

LENNIS RUKALE V. MARK KEMAKEZA AND RETURNING OFFICER FOR CENTRAL ISLANDS PROVINCE

Civil Case Number 326 of 2002

High Court of Solomon Islands
(Palmer C.J.)

Hearing: 30th - 31st March 2004

Judgment: 1st June 2004

R. Ziza for the Petitioner

B. Titulu for the Respondent

Palmer C.J.: This is an election petition brought under the Provincial Assemblies Election Regulations and the Local Government (Election Petition) Rules. The Petitioner, Lennis Rukale ("**the Petitioner**") was one of the candidates in the Election for the Central Islands Province held on 5th December 2002. He polled 149 votes, the First Respondent, Mark Kemakeza ("**the Respondent**") polled 183 votes and another candidate, Catherine Pule polled 53 votes. The Respondent was duly returned as the winning candidate and duly elected.

The Petitioner filed his petition on 30th December 2002. On 3rd February he filed another petition to supercede that original petition and provided further particulars of his petition. The Petition alleges against the Respondent and his agents a number of corrupt practices including bribery, treating and undue influence; offences encapsulated in section 71 of the National Parliament (Electoral Provisions) Act [cap. 87] and deemed part of the Provincial Assemblies Election Regulations by virtue of section 50 of the Provincial Government Act [cap. 118].

The Law

Section 66(1) of the National Parliament (Electoral Provisions) Act [cap. 87] ("**the Electoral Act**") provides that:

"No election shall be valid if any corrupt or illegal practice is committed in connection therewith by the candidate elected or his agent."

If the candidate elected or his agent is convicted or found guilty of a corrupt practice, the election would be rendered invalid. The Petition alleges a number of grounds in which it is argued that the Respondent and his agents had committed acts of bribery.

Section 71 of the Electoral Act sets out the definition of bribery:

Paragraph 71(a) reads: "any person who directly or indirectly, by himself or by any other person on his behalf, gives, lends or agrees to give or lend, or offers, promises or promises to procure or to endeavour to procure, any money or valuable consideration to or for any elector or to or for any person on behalf of any elector, or to or for any other person, in order to induce such elector to vote or to refrain from voting, or corruptly does any such act as aforesaid on account of any elector having voted or refrained from voting at any election;"

It is for the Petitioner to prove his case to the required standard; that is, the judge must be reasonably sure that the ground has been made out. That standard is higher than the normal

standard in civil cases on the balance of probability but below the standard of proof beyond reasonable doubt – see *William Gigini v. Eric Notere*¹, *Thugea v. Paeni*², *Alisae v. Salaka*³ and *Maetia v. Dausabea*⁴, *Haomae v. Bartlett*⁵, *Tegavota v. Bennett*⁶. That standard has been expressed by the courts in various ways;

- being satisfied so that the court is sure or to its entire satisfaction;
- finding proof that is sufficiently clear to support such allegation;
- clear and cogent proof so as to induce on the balance of probabilities an actual persuasion of the mind that the candidate did in fact lack the required qualifications;
- or finding evidence that is clear and unequivocal in order to enable the court to be entirely satisfied that the allegation of corrupt practices are made out.

(a) Allegations of bribery against the Respondent: The Petitioner alleges that before the 5th day of December 2002, when in clear contemplation of standing for election, the Respondent called Malachi Suhu (“Suhu”) to his office and attempted to give him \$50.00 under the pretext of settling the Respondent’s swearing of Suhu some weeks earlier and then discussed the election before saying “see me if you need help”. A few days later, but before the elections, the Respondent invited the said Suhu to his residence and gave him \$100.00.

It is not disputed that the swearing related to an incident earlier on when the Respondent had hurled such swearing words at Suhu. There has been some dispute as to when that swearing may have occurred, Suhu says a week earlier, the Respondent however gave the better time estimate and which I respectfully accept as accurate. According to his evidence the incident occurred on the night of Friday 29th November 2002. It is not in dispute that the Respondent swore at him. Suhu says that in spite of that however, he had no intention of asking for compensation from the Respondent. He says this was because he was also drunk at that time. He says on the 2nd day of December, he was approached by Jonas Talo (“Talo”) to go and ask for compensation from the Respondent. Earlier on in his examination in chief however he also says that his wife had told him to go and see the Respondent. He says the Respondent met his wife at the market and told her to tell him to go and see him. He met the Respondent at about 1.00 o’clock that afternoon. The sum of \$100.00 was given as compensation and they shook hands. No mention of the elections was made in that meeting. Following this the Respondent invited him to go to his house at five o’clock that same day. In the second meeting he was given \$100.00 and told to vote for the Respondent.

The Respondent on the other hand says that Talo saw him earlier that day and spoke to him about the swearing that had occurred and compensation which Suhu wanted. Following this visit by Talo he told him to tell Suhu with his wife to see him at his house. Suhu however went to see him at his office later that afternoon, he says he told him the same thing he had told Talo, to see him the following day with his wife. At that second meeting they had a meal together and after explaining carefully to them what the payment was for he gave him \$100.00 for the swearing he had done earlier on.

There is some vagueness in the evidence of Suhu as to how he went to see the Respondent in his office. In his evidence in chief, he states that he went to see the Respondent following

¹ HCSI-CC No. 9 of 2002 at p. 3

² [1985/86] SILR 22

³ [1985] SILR 31

⁴ HCSI-CC No. 266 of 1993

⁵ [1988/89] SILR 35 at page 37 paragraphs 90 – 105 per Ward CJ

⁶ [1983] SILR 34 at page 36

what his wife had told him. Later on in chief however, he says that Talo had told him to go and ask the Respondent for compensation for the swearing and to solve the problem. Talo however denies this. Whilst he did tell Suhu to go and see the Respondent this was only after he had gone to see and talk to the Respondent earlier on about the swearing. He says his visit to the Respondent had been instigated by Suhu. It is not clear therefore whether he had gone because of what his wife had told him or because of what Talo had told him. Secondly, if what he says is true, that he had no intention or desire to ask for compensation, why did he go when told by Talo? He could simply have refused and said to forget it. On balance, I find the version by Talo more credible, that he had gone because Suhu had asked him to go and talk about the swearing that had taken place. Talo's version has also been confirmed by the Respondent himself. Suhu's version on the other hand stands alone. His wife who could have given relevant evidence was never called.

That a meeting did take place in the office of the Respondent is not in issue. There is dispute however as to whether any payment for compensation was transferred at that time. There is also dispute as to the timing of the second meeting. Suhu says it occurred on the same day; the Respondent says it occurred on the next day.

To determine where the balance of truth may lie, it is important to go back to the case of the Petitioner as set out in his petition. This is important because the particulars of the petition set out in black and white the case for the Petitioner and gives the Respondent notice of the allegations he is up against as well as opportunity to mount his defence. Paragraph 3(a) of the Petition alleges that the act of bribery occurred some time before 5th December 2002 when the Respondent called Suhu to his office and attempted to give him \$50.00 under the pretext of settling the Respondent's swearing and then discussed the election before saying "see me if you need any help". The allegation of bribery is contained in that attempt to bribe Suhu with \$50.00 in his office to vote for him. Unfortunately, the evidence adduced did not support the allegation. I have already pointed out the vagueness and apparent contradiction in the evidence of Suhu as to how or why he had gone to see the Respondent in his office. I have also pointed out that the wife has never been called to verify what Suhu says; her evidence sought to be introduced by Suhu therefore is hearsay and inadmissible. The contradiction therefore has not been explained.

Suhu's evidence on this matter has also been unconvincing, in that whilst he has said that he had no intention of asking or demanding compensation from the Respondent, when the matter was raised, he accepted payment, instead of rejecting it. If he was not interested in any compensation demands or payment why didn't he refuse to take the money if what he says is true? There is also clear contradiction over the allegations of attempted bribery of \$50.00 as opposed to his evidence in court. There was no evidence in that meeting in the office to support any attempts of bribery of \$50.00. There was no evidence to support the allegation that at that meeting the Respondent discussed the election and said "see me if you need help". To the contrary, Suhu expressly stated that at that meeting no mention or talk about the elections occurred. His evidence was essentially to the effect that the payment of \$100.00 was for compensation for the swearing. No logical explanation has been provided for this major discrepancy in the allegation and the evidence. This must be viewed adversely against the Petitioner's case; that the goal posts appear to have been moved.

But there is also denial by the Respondent of any payments of money at his office. Whilst conceding he did see Suhu at his office, he denied paying him any money at all. The only thing he told him was to see him the next day and to bring his wife with him. He explained he was quite tied up with many appointments that day and that it would not be possible for him to see him that evening. His evidence is consistent with what Talo says he told him.

There is also clear discrepancy with the evidence adduced and the allegation in the petition regarding the date or time when Suhu met with the Respondent at his house. The petition alleges that the second meeting occurred **a few days later**. In his evidence before this court however Suhu says it was done on the same day. The Respondent says it was on the following day. No explanation has been provided also for this discrepancy and must be construed against the Petitioner's case. This is his petition, he has had all the time to prepare it and ensure that the particulars presented are accurate and not misleading. He ought to have taken care when instructing his counsel about the particulars of each petition. An inconsistency such as this is significant and needs explaining. In the absence of satisfactory explanation it must be construed against the case for the Petitioner. On balance the explanations and evidence of the Respondent must be preferred over and above the evidence adduced by the witnesses for the Petitioner. It must be borne in mind that the onus lies with the Petitioner throughout.

Also there was nothing in the allegations about any attempts or acts of bribery against the Respondent in that second meeting.. The particulars in the petition merely say that the sum of \$100.00 was paid without specifying what was corrupt about that payment. That particular on its own is incapable of supporting any allegation of bribery and ought to have been dismissed at the outset.

Suhu however did raise some allegation of bribery in his evidence as adduced in court and so I will address that in any event. In his evidence in court he says the bribe was committed at that second meeting. He denies being accompanied by his wife though he did say that he told his wife later about the alleged bribe. Unfortunately the wife has not been called as a witness in this case despite the fact that there were matters which she could have been a relevant witness to, especially in the light of the evidence of the Respondent as well that not only did the meeting take place on the following day but that Suhu and his wife were present at that meeting. There was no attempt to rebut this evidence by the Respondent.

It is for the Petitioner to satisfy this court that the allegations raised in the petition have been clearly supported by clear and cogent evidence so as to induce on the balance of probabilities an actual persuasion of the mind that this candidate (the Respondent) did in fact lack the required qualifications and therefore is guilty of corrupt practices to wit bribery. Unfortunately, I am unable to so find and this ground must be dismissed.

(b) Allegations of bribery against Robert Olisea - an agent of the Respondent. The Petitioner alleges that on the night of the 4th December 2002 at about 1.00 a.m. Robert Olisea ("Olisea") an agent of the Respondent called into Suhu's residence to enquire and confirm if Suhu was still a supporter of the Respondent and then gave him \$50.00 before leaving. Petitioner alleges Olisea was a campaign manager of the Respondent and that on the night of the 4th December 2002 he was sent to find out from Suhu at his residence whether he would vote for the Respondent. When Suhu confirmed that he would vote for the Respondent he gave him \$50.00.

The Respondent on the other hand denies that Olisea was a campaign manager or an agent and denies giving him any money or asking him to do anything in private even for him. Olisea also denies this in his evidence.

Suhu says in his evidence that he was woken up at night by Olisea and told that he had been sent by the "boss" (meaning the Respondent) to enquire about his vote, meaning who he was going to vote. When he confirmed that he was going to vote for the Respondent, Olisea gave him \$50.00.

Olisea on the other hand denies making any such approaches to Suhu that night; he says he did go but it was to buy beer for himself as Suhu operated a black market for beer. He says he had been drinking that night and when he ran out of beer he decided to go and buy beer from Suhu's black market. The only other place where he could buy beer was Vanita Restaurant but this was quite far from his residence. He says after buying a couple of beers from Suhu he asked him if he wanted to accompany him but when he refused he gave him \$50.00 to buy beer for himself. This was the explanation given for the \$50.00 given to Suhu.

In order for the Petitioner to succeed under this ground, not only does he have to show that such an approach was made by Olisea but that he also had to show that it was the Respondent who had sent him. On this point, I have considered the evidence of the Respondent, Suhu and Olisea carefully but cannot be satisfied it had been shown that Olisea had been sent by the Respondent or that he was an agent of the Respondent. There is hardly any evidence to support this allegation apart from observations that he was a supporter of the Respondent. But being a supporter is not an offence.

The same also applies to the question of payment of the \$50.00. Olisea has provided a reasonable explanation of his movements and activities that night and reason why the money was given. He denied giving the money on the basis that it was to secure his vote for the Respondent.

Suhu's evidence on the other hand contains some inconsistency. Initially he had said that Olisea had asked him who he was going to vote for, and when he had told him that he was going to vote for the Respondent, Olisea gave him the \$50.00. Under cross-examination, he said the money had been given if he would stand strong.

It is clear someone is not speaking the truth. The onus is on the Petitioner to satisfy this court on cogent and clear evidence that the matters alleged were true on the balance of probabilities. I have listened carefully to the evidence but cannot be satisfied that Suhu had been bribed on the night of 4th December 2002 to vote for the Respondent. First, he runs a black market for beer, an illegal activity and so according to the version of Olisea there was reason for him to go to his place at night. On the other hand, Suhu had reason to deny any sales of beer by virtue of his black market as it is a criminal offence. Admitting that a sale took place is basically admitting to the commission of a crime. Secondly, it has not been established that Olisea is an agent or even a member of the campaign committee of the Respondent. Whether he is a supporter or not is not an offence. A person may be a supporter but not necessarily a member of the campaign committee or an agent of the Respondent. During election times, it is common for people to disclose who they support and to rally support for such person. Just because a person says he is a supporter of someone and encourages others to vote for him does not automatically make him an agent or that he has committed an electoral offence. This happens all the time during election periods when supporters of a particular candidate will always say good things about the candidate they support, even to the extent of exaggeration. It only becomes an offence under section 71 of the National Parliament (Electoral Provisions) Act [cap. 87] when money, promises, gifts etc. are exchanged so as to induce someone to vote for a particular candidate. Thirdly, there is no evidence to support any suggestions that Olisea had been given money to dish out to others in support of the Respondent. He has also denied any suggestions that he had been given money or that he had money to dish out to people to support the Respondent. He has consistently denied being an agent or part of the campaign committee and denied holding any money to give away for such purposes. His evidence on this point has been confirmed and supported by the Respondent's evidence. Fourthly, and of crucial significance is that even if an act of corruption may have been committed, its

occurrence must be confined to this particular instance. Apart from other allegations against him in relation to Basile Kake and Paterson Bakile there are no other suggestions that this activity may have prevailed on an extensive basis so as to affect the results of the election.

(c) Allegations of bribery against Allen Kejoa: The Petitioner alleges that on the 4th December 2002 Allen Kejoa an agent of the Respondent, in an attempt to influence Patterson Bakila to vote for the Respondent, said they would give money to those on the Respondent's side. This ground is connected to ground (e) as they relate more or less to similar promises made to these two persons.

Patterson Bakila ("Bakila") gave evidence in support of this allegation. In his evidence, Bakila said that he had heard from Allen Kejoa ("Kejoa") that money would come to them from the Respondent.

The Respondent on the other hand denies this allegation. In his evidence Kejoa denies making any promises of any lump sum of money to people, though he did say that when campaigning he did recount the achievements of the Respondent in terms of monetary and other forms of assistance given to various people, communities, church groups and so on. He denied promising any money to anyone that if they voted for the Respondent that he would give them money or that anyone would give them money.

I have had opportunity to consider and compare the evidence for and against this allegation against Kejoa. The evidence of Bakila on this point has been quite vague. There is no evidence or suggestion that any promises or assurances of money were made by Kejoa to Bakila on 4th December 2002. Note this is a significant discrepancy. The petition alleges that on that specific date such promises were made. The evidence adduced however from Bakila referred to an **unknown date and time**. He could not remember the actual time but it was on one of those occasions when they sat down and told stories at his house. When contrasted with Kejoa's evidence on the matter, Kejoa has provided a convincing explanation that when he campaigned for the Respondent and told people about what the Respondent had done and would do, he had not made any promises of money to Bakila or anyone else. The Petitioner himself conceded that he never heard anything untoward, corrupt or illegal being said by the Respondent or his campaign team. He did say however that he would not know what may have been said in private. Having weighed carefully what has been said, I am not satisfied it has been established to my satisfaction that the allegation of bribery against Kejoa has been made out.

(d) Allegation of bribery against Robert Olisea. The Petitioner alleges that on 5th December 2002 between 8.00 - 9.00 am at Sasape Base No. 1, Olisea gave \$20.00 to Patterson Bakila before he voted at 11.00 am. Note this allegation is also connected to ground (f) of the Petition.

Bakila confirms in his evidence that the sum of \$20 was given to him by Olisea on the 5th December but that he did not vote until at 3.00 pm.

Olisea does not deny giving the sum of \$20.00 but says it was given so that Bakila could buy cigarettes for himself. He says when Bakila asked him for cigarettes that day he did not have any cigarettes on him and so gave him the money instead. He states he gave a total of \$40.00 being \$20.00 for Bakila and the other \$20.00 for Kake. Bakila did confirm using the money later to buy cigarettes, tea, betel nuts etc. Olisea also denies telling Bakila to vote for the Respondent.

The Respondent also gave evidence and denied that Olisea was an agent. I have already ruled on this and do not need to repeat my conclusions on this. I am not satisfied it had been established to my satisfaction that Olisea was an agent. Not only did he expressly deny this, but the Respondent had also denied engaging him as an agent or as part of his campaign committee.

Bakila's evidence on this allegation of bribery is also vague. Although the particulars in the petition did not say so, the allegation sought to be portrayed was that Bakila had been paid money that day to vote for the Respondent. The evidence adduced however does not support such allegation or if it did it is based more on suspicion and conjecture. Under cross-examination, Bakila states that when the money was given nothing further was said. There was no direct evidence of anything being said to him to the effect that he should vote for the Respondent etc. So even if his evidence were to be accepted, there is no suggestion that the payment of the money was for purposes of securing his vote. He did say in his evidence that **he thought in his mind** it may have had something to do with what Kejoa might have said earlier on regarding some moneys that was going to be given or released. Also under cross-examination, when asked if he knew where Olisea had come from or who might have sent him and for what purpose the money may have been given, he did not know. If he did not know where Olisea had come from or who had sent him then how could he possibly have been bribed? The court cannot make a decision based on assumptions in the mind of Bakila. The Petitioner must prove its case to the required standard. I am not satisfied this ground has also been made out and should be dismissed.

(e) Allegation of bribery against Allen Kejoa: Petitioner alleges that on 3rd December 2002 Kejoa in an attempt to unduly influence Basil Kake ("**Kake**") to vote for the Respondent, asked Kake who he would vote for and then said that the Respondent had sent him to see people who need assistance.

In his evidence Kake says that he heard Kejoa telling them that the Respondent had money to give to those who would vote for him. He says this occurred about a week before the elections.

The Respondent denied the allegations of promises of money to those who vote for him. Kejoa also denied making any such promises although he did highlight in his campaigns the achievements of the Respondent and pointed out that he was a good candidate as he was always willing and ready to help them in their needs. In cross-examination Kake conceded when it was put to him that what Kejoa was in fact saying was that they should vote for the Respondent because he was an easy man and always willing to assist them in their needs, even to buy smokes if they asked, etc.

I note the petition alleges a specific date 3rd December 2002 when this occurred. However the evidence adduced does not bear this out.

On the balance of probabilities, I am not satisfied also that the Petitioner had established to my satisfaction that Kejoa in any way had sought to unduly influence Kake to vote for the Respondent through promises of assistance or money. Candidates during election times often make all sorts of promises to people about what they would do if they come to power (some realistic promises, some unrealistic etc). It would seem from the evidence adduced that the promises made by the Respondent to the people was in terms of what he had done and of what he was capable of doing and will continue to do. It is for the people to decide as individuals with a free will, to choose who they wish to represent them in such provincial elections. But insofar as it has been alleged that undue influence has been used, I am not

satisfied this had been borne out in the evidence such that I can be sure that Kejoa is guilty of corrupt practices in terms of this case. This ground too must be dismissed.

(f) Allegations of bribery against Robert Olisea: Petitioner alleges that on 5th December 2002 Olisea called Basil Kake as he was preparing to go out on a diving trip and said to him "*if you want anything see your uncle Patterson Bakila*" which referred to the \$20.00 which had been left with Bakila. Kake collected the \$20.00 before voting for the Respondent. This incident is connected to ground (d) in that the said sum of \$20.00 was given at the same time as Bakila was given his.

In his evidence Kake told the court that when Olisea called him, he was already in his canoe preparing to go on a diving trip. He says that when he heard his name called out, he shouted back to him and told him that if there was any thing to go and see Bakila. He told the court that when he went to see Bakila, he gave him the money and told him that it was the money that Kejoa had told them about.

The Respondent also denies any act of bribery or treating in relation to this incident. This was the same incident referred to in paragraph 3(d) of the Petition. Olisea says he had given the money for Bakila and Kake to buy cigarettes for themselves because when Bakila asked him for cigarettes that day he had none with him. He told the court that if he had had cigarettes on him that day he would have given them cigarettes. He conceded calling out to Kake when he was in the canoe but this was because he knew him as a friend. He denied telling Kake that if he wanted anything to see his uncle Patterson Bakila. This is consistent with what Kake says that Olisea called out his name only and nothing more.

The petition alleges Olisea said words to the effect to Kake, "if you want anything see your uncle Patterson Bakila". The evidence adduced however does not support this. The only statement borne out by the evidence came from Kake who had told Olisea to see Bakila when he heard his name called out. This is a major discrepancy in the allegation and what has been adduced. Also there is no evidence which supports the allegation that the money given was for purposes of inducing or bribing Kake to vote for the Respondent. The only evidence adduced by the Petitioner on this point came from assumptions made by Bakila and Kake based on what they allege they had heard. When Kake heard his name called out by Olisea, he did not even know what it was for. He only assumed it had something to do with the elections and only found out when he returned and spoke with Bakila. He also says he used the money to buy smoke etc.

There is also some discrepancy between the evidence of Bakila and Kake. According to Kake, when he collected the money, Bakila told him that the money was in relation to what Kejoa had told them about earlier on in the week. Bakila however states during cross-examination that he did not even know what the money was for. If that was the case, how could he have told Kake what the money was for, unless it had also been based on mere assumptions as well? Unfortunately, assumptions are insufficient to find a person guilty of bribery or of a corrupt practice.

No evidence has been adduced to suggest that Kejoa made any specific promise that he would make payments to Kake or Bakila. The only evidence was of a general statement that money would be released to those who would support the Respondent. Kejoa however has not only denied those allegations but provided explanations as to what he said and did during his campaigns. I find his explanations reasonable and credible. No evidence has also been adduced to suggest that Olisea would make payments to anyone on any specific day. Olisea denies he had money from Kejoa or the Respondent to give to anyone, and Kejoa and the

Respondent have also denied giving him any money to distribute to people. Olisea says that it was not the first time for him to help those two persons. On other occasions he had given them cigarettes when they asked for cigarettes. He had also assisted them with money at other times as they do not work.

But even if the evidence of Kake is accepted, it is important to bear in mind that if Bakila did not even know in the first place what the money was for then how could it be argued that it was given as a bribe. Any allegations of bribery or corrupt practice must be proven on clear and unequivocal evidence; there must be clear and cogent proof; assumptions are not sufficient. When balanced against the explanation of Olisea even if their evidence were accepted I am still not satisfied on the balance of probabilities that it had been established to my entire satisfaction that a corrupt practice had been committed on this occasion. Further even if it were accepted that acts of bribery may have been committed in respect of Bakila and Kake, there is insufficient evidence to support any suggestions that this practice was widespread so as to affect the results of the election. This ground must also be dismissed.

Conclusion:

The Petitioner has failed to prove the grounds set out in his petition to the required standard and accordingly the petition must be dismissed. This court will certify to the Minister responsible that the Respondent has been duly elected.

The Court.