

In re Gallus Yumbui [2007] PGLT 2; N4052 (2 March 2007)



PAPUA NEW GUINEA

IN THE MATTER OF A REFERENCE BY THE PUBLIC PROSECUTOR PURSUANT TO SECTION 27 (2) OF THE ORGANIC LAW ON THE DUTIES AND RESPONSIBILITIES OF LEADERSHIP ("the Organic Law")

AND

IN THE MATTER OF GALLUS YUMBUI MP ("the Leader") MEMBER FOR WOSERA-GAWI OPEN AND MEMBER, EAST SEPIK PROVINCIAL ASSEMBLY

Before

HON. JUSTICE LAY - CHAIRMAN

MR. IOVA GEITA - PRINCIPAL MAGISTRATE - MEMBER

MR. LAWRENCE KANGWIA - SENIOR MAGISTRATE - MEMBER

a Leadership Tribunal appointed pursuant to section 27 (7) (e) of the Organic Law

WAIGANI

2nd March 2007

Decision on Penalty Facts

The Leader was found guilty of 4 counts of misconduct in office arising from two sets of facts, the first being that he purchased a vehicle with public funds for use as an ambulance in his electorate, but personally used that vehicle for a period of 7 months without right or authority; the second being that he failed to disclose in his annual statements to the Ombudsman Commission that he had the vehicle in his possession and that he was enjoying the use of it.

Held

1. The proper approach to determining penalty is to look at the whole of the Leader's conduct together, and not at each individual charge of which the Leader has been found guilty;
2. The first question to be determined is whether the Tribunal can say that the conduct of the Leader did not involve any serious culpability;
3. (Mr Kangwia SM dissenting) Having regard to the fact that the Leader's conduct:
 1. Deprived the intended beneficiaries of the ambulance of its use for 7 months in an area where

health transport was a serious problem;

2. During that 7 months the Leader used the vehicle for his own personal purposes in Port Moresby;

1. The commercial value of the benefit obtained by the Leader from the use of the vehicle would exceed K40,000;

1. Use of a vehicle without the consent of the owner could be subject to criminal law sanction;

2. The Leader's conduct was not disclosed in his annual statement to the Ombudsman when there was a duty to make that disclosure;

The Tribunal can not find that there is no serious culpability on the part of the Leader;

1. (Mr Kangwia SM dissenting) Accordingly the only penalty which the Tribunal can impose is to recommend to his Excellency the Governor General that the Leader be removed from office.

Counsel

C. Manek, *assisting the Tribunal*

S. Liria, *for the Leader*

2 March, 2007

1. **LAY J and Mr. I Geita PM:** On the 31st of October 2006 this Tribunal found the Leader guilty of four allegations of misconduct in office brought against him by the Ombudsman Commission of Papua New Guinea.

2. The facts are fully set out in the decision on verdict. It is sufficient for this decision on penalty to say that the Tribunal found as a fact that having obtained funds of K85,718.60 from the National Gaming Control Board, the Leader purchased a Toyota 10 seater vehicle intended and suitable for use as an ambulance, for the Leader's electorate of Wosera-Gawi in the East Sepik Province. The Leader personally took delivery of the vehicle in Port Moresby from the supplier. He attempted to have it shipped at no cost to Wewak through the Defence Force, but that arrangement failed. He then had the vehicle in his possession for seven months during which time he used the vehicle personally or allowed to be used by his associates. The vehicle should not have been in the possession of the Leader and he had no right to use it. The Leader was careless of the significance of the vehicle being in his possession. The vehicle was subject to very heavy use.

3. The Leader did not disclose in his Annual Statement for 2000/2001 and 2001/2002 and that he had the vehicle under his possession and control and that he was receiving the benefit of the use of that vehicle.

4. In relation to the allegations brought against the Leader the Tribunal found the Leader guilty of misconduct in office, because:

1. Using the vehicle for the Leader's personal purposes when he had no claim of right to the use of that asset by reason of his office, demeaned his office and brought his public or official integrity and his personal integrity into question. He failed to carry out the obligations imposed by Sections 27 (1) and

(2) of the *Constitution* thereby being guilty of misconduct in office under Section 27 (5) (b) of the *Constitution*.

2. Using the vehicle for seven months was the acceptance of a benefit contrary to the provisions of Section 5 (1) of the *Organic Law on the Duties and Responsibilities of Leadership*.

3. By not making disclosure in his annual statements the Leader breached Section 27 (1) and 27(2) of the *Constitution* and Section 4 (6) (b) of the *Organic Law on the Duties and Responsibilities of Leadership*.

5. We have received the oral and written submissions of counsel for the Leader and of the Public Prosecutor, counsel assisting the Tribunal.

6. In considering the imposition of a penalty the Tribunal is guided and constrained by *Constitution* Section 28(1A) and the *Organic Law on the Duties and Responsibilities of Leadership* section 27 (5). The Tribunal must approach penalty in this way, it must recommend that the Leader be dismissed from office unless it finds (a) there was no serious culpability on the part of the Leader and (b) public policy and the public good do not require dismissal. If the Tribunal finds both (a) and (b) then it can impose a fine not exceeding K1000 or order that the Leader enter into his own reconnaissance in an amount not exceeding K500 not to further breach the Leadership Code, suspension without pay, a reprimand, a reduction in salary or demotion (where appropriate to the particular office).

7. Both counsel agreed in their submissions with the proposition that it is the totality of the circumstances of the behaviour of the Leader which needs to be examined in determining whether there was "no serious culpability", as argued by Amet C.J. in *Peter Ipu Peipul v Sheehan* (2002) [SC706](#), and not the findings of guilt in respect of each distinct alleged offence. We find that is the correct approach.

8. The Constitutional Planning Committee (CPC) said in its considerations in its final report at paragraphs 6:

"If the leader were to use his power for purposes other than the betterment of the citizens, he would be abusing it, and he would thereby be demonstrating his unworthiness of his high office. In short, high office and all that it legitimately brings with it is never meant for the office holder's material enrichment; it is meant to be used in the service of the citizens of the State and for their betterment. Apart from its citizens, the nation-state is nothing. The State consists of them, and the leaders in various high offices are meant to serve the citizens as a whole, to make the nation what it is and what it is destined to become."

9. Thus the primary purpose of the Leadership Code is to "*preserve the people of Papua New Guinea from misconduct by its leaders*": see Supreme Court reference No. 2 [\[1992\] PNGLR 336](#) at 341-342.

10. "*... it is the public perception of the leader which is the dominant theme... the laws of this country in themselves set a standard of conduct. Where a leader breaches or ignores any law of Papua New Guinea he is likely to breach section 27 (1) (b) to (d) of the Constitution*": see *Application of John Mua*

Nilkare (1997) SC 536 per Kapi DCJ (as he then was) at page 27.

11. The first issue to be addressed, is whether this Tribunal can say "there was no serious culpability on the part of" the Leader "found guilty of misconduct in office": see *Constitution* Section 28 (1A). There are two aspects to the Leader's behaviour which we must take into consideration. Firstly there is the negligent possession and use of a brand-new vehicle worth over K85,000, for seven months. Secondly there is the failure to disclose that behaviour by the failure to disclose the possession and benefit of the use of the vehicle in the annual statements which are created for the very purpose of making leaders accountable.

12. How can the first aspect of the leader's behaviour be characterised in terms that the ordinary citizen can appreciate in his daily life? If the Leader had lawfully gone about obtaining a vehicle for his use for a temporary period of six or seven months, as a private commercial transaction, he would have had to hire that vehicle. Taking the average daily rate from major hire companies, at say a conservative K200/day, that would have involved the expenditure of in excess of K40,000. So by using, for his own purposes, a vehicle purchased with public money for the benefit of the people of his electorate, the Leader has received a benefit to which he was not entitled, of that substantial value. Irrespective of whether the behaviour was planned or occurred through negligence or oversight, this is not the type of behaviour which we believe ordinary citizens expect of their leaders and which the people of Papua New Guinea would regard as an having no serious culpability.

13. If an ordinary citizen took a vehicle which did not belong to him and used that vehicle without the authority of the owner, what might happen to him? In all probability such a citizen would be charged under the *Criminal Code* Section 383 with unlawful use of the motor vehicle, and would be subject to a penalty of up to five years imprisonment. Again we consider that this is not the sort of behaviour the citizens of Papua New Guinea expect from their leaders and which should be regarded as containing no serious culpability.

14. For the ordinary citizen, particularly in a rural electorate such as that from which the Leader was elected, daily life is a struggle to make ends meet, and sometimes even for survival. The evidence demonstrated that part of that struggle is getting to a health facility when sick and getting from a local health facility to a hospital when the patient is more seriously ill. The Leader recognized that as a difficulty faced by the people of his electorate. The vehicle was purchased to help with that problem. The Leader had more than ample public funds at his disposal to deliver the vehicle promptly from Port Moresby to his electorate for its intended purpose, as he eventually did after the Ombudsman Commission commenced its enquiry.

15. The ordinary citizens of Papua New Guinea do not have vehicles at their disposal. The purchase of the vehicle is a substantial investment. Citizens who own vehicles are the exception rather than the rule. In our view this Tribunal should not say to citizens:

1. who face the daily struggles referred to in the foregoing paragraph, and
2. who would be faced with substantial financial burden, or criminal sanction if they sought to have the benefit of a vehicle, such as the one which the Leader enjoyed, in the manner that he enjoyed it,

that there is no serious culpability on the part of a Leader who withholds the use of an ambulance vehicle from his people for a period of seven months. Not only withholds that benefit from his people, but uses that vehicle for his own personal benefit during that period, when, as the evidence shows, he had his own personal vehicle which he could have used instead of misusing the ambulance vehicle and withholding it from use by its intended beneficiaries.

16. The subsequent behaviour of the Leader in not disclosing in his annual statements the benefits which he received from possession and use of the vehicle only exacerbate the culpability already discussed.

17. Ours is a forgiving society. Some evidence of that trend is shown by media reference to former leaders found guilty of misconduct in office and dismissed as "retired" or "a former member of Parliament". In other countries, particularly in the Western world, such leaders might frequently find themselves referred to in the media as "the disgraced and dismissed former...". We have no doubt therefore that there is a section of the community who will say "well, the vehicle was eventually delivered as intended and the Leader has done other good things for his people, so really what harm has been done"? The harm is in the perception that a leader can take an asset purchased with public money and use it for his personal purposes when he has no right to do so. The people expect and the law demands a higher standard of behaviour.

18. We are of the opinion that we cannot say that there was no serious culpability on the part of the Leader whom we have found guilty of misconduct in office. There is no need nor relevance for us to address any of the other matters which might otherwise arise on the issue of penalty pursuant to the *Leadership Code (Alternative Penalties) Act*. There is only one penalty which we may impose in the circumstances.

19. Accordingly the Tribunal respectfully recommends to his Excellency the Governor General that the Hon Gallus Yumbui be dismissed from the office of Member of Parliament for the electorate of Wosera-Gawi.

20. In accordance with the *Organic Law on the Duties and Responsibilities of Leadership* Section 27(6) a copy of this decision will be sent to the Speaker of the National Parliament for presentation to the Parliament and to the National Executive Council.

WAIGANI this **2nd** day of **March** 2007

Mr Justice Lay Mr. Iova Geita Mr Lawrence Kangwia
Chairman of the Tribunal Member of the Tribunal Member of the Tribunal

Public Prosecutor assisting the Tribunal

Liria Lawyers: *Lawyer for the Leader*