PAPUA NEW GUINEA

N 316 (M)

IN THE NATIONAL)
COURT OF JUSTICE)

CORAM: Bredmeyer J.
Thursday
2nd July 1981

HENRY AISI
Appellant

v.

MALAITA HOALA
Respondent

(Appeal 329 of 1980)

1981

18 June
2 July

RABAUL

Bredmeyer J.

REASONS FOR DECISION

This is an appeal against a decision given by the Rabaul District Court in a civil case on 10 July 1979 whereby the defendant Aisi Henry was ordered to pay K500 to the complainant, Malaita Hoala. The judgment creditor took steps to enforce the order and in August 1979 the defendant was imprisoned for two months in respect of K250 of the debt owing as a fraudulent debtor. In November 1979 the debtor was examined as to his means and ordered to pay the judgment debt at the rate of k100 per month. He failed to pay the first instalment and a warrant of commitment was signed for one months imprisonment in February 1980. In July 1980, one year after the decision, the defendant saw the Deputy Public Solicitor in Rabaul who thought he had grounds of appeal and in December 1980 Mrs. Ridsdale obtained leave to appeal out of time by another judge.

The complaint before the District Court read as follows:

> "That you did entice the complainant's wife (Mala Haloma) away from the said complainant, knowing the woman to be a married native of the opposite sex.
>
> The complainant claims K800 being money spent as a bride price for the woman."

The learned magistrate, Mr. Arnold Joseph SM, heard brief evidence from the complainant, his wife, one witness and from the defendant. The learned magistrate's Reasons for Decision are as follows:

"This case was brought up as a civil claim for K800 spent on bride price by the respondent. The complaint though made as an action for enticement was not treated as the action based on enticement but a claim for repayment of bride price and the loss of consortium. Enticement is alleged here only to show that the wife had left the husband to live with the appellant as his wife and the appellant did not make any attempt to send her back or refuse to take her and live with her.

Both parties in this case are from Papuan Region. The appellant is from Central Province and the respondent is from Gulf Province. The woman, the subject of this complaint is also from the Gulf Province. My observation of the parties in court revealed that the respondent and the woman concerned appear to be in their late 30s or early 40s and are uneducated and the appellant appears to be in his early 20s and is well educated. The marriage between the respondent and the woman produced eight children and at the time this case was brought up, the woman had left the respondent with two very young children in his custody and refused to have anything to do with them.

I as the presiding magistrate who ordered the appellant to pay K500 to the respondent instead of the K800 claimed decided this amount on the evidence of bride price paid. I found from the evidence given that bride price for the woman had been paid by the respondent with K300 in cash and goods to the value of K100. In addition to these I found that the respondent spent approximately K100 to bring the wife from Port Moresby to Rabaul and also awarded a further K100 to compensate him for the loss of the wife's consortium."

The learned magistrate said that he treated the action as a case for "repayment of bride price and the loss of consortium". The word "repayment" is used here inaccurately. The complainant husband was not suing his wife's family for the repayment of bride price, but rather his wife's defacto husband for the payment of bride price or the reimbursement of bride price which he had paid to her family some years ago.

Mr. Lightfoot appeared for the appellant. There was no appearance by the respondent although he knew of the hearing date. Mr. Lightfoot's first argument was that the District Court had no jurisdiction to hear a bride price claim under s.29(1) of the District Courts Act which reads as follows:

"s.29 Civil jurisdiction

(1) Subject to this Ordinance, in addition to any jurisdiction conferred by any other law in force in the Territory or a part of the Territory a court has jurisdiction in all personal actions at law or equity where the amount of the claim ... does not exceed ... (underlining mine).

Mr. Lightfoot argued that the phrase "personal actions at law" means actions arising out of contract or tort at common law. He cited Vol. 1 Halsbury (3rd Ed.) pp. 21 and 24 where it states that the old forms of action, abolished by the Judicature Acts, were real, personal and mixed and that personal actions are those arising out of tort or contract. He also cited the judgment of Kelly J. in Awabdy v. Germain (1) where the learned judge followed the interpretation of "personal actions" given in two English cases. I agree with that decision. Personal actions are those in which a man claims the specific recovery of a debt or a personal chattel, or else satisfaction in damages for an injury to his person or property. They are founded on contracts or torts: Stephen's Commentaries (10th Ed.), Vol. 3, pp. 383, 385; 3 Blackstone's Commentaries 117; and are actions to enforce money claims as distinguished, for example from actions seeking a declaration: DeVries v. Smallridge (2). But I think Mr. Lightfoot's submission fails in saying that the words "at law", mean "at common law". If the legislature had intended that it would have used the words "common law and equity" as it did in other legislation for example s.16 of the Laws Repeal and Adopting Ordinance 1921 (N.G.) which applied in New Guinea until Independence and in Schedule 2.2 of the Constitution.

I consider that the phrase "at law" in s.29 means more than at common law. It clearly includes statute law. For example a number of statutes create a cause of action but do not expressly confer jurisdiction on the District Court to hear those actions - yet those actions have in the past been heard, and I think properly so, in the District Court. An action for defamation under the Defamation Act 1962 is one such action, another is an action for damages following a fatal accident under Part IV of the Law Reform (Miscellaneous Provisions) Act 1962. A third example is afforded by s.30 of that Act which provides that a shipowner is liable for any damage his vessel causes to a wharf. These statutes differ from other statutes which create a cause

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(1) (1971-72) PNGLR 68 at p.72

(2) (1928) 1 K.B. 482, 488.

of action and expressly confer jurisdiction to hear the action on the District Court, for example the Summary Ejectment Act 1952, the Deserted Wives & Childrens Act 1951, and the Workers' Compensation Act 1958.

I consider that the phrase "at law" means allowed by the law of the land and encompasses common law, statutory law and also customary law. The Constitution has given a more important role to customary law than it hitherto enjoyed. Prior to Independence there were a number of statutory provisions dealing with customary law, the chief of which was the Native Customs (Recognition) Act 1963. That Act remains in force, but under the hierarchy of laws carefully established by the Constitution custom now occupies a premier place in the underlying law. By Schedule 2 of the Constitution custom is applied first to a problem and, only if it is inapplicable, due to one of the circumstances specified in Schedule 2.1, is the court to turn to the English common law and equity. I think it consistent with the important place given to custom by the Constitution that I should interpret the phrase "at law" in s.29 to include personal actions for the recovery of a debt, or chattel or for damages arising out of customary torts and contracts. The claim for K800 for enticement or bride price was a personal action in that sense based on a customary tort which is not inconsistent with the Constitution, or any statute, or repugnant to the general principles of humanity. I consider that the magistrate had jurisdiction to hear the claim.

Mr. Lightfoot's second argument was that the original complaint was for damages for enticement, there was no application to amend the complaint, the evidence did not establish any enticement, and therefore the magistrate should have dismissed the claim and not have treated the case as one for payment of bride price and loss of consortium. Mr. Lightfoot quoted s.139 of the District Courts Act which provides that concise particulars of the complainant's demand must be shown on the complaint, and s.143 which provides that evidence cannot be given on behalf of the complainant other than for the cause of action stated in the summons or the complaint.

It is true that on the facts there was no enticement by the defendant, that the wife left of her own free will. But the cause of action was not simply enticement; as stated in the complaint, quoted above, it was that because of the enticement the complainant was entitled to K800 bride price. The magistrate in effect found that, although the wife left of her own will, the husband by custom was

entitled to recover from the defendant the bride price paid plus a sum for consortium. I do not regard that as a very substantial variation from the original complaint; it is the kind of variation that could have been sanctioned by an amendment under s.139(4) of the District Courts Act. I therefore reject this argument.

Mr. Lightfoot's third argument is that the magistrate failed to hear any evidence on customary law. This is a powerful argument. Section 5 of the Native Customs (Recognition) Act 1963 deals with proof of custom. Subsection (1) reads as follows:

> "(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."

This subsection means that native custom must be proved as a fact, that is by sworn evidence or affidavit evidence. The following subsections widen the court's powers somewhat - the court itself may call a witness, the evidence given can be unsworn, it can include hearsay and opinions, the court may refer to books, etc. Very often I suspect books will not be available. The court's basic duty under subsection (1) is to hear evidence of custom. This is necessary even though the magistrate may feel that he knows the customs very well. If he does not do so, he has erred at law. Unrepresented parties in the District Court are unlikely to lead evidence of custom so the best way for the magistrate to get evidence of it is to put questions to the complainant and defendant and their witnesses. The questions should be designed to ascertain the principles of customary law, for example, do you have a custom that if a wife leaves her husband for another man, the latter has to pay bride price to the husband? If so, does the amount depend on whether the wife leaves of her own will, or has been enticed there by the new man, or if her husband has ill-treated her? Does the amount depend on whether the wife is young or old; whether she has born children or not; whether she is still capable of bearing children or not? Can the husband recover more than the bride price, for example for money spent on her food and clothes, or fares, for the shame caused to him, or for the loss of her company and services? Having obtained evidence on the customary law applicable the magistrate should weigh up the evidence on custom stating which witness he believes or does not believe and resolving any conflicts

of custom. The magistrate should state the customary law which he intends to apply. His Reasons for Decision should state his findings of fact, the law he considers applicable, and he should then apply the law to the facts to get the result. Sometimes magistrates in civil cases omit to state the law they are applying. They simply make findings of fact and then make an order for the complainant or defendant.

The magistrate did not hear evidence of native custom as required by s.5, that is an error of law which amounts to a substantial miscarriage of justice. I allow the Appeal and I remit the case back to the Rabaul District Court and order a rehearing before another magistrate.

For the assistance of the magistrate rehearing the case I should add that there is no common law action of enticement in Papua New Guinea. The common law action which did exist in England was abolished by the Law Reform (Miscellaneous Provisions) Act 1970 and thus was not part of the common law of England adopted at Independence under Schedule 2.2 of the Constitution. See Constitutional Reference No. 1 of 1977 (3).

Since preparing and delivering the above reasons my attention has been drawn to the definition of "law" in s.1 of the Interpretation (Interim Provisions) Act 1975 where, unless the contrary intention appears, "law" includes (a) the underlying law. This supports the interpretation I had reached above on s.29(1) of the District Courts Act.

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Solicitor for Appellant : A. Amet
Public Solicitor

Counsel : D. Lightfoot

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(3) (1978) P.N.G.L.R. 295