SUPREME COURT REFERENCE NO. 6 OF 1984 *

The recent decision of the Supreme Court in Supreme Court Reference No.6 of 1984 is to be welcomed. This decision finally resolves the issue of whether or not provocation can be a defence to a charge of assault under S.6(1) of the Summary Offences Act 1977. Prior to the Supreme Courts pronouncement this issue had been the subject of conflicting opinions in a series of National Court decisions. A brief look at the background to this conflict will help clarify the arguments subsequently made.

Background - the two assault provisions:

At present under the law of Papua New Guinea a person charged with assault can be charged either under the Criminal Code or under the Summary Offences Act. Section 335 of the Criminal Code (Chapter 262) provides that:

> A person who unlawfully assaults another person is guilty of a misdemeanour.

The penalty is a maximum period of one year imprisonment, if no greater punishment is provided.

Section 6(1) of the Summary Offences Act 1977 states that:

> A person who unlawfully assaults another person is guilty of an offence.

The penalty provided for is a fine not exceeding K200.00 or imprisonment for a term not exceeding six months. This latter section is amended by section 1 of the Summary Offences (Amendment) Act (No.17 of 1983) which now imposes a minimum sentence of six months imprisonment and a maximum of two years.

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* Unreported Supreme Court judgment SC286 of February 28, 1985.

The assault provision in the current Criminal Code is traceable back to the original Queensland Criminal Code Act 1899 (63 Vic. No.9).

The Summary Offences Act 1977, which came into force on 23rd March 1978, amalgamated and replaced two former colonial enactments - the Police Offences Act (Papua) and the Police Offences Act (New Guinea). Although there was no offence of assault as such, under either of the Police Offences Acts it was an offence for a person to 'unlawfully lay hold of, strike or use violence towards any other person' .[Police Offences (New Guinea) Ordinance (no.2) 1963, s.6 and Police Offence (Papua) Ordinance (No.2) 1963, s.5]. This latter offence was clearly designed to deal with minor offences.

Despite the differences in the respective penalty provisions, it is apparent that S.6(1) of the 1977 Act and S.335 of the Criminal Code contain almost identical definitions of the offence of assault. This duplication, combined with uncertainty over the application of the defences available under the Code has led to disagreement between the judges as to whether provocation can be a defence to a charge of assault under S.6(1) of the Summary Offences Act. Division 5 of Part 1 of the Code provides a number of defences - bona fide claim of right, [Criminal Code Act (Chpt. 262), s.23.] mistake of fact [Id., s.25], extraordinary emergency [Id., s.25], insanity [Id., 2.28], intoxication [Zd., s.29], under-age [Id., s.30], and compulsion [Id., s.32] - which are specified by S.22 to be of general application to all statutory offences in Papua New Guinea. The defence of provocation as provided in Sections 266 and 267, however, is found under Division 1 of Part V of the Code which is not expressly stated to be of general application. The location of the provocation defence in this manner has given rise to subsequent problems of interpretation.

The National Court decisions

As stated above the issue of the applicability of provocation as a defence to a charge of assault under S.6(1) of the 1977 Act has been the subject of conflicting National Court decisions. In particular, Justices Bredmeyer and Pratt arrived at quite opposing conclusions on this matter. Thus, in the cases of Aipa Peter v James Kapriko N 469(M) (1984); John Mongo and Lazarus Pisu v Simon Saun N 470(M) (1984); and Freda Nup v Chris Hambuga N478(M) (1984), Bredmeyer J. concluded that whilst the defence of provocation as provided for by sections 266 and 267 of the Criminal Code (Chapter 262) is available as a defence to a charge of assault under S.335 of the Code, it is not available as a defence to a charge of

assault under section 6(1) of the Summary Offences Act. In contrast, Pratt J. arrived at the opposite conclusion in the case of Mogia Widu v Koda Ubia N 473(M) (1984). In that case it was held that the defence of provocation provided in the Criminal Code was available in relation to a charge of assault under section 6(1) of the Summary Offences Act.

(a) The Bredmeyer position -

In Aipa Peter v James Kapriko N 460(M) (1984) the appellant had pleaded guilty to assault under S.6(1) of the Summary Offences Act and received the minimum sentence of six months imprisonment. The evidence suggested that what took place was a minor assault provoked by the fact that the defendant believed that the complainant was going around with her husband. Upon conviction the appellant appealed against sentence. In finding that sections 266 and 267 of the Criminal Code do not apply in respect of an assault charge under the 1977 Act, Bredmeyer J. gave his reasons as follows:

> It is erroneous but all too easy to assume that the provocation defences by SS.266 and 267 of the Criminal Code (Chapter 262) apply to the offence of assault under the Summary Offences Act. It is clear from the Code, because of the express words of S.22, that a number of specified defences... apply to all statutory offences in Papua New Guinea but on the rule expressio unius personae vel rei, est exclusio alterius the express application of these general defences to all offences means that the provocation defence which is not contained in Division 5 (SS. 22 - 36 of the Code) does not apply to offences created outside the Code [Aipa Peter v James Kapriko N.469(M) (1984), per Bredmeyer J., at p.3].

According to Bredmeyer J. provocation, whilst not a defence to a charge under the 1977 Act, is an important mitigating factor. This is the common law position under which provocation, whilst mitigating the penalty, was not an excuse so as to render the assault lawful.

In John Mongo and Lazarus Pisu v Simon Saun N 470(M) (1984) the appellant had been convicted under S.6(1) of the 1977 Act and given the minimum penalty of six months imprisonment. Bredmeyer J. arrived at the same conclusion in hearing the appeal against sentence, stating:

> the offence under (S.6(1) is 'unlawful assault' and whether an assault is lawful or unlawful is to be determined by the common law of England pre-independence. Under the common law provocation is not a defence to assault but is an important and common mitigating factor to reduce the penalty [John Mongo and Lazarus Pisu v Simon Saun N.470(M) (1984, per Bredmeyer J. at p.2].

These views were reiterated in Freda Nup v Chris Hambuga N.478(M) (1984). Here Bredmeyer J. acknowledged Pratt J's decision to the contrary in Mogia Widu v Koda Ubia N 473(M) (1984) and expressed the hope that "the Public Prosecutor will appeal against any decision so that the Supreme Court can resolve the conflict" [Freda Nup v Chris Hambuga N.478(M) (1984), per Bredmeyer J., at p.7].

It is worth noting that in the three Bredmeyer decisions, whilst holding that provocation was not a defence to an assault under S.6(1) of the 1977 Act, he decided that provocation was an 'extenuating circumstance' for the purpose of S.138 of the District Courts Act 1963. Section 138(1) of that Act empowers a Court where a person is charged with a simple offence and the charge is proved, to dismiss the charge or give a conditional discharge without proceeding to conviction in certain circumstances, including the extenuating circumstances under which the offence was committed. In fact, in all three of the above cases Bredmeyer J. considered that there had been a substantial miscarriage of justice under S.236(2) of the District Courts Act and applied S.138 in allowing the appeals. Thus, whilst disallowing provocation as a defence to an assault charge under the Summary Offences Act, Bredmeyer achieved more or less the same result by construing provocation as an 'extenuating circumstance' under S.138 of the District Courts Act which allowed him to dispose of the case without imposing a punishment.

(b) The Pratt position -

In Mogia Widu v Koda Ubia N 473(M) (1984) the appellant had been convicted before the District Court at Chuave of assault under S.6(1) of the 1977 Act. In holding to the view that the defence of provocation provided under the Criminal Code was available to an assault charge under the Summary Offences Act, Pratt J. abruptly rejected Bredmeyer J.'s reasoning:

> the fact that provocation is not contained in the offences covered by Division 5 Part 1 which is applicable to all offences in the State by virtue

> of S.22 is quite beside the point. There is nothing contained in the wording of SS.266 and 267 to justify any attempt at limiting the application of the section to those assaults only mentioned in the Code [Mogia Widu v Koda Ubia N.473(M) (1984), per Pratt, J., at p.2].

Moreover, "such a proposition (is) entirely without merit and seemed to me to be against all principles enunciated in this jurisdiction for many years" [Id., at p.2].

Supreme Court Reference No.6 of 1984.

The Supreme Court finally got its opportunity to pronounce on this issue when the Principal Magistrate at Lae referred the following question to the National Court which in turn referred it to the Supreme Court pursuant to S.15 of the Supreme Court Act (Chapter 37):

> Is the defence of provocation available to a defendant charged with unlawful assault contrary to S.6 of the Summary Offences Act?"

On the 28th February, the Supreme Court, consisting of Justices' McDermott, Amet and Los unanimously answered the question in the affirmative.

The decision of the Supreme Court was premised upon two main objections to Bredmeyer J.'s reasoning. Firstly, that by holding that provocation was available as a defence to a charge of assault under the Criminal Code but not under the Summary Offences Act, the Court would be leaving the selection of the applicable law in the hands of the police prosecutor who lays the assault charge. McDermott J. referred to this as "a horrifying prospect" [Supreme Court Reference No.6 of 1984, per McDermott, J., at p.6], and both he and Amet J. illustrated the kinds of anomalous results that might arise from such a situation. Secondly, the Supreme Court asserted that it is possible, as well as desirable, to hold that provocation was a defence to an assault charge under S.6(1) of the 1977 Act through the application of existing and well understood rules of statutory interpretation.

In relation to the first objection, the most serious anomaly arising from Bredmeyer J's decision would clearly be that a defendant charged under the Code would have a chance of a complete acquittal if his defence were successful, whereas the defendant charged under the Summary Offences Act would not. Another anomalous situation arises from the mandatory minimum sentence now applicable in the case of S.6(1) of the

1977 Act. This provides for a minimum penalty of six months imprisonment and a maximum of two years upon conviction. A conviction under S.335 of the Code, however, only entails a maximum penalty of six months. In addition, it is now clear that, as a result of the Criminal Code (Amendment) Act 1983 (No.29 of 1983), the range of lesser penalties available under S.19 of the Criminal Code are no longer available in the case of a minimum penalty [Criminal Code (Amendment) Act 1983 (No.29 of 1983), s.2].(1) Thus, whilst the defendant convicted under S.335 might receive a custodial sentence of less than six months or a non-custodial sentence, there is no such flexibility in the case of the defendant convicted under S.6(1) because of the minimum penalty provision. The only flexibility, as far as punishment under this latter section is concerned, seems to lie in the application of S.138 of the District Courts Act which remains unaffected by the minimum penalty provisions. This section, which was the one resorted to by Bredmeyer J., is, however, of limited scope and, moreover, appears to be a rather akward way of mitigating the inevitable injustices that would arise were provocation not to be available as a defence under S.6(1). Amet J. dismissed its appropriateness in the following manner:

> It is not to the point to suggest that the latter defendant may nevertheless be discharged under S.138 of the District Courts Act because provocation is a very strong mitigating factor [Supreme Court Reference No.6 of 1984, per Amet, J., at p.9].

Amet J. gives another striking example of the potential for injustice which could follow from Bredmeyers reasoning. Thus, where A assaulted B acting under provocation and B subsequently died as a result of his enlarged spleen being ruptured by A's blow, A could be acquitted if charged with manslaughter, as provocation is a complete defence to manslaughter. He contrasts that with the situation in which A struck B under similar circumstances of provocation and B sustained no injuries. If A, in this second instance, were charged with assault under the Summary Offences Act, the defence of provocation would not be available to him and he would, therefore, be liable, upon conviction, to the minimum penalty of six months.

McDermott J, and Amet J, quote approvingly the caution expressed by Lopes L.J. in Colquhoun v Brooks (1888) 21 QBD 52 in respect of the maxim of legal interpretation adopted by Bredmeyer J. - **expressio unius personae vel rei, est exclusio alterius**:

> "It is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents."

They also assert a number of other well known rules of construction from the common law and the Constitution which confirm their own approach.

For example:

a) Statutes should be given their "fair and liberal meaning" - the 'purposive' rule of interpretation as opposed to the 'literal' interpretation: PLAR No.1 of 1980 (1980) PNGLR 326.

b) If there is some doubt as to which of a number of constructions prevail particularly in the construction of a penal statute, then the construction most favourable to the subject must be adopted: R v Sleep (1966) Qd. R. 47, 54.

c) The Court "in interpreting the law... shall give paramount consideration to the dispensation of justice" S.158(2) Constitution.

The end result is that all three judges agree to follow the 'purposive', as opposed to the 'literal', approach to statutory interpretation. The former approach, in the words of Amet J., avoids:

> construction which would result in injustice or capricious results and which would enable the construction most favourable to the subject, to be adopted. In the final analysis, that is a construction which is consistent with the Constitutional injunction to give paramount consideration to the dispensation of justice [Id., at p.14.].

Los J. goes on to suggest that had there been no clear rule of construction, the Court would have created one under Schedule 2.3 of the Constitution and that this would have presented no difficulty as the concept of provocation is a familiar one in Papua New Guinea society:

> Had there been a need to formulate a new defence to the offence of assault under the Summary Offences Act it would have been done easily without offending the provisions of the Constitution, Schedules 2.3 and 2.4 and other statutes as the idea of provocation in Papua New Guinea Society has been

> well explored and is well recognised by the Constitution and other statutes [Surpeme Court Reference No.6 of 1984, per Los, J., at p.20].

Conclusion

The decision of the Supreme Court in Reference No.6 of 1984 (1984) is welcome on two main grounds. Firstly, it identifies the kinds of anomalies likely to flow from a restrictive application of the defence of provocation to an assault charge and opts for the interpretation that will avoid such unjust consequences. As the judges acknowledged, leaving the applicability of the law in the hands of the prosecutor would indeed be undesirable. This is particularly so at the present time when the criminal justice system and its personnel are operating under conditions of considerable pressure.(2) Moreover it would represent an opting out by the judiciary of their constitutional duty S.158(2) to dispense justice.

Secondly, the Supreme Court decision represents a departure from the much criticised tendency of the courts in the past to go for the ready made common law solution when a problem of interpretation arose.(3) Whilst it can be argued that Bredmeyer J's reasoning is technically correct, it does run counter to the need to develop Papua New Guinea's own system of criminal law in accordance with the needs and aspirations of its own people. Continued resort to the common law in this manner will not help such a development. As McDermott J. pointed out:

> The end result of the Bredmeyer view is to make another fundamental change (in the approach to the criminal law) by, very selectively introducing in 1984, the common law of England into the developed criminal law of this country [Supreme Court Reference No.6 of 1984), per McDermott, J., at p.p.'s, 5-6].

The task involved in developing such a system is an enormous one and one that cannot be left entirely in the hands of the already overburdened judges. Nevertheless it is encouraging to note the positive approach of the highest Court in the land adopted in this case.

END NOTES

1. See also The State v Peter Samak Bandi and Gibson Wi N.462 of 1984 as an example of the operation of this amendment.

2. See, in general, Law and Order in Papua New Guinea, Vols. 1 and 2, September 1984.

3. See, for example, "The Status of the Common Law under the PNG Constitution," by John Gawi in Essays on the Constitution, edited by De Vere, Colquhoun-Kerr and Kaburise (forthcoming).

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