

PAPUA NEW GUINEA
[IN THE NATIONAL COURT OF JUSTICE]

CR (FC) 231 OF 2015

THE STATE

V

SIWI BUNGO

Kimbe: Batari J
2018: 17th April,
2020: 19th August

CRIMINAL LAW – misappropriation – State property – Kimbe Urban Local Level Government - daily market fees – cash payments out – aggregate of cash solicited/received by Acting Mayor of Kimbe from daily takings – finance processes - lack of

CRIMINAL LAW – misappropriation – State property – evidence – whether accused received aggregate amount alleged – whether accused dishonestly applied market proceeds to own use – “dishonestly” meaning of applied

The Kimbe Urban Local Level Government operated Kimbe town market and charged vendors fees for use of the market and amenities. The accused as Acting Mayor solicited and received cash payments from the market daily takings without proper approvals in what amounted to misappropriation. He pleaded not guilty.

Held:

1. The admission by the accused in receiving cash payments from Kimbe Urban Local Level Government market takings strengthens State’s case of his soliciting and receiving cash payments outside due procurement process.

2. The absence of formal requisitions for approvals and acquittal of the amounts taken is sufficient evidence to infer the accused dishonestly applied monies intended for public purpose, to his own use in contravention of s. 3838A (1) (a) *Criminal Code*.
3. The amount taken is not a critical element of the charge of misappropriation as the element of dishonestly is, within the meaning of s. 383A (1) (a) *Criminal Code*.
4. The onus is on the prosecution to prove beyond reasonable doubt, the conduct of the accused was not honest, trustworthy or sincere, such that it constituted dishonest application of town market takings.
5. That guilt must be proved beyond a reasonable doubt does not require the relevant facts be established with complete scientific accuracy: *R v. Summers* [1990] 1 Qd R 92. A judge is free to accept some evidence from a witness and reject other parts of the evidence, even if it relates to closely linked events: SCRA No. 34 of 2003, *Ano Naime Maraga & 2 Ors v The State* (2009) (Unnumbered SC Judgment).

Cases Cited:

Papua New Guinea Cases

The State v Francis Natuwohala Laumadava [1994] PNGLR 291
SCRA No. 34 of 2003, Ano Naime Maraga & 2 Ors v The State (2009)
(Unnumbered SC Judgment)

Overseas Cases

R v. Summers [1990] 1 Qd R 92

Counsel

J. Apo, for the State

D. Kari, for the Accused

DECISION ON VERDICT

19th August, 2020

1. **BATARI J:** Siwi Bungo is presented before the court upon indictment charging one count of misappropriation pursuant to s. 383A (1) of the *Criminal*

Code. This is the verdict on his trial.

Charge & plea to the Charge

2. The charge on the indictment alleges, that between 1st July 2014 and 31st December 2014 in Kimbe, West New Britain Province, Siwi Bungo of Kimemb village of Kerowagi District, Simbu Province, dishonestly applied to his own use, Fifteen Thousand and Five Hundred and Seventy Kina (K15,570.00) property belonging to the State.

3. The accused has all along denied the charge but concedes receiving smaller amounts only occasionally from the Market takings. He denied any wrong and says it was for his official use.

Issues to tried

4. Accepting that the accused received monies from the Market takings, the issue is; (i) whether he regularly solicited and received cash as alleged, and (ii) whether his conduct amounted to misappropriation.

5. The first issue is substantially a question of fact. The issues of facts are not complex. It will be quickly resolved on the basis of who to believe.

6. The second is the main issue. The Court must be satisfied, depending on the proven facts, that on each occasion, the offender dishonestly benefited himself from the Market proceeds, a question of law. In deciding this crucial issue, the application of the meaning of “dishonestly” in the context of s. 383A (1) (a) must be clearly understood. The term “*dishonestly*” is an adverb, the adjective being, “*dishonest*,” defined in the *Concise Oxford English Dictionary* as, “*not honest, trustworthy or sincere.*” What Injia AJ (as he then was) stated in *The State v Francis Natuwohala Laumadava* [1994] PNGLR 291 offers helpful insight:

“The crucial issue here is the meaning of the word “dishonestly” in the context of s.383A (1) (a). This issue was decided by the Supreme Court in the case of Lawi-v- The State, [1987] PNGLR183. In brief, it was decided that, “dishonestly” relates to the state of mind of the accused. It is a question of fact which the court has to decide. The court has to decide whether, according to the ordinary standards of decent, reasonable, and honest people, what the accused did was dishonest. The test here is an objective

one. At the same time it is also a subjective one. The court must look into the mind of the accused and determine whether, given his intelligence and experience, he would have appreciated as right-minded people would have done, that what he was doing was dishonest”.

Undisputed facts

7. The common facts are these. Kimbe town Market (Market) comes under the functions and responsibility of Kimbe Urban Local Level Government (Kimbe ULLG), an arm of the State. It raises its revenue from fees collected from market vendors for use of the market stalls and such other amenities as the Market public toilets. Daily takings and cash disbursements are tallied at the end of each trading day in the Records of Daily Market Fees and Payments/Deductions form. A Daily Fees Collections Summary is also filled out and the cash balance is retained for deposit into the Kimbe ULLG bank account. A Monthly Summary Report on the Market fees collections is also compiled.

8. Rampant and excessive cash payments from the Market revenue takings were transacted without or rarely supported by written requisitions.

9. During the period in question, the accused was the Acting Mayor of Kimbe town. The total amount charged in the indictment is the aggregated amount the accused allegedly solicited and received from the Market revenue takings.

Disputed facts

10. On the contested facts, the prosecution called three witnesses namely, Moses Balush, Martin Linge, Ryan Mondo. The prosecution also relied on documentary evidence in the form of, *Record of Interview; Records of Daily Market Fees and Payments/Deductions; Daily Fees Collections Summary and Monthly Summary Report.*

11. The main evidence on the daily Market fee takings, cash payments and documentary records of those transactions was given by Moses Balush. He was employed by Kimbe ULLG as the Market Supervisor from 2011 and during the period in question. He oversaw the Market operations and maintenance, collections and recordings of Market fees and cash payouts from the daily takings. He testified, that on numerous occasions, the accused would ask for cash with threats and would be paid the amount requested.

12. The evidence of Martin Linge and Ryan Mondo are substantially on financial procedures for expenditures of public funds and good accounting practices for collections and disbursements of the Market revenue. The daily takings were to be banked before any payment or deduction is made except, where approval is given by the person appointed as a finance delegate under s. 32 of the *Public Finance (Management) Act*, 1995 (section 32 officer) to approve expenditures. In this case, payments from the Market takings were made in most cases outside formal requisitions and approvals of the section 32 officer.

13. Martin Linge was the section 32 officer or finance delegate. He would normally approve payments for field officers' wages from the Market revenue as, they are casual employees and not on salary. He did not approve any payment to the Acting Mayor. Too, the Market supervisor is not a finance delegate. As such he cannot approve payments from the Market takings. Their undisputed stories revealed serious flaws in the proper disbursements of the Market fee collections.

14. The accused in his testimony conceded, he would occasionally request and get K50.00 to K100.00 to cover his official running costs for fuel and office stationaries. On other occasions his requests were denied. On the entries in the Records of Daily Market Fees and Payments/Deductions showing payments to "Acting Mayor", the accused responded, the entries are not in his name. Others had recorded the payment under "Acting Mayor" to falsely implicate him.

15. The defence called Sylvester Essau, Deputy Town Mayor. His evidence is mainly on remunerations for the Town Mayor, ward members and administrative costs. He said Market fees are banked. Some are used by Kimbe ULLG to clean the market, town and for such other operational costs as fuel for vehicles. His other evidence did not advance the defence's case in any significant way

Parties submissions

16. Mr Kari for the defence submitted, the prosecution has not proven beyond reasonable doubt, the amount taken by the accused and has not shown evidence or enough evidence to establish the elements of dishonestly applying public monies to his own use. Accepting that the accused solicited and received payments from the Market fee takings, the Court should find the small amounts of K50.00 to K100 he occasionally received was to cover his official necessities. Counsel submitted, State witness Moses Bush should not be believed in his evidence that the accused forced him to give the money. It is illogical and absurd to believe, for some five months the accused would force him, and he would simply comply without the slightest complaint to relevant authorities.

17. Mr Apo for the State submitted, the accused should not be believed in his testimony that others had used the name of his office to solicit and benefit from the Market fee takings. His testimony contradicts his earlier story to the police in receiving smaller portions of the amounts he allegedly took. That in effect, reduces his honesty and reliability. Counsel submitted the prosecution has proven beyond reasonable doubt, the accused had outside due process and without proper authority, helped himself from the Market fee takings for his own personal use and that his conduct was not honest, trustworthy or sincere.

Assessment and conclusions on trial evidence

18. The onus is on the accused to prove on the balance of probability, the amount he received and the lawful purpose to which he applied the money. The more onerous onus on the State is, to prove on the higher standard of prove beyond reasonable doubt, the accused dishonestly applied public funds to his own use.

19. I find, as acceded by both Counsel, the Market fee receipts by the Kimbe ULLG lacked proper stringent control for expenditure of the revenue. As Mr Kari described it, the Market revenue was a milking source for workers. The situation was susceptible to abuse and corrupt practices. It no doubt encouraged workers to help themselves to the government till and I think the accused fell into that trap.

20. I find from his own concessions; the accused was one of those milking that cow. He had direct access to the Market fee collections and would get paid some cash whenever he requested. Whether he only took small amounts is not critical. The critical issue is whether he acted dishonestly within the meaning of s. 383A (1)(a) of the *Criminal Code*. The amount taken is relevant as an aggravating factor.

21. So, what was the amount taken and most importantly, whether the State has proven on the requisite standard, the conduct of the accused was not honest, trustworthy or sincere, such that it would constitute dishonest application of monies intended for Kimbe ULLG?

22. On the issue of amount, the following appears in his Record of Interview:

Q37. I will also produce to you copies of the daily market fee balance and summary sheet for the month of July 2014 which a total of K3,062.00 was paid to you What do you say about this?

Ans. I won't respond because I did not sign this document. They gave me money, but the figures are excessive. Also, petty cash approved by FEC K500.00 for Mayors was not excess by Manager eventually.

Q38. I will also produce to you copies of the daily market fee balance and summary sheet for the month of August 2014, total of K3,512.00 was paid to you. What do you say about this?

Ans. I won't respond because I did not sign this document. They gave me money but the figures are excessive.

Q39. I will also produce to you copies of the daily market fee balance and summary sheet for the month of September 2014, K2,970.00 was paid to you. What do you say about this?

Ans. I won't respond because I did not sign this document. They gave me money but the figures are excessive.

Q40. I will also produce to you copies of the daily market fee balance and summary sheet for the month of October 2014, a total of K2,481.00 was paid to you. What do you say about this?

Ans. I won't respond because I did not sign this document. They gave me money but the figures are excessive.

Q41. I will also produce to you copies of the daily market fee balance and summary sheet for the month of November 2014, a total of K1,010.00 was paid to you. What do you say about this?

Ans. I won't respond because I did not sign this document. They gave me money but the figures are excessive.

Q42. I will also produce to you copies of the daily market fee balance and summary sheet for the month of December 2014, a total of K2,535.00 was paid to you. What do you say about this?

Ans. I won't respond because I did not sign this document. They gave me money but the figures are excessive.

23. The accused was being questioned from the Monthly Summary Report of the Market revenue and cash payments for each month from July to December 2014. His common answer in respect of each amount allegedly paid to him each month was, *"I won't respond because I did not sign this document. They gave me money but the figures are excessive."* (emphasis added).

24. It is apparent from this evidence, the accused received monies from the Market revenue for six months. The aggregate amount for each month came from the number of occasions the accused solicited and received payment from the Market fee takings. This came to K15, 570.00 in total.

25. The accused generally conceded receiving less amounts. He did not specify the exact amount he received on each occasion or in total. This does not help his case. The documentary evidence is specific on the amount he received on each occasion each month and the aggregate in the period in question. The evidence is not challenged as to its authenticity and content correctness. This leaves a strong impression; the accused took the amount charged.

26. As to what he used the money for, the accused did not disclose that to the police, nor did he produce any receipt or other evidence of acquittal in support of his belated claim of using the money on office requirements.

27. The accused is clearly an intelligent person. It would have been easy for him to understand the serious dilemma he was in and tell the police, the exact amount he received and explain the purpose for which the money was used. He also had an early opportunity to tell the police, other persons had benefitted from the Market revenues and falsely written, "Acting Mayor" to implicate him. He did not tell the police then, the "Acting Mayor" was not him or he did not authorise anyone to use his official capacity. All his explanation was that he would not respond because he did not sign the document. The inference is clear, what he is telling the court now is a recent invention.

28. Furthermore, it is trite, and I think he understands from common practices, all public expenditures from the government purse must be precipitated by formal requisitions, stating the amount and purpose for approval by the finance delegate. In this case, there is no formal requests for expenditure of the Market revenue for his office operational costs.

29. I am least impressed with defence's general denials.

30. The payment of public funds in drips and drabs to the Acting Mayor in July and the ensuing months hardly speaks of formal expenditures for lawful purpose. It strongly indicates lack of expenditure planning and control from a government office. It shows gross mismanagement of public funds.

31. The State's evidence which I accept is, that the accused would verbally ask and was paid the amount as shown in the documents; *Records of Daily Market Fees and Payments/Deductions; Daily Fees Collections Summary and Monthly Summary Reports*. The cash payment to "Acting Mayor" as recorded was an almost every-two-day event. For instance, for the month of July 2014 in Exhibits B1.1 to B1.21, the accused admitted being given the money but denied it was the amount recorded. So, I conclude he was given the money as recorded in his

capacity as the Acting Mayor. I further conclude, it is highly likely; the accused applied the money intended for public purpose, to his own benefit.

32. I do not believe the story by Moses Balush that the accused forced him to give the amounts on each occasion he requested. Without the admissions by the accused, his story might raise serious issues of his honesty and reliability. It is however settled, that if a witness is disbelieved on one aspect of his evidence, it does not necessarily follow, other aspects of the evidence would be disbelieved.

33. The rule of the law that guilt must be proved beyond a reasonable doubt does not require that the relevant facts be established with complete scientific accuracy: *R v. Summers* [1990] 1 Qd R 92. And there is no rule that a trial judge must reject all of a witness's evidence because he finds some of it inconsistent. A judge is free to accept some evidence from a witness and reject other parts of the evidence, even if it relates to closely linked events: SCRA No. 34 of 2003, *Ano Naima Maraga & 2 Ors v The State* (2009) (Unnumbered SC Judgment).

34. This is more so where the other aspects of his evidence is consistent with other evidence, oral or documentary or is consistent with logic and common sense. In this case, the evidence of Moses Balush is supported by the documentary evidence and the accused's own admissions.

35. It is clear from the whole of the evidence, the accused helped himself from the Market takings at his own volition outside proper accounting processes and applied the monies to his own use. He has not shown how much he took as the lesser amount. I am persuaded by the documentary evidence he periodically took the amounts as recorded and the aggregate amount was K15, 570.00.

36. The inescapable conclusion is that the prosecution has adduced overwhelming evidence to support a guilty finding.

20. I find the accused guilty and convict him as charged.

Public Prosecutor: *Lawyers for the State*
Public Solicitor: *Lawyers for the Defence*