SUPREME COURT OF THE TERRITORY OF PAPUA AND NEW GUINEA

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TOKAVAR AND OTHERS

of TINGENAGALIP (Appellants)

-and-

VUNADADIR/TOMA/NANGA-NANGA

LOCAL GOVERNMENT COUNCIL

(Respondent)

The Supreme Court, (Gore J.) in its Appellate Jurisdiction sitting at Rabaul, New Guinea, (on appeal from the Vunadadir Court for Native Affairs) 23rd June, 1960 and 1st July, 1960.

Council Tax - "Residents" - Proof of - Onus and Method

Village Book in which the Census is recorded is not a Public Document

On a prosecution for failure to pay tax to a Local Government Council the Court for Native Affairs held that:-

"The Court is of opinion that Reg. 3 of the Native Local Government Council Regulations defines residents within a Council Area, and that the Defendants are residents within the Vunadadir/Toma/Nanga Nanga Council. These Defendants live in an area known as Tingenagalip. Their names and ages are in the Village Book of Tingenagalip. When word is sent for the residents of Tingenagalip Village to appear for census, the Defendants have appeared. The censuses are held at regular intervals and it appears from the Village Book that none of these Defendants, either in 1958, or 1959 asked for their names to be removed from this Village Book. The area in which they live has been known as Tingenagalip from the time of the German Administration. When this Council was proclaimed (Gazette of the 4th December 1952) mention is made, (in the schedule of the Proclamation) of a list of Villages owned or occupied by the Natives deemed by customary usage to be the inhabitants of them. This proclamation was amended (Gazette of 5th July, 1956) to include some new villages, one of which was Tingenagalip.

The Defendants have been shown by the Prosecution to be occupying land in the area deemed by customary usage Tingenagalip Village, a village within the Vunadadir/ Toma/Nanga-Nanga Council Area.

The Defendants did not bring any evidence to the effect that they belong to another area. Reg. 81 (i) of the Native Local Government Council Regulations clearly states that a Native liable to pay tax has to show cause, and proof lies upon him, as to any reason why he failed to pay the tax. Notice is taken of the ages in the Village Book and all of the Defendants are adult males and, under Reg. 82, are liable to pay tax. Furthermore, Rule No. 1 of 1959 (of the Vunadadir/Toma/Nanga-Nanga Native Local Government Council) states that adult males other than those from Malabanga Village are liable to pay Council Tax of £4. The Defendants have not done this. The Court therefore finds them guilty."

Held

(i) The Magistrate misdirected himself as to the onus of proof.

(ii) It is for the Council affirmatively to prove that a person is a "resident" and not for the appellants to show that they are not "residents".

(iii) The Village Book is not a public document and was incorrectly admitted as evidence.

Cases referred to:-

(a) Huntley v. Donovan (1850) 15 Q.B. 96; 117 E.R. 394
(b) The King v. Inhabitants of Debenham (1818) 2 B. and Ald. 185; 106 E.R. 334.
(c) Merrick v. Wakley (1838) 8 Ad. and E. 170; 112 E.R.802
(d) Doe d. France v. Andrews (1850) 15 Q.B. 756; 117 E.R. 644
(e) Sturla v. Freccia (1880) 5 App. Cas. 623
(f) Lilley v. Pettit (1946) 1 K.B. 401
(g) May v. O'Sullivan (1955) 29. A.L.J. 375
(h) Morgan v. Babcock and Wilcox Ltd. (1930) 43 C.L.R. 163

Dudley Jones for the Appellants

Norris Pratt for the Respondent

Appeal against conviction on special grounds that

(i) the Magistrate was in error in admitting the Village Book of Tingenagalip in evidence as proof of residence of each of the appellants.

(ii) the Magistrate was in error in finding that the appellants and each of them was resident in the village of Tingenagalip for a period of not less than four months during the year 1959.

(iii) the Magistrate was in error in finding that the onus was on the appellants and each of them to prove that they were not residents of the village of Tingenagalip

for a period of four months during the year 1959.

Dudley Jones, for the Appellants, submitted:-

(a) that the village book had been wrongly admitted in evidence as there is no legislative authority to show that it was admissible and that therefore the Magistrate admitted hearsay evidence;

(b) that there was no evidence before the Magistrate to show that the appellants had been resident in Tingenagalip village for a period in excess of four months, and that although there was some slight evidence that they were residents of Tingenagalip village, Respondent had not displaced the onus of proof to show that this period of residency was of the required time.

(c) Although Regulation 3 of the Native Local Government Council Regulations defines a resident this was of no assistance to the prosecution until they had established a period of residency. Before a person can become liable for tax, it must be shown that he is a resident within Regulation 3, and that this residency has extended for a period longer than four months. Accordingly, Regulation 81 cannot be applied until it is shown by the Prosecution that a Native fulfils the requirements of Regulation 83, namely, that he has been resident for a period of four months. The Magistrate was therefore in error in assuming that once residency had been established by the prosecution it was then on the defence to show that they had not been there for a period in excess of four months. The onus for non-payment of Council tax did not rest upon a defendant until it had been shown that he was in fact liable to pay tax, and this could not be done until evidence was called to prove that the defendants had been resident in the village for the specified period.

N.H. Pratt, for the Respondents, conceded that it is necessary for the prosecution to adduce evidence of a period of residence in excess of four months before it can rely on the provisions of Regulation 81, but submitted that the village book was rightly admitted in evidence on the ground that it was in fact a public document. For the definition of public documents see Phipson, 9th Ed., pp. 351 and cases therein, particularly to those which point out that the document must be one which is not made in the interest of the person making the document vide Huntley v. Donovan (a) and the King v. Inhabitants of Debenham (b) and Merrick v. Wakley (c). However, the test of a public document is set out in Doe d. France v. Andrews (d) Sturla and Freccia (e) and Lilley v. Pettit (f) at 406 ff. He also conceded that there was no legislative authority for the existence of a village book but sought to draw some legislative authority from the fact that Regulation 113 of the Native Administration Regulations states in effect that any Native required to do so by a District Officer or Patrol Officer must appear for census or be guilty of an offence. Although there is no mention of a book of record for the purpose of census, the respondent invited the Court to infer that as the village book was the only method which was commonly in use in the Territory to record census, apart from the recently introduced tax census sheets, there was no other method of recording the census other than in the village book.

If the village book were then admitted in evidence it would show evidence of residence in view of the fact the census had been carried out since 1949, and that the

last census was some few months before the date on which the tax in this matter fell due. He therefore asked the Court to draw a presumption of regularity, namely, that if the persons were in residence at various periods from 1949 to 1958, it would be entitled under the rule governing presumption of previous and subsequent existence of facts to find that the appellants had been in residence for a reasonable period of time, and that this period would certainly extend over four months (see Phipson on Evidence 9 Ed. page 107-8). He argued that this presumption is strengthened by the fact that verbal evidence had been given by the witnesses to the effect that the appellants were members of Tinginagalip and that one of the witnesses had seen them there on a number of occasions.

If the Court made this presumption, then taking into account the facts that there was no contradicted evidence, there was sufficient to establish more than a mere prima facie case. The Magistrate was entitled to rely on May v. O'Sullivan (g) and Morgan v. Babcock and Wilcox Limited (h) at page 178, per Isaacs J. The Respondent submitted that this was an example of the situation envisaged in May v. O'Sullivan (g) where there was certain information which was peculiarly within the knowledge of the accused person and where the Court might expect an accused person to furnish some sort of reply. It was further submitted that whereas this evidence was particularly easy for the Appellants to adduce, it was extremely difficult for the prosecution to adduce such evidence, and that therefore a further requirement of May v. O'Sullivan (g) had been met. It was submitted by the Respondent that the Magistrate was perfectly entitled to expect, in view of the state of the evidence, a reply by the Appellants and in the absence of such reply he was entitled to draw a conclusion sufficiently adverse to the appellants to warrant a conviction.

Dudley Jones, in reply, submitted that the first requirement set out in Phipson on public documents, namely, that "the book is required by law to be kept for public information or reference" had not been shown to exist in this case. He did not dispute the respondent's submission that a patrol officer in making a census report was a public officer but he did submit that the census was not so much for public information as for an administrative purpose, and that the book was kept merely for administrative use. There was certainly no statutory or legal authority for the existence of the book, and there was no legal obligation on any person to attend to the book or to record any facts or information therein. He also submitted that the facts of this case did not come within the provisions of May v. O'Sullivan (g) and that the legislation clearly envisaged proof beyond reasonable doubt of a period of residency in excess of four months, and that the Court would not make any presumption as to continued existence and that the Magistrate should have dismissed the case for want of sufficient evidence.

GORE J. Appeal upheld. Convictions quashed. cur ad vult.

On 1st July, 1960 His Honour delivered the following judgment :-

JUDGMENT.

GORE J.

This is an Appeal from a Court for Native Affairs by TOKAVAR and seven other Natives who were convicted and

sentenced to one month's imprisonment for failure to pay the tax of £4 to the Vunadadir, Toma, Nanga Nanga Local Government Council before 30th April, 1959, in contravention of the provisions of Regulations 81 (1) and 109 of the Native Local Government Councils Regulations 1949 and as amended.

The grounds of the Appeal are:-

(1) That the Magistrate was in error in admitting the Village Book of TINGENAGALIP in evidence as proof of residence of each of the appellants.

(2) That the Magistrate was in error in finding that the appellants and each of them were resident in the village of TINGENAGALIP for a period of not less than four months during the year 1959.

(3) That the Magistrate was in error in finding that the onus was on the appellants and each of them to prove that they were not residents of the village of TINGENAGALIP for a period of four months during the year 1959.

(4) That the convictions were against the evidence and the weight of evidence.

With regard to ground (3) it was conceded by Mr. Pratt for the Respondent that the onus was not on the Appellants and each of them to prove that they were not residents of the village of TINGENAGALIP for a period of four months during the year 1959.

In this instance the Regulations governing the levying of village tax are those of No. 6 of 1950 because at the time of the alleged failures to pay the tax, Regulation No. 25 of 1959 had not been promulgated. Regulations 82 and 83 of the 1950 Regulations have been amended by the Regulations of 1959 but these amendments are not relative to this Appeal.

By Regulation 82 of the 1950 Regulations, "Council Tax shall be payable by all able-bodied male natives apparently above the age of seventeen years at the time when the tax falls due, who are resident in a Council's area, and by such female natives apparently above the age of seventeen years resident in a Council's area who have become eligible to vote."

Regulation 83 of the same Regulations provides that "for the purpose of Council taxation any native who has resided for a continuous period of more than four months in an area under a Council's jurisdiction shall be regarded as being resident in the area provided that a native shall not be liable to pay tax to more than one Council in respect of any one year."

It will be seen then in Regulation 83 that it is necessary for tax liability that a native should have resided for a continuous period of more than four months in the area under the Jurisdiction of the Council which imposes the tax. It does not seem to say so definitely, but it must mean in any one tax year.

In Regulation 3 of the Native Local Government Councils Regulations 1950 there is a definition of "native resident within the area of the Council" but this definition does not apply to Regulation 83 because the opening words of Regulation 3 are - "In these Regulations unless the contrary intention appears, " and the Regulation goes on to define "native resident within the area of the Council."

It seems to me that the contrary intention does appear in Regulation 83 of the 1950 Regulations, for it says - "For the purposes of Council Taxation any native who has resided for a continuous period of more than four months in the area ....shall be regarded as being resident in the area." One is a definition for the general purposes of the Native Local Government Councils Regulations, while the other is an explicit regulation for the purposes of Regulation 83, and one must look to it only for the residence qualification for tax liability.

Regulation 83 was no doubt framed to include natives from other areas and foreign natives who do not have the area interests contained in Regulation 3. But one cannot divide

the two classes, those who have area interests under the definition, and those who have not. The tax qualification in Regulation 83 as to residence must apply to all. A native might be maintaining a permanent house, for example, within the area, yet could be absent from the area for the whole of a tax year; indeed the Village Book discloses that this could be so. He could not be liable, just because he held the house for more than four months but was not residing within the area.

To become liable the native must have "resided," that is, dwelt" within the area for more than four months continuously.

The admission in evidence of what is knownas the "Village Book" was important for the prosecution of the eight accused before the Court for Native Affairs because the oral evidence tendered was meagre. It was necessary for the prosecution to prove not only that the eight accused resided within the area but that they had so resided continuously for a period of more than four months.

There was some evidence by the two witnesses, MICHAEL TIBU, the Council Clerk, and the Police Constable ROTA, that the accused "were residents" of TINGENAGALIP but not that they had resided continuously for more than four months within the area.

The evidence of these two witnesses did not go far enough. Perhaps they could not go any further. On the oral evidence, therefore, I am unable to find that the eight accused were taxpayers.

The argument was mainly on the admission as evidence of what is known as the Village Book, for it was upon the inclusion of the names of the Appellants in this Book that the prosecution before the Magistrate for Native Affairs relied to obtain a conviction. The Magistrate held the Book was admissible and upon being admitted the burden of proof was thrown upon the Appellants to show that they were not taxpayers. Of course this was not so, and as I have remarked earlier, Counsel for the Respondent conceded that the onus was not on the Appellants to prove the negative.

The Magistrate relied upon Regulation 81 (1) substituted by Regulation 7 of No. 2 of 1955, which provides that "a native liable to pay Council Tax shall not without reasonable excuse proof whereof lies upon him refuse or fail to pay the tax". The Magistrate was in error in relying upon Regulation 81 (1) because it has no application unless and until the native is found to be liable to pay tax.

There are in law what are known as public documents which are admissible as prima facie evidence of the contents thereof. The admissibility of public documents is as a rule governed by statute but if they are in truth public documents but their admissibility is not given force by statute, they may be admitted at Common Law provided that their public character is shown. The admission of public documents is an exception to the hearsay rule on the general grounds that they were made in the course of official duty respecting facts which were of public interest recorded for the benefit of the public and available for consultation by members of the public. I think the document must be made for the purposes of the public.

The Village Book has no statutory authority. During the argument on the Appeal it was not claimed that it had statutory authority and no-one could suggest its origin. It does not appear by whom it was authorised nor by whom it was prepared and printed.

The Village Book is not one which is kept for the purpose of recording the names of probable taxpayers. It appears to be a book for the purpose of recording the names of villagers, their births, deaths and marriages, and general matters in relation to the Village for Departmental information. That it is used for the purpose of disclosing probable taxpayers would appear to be incidental because the Village Book of TINGENAGALIP was first opened on 8th November, 1949 and so before the Regulations No. 6 of 1950, which imposed village Council Tax, were made. It is from this very untidy book that the information is gained from which a native becomes liable to tax.

Now the Appellants were charged and convicted for failure to pay tax for which it was claimed they had become liable. Their names were obtained from the Village Book. It has been argued for the Respondent that the Book is a public document and should be admitted at Common Law on the ground that it is a book made for the purpose of the public making use of it and being able to refer to it. Vide Lilley v. Pettit (1946) K.B., 401 at p. 407.

In my view the Village Book is not kept for the purpose of the public and for the public to have access to it. The very nature of the Book and its contents show that it is purely for Departmental purposes. Indeed the Book contains material which I am sure the public should not be allowed to see. The Village Book was wrongly admitted as evidence.

Even if the Book was admissible, it would not be prima facie evidence, for an examination of its contents reveals that the information contained therein is too uncertain in any event to found a prosecution for failure to pay tax.

I uphold the Appeal and quash the convictions recorded against the eight Appellants, with costs.

(end).

Dudley Jones, Barrister and Solicitor Rabaul

Norris Pratt, instructed by the Secretary for Law.

Published by P.J. Quinlivan, Barrister-at-law, from material supplied by the Appeal Judge, the Supreme Court Registry and N.H. Pratt, Esquire, Barrister-at-Law.