STATE V DAKOL: SORCERY AND VIOLENCE IN PAPUA NEW GUINEA (CASE NOTE)

GEORGIA ALDERTON*

CASE SUMMARY

Name of Case

State v Dakol

Citation

National Court of Justice of Papua New Guinea [2018] PGNC 364 http://paclii.org

Judge

Acting Justice Kaumi

Counsel

Ms. Langtry, for the State

Mr. Tsipet, for the offenders

Facts

The victim was known to be a 'sorcerer' in the village of Popdubi, Morobe Province, Papua New Guinea (PNG). The four offenders suspected him of causing the death of their brother through witchcraft. The offenders ambushed the victim at his home and attacked him with bush knives. The victim died of his injuries. The killing appeared to be supported by the local villagers and the victim's family did not ask for compensation.

The offenders were arrested sometime after their return to the village, and all pleaded guilty to murder. As such, this was a sentencing hearing.

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Issues

In determining the appropriate sentence in this case, the main issue was whether and how this was impacted by the offenders' belief in sorcery.

This was guided by two sub-issues:

1. Whether the offenders' belief in sorcery had been established
2. The degree to which this belief should be a mitigating factor in the circumstances

Outcome

Kaumi AJ found that the offenders had a genuine belief that the victim was a sorcerer who had caused many deaths in their village. In the circumstances, however, this was not found to be a special mitigating factor. The offenders received a head sentence of 20 years, accounting for a number of mitigating and aggravating factors. The sentence was only partially suspended (18 years 1 month and 11 days was to be served), with the judge highlighting the need to deter similar cases.

Ratio Decidendi

Formal education and exposure to the influence of modernisation are circumstances which should diminish an offender's belief in taking the law into their own hands and therefore must diminish the effect of 'belief in sorcery' as a mitigating factor.

Obiter Dicta

Sorcery is a belief, not a fact (Following *Acting Public Prosecutor v Uname Aumane &Others* [1980] PNGLR 510).

COMMENTARY

Significance

The rejection of sorcery as a special mitigating factor is not novel and has been seen as far back as *John Baipu v The State* [2005] SC796. In *State v Dakol*, Kaumi AJ applied the discussion of sorcery from *Baipu* to the present circumstances, leading to the specific outcome. This is a recent case, but it seems likely that the main impact will be in lending assistance to future sentencing decisions. The main significance of this case comes not from its potential impact but from its extensive discussion and reflection of various aspects of Papua New Guinean law and society.

Dakol demonstrates the relationship between state and custom in PNG. The conflict is between a locally-accepted solution to a sorcery problem and the state law which criminalises murder. Although no action was taken within the village, the offenders ultimately faced legal

consequences. Custom was not a defence for breaking the law. This is consistent with the *Underlying Law Act 2000* which states that customary law shall apply in PNG unless it is inconsistent with written law.[1] This case shows, however, that written law does not completely negate consideration of custom. It was for the judge to decide the extent to which recognising custom could impact the legal consequences for the offenders. Ultimately, custom was treated as level to other ordinary mitigating factors, such as cooperation and youth.

Dakol is also a strong starting point to reflect on attitudes towards human rights in PNG. Kaumi AJ emphasised that belief in sorcery is only a belief, not a fact, and that sorcery-related violence (i.e. violent responses to suspected acts of sorcery) should not be legitimized or sanctioned through any special recognition. He reflected on the dangers of such responses, especially as they relate to the safety of vulnerable members of the community, in paragraph 78 of the decision:

> '…I am of the view that the deterrence and retribution purposes of sentencing must feature more prominently over that of rehabilitation in the sentence. The reason for this is that people in the community both in rural and urban settings must be made aware that when a death occurs in their midst and sorcery is suspected they have no right to conduct "kangaroo courts" under the pretext of trying to establish the cause of death. Recent history in this country has shown that more often than not this leads to the marginalized members of the community being singled out, interrogated, tortured and then brutally attacked in the most unimaginable ways when they "confess" under duress thinking that such a confession will be their saving grace from further torment. Their constitutional right to life is not respected at all when death occurs nor their right to full protection of the law.'

The desire to deter violent responses to sorcery shows respect for a number of Constitutional basic rights – right to life,[2] right to protection of the law,[3] equality of citizens.[4] Underlying the discussion is the belief that regardless of social position, everyone has a right to be free from violence and fear.

Finally, this case may reflect the modernisation (and Westernisation) of PNG. The legal status of sorcery as a mere belief, as well as the desire to protect suspected sorcerers rather than their alleged victims both reflect an imported way of thinking that might be contradictory to local beliefs. This has been condemned by some as the state attempting to Westernise PNG at the expense of traditional ways of life.[5] While modernisation has often meant the Westernisation of South Pacific nations, it was said in *Dakol* that modernisation does not have to diminish 'belief in the effectiveness of sorcery'. Instead it was taken in this context to mean that educated and modern

[1] s 4(2)(a).
[2] *Constitution of the Independent State of Papua New Guinea 1975* ('*Constitution of PNG*') s 35.
[3] Ibid, s 37.
[4] *Constitution of PNG*, above n 2, s 55.
[5] See for example, Molu Pass Dam, 'Sorcery-related violence rising', *The National* (Papua New Guinea) 11 January 2018 https://www.thenational.com.pg/sorcery-related-violence-rising/ (Accessed 12 January 2020).

citizens should have increased knowledge of legal avenues and consequences. However, despite the apparent progress towards modernisation made by the recent repeal of the *Sorcery Act*, Kaumi AJ commented in paragraph 80 that PNG has been 'digressing' due to an increase in sorcery-related violence:

> 'I note the prevalence of this type of offence, the fact that it continues to increase at an unabated rate despite the best of efforts to curb it and the unimaginable levels of brutality involved. It seems like this country despite 43 years of independence and over 150 years of Christian and western influence is digressing to days of Medieval Europe where suspected witches were burnt alive at stakes.'

So, cases such as *Dakol* may suggest that modernisation without regard for local contexts has been doing more harm than good. Kaumi AJ's comments regarding the repeal of the *Sorcery Act* are further discussed below.

Avenues for recourse against sorcerers

Kaumi AJ's decision concluded with some remarks regarding the lack of avenues for legal recourse against suspected sorcerers in PNG (paragraphs 86-87):

> 'In passing I note that the *Sorcery Act* was repealed by the National Parliament and in my view this created a void in terms of a legal recourse for people aggrieved by the actions of persons suspected of sorcery. It is imperative that our legislators legislate a law to fill in this void so people have recourse in law to deal with such situations and are not left to their own devices, the consequences of which can be seen being played out in the most tragic circumstances today.'

However, these remarks may be contradictory to the judge's previous reasoning that belief in sorcery was not a special mitigating factor because the offenders should have known of better ways to deal with the problem.

For context, the *Sorcery Act 1971* was repealed in 2013. Under the former Act, a person found to have committed an act of forbidden sorcery was guilty of an offence and liable for a sentence of up to five years.[6] Sorcery could also amount to provocation, potentially reducing murder of a suspected sorcerer to manslaughter.[7] In addition to repealing these provisions, 2013 also saw the introduction of the crime of 'willful murder of a person on account of accusation of sorcery', for which offenders can receive the death penalty.[8]

The recent changes are part of the push to decrease violent responses to sorcery. Their impact can be seen in cases such as *Dakol* where sorcery-related killings are treated as seriously as other murders (if not more seriously), and belief in sorcery as a motivation has little-to-no mitigating

[6] s 7.
[7] *Sorcery Act* s 16; *Criminal Code Act 1974* (PNG) ss 267, 303.
[8] *Criminal Code (Amendment) Act (No. 6) 2013* (PNG) s 1.

effect on the final sentence. Outwardly, the repeal of the *Sorcery Act* appears to be operating as intended. However, sorcery-related violence is still at a crisis-point in PNG. The removal of the offence of forbidden sorcery was likely intended to delegitimise such accusations, but it may have increased citizens taking matters into their own hands.

The repeal of the *Sorcery Act* did decrease options for dealing with sorcery, but there are potentially other avenues that might be taken. Village courts operate in PNG under the *Village Courts Act 1989* (*VCA*). Village Courts are authorised to apply relevant custom 'whether or not it is inconsistent with any Act'.[9] The *Village Courts Regulation 1974* made sorcery a prescribed offence for the *VCA*, bringing it within the Village Courts' jurisdiction.[10] This has apparently not been revoked.

Additionally, the judge in *Towarngar v Tokava* [2019] PGNC 34 opined that the *Underlying Law Act* gives the option to file a case based on custom into court – specifically, that someone who suffers injury or loss due to sorcery should be allowed to bring this action. However, this opinion was given after *Dakol*.

Perhaps one of these legal actions was meant by Kaumi AJ to be the 'effective means' of dealing with sorcery that should be known to modern, educated citizens. It might also be that those citizens should realise they cannot break the law to deal with a sorcery problem, regardless of a lack of options. The availability of some potential legal avenues for aggrieved persons means that the reasons for the decision are still sound, although there is some lack of cohesion between these reasons and Kaumi AJ's concluding remarks.

Note that even without official avenues, there are likely to be traditional dispute resolution systems operating within villages. A 1977 paper by the PNG Law Reform Commission stated that the main traditional remedy for sorcery causing injury or death was compensation.[11] This may still be the case in some communities regardless of state law. Although, statements from villagers given in *Dakol* explain that the community had been living in fear. Fear of retaliation may have prevented any peaceful attempts to resolve the issue, legal or traditional.

Comparison to other Melanesian nations

It has been seen above that the PNG approach no longer focuses on the prosecution of sorcerers (i.e. those suspected of committing acts of sorcery), reflecting the view that sorcery is not a fact. Instead, there is a focus on the prosecution of those who respond violently to suspected acts of sorcery. Comparison reveals that while the issues reflected in *Dakol* are shared in the region,

[9] s 57(2).
[10] s 3(p).
[11] Law Reform Commission of Papua New Guinea, 'Sorcery' (Occasional Paper No. 4, 1977) http://www.paclii.org/cgi-bin/sinodisp/pg/lawreform/PGLawRComm/1977/2.html?stem=&synonyms=&query=sorcery (Accessed 12 January 2020).

responses to the issue of sorcery (and to the resulting violence) differ. This may be due to the different historical and cultural experiences of other Melanesian nations, which allow them to offer different approaches and perspectives.

In Vanuatu, sorcery itself is an offence with maximum two-year sentence.[12] Despite the existence of this legal avenue, violent attacks on sorcerers still occur and the need for deterrence appears to be taken very seriously. In the case of *Public Prosecutor v Obed* [2015] VUSC 39, the judge made similar comments to Kaumi AJ, for example that the offenders should have spoken to the authorities and that belief in sorcery was no justification for murder. In this case, belief in sorcery was not a mitigating factor in the sentencing at all.

The Vanuatuan approach clearly creates a conflict between recognising the existence of sorcery and deterring citizens from acting under this belief to punish sorcerers. Adding to the problem, it would also appear that acts of sorcery can be difficult both to prove and to link to deaths/injuries. This can be seen in the case of *Malsoklei v Public Prosecutor* [2002] VUCA 28, where a series of extraordinary events were described by the witness leading to the deceased being pronounced dead. The Court stated that various inexplicable factors in the death as described by an unreliable witness should not be explained away as 'black magic'. A further instance of acquittal based on lack of forensic evidence can be seen in *Peter v Public Prosecutor* [2018] VUCA 18, although the Court clarified that future prosecutions for sorcery were still possible despite the outcome in this case and *Malsoklei*. Based on these cases, it is possible that the existence of a legal avenue to punish sorcery does not deter violent attacks on suspected sorcerers because of the difficulty of prosecuting sorcery.

Sorcery is also an offence in the Solomon Islands, but with a significantly shorter maximum sentence of two months.[13] The Solomon Islands Law Reform Commission suggests that occurrences of sorcery increase occurrences of other crimes such as murder.[14] The aim seems to be to deter both sorcery and sorcery-related violence. Despite this, no prosecutions for sorcery have been made under the *Penal Code*, and traditional and local systems are preferred.[15] It seems like sorcery is still an issue, as it is in PNG and Vanuatu, but the Solomon Islands response displays a more traditional approach than its neighbours.

The problem of sorcery-related violence is clearly not unique to PNG, and neither is the opinion that strong deterrence is needed. Unfortunately, comparison reveals that even more traditional or state-involved responses to sorcery have not prevented citizens from taking justice into their own hands. It might be that a weak sentence has no real effect, whereas a stronger sentence might better satisfy aggrieved persons, encouraging them to use legal avenues. It might also be that sorcery as

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[12] *Penal Code 1988* (VU) s151.
[13] *Penal Code 1996* (SI) s 190.
[14] Solomon Islands Law Reform Commission, *Review of Sorcery Offence Consultation Paper* (2013) 9 [1.17] http://www.paclii.org/cgi-bin/sinodisp/sb/lawreform/SBLawRComm/2013/3.html?stem=&synonyms=&query=Review%20of%20Sorcery%20Offence%20Consultation (Accessed 12 January 2020).
[15] Ibid, 13, 16-21.

an offence is too difficult to prove in non-customary legal systems, thus causing this option to be overlooked. However, to acknowledge sorcery as both a fact and worth punishing severely would be a step backwards in the PNG context. This once again demonstrates the conflict between traditional contexts and modern development from which state responses to sorcery struggle to break free.

CONCLUSION

State v Dakol reflects the PNG legal system's attitude towards custom, human rights and modernisation. It also reveals the response to, and potential causes behind, the crisis of sorcery-related violence. There is no easy solution to this issue. Kaumi AJ suggests that the best way forward may be to replace the repealed *Sorcery Act*. Re-criminalising sorcery may reduce violence but it definitely has not eliminated the issue elsewhere in Melanesia. Another option could be to emphasise non-violent legal and traditional options that already exist in PNG. This is consistent with Kaumi AJ's opinion that modern citizens should be aware of effective alternatives to violence. The current approach across the region seems to be a strong push for deterrence, reflected in cases such as this one. Time will reveal the effects of this approach and any future impact of the decision and discussion from this case.