

## The State v. Kwayawako and Others

National Court  
Kapi, Dep. C.J.  
15 August 1988

*Customary law and custom—customary belief in sorcery—whether customary belief is defence in substantive criminal law—whether customary belief to be taken into account in sentencing—Customs Recognition Act.*  
*Criminal law—murder—whether customary belief in sorcery is relevant to sentence imposed on those responsible for wilful homicide of alleged sorcerer.*

### <sup>10</sup> **Facts:**

The defendant and “the village people” had a general belief that Joas Tepaku was a sorcerer responsible for a number of deaths including relatives of the accused. The named defendant, and five others, planned the killing of Tepaku, and carried out that plan, as payback and to prevent future deaths. All the accused pleaded guilty to murder, and their belief in the power of sorcery became relevant to the determination of sentence. The Customs Recognition Act Ch. No. 19 provides that “custom may be taken into account in a criminal case only for the purpose of . . . determining the penalty (if any) to be imposed on a guilty party” (section 4(e) of the Act).

### <sup>20</sup> **HELD:**

The law of Papua New Guinea, as expressly manifested by the Sorcery Act, does not recognize the power of sorcery, and to take such customary belief into account, upon sentencing, is contrary to the provision of the Sorcery Act.

### **Other cases referred to in judgment:**

*Acting Public Prosecutor v. Unane Aumane* [1980] P.N.G.L.R. 510

*R. v. Iu Ketapi* [1971–1972] P. N.G.L.R. 44

*R. v. Lakalyo Neak Kaia Yongaipa and Kupuni Yakana* unreported, No. 632, 21 July 1971

*State v. Noah Magou* [1981] P.N.G.L.R. 1

### <sup>30</sup> **Legislation referred to in judgment:**

Customs Recognition Act (Ch. No. 19)

Sorcery Act (Ch. No. 274)

### **Editorial Observation:**

The preamble and section 5 of the Sorcery Act are set out below:

#### **Preamble**

There is a widespread belief throughout the country that there is such a thing as sorcery and that sorcerers have extraordinary powers that can be used sometimes

for good purposes but more often for bad ones, and because of this belief many evil things can be done and many people are frightened or do things that otherwise they might not do.

Some kinds of sorcery are practised not for evil purposes but for innocent ones and it may not be necessary for the law to interfere with them, and so it is necessary for the law to distinguish between evil sorcery and innocent sorcery.

There is no reason why a person who uses or pretends to or tries to use sorcery to do, or to try to do, evil things should not be punished just as if sorcery and the powers of sorcery were real, since it is just as evil to do or to try to do evil things by sorcery as it would be to do them, or try to do them, in any other way.

Sometimes some people may act, or may believe that they are acting, under the influence of sorcery to such an extent that:

- (a) their conduct may not be morally (and should not be legally) blameworthy; or
- (b) actions that would ordinarily be regarded as customary offences may, in traditional social groups, be regarded as excusable or capable of being compensated for.

There is a danger that any law that deals fully with sorcery may encourage some evil-intentioned people to make baseless or merely spiteful or malicious accusations that their enemies are sorcerers solely to get them into trouble with other people, and this is a thing that the law should prevent.

##### **5. Existence and effectiveness of powers of sorcery**

Even though this Act may speak as if powers of sorcery really exist (which is necessary if the law is to deal adequately with all the legal problems of sorcery and the traditional belief in the powers of sorcerers), nevertheless nothing in this Act recognizes the existence or effectiveness of powers of sorcery in any factual sense except only for the powers of, and of proceedings under or by virtue of, this Act, or denies the existence or effectiveness of such powers.

##### **Counsel:**

*V. Noka* and *J. Wala* for the State

*D. Koeget* for the defendants

##### **KAPI Dep. C.J.**

##### **Judgment:**

These accused persons pleaded guilty to a charge of wilful murder arising out of the killing of a reputed sorcerer in the village. During the course of submissions on sentence, I raised the issue of whether, when sentencing, I should take into account the belief by these men that the deceased was responsible for killing their relatives by sorcery. Both counsel agreed that I should not take into account this belief. I accepted this submission and disregarded their belief in the power of sorcery and that the deceased was responsible for killing their relatives by sorcery. I sentenced each of the accused to fifteen years with hard labour, with the exception of one accused (who did not participate in the actual killing)—he was sentenced to twelve years with hard labour. I stated that I would publish my reasons for not taking into account the belief of these men in the power of sorcery. This I now do.

Prior to the killing of the deceased person (Joas Tepaku), the village people had a

general belief that he was a sorcerer. The village people believed that he was responsible for an unspecified number of deaths. The last death for which he was blamed was the village councillor.

All accused persons planned that they would kill the deceased. The reason they did this was to pay back and to prevent further deaths in the future. The courts have treated killing of reputed sorcerers as a special class of murder for purposes of sentencing: *R. v. Iu Ketapi* [1971-1972] P.N.G.L.R. 44; *R. v. Lakalyo Neak, Kaia Yongaipa and Kupuni Yakana* unreported, No. 632, 21 July 1971, and *Acting Public Prosecutor v. Uname Aumane* [1980] P.N.G.L.R. 510.

The issue which has been raised before me was not raised in any of these cases. It is therefore necessary to discuss the proper basis for recognizing the customary belief in the power of sorcery.

The statutory basis for treating the belief in the power of sorcery as a relevant consideration is to be found in section 4(e) of the Customs Recognition Act (Ch. No. 19). It is in the following terms:

- (4) Subject to this Act and to any other law, custom may be taken into account in a criminal case only for the purpose of . . .
- (e) determining the penalty (if any) to be imposed on a guilty party.

I adopt what I said in the *Acting Public Prosecutor v. Uname Aumane* in regard to this section. In that case the Supreme Court was not concerned with the issue now before me. The court simply assumed, as it has in other cases referred to, that the customary belief of the accused persons in the power of sorcery was relevant consideration in sentencing. This provision has to be read "subject to . . . any other law". The Parliament has given some thought to the question of the power of sorcery in this country. The relevant legislation is the Sorcery Act (Ch. No. 274). It is important to set out the preamble to the Act. The reason for this is found in section 3 of the Act:

Notwithstanding, anything in any other law or rule of statutory construction, in the interpretation and application of this Act, the provisions of the preamble shall be taken fully into account in all cases, and each provision of this Act shall be read and construed as being intended to give effect to those provisions.

The preamble is as follows:

There is a widespread belief throughout the country that there is such a thing as sorcery and that sorcerers have extraordinary powers that can be used sometimes for good purposes but more often for bad ones, and because of this belief many evil things can be done and many people are frightened or do things that otherwise they might not do.

Some kinds of sorcery are practised not for evil purposes but for innocent ones and it may not be necessary for the law to interfere with them, and so it is necessary for the law to distinguish between evil sorcery and innocent sorcery.

There is no reason why a person who uses or pretends to or tries to use sorcery, to do or try to do evil things, should not be punished just as if sorcery and the powers of sorcery were real, since it is just as evil to do, or to try to do, evil things by sorcery as it would be to do them, or to try to do them, in any other way.

Sometimes some people may act, or may believe that they are acting, under the

influence of sorcery to such an extent that:

- 130 (a) their conduct may not be morally (and should not be legally) blameworthy;  
or  
(b) actions that would ordinarily be regarded as customary offences may, in traditional social groups, be regarded as excusable or capable of being compensated for.

There is a danger that any law that deals fully with sorcery may encourage some evil-minded people to make baseless or merely spiteful or malicious accusations that their enemies are sorcerers solely to get them into trouble with other people, and this is a thing that the law should prevent.

Section 5 of the Act states:

140 Even though this Act may speak as if powers of sorcery really exist (which is necessary if the law is to deal adequately with all the legal problems of sorcery and the traditional belief in the powers of sorcerers), nevertheless nothing in this Act recognizes the existence or effectiveness of powers of sorcery in any factual sense except only for the powers of, and of proceedings under or by virtue of, this Act, or denies the existence or effectiveness of such powers.

It is clear from this Act that certain offences have been created to prevent those who claim to be sorcerers from performing various acts of sorcery (sections 7, 8, 9, 10, and 11 of the Act. This is done to prevent sorcerers from frightening people and causing them to do "things that otherwise they might not do".

150 Section 5 of the Act was enacted to ensure that no room is given to any person who may make baseless or malicious accusations against enemies as sorcerers and use this as an excuse and get them into trouble. According to the preamble to the Act, this is the thing that the law should prevent. I conclude from the provisions of the Act that the law does not permit nor encourage the customary belief in the power of sorcery. Section 4(e) of the Customs Recognition Act is subject to this. The provisions which I have dealt with are an express provision to the contrary that customary belief in the power of sorcery should be taken into account (see section 19 of the Sorcery Act). To take the customary belief of the power of sorcery into account in sentencing is contrary to the provisions of the Sorcery Act. That is a clear choice of the statute and there is no discretion in the matter.

160 Acting Justice Narokobi came to the same conclusion when he refused to take into account in sentencing the victims of sorcery (*The State v. Noah Magou* [1981] P.N.G.L.R. 1 at 3-5). The law does not recognize the power of sorcery and it follows from this that the law cannot recognize the belief in the power of sorcery as a relevant consideration.

Rules accordingly.