe voters and escape punishment.

23. But a complainant is not left without a remedy. He has recourse to lodging a complaint with the police to arrest and charge a candidate, turned member/politician, for bribery under the ordinary criminal law process under Section 103 of the *Criminal Code*.

24. The end result, a person is a candidate when he has nominated.

25. As to when the first respondent nominated is hotly contested. Two different dates were put forward as the date of nomination of the first respondent; one 21st April 2017 and the other, 24th April 2017.

26. The evidence in Form 23 relied upon by the respondents showed that the date of nomination of the first respondent was 24th April 2017.

27. The petitioner relied on the evidence of Mrs. Warpin who said that the date of nomination of the first respondent was 21st April 2017.

28. I uphold the respondents' submission that Form 23 is the official record of the second respondent. Recorded on that document (Form 23) is a date of 24th April 2017. In my view, the date recorded in Form 23 is prima facie evidence of the date of nomination of a candidate, in this case, the first respondent.

29. At the same time there is evidence from the petitioner's witness, Mrs. Warpin that 24th April 2017 was not the date of nomination of the first respondent. It was 21st April 2017.

30. All I have to be satisfied at this stage is whether there is no evidence to prove the date of nomination. I cannot find that there is none because there is. That evidence is from Mrs. Warpin and it is in direct conflict with Form 23. (Emphasis added).

31. As to which evidence should be accepted is a matter for me to decide at the close of all evidence.

32. For these reasons, I am not satisfied that there is no evidence to prove the date of nomination of the first respondent.

Elector

33. There is no contest that the person identified as being bribed is one August Punion. There is also no contest that the name August Punion is not on the Common Roll for Gazelle Open electorate. There is a name "Lakit Punion".

34. August Punion said that he is also known as Lakit Punion.

35. An "elector" is defined in Section 3 of the *Organic Law* as ".....a person whose name appears on a Roll as an elector".

36. If August Punion said that he is an elector, his name, must appear on the Common Roll for Gazelle Open electorate. This view appears too legalistic and technical but that is the only way to put to rest the elector identity issue. Here the name "August Punion" does not appear. *aw*

37. He can explain why he is also Lakit Punion or why the Common Roll is flawed and should not be accepted on face value, or he was allowed at polling to vote under the name, Lakit Punion, but the bottom line is, August Punion which is the name he swore his affidavit by, does not appear anywhere in the Common Roll.

38. Compare this case with *Bryan Kramer v. Nixon Philip Duban & Andrew Trawen (No.3)* (2013) N5215 where a no case application was refused because no Common Roll for the electorate was produced to verify if the persons who were allegedly bribed and unduly influenced and called to give evidence that they were registered voters, were accepted as registered voters.

39. Here, there is a Common Roll which does not support the assertion by August Punion that he is an elector within the meaning of under Section 3 of the *Organic Law*.

40. For these reasons, I am not satisfied that there is evidence to prove that August Punion is an elector.

Purpose

41. As to the purpose of giving the money, the respondents tried to show a case of inconsistencies and contradiction in the evidence of the petitioner's witnesses, August Punion, Lawrence Gogome and Henry Minalom where the latter two witnesses said that the money was given to purchase food for a campaign gathering rather than to buy votes.

42. As I said earlier, all I have to do at this stage is to consider whether there is evidence to support the element of inducement in a bribery case. So far there is evidence from August Punion that it was given by the first respondent to induce him to vote for him.

43. In my view, whether that evidence conflicts or contradicts the evidence of the other two witnesses is a matter to be decided after close of all evidence.

44. I am not satisfied that there is no evidence proving the purpose to which the money was given.

Conclusion

45. Notwithstanding the findings in favour of the petitioner, a crucial material ^{or} fact of the allegation of bribery in the context of a General election is lacking or missing. The petitioner has failed to prove that August Punion is an elector within the meaning of Section 3 of the *Organic Law* and it would be pointless to allow the case to proceed further.

46. It must be stopped here.

Order

47. The orders are:

1. The no case submission is upheld.
2. The petition is dismissed.
3. The petitioner shall pay the costs of the proceedings, 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 and divided equally between the respondents.

Holingu Lawyers :
Jema Lawyers :
Kimbu & Associates Lawyers :

Lawyers for Petitioner
Lawyers for First Respondent
Lawyers for Second Respondent

