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ALIPET AND ORS.

Plaintiffs.

-v-

CHIN PAK

Defendant.

J U D G M E N T.

This is a claim for repayment of the sum of £2,000 alleged by the Plaintiffs to have been paid to the Defendant in or about the years 1953 and 1954 in relation to a transaction under which the Plaintiffs intended to purchase from the Defendant a motor vessel named the "Kombon." It is common ground that the transaction, if made, was not in fact carried out, and that the "Kombon" was sold by the Defendant to Sato Tong in 1954. The Plaintiffs alleged that after this sale there was a similar transaction in relation to a larger vessel, the "Sopik," which was to be purchased by the Plaintiffs for the sum of £5,000, but again it is common ground that if any such transaction was entered into, it was never carried out. The Plaintiffs rely on the fact, which is conceded by the Defendant, that the District Officer was not notified of any such transaction and did not give his sanction. It is common ground that if the sum of £2,000 claimed or any part of it was paid to Chin Pak, the Plaintiffs are entitled to recover the amount so paid.

The Plaintiff, Alipet, in his evidence said that prior to 1950 he knew Chin Hin, the brother of the Defendant, Chin Pak, and had some dealings with him. He agreed with Chin Hin to purchase from him the motor vessel "Kombon" for £1,600 and handed over in part payment 82 bags of copra which for present purposes may be valued at something in the vicinity of £500. In January, 1950, Chin Hin died, and thereafter Chin Pak came and lived in the house formerly occupied by his deceased brother and looked after the two families. The two brothers were engaged in some sort of partnership arrangement, of which I have no details, in producing and trading in copra. Prior to his brother's death, Chin Pak had been living on the Island of Tanga, and had not met Alipet. Chin Pak took over the management of his brother's affairs, and it appears from the Court files that he obtained a Grant of Probate as his brother's Executor in

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May, 1950. It does not appear whether the vessel "Komben" was the property of the Estate or whether it was some kind of partnership asset, but nothing appears to turn on the point in the present case.

After Chin Hin's death, the vessel "Komben" broke down and was moored at Rabaul from some time in 1951 until late 1953. Alipet says that in 1953 he spoke to Chin Pak and told him about his previous agreement with Chin Hin to purchase the vessel, and that Chin Pak agreed to carry out the transaction subject to some variations. He pointed out that the vessel needed repairs and that the engine was useless and that a new engine would have to be installed. He said that the purchase price would be £2,000 for the vessel after repairs had been effected and after a new engine had been installed. Alipet says that he agreed to this and went back to the Duke of York Islands where he lived to collect money for the purchase. He said that he collected £1,000 and brought this into Rabaul and paid it to Chin Pak at the latter's house. On two subsequent occasions he collected and paid Chin Pak further instalments of £500, making a total of £2,000 altogether. According to Alipet's version of the facts, Chin Pak entered into an arrangement with him whereby Alipet was to take possession of the vessel as soon as it was repaired and act as Captain of the vessel, operating it on Chin Pak's behalf until the vessel was fully paid for. Some of his relatives made up the crew. Chin Pak's version of this part of the transaction, which is somewhat clearer than Alipet's, was to the effect that Alipet was employed on wages and rations, plus a commission of 5% on the earnings of the vessel. That this was the substance of the transaction appears to be supported by Exhibit "A," which suggests that the Plaintiff was in the habit of deducting 5% commission from the moneys for which he accounted to Chin Pak. However, Alipet in his evidence said that he never received rations and had to get his food from his own village, and that he never received his full wages, but received small sums of money on odd occasions from Chin Pak, who was to apply the balance towards the purchase price of the vessel.

After working on the vessel for some time as Captain, Alipet says that he was met on his arrival one day by Chin Pak, who took him to see the motor vessel "Sopik" which was then in dock and told him that the "Komben" had been sold to Secto Tong, but that Alipet could buy the "Sopik" for £5,000, and that the £2,000 already paid would be taken off the purchase price. Alipet says that he agreed to this. He had an interview with Secto Tong and others in the presence of Chin Pak and agreed to continue to work the "Komben" until Secto Tong completed his arrangements to send the vessel down to Bougainville. After this, Alipet says that he was employed on the "Sopik," not as Captain,

but on the same terms as to remuneration, and after working for a very short time, became involved in a dispute with the other crew members of the "Sepik" over some copra which Alipet says was stolen from him, and the result of this was that Alipet was dismissed from his employment and taken to Court by Chin Pak.

According to Chin Pak's version of the facts, he had never met Alipet until the vessel "Kambon" had been repaired, whereupon Alipet approached him and asked him for employment on the vessel. According to Chin Pak it was some time after the commencement of this employment that Alipet first expressed a wish to purchase the vessel, and Chin Pak told him that he could do so if he could raise the money. However, according to Chin Pak's evidence, nothing was ever paid on account of the purchase of the vessel. When Seeto Tong wanted to buy the vessel in 1954, Chin Pak took Alipet along to the meeting to give him the first opportunity of buying the boat and told him that Seeto Tong was buying it for £1,800 but told Alipet that he could buy it for that price if he had the money. Upon Alipet saying that he had no money and had no objection to the boat being sold to Seeto Tong, Chin Pak accepted a cheque for the purchase money from Seeto Tong. Chin Pak says that he never agreed to sell the "Sepik" to Alipet.

It is clear that Chin Pak was more than willing to employ Alipet, because Alipet is Paramount Lulua of the Duke of York Islands, and a man of great influence and standing in his native community, and Chin Pak's agreement to give him commission was intended as an inducement to get Alipet to influence as many natives as possible to trade with Chin Pak. Since the vessel "Sepik" was much larger and Alipet was not qualified to take charge of this vessel, Chin Pak was still prepared to pay him 5% on all business coming from the Duke of York Islands. The essence of Chin Pak's case was that when in 1954 Alipet sought employment, Chin Pak readily agreed to this proposal, but that the incidents of this employment were the only matters ever transacted between them.

After Alipet's dismissal, Chin Pak laid an information against him and had him taken to Court, and some time after this, Alipet retaliated by claiming that Chin Pak was withholding £2,000 from him. Chin Pak, having come across a Memorandum (Exhibit "A") showing that Alipet was holding £23,76.0., took advantage of this by bringing proceedings to recover that sum from Alipet. Alipet, in turn, charged Chin Pak with stealing the £2,000, and appears to have complained to the Police that he had never been paid for the 82 bags of copra which he gave to Chin Pak.

As a result of all this, the parties have been frequently engaged in dispute and recrimination, and have had their complaints ventilated in a number of Courts presided over by

Magistrates who clearly had no jurisdiction to entertain most of these claims and who were apparently unable to bring the dispute to an end. It does not appear that Alipot has ever made any claim for non-payment of wages. In spite of all this cross-fire of claims and litigation that has been carried on for the last four years or so, it became apparent on the trial that Alipot's claim to the £2,000 has never been fully investigated, and this has rendered the task of deciding the essentially simple issues of fact which emerge in this case extraordinarily difficult. The whole course of the defence was a simple denial that any money had been received, and the strength of the Defendant's case lies in the submission of Counsel for the Defendant that in circumstances such as these where it is simply a matter of oath against oath, the Court cannot resolve the dispute, and the Defendant must succeed because the Plaintiffs have failed to discharge the onus of proof. This submission was reinforced by the argument that Chin Pak's story being purely negative, left Chin Pak in a position in which he could take no other course. Therefore I was invited to take the view that beyond his plain denial there was nothing that Chin Pak could do or say to carry the matter any further.

I think that I cannot accept this view. During the trial it appeared from the evidence that when he acquired the vessel "Sopik," Chin Pak found it necessary to arrange for a friend of his to purchase the vessel on his behalf for the sum of £2,000; the transaction was in substance a loan to Chin Pak. The fact that Chin Pak found it necessary to borrow £2,000 at this stage became significant in the light of the assertion made on behalf of the Plaintiffs that no attempt had been made by Chin Pak to order the new engine for the "Kombon" until he received the first £1,000 in 1953, and that he needed the Plaintiffs' money to assist him in purchasing the two marine engines, one for each of the two vessels. When this point emerged, I suggested that it was likely, if Chin Pak's resources were being strained, that he would pay the £2,000, if he received it from Alipot, into his Bank account, and suggested that his banking records should be sent for. These were procured and revealed substantial cash credit entries which on the face of them were more or less consistent with their being derived from Alipot. The only explanation of these payments offered by Chin Pak was that they might have been sums contributed from time to time by groups of traders in Rabaul who were in the habit of assisting each other on a sort of Starg-Bonkett principle.

He said that he had no clear recollection of the items in question, which is not at all surprising, and he was given the opportunity to look into his records and call further evidence if he wished to explain where these items had come from. He did

not avail himself of the opportunity. In other matters he might have done more if he had wished. He said that he had ordered the engine for the "Kombon" in 1951, and gave the name of the firm to whom the order was given. It seemed more probable that the engine was ordered in 1953, but neither party produced any records or called the witnesses who could have established the fact.

In relation to several matters, Chin Pak simply adhered to the negative proposition, speaking from recollection without taking the risk of producing to support his recollection contemporaneous records which he said were kept by himself or his son. These records might at least have given a better picture of the occasions on which the parties met to transact business. If those points were matters directly in issue between the parties, they would, I think, fall within the category of matters in relation to which the onus would be on the Defendant, they being matters within his own particular knowledge, but I do not think that that is the true position here. They are not matters directly in issue, and their effect is probably limited to credit when assessing the value of Chin Pak's bare denial. I think that they have this effect, that it is not open to Chin Pak to say - "I could not do any more than I did." I think that the true position is that these matters indicate that Chin Pak's adoption of a purely defensive role is as much a matter of choice as of compulsion. Of course, the defensive role is one which he is perfectly entitled to take, and raises no affirmative case against him, but it has this effect, that he must stand or fall by the strength of the Plaintiffs' case, rather than his own. I must therefore examine the Plaintiffs' case in the light of the Defendant's denial, which does not, to my mind, carry much weight of conviction.

Looking at the matter very broadly, I am left with the general impression that there is substance in the Plaintiffs' complaint, and that they, the Plaintiffs, did pay over to Chin Pak a substantial sum of money. If Alipet's evidence stood alone, I would have considerable doubts about how many sums were paid or whether any of them exceeded £500. I would also have considerable doubt that the full purchase price had been paid prior to the interview with Mr. and Mrs. Saeo Fong, but I would be fairly convinced that Chin Pak's assertion that he had never met Alipet before the vessel was repaired in 1953 was untrue.

In the course of his attack upon the Plaintiffs' case, Mr. Jones for the Defendant was able to advance many serious criticisms of the evidence. Those that impressed me most were:-

- (1) Alipet and his witnesses gave evidence on most points in very much the same terms. This might be taken to indicate a strong and clear recollection,

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which would be unusual amongst natives, or the result of reconstruction and careful schooling. That the latter was the position in this case is indicated by the fact that Alipet had in his possession a number of memoranda clearly inconsistent with his evidence as to important details. Although he and the other witnesses spoke of contemporaneous records, only one of those produced purported to be contemporaneous, and I cannot accept it as being genuine. I think that all these records were made after the event, and as Alipet himself said in relation to most of them, were used as a means of preparing their evidence for earlier Court hearings. The documents suggest advancing stages of consolidation of the story before it had reached its present form. When it is remembered that the leading Plaintiff is the Paramount Lahu for the District and has close contact with, and great influence over most of the other witnesses, the whole question becomes very significant. Mr. Jones made a great deal of this, but there is not enough in it to show affirmatively that the records are inconsistent with honest efforts to reconstruct events which really did happen, and as far as the evidence goes, it reveals no more than what well might be regarded as clumsy but legitimate preparation by witnesses for the trial by weeding out errors and inconsistencies in their story. The Plaintiff, Alipet, gave me some misgivings when he attempted to reconcile one of these documents with his evidence by suggesting that his son bore another name, which would agree with the record, and even if this assertion had any truth in it, which I do not believe, I think that Alipet must be taken to have discredited himself considerably on this point.

- (2) On the Plaintiff's version of the facts, there is extraordinary discrepancy in relation to some of the payments which he made towards the purchase price. He appears to have forgotten for quite a long time all about the 82 bags of copra and to have made no claim for moneys allegedly withheld from his wages. It is curious that the vessel which he had purchased for £2,000 should be sold to Scott Tong for £1,800, after payment in full of the larger sum, and stranger still, if such were the case, that the fact should be disclosed to Alipet

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without his making any complaint. Some of these discrepancies may be partly accounted for by the fact that Alipot on his own case placed complete reliance upon both Chin Hin and Chin Pak, and was prepared to accept whatever they said until the dispute arose in 1954. From that time onwards I think it is not reasonable to blame Alipot for any inconsistencies or discrepancies, since it does appear that he promptly reported the whole matter to officers of the Administration, who took charge of various proceedings and called upon the Police to investigate some of Alipot's allegations.

- (3) In spite of the fact that Alipot regarded the vessel as belonging to him in 1953, he was prepared to let the vessel go to Seate Tong, to continue to work for Seate Tong for some little time, and to transfer the purchase price, which he had already paid, towards the purchase of the vessel "Sepik" for \$5,000. There is much to suggest that \$5,000 would be unreasonably high for the vessel, and that in any case the vessel itself, as well as the purchase price, would have been beyond Alipot's capacity.

I have taken full account of these and the other points which were ably argued by Mr. Jones, but I am still left with the conviction that there is substantial truth in Alipot's story. His substantial case is strongly supported by a great deal of evidence. Some of the witnesses had a substantial pecuniary interest in the transaction, according to their evidence, but others had not, and I think that on the weight of evidence, I should accept it that the three instalments of money were collected at the village and sent on their way to Chin Pak. I think also that it must be accepted that the purpose for which the collections were made was notorious, and much discussed at the time, since contributions were received from widely separated areas.

The fact that one payment of purchase price was made is, of course, no evidence that another payment was also made, and if it appeared to me that any different considerations applied, I would be inclined to deal separately with each payment, but I think that the weight of evidence indicates that each payment was collected, put away and despatched, and I think that on the available evidence it would be very unlikely for any of those payments to go astray before reaching Chin Pak's hands. I think that I should accept the evidence as to the manner in which each sum of money was actually taken to Chin

Pak and handed to him. If any distinction could be made between the three payments, I would be inclined to attach most doubt to the third payment, particularly if I could accept Chin Pak's version of the conversation which took place in the presence of Mr. and Mrs. Sesto Tong, but I think that the Defendant derives very little support from those two witnesses. The conversation was carried on partly in Chinese and partly in pidgin, and on the evidence given I think that Alipet must have understood very little of what was going on and would have to accept whatever he was told, which was not very much. Moreover, although Sesto Tong gave his recollection of the conversation confidently, it is quite apparent that Mrs. Sesto Tong retains no real recollection of the conversation at all. At the conclusion of her evidence, she showed some disposition to agree with several inconsistent versions of the conversation, and then readily assented to the suggestion that she could not really remember what was said at all.

Some of the Plaintiffs' witnesses were not only independent, but were people who should in some respects be regarded as having quite opposing interests; in particular KIPLAU, who gave valuable support to the Plaintiffs on one small but important point, is entirely independent and is a member of a different Mission group. Inspector Young of the Police Force at Labaul also affords material support to the Plaintiffs on their assertion that Chin Pak knew the Plaintiff, Alipet, in 1952.

I think that the proper decision for me to reach upon the evidence is that the Plaintiffs did pay the sum of £2,000 to Chin Pak, and that they are entitled to recover this sum from him.

In deciding this, I am fully aware of the danger that my conclusion may in fact be quite wrong. In a case of this kind where there is a direct conflict on a perfectly simple question of fact, it is plain that one party or the other has committed perjury in order to obtain or withhold a substantial sum of money.

I have not been satisfied with the preparation of the case prior to trial, and I think that a much closer investigation into contemporary documents might have revealed a little more for the guidance of the Court. If such an investigation were now made by the Crown Law authorities, and if as a result evidence were obtained sufficient to support a charge of perjury, I think that in the public interest appropriate proceedings should be taken. I think that Chin Pak's own records, including those kept by his son, might throw some useful light on the matter. I propose, therefore, to make a recommendation to the Crown Law authorities that the

matter should be looked into.

I will enter judgment in favour of the Plaintiffs for the sum of £2,000 with costs to be taxed, and I will direct that proceedings upon that judgment be stayed for thirty days, with liberty to the Defendant to apply for a further stay. Should any such application for a further stay be supported by the Crown Law authorities, I would be disposed to consider the desirability of making a conditional order for a much longer period.

CHIEF JUSTICE.

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