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IN THE SUPREME COURT) CORAM: RAINE, J.

OF PAPUA NEW GUINEA) Wednesday,
13th November, 1974.

TOPEU TAUPA v. TIOTAM JOEL

(App. 113 of 1974 (N.G.))

1974

Nov. 13
RABAUL

RAINE, J.

This is an appeal from a decision of a Local Court held at Rabaul. The appeal is against an order made by the Magistrate that the appellant pay ten fathoms of tabu to the respondent, who was the complainant in the court below.

The complaint alleged that the appellant defamed the respondent. The words set out in the complaint were not pleaded with an innuendo but when looked at in the light of the evidence are prima facie defamatory, I would direct a jury that they were capable of bearing a defamatory meaning.

However, there is no evidence of publication to a person or persons other than the respondent. Not only is that the case, but the evidence indicates pretty plainly that the words were only uttered to the respondent himself. Thus the claim against the appellant must fail. It is a civil claim, and, of course, a Local Court has jurisdiction to entertain civil claims. Section 13 reads:-

> "13.(1) Subject to the Ordinance, a Local Court has jurisdiction over -
> (a) .....
> (b) all civil actions at law or in equity;"

When I pointed out to Mr. Ross of Counsel for the respondent, who was instructed by the Crown, that the civil action was doomed to failure he sought to rely upon s.13(1)(c). This gives a Local Court jurisdiction over "all matters arising out of and regulated by native custom, other than such matters as are within the exclusive jurisdiction of the

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Land Titles Commission." Although the words uttered were in relation to land, neither Counsel suggested that the embargo contained in the concluding words had any effect here.

The words complained of would, I have no doubt, have been taken very seriously by a Tolai villager like the respondent. They reflected on his ownership of land he claimed was his, and which he occupied, and they strongly suggested that he had lied to the Administration and tricked his way into obtaining the land. We all know what land means to the Tolai people, and to other people in this country.

But there was no evidence that this was one of those "matters arising out of and regulated by native custom." Even had there been such evidence, there was no evidence as to the manner in which native custom would have ordained that the affair be "regulated."

It might well be that in the area containing the respondent's land a custom prevailed whereby the senior men in the area would impose a fine of up to fifty fathoms of tabu on a person uttering provocative words about land and the fruits of the land. But no such action was taken at village level, the respondent complained to the Local Court, and, as I have said, there is absolutely no evidence that a custom existed.

The learned Magistrate, in his careful report, does not suggest for a moment that he had custom in mind. At the conclusion of the report His Worship indicates that the uttering of the words complained of "would lower the complainant in the estimation of right-thinking (members) of society generally." With this, I would agree, but the difficulty is that there is no evidence that any of the Rakuna people heard the words uttered at all. As I pointed out earlier, the only evidence is that the words were spoken of and to the respondent, but not in the presence of bystanders.

Thus the appeal must succeed, as it was not suggested that the complaint alleged an offence "against a law in force in the Territory or a part of the Territory which may be dealt with summarily." See s.13(1)(a) of the Local Courts Act of 1963.

Mr. Ross did refer me to the Native Customs (Recognition) Act of 1963. Of course I am fully aware of that Act's provisions, but I am quite in the dark as to how it overcomes the problem the respondent has here, namely, that there is no evidence that there was a custom, and, if there was, what remedies it provided. Indeed, s.5 of the Act provides as follows:-

> "5.(1) Subject to this section, questions of the existence and nature of native custom in relation to a matter, and its application in or relevance to any particular circumstances, shall be ascertained as though they were matters of fact.
>
> (2) In considering a question referred to in the last preceding subsection, a court is not bound to observe strict legal procedure or apply technical rules of evidence, but shall admit and consider such relevant evidence as is available (including hearsay evidence and expressions of opinion), and shall otherwise inform itself as it sees fit.
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> (3) For the purposes of the decision on a question referred to in Subsection (1) of this section, a court -
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> (a) may refer to books, treatises, reports or other works of reference, or statements by Native Local Government Councils or committees thereof (whether published or not), and may accept any matter or thing stated therein as evidence on the question; and
>
> (b) may of its own motion call such evidence

or require the opinions of such persons as it thinks fit,

but nothing in this subsection contained shall be deemed to limit in any way the discretion of the court in obtaining evidence or informing itself on the question.

(4) Notwithstanding the provisions of Sub-section (1) of this section, where an appeal is made from a decision of a court, the court which hears the appeal may, if it thinks fit, consider de novo a question referred to in that subsection and which arises in the appeal."

Mr. Ross also referred to the Laws Repeal and Adopting Act, 1921-1952. This does not assist.

Mr. Ross also said that the Crown regarded the appeal as most important. I gather that this was some sort of policy statement. With great respect I really cannot see why it is important. In allowing the appeal I am not striking down customary law and rights accruing to it. The Native Customs (Recognition) Act enjoins me, and all courts and persons acting judicially, to take native custom into account when the case arises. But, in any event, the last thing in the world I would wish to do is to ignore, or depreciate, the customs of our people, many of them long established and for long well understood and respected, and very largely obeyed. Of course, in a complex new and changing world the marriage of the old and the new has its problems, there will be some cases where the old will have to give way to the new in the interests of progress, but in very many cases the "marriage" can be a happy one, and so it should be.

Appeal allowed. Local Court's order set aside.

Solicitor for the Appellant: G.R. Keenan, Esq., Public Solicitor

Solicitor for the Respondent: P.J. Clay, Esq., Crown Solicitor