REGINA -v- DONALD MARAU & OTHERS

High Court sitting at Kira Kira
(Palmer J.)
Criminal Case No. 48 of 1993
Hearing: 2 August 1993
Judgment: 3 August 1993

C. Tagarainiana for Defendant
J. Faga for Prosecution

PALMER J: The three defendants in this case have been charged with the offence of demanding money with menaces contrary to section 288 of the Penal Code. The offence related to an incident which occurred at Ripo, Ulawa, Makira Province on the 20th and 21st of April 1992.

The facts briefly are as follows. On the evening of the 20th of April 1992, the victim, Michael Masitaloa, was seen alone with a girl from the Madjoa area by the 3 defendants. That girl happened to be the 3 defendants sister or close relative. And according to their custom it was a no no or tabu for the victim to be seen with these defendant's sister by the defendants. If they were not seen then it would have been alright. There is no evidence to show that the girl was not a willing participant in the meeting with the victim.

What happened subsequently is told differently by the three accuseds on one hand, and by the victim on the other. Perhaps a witness that could have further provided light and confirmation as to what did actually take place and should have been called is the girl herself.

The victim says that he was chased by the three defendants. Rubenson Mwaemwae in his evidence under oath denies ever chasing the victim. He stated that when they saw the victim with their sister, they called her to them, which she obeyed, and they told her to return home. The victim by then however had run off, but not after having been identified by the three Defendants. They then went straight to Ripo Camp where the victim was staying and told his boss, Abraham Paholo about the incident. I must point out here that it is equally possible for the victim to be chased as to make out that he was being chased through fear.

At the time they went to the Camp, the victim was not present. Abraham Paholo stated in evidence that when these three Defendants arrived, they asked for the victim and said that they want to kill him for breaking their custom. They said that the victim must pay compensation or they will kill him.

In contrast the defendants denied ever being aggressive or using threatening words. In his evidence Rubenson Mwaemwae portrayed the picture of three Defendants who despite the breach of custom and were therefore very offended in custom it seems about that, were very composed, cool and calm about the incident and walked all the way to Ripo Camp, although they were on their way to Madjoa, to report the incident to Abraham Paholo, the foreman or supervisor at the camp and to arrange compensation to be paid to them by the victim. There is no evidence however, before this court that the second principal offender in custom, the girl was also asked to pay similar compensation.

Having reported the matter to Abraham Paholo, they were told to return the next day to sort the matter out. They obliged and went home.

On the following morning the three Defendants arrived at Ripo Camp and according to Abraham Paholo's evidence demanded compensation of $200.00 to be paid or they will kill the victim. He described the situation as very dangerous and quite frightening. He said that at that time the victim remained indoors at his advice. Only himself came out to meet and talk with the Defendants. He gave them $50.00 and told them to go away and he will sort out the remainder later on.

The version of the Defendants however is different. Interestingly, one of the prosecution witnesses, Jonathan Lioha, an elderly man, and the father of one of the Defendants, (Rubenson Mwaemwae), confirmed the version of the Defendants. He stated that he accompanied the Defendants to ensure that no trouble occurred. He went and spoke with Abraham Paholo, after which $50.00 was given straight away and another $150.00 given at a later date. He stated that there was no trouble or shouting whatsoever. When he spoke with Abraham Paholo the defendants sat down quietly and waited.

In the caution statements the three Defendants admitted asking compensation from Michael Masitaloa for the breach they allege in custom, but there was no indication of any threats or force being used.

I will now turn briefly to the questions of law. The two key elements in the charge are the words 'demand' and 'menaces'. There must be a demand with menaces. The learned

author in *Archbold Criminal Pleading Evidence and Practice, 43rd Edition, Vol.2 at para. 18-139* says that the demand may be made in writing or by speech or by conduct.

I am satisfied in the circumstance of this case that a demand was being made. The fact The fact that it was made through Abraham Paholo makes no difference. That demand was subsequently communicated to the victim by Abraham Paholo.

What however needs to be understood is that it is not wrong to ask or make a demand for compensation. In most of Solomon Islands Societies, the concepts of demanding compensation and payments of compensation are not strange or foreign. These were here long before the rule of law was introduced by Britain. However in those days, it was common to use force or threats to make or accompany such a demand. The result is that people always lived in fear and much apprehension, and there was a vicious cycle of violence, revenge, and bloodshed, injury and damage to property.

The law was therefore passed to curb the use of force or menaces, so that whenever a so-called breach in custom is caused, there will not be further trouble, fear and mis-apprehension but rather a coming together in understanding and peace, with respect and restraint to settle the so called customary problems or offence. The crude or the vile nature of man needed to be suppressed or controlled by the law so that there is an opportunity for peaceful and lawful settlement.

The offence therefore is committed when the demand is made with menaces or by force.

The learned author of *Archbold (ibid) at para. 18-140* referred to *Sellers L.J.* judgement in the case of *R -v- Clear [1968] 1 All E.R. 74, C.A.* in which his Lordship stated:

> " *Words or conduct which would not intimidate or influence anyone to respond to the demand would not be menaces..., but threats and conduct of such a nature and extent that the mind of an ordinary person of normal stability and courage might be influenced or made apprehensive so as to accede unwillingly to the demand would be sufficient...*"

It needs to be pointed out that the definition of the word 'menace' was given in the context of the English offence of 'blackmail'. This is slightly different to the context within which section 288 was sought to be applied within our jurisdiction. Section 288 was especially directed at customary demands that were being made with menaces or by force.

It needs to be borne in mind that within Solomon Island society, customary demands are often (not always) justifiable in custom. People in Solomon Islands generally know and

understand when a so-called breach or offence in custom has been made and when it is reasonable and justifiable to expect payment of compensation.

In the facts of this case, the witness Abraham Paholo admitted that compensation is due or should be paid in such circumstances. Abraham Paholo is a man from the same village as these Defendants and he was aware that such incidents in which the victim was found in were breaches in his custom. Abraham Paholo therefore played a major role in settling the customary offence, and this does have some bearing in determining the question of menaces.

On one hand Abraham Paholo acknowledged that compensation would be paid. However, he pointed out that the behaviour and the conduct of the three Defendants was such as to cause fear and a lot of apprehension.

There is also another important aspect of customary practice which needs to be addressed and taken stock of and understood. In the customary context of many cultures in Solomon Islands, whenever a customary breach or offence is caused it must be compensated for immediately. In other words, at the heat of the moment compensation must be paid at once, to cool or calm the persons offendor prevent further bloodshed. There is some logic to this or understanding even within these cultures, of the crude human nature of man. However, it is that very thing which the law seeks to address, and says that urgency, and the requirement to pay at once or there will be bloodshed or injury or damage are wrong. In other words, members of a society must learn to settle their customary breaches or offences peacefully and lawfully.

The three defendants have sought to put forward that what they did that night was done peacefully, quietly and orderly. They sought to explain that the action they took required some urgency because it was possible that the victim would abscond.

The prosecution in essence however relied on the happenings of the morning of the 21st of April 1992 to prove its allegation.

The events of the evening of the 20th of April were basically between Abraham Paholo and the three Defendants, as the victim was not present during that time. It is important to note that Abraham Paholo told the Defendants to go back and return the next day. This they did.

On the morning of the 21st of April, these three Defendants went with one, Jonathan Lioha, (PW3). What is of significance is that Jonathan Lioha was not charged together with these three defendants. If it was as alleged by prosecution that the three defendants did make a demand for compensation with menaces, then Jonathan Lioha

should have been charged with aiding or abetting under section 21 of the Penal Code. He was not charged and his evidence basically contradicted the evidence of PW1 and PW2. This does weaken the prosecution case. His version would also have some force in my view because the defendants received only $50.00 that morning and then left for their village.

The remaining $150 was paid by Abraham Paholo to them at their village. When the defendants were told to go away, they obliged. The impression given is one more of a willingness perhaps to negotiate or settle the breach on the part of the Defendants, but also a willingness on the part of Abraham Paholo on behalf of the victim to settle the matter.

The Defendants came at the request or invitation as correctly put by learned counsel for the defendants, of Abraham Paholo. Abraham Paholo knew that compensation was due. He must therefore have spoken to the victim about this. When the defendants arrived, Abraham Paholo met them and spoke with them. The life of the victim therefore was not directly at risk. He was covered by Abraham Paholo and I must say that the actions of Abraham Paholo were very wise and responsible.

At no time in the trial was it led or put that the amount asked or demanded was too much.

There was an acceptance and willingness to pay compensation. There was no weapon or evidence of any weapon involved or evidence of any physical contact or damage to any property.

I do note that both Michael Masitaloa and Abraham Paholo said that they heard threatening words used. This is really a question of credibility. It is quite possible that this did occur and that the Defendants were not speaking the truth. However, the contradictory evidence of prosecution witness Jonathan Lioha in a way as I said, weakened the prosecution case, together with the other factors already considered.

Abraham Paholo did say it was quite dangerous. However, when the defendants left and he went after them to their village, the tension surely must have been diminished and there was further opportunity for a negotiated settlement. However, it seems that this did not occur or perhaps it did. No evidence was led concerning this. What is clear is that Abraham Paholo knew that in his custom, compensation was to be paid. Perhaps this explained why he was very concerned and perhaps why he too may be apprehensive about the matter if compensation was not paid. There was no evidence led to say that negotiation did take place to have the compensation paid at a later date. It seems that all the terms were readily acceded to. Perhaps this did reflect fear and apprehension.

However, I am equally satisfied that there was an acknowledgment, acceptance and a willingness to pay compensation. Perhaps there was pressure applied by the presence of the defendants and their insistence on payment. There is however a fine line to be drawn between demand in which it is accompanied by menaces and a proper demand without menaces or force.

The circumstance of the offence as alleged by prosecution do show the commission of the offence. However, when balanced together with the Defendants version and the version of prosecution witness PW3, there is sufficient doubt raised so that I can give the benefit of it to the defendants.

There are two other matters which I wish to bring out in this judgement.
One is that swearing an oath on the Bible to speak the truth but not speaking the truth brings a curse.

Secondly, there is a need to re-examine what customary offences are, what causes customary offences and seek to apply ones rational mind to these and not take them for granted. By doing that, one should be able to adapt customary issues so that they fall in line with the law, because at the end of the day, the law prevails.

The defendants are acquitted accordingly.

(A.R. Palmer)
JUDGE