

PAPUA NEW GUINEA
[IN THE NATIONAL COURT OF JUSTICE]

CR No. 250, 251, 252, 253, 254, 255, 256, OF 2018

THE STATE

V

**BEN PONDA & CAROL LAKREK & TONY WATETIO &
PETER LUKAIO & SEBASTIAN BOAS SAKANI &
CLEMENT KAPUN PONDA & CLEMENT SAKANI.**

Kandrian: Miviri AJ
2018 : 11th 17th April

CRIMINAL LAW – PRACTICE AND PROCEDURE – Unlawful & wilful damage s 444 CCA– plea – parity of sentence – section 7 & 8 CCA – no parity – dispute Logging Company & land owners – allegation of breach court order – landowners attempt to enforce compliance – damage of bridge – PSR & MAR ordered– payment of compensation – reconciliation – follow due process of law-deterrent sentence

Facts

The seven Accused took a chainsaw, bush knives and other tools, went to the Keleng Bridge and damaged it. They were motivated to ensure compliance of a court order by the logging company who was not complying by using that bridge.

Held

Plea
First time offenders
Peace & reconciliation with company
Took law into own hands
4 years IHL

Cases Cited:

Pakuri-Flabu v Hambakon Sma [1966] PNGLR 348
The State v Doreen Lipirin [2001] PGSC 11; SC673
The State v Terea [2005] PGNC 136 ; N2816
The State v Yokum [2002] PGNC 24; N2337

The State v Rapola, [1988] PGNC 89[1988-89] PNGLR 487
The State v Gimble [1988-89] PNGLR 271.

Counsel:

A Bray, for the State
R. Bailey, for the Defendant

SENTENCE

17th April, 2018

1. **MIVIRI AJ:** This is the sentence of the prisoners who pleaded guilty before me on 11th April 2018 for wilful and unlawful damage of property a bridge. I adjourned to allow the preparation of Presentence and Means Assessment reports and address on sentence based on the 17th April 2018. That has been done and this is now the sentence upon the prisoners after consideration.

Background

2. On the 31st July 2017 at Keleng, Kandrian West New Britain, Ben Ponda, Carol Lakrek, Peter Lukaio, Tony Watetio, Sebastian Boas Sakani, Clement Kapun Ponda, and Clement Sakani cut and damaged the Keleng Bridge along the Wasum highway with a chain saw. At that time also they were armed with bush knives and other tools which they used to dig up the bridge so that it was not useable by vehicles.

3. The charge is pursuant to section 444 Malicious Injuries in General; Punishment in special cases. Section reads:

“(1) A person who wilfully and unlawfully destroys or damages any property is guilty of an offence that, unless otherwise stated is a misdemeanour.

Penalty: If no other penalty is provided by this section-imprisonment for a term no exceeding two years.

- (2).....*
- (3).....*
- (4).....*

Subsection (5) reads, *“If the property was a bridge viaduct, or aqueduct that was over a highway or canal or over which a highway or canal passed, and –*

- (a) Was destroyed; or*
- (b) Was damaged and –*
 - (i) The damage was done with intent to make the bridge, viaduct*

and aqueduct or the highway or canal, or any part of any of those things, dangerous or impassable; and
(ii) The bridge, viaduct or aqueduct, or the highway or canal, as the case may be, was made dangerous and impassable by the damage,
the offence is a crime, and the offender is liable, subject to section 19, imprisonment for life.”

4. The act is a wilful act meaning that, “intentionally”, deliberately, recklessly, or maliciously but not accidentally or negligently. Thus, for an offence to be committed under this section it is necessary for the accused to either intend to do the particular type of harm in fact done, or having reason to foresee that such harm was likely to be done, for the accused recklessly to take the risk of it. Where the accused tossed a bottle out of the window of a moving bus and smashed the windscreen of a parked car, the test of liability is whether the accused intended the damage or had foreseen the risk involved: *Pakuri-Flabu v Hambakon Sma* [1966] PNGLR 348. It is an act of violence and cannot be seen in the light of *Doreen Lipirin v State* [2001] PGSC 11; SC673 misappropriation is primarily an offence of breach of trust and cannot be likened to acts of violence as in robbery or homicide offences or the present offence. It is an act of violence destroying a property a bridge here.

5. Not as in *State v Terea* [2005] PGNC 136; N2816 which relates to Section 444 (1) wilful and unlawful damage of office equipment by the prisoner who believed that these were used by his bosses for illegal and corrupt purposes. He therefore did what he did damaging them. He was convicted and sentenced to 1 year IHL wholly suspended. Its application here is restricted because it is not under subsection (5) here which draws life years as maximum penalty. That was under subsection (1) the maximum penalty being 2 years therefore the restriction in its application to the present.

6. Here the maximum sentence for this offence is life imprisonment by operation of subsection 5 invoked here. It would not be proportionate in view of the facts and circumstances of the case for the imposition of the maximum penalty of life years upon the prisoners. Quite clearly a term of years is appropriate given the mitigating aggravating and any extenuating circumstances here.

Mitigation

7. All seven prisoners have mitigated by pleading guilty and in their respective allocutus expressing remorse for the wrong committed. And that compensation of 100 param shell money was paid with two live pigs to the Company a total value of K3000. All seven prisoners have affirmed and endorsed this as to what they did after committing the crime. Including that the Company has paid K 21, 000. 00 in cash to the people of Keleng and both sides are at peace now. They have also asked for the mercy of the court. This is a gesture in their favour. It shows their genuineness not by their plea alone but that they are serious at bringing peace and

normalcy in the matter. It is a commitment with substance and will be held in their favour in any sentence determined. All appear from Bail of K1000 each again in their favour.

Antecedents

8. Ben Ponda is 40 years old married with five children, and is educated to grade 10 at Don Bosco Secondary School in East New Britain. He has no formal employment history, is a subsistence farmer with no prior criminal record. He organized and was involved in the planning to damage the Keleng Bridge. His role in the crime is significant and his sentence will reflect that fact. He is a director in the Tulia Anu Project.

9. Carol Lakrek is 42 years old married with four children, and is the fifth born out of nine siblings. He is educated to grade 6 at the Sara Community School Kandrian. He has no formal employment and is a subsistence farmer. He is a Catechist in the Catholic Church. He is a leader and was involved in the planning and organizing to damage the Keleng Bridge. He believed that they had good reason to do so because there was a National Court Interim Order WS 508 of 2017 restraining the company Cakara Alam (PNG) Limited but they did not comply so they did what they did to stop it.

10. Tony Watetio is 44 years old married with five children, and is the first born out of five siblings. He is educated to grade 6 1990 at Wasum Community School. He has no formal employment and is a subsistence farmer. He has no prior convictions. He is an elder of the Catholic Church. He was involved in the planning and organizing to damage the Keleng Bridge. He also states that they acted as they did to stop the Company because there was a National Court Interim Order WS 508 of 2017 restraining the company Cakara Alam (PNG) Limited but they did not comply so they did what they did to stop it.

11. Peter Lukaio is 46 years old married with six children, and is the 11th born out of 12 siblings. He is educated to grade 6 at the Wasum Community School. And is a subsistence farmer with no prior criminal history. He too was involved in the planning organizing and damaging of the Keleng Bridge. And confirms that the reason was to enforce the National Court Interim Orders of WS 508 of 2017. The company Cakara Alam (PNG) Limited was not complying and adhering so they took it upon themselves to enforce compliance by the destruction of the bridge.

12. Sebastian Boas Sakani is 48 years old married with six children, and is the first out of six siblings. He is educated to grade 10 at the Kandrian High School. And has completed an air Traffic Certificate Training at Madang Airlink Training Centre. He has no formal employment. Currently is a subsistence farmer in the village. He too was a leader in the planning, organizing and damaging of the Keleng Bridge. And reasons as the others that the National Court Interim Orders of WS 508 of 2017 was breached by the company Cakara Alam (PNG) Limited. So they took it upon themselves to enforce compliance by the destruction of the

bridge.

13. Clement Kapun Ponda is 55 years old married with seven children and is the fourth out of nine siblings. He is educated to grade 6 at Sara Community School Kandrian West New Britain. He is a subsistence farmer and resides in his village. He was also involved in the planning organizing and damaging of the Keleng Bridge. He too reasons that the crime was committed because the company was not complying with the National court's Interim Orders in WS 508 of 2017. He is a first time offender.

14. Clement Sakani is 42 years old married with five children and is the eight out of nine siblings. He was educated to grade 6 at Sara Community School Kandrian, West New Britain. He has no record of any formal employment and is a subsistence farmer. He too was involved in the organizing planning and damaging of the Keleng Bridge to stop the Company Cakara Alam (PNG) Limited from breaching a Court Order issued by the National Court in WS 508 of 2017.

15. And all are from Wasum village in Kandrian West New Britain Province. That there was a peace ceremony made out between themselves and the company at Keleng Bridge where they paid over a pig and a shell money 50 param and the inland communities came with the same amount and exchanged. Cakara Alam (PNG) limited came with K21, 000 cash which was paid over to the offenders.

16. The bridge has been repaired with the logs that were cut replaced across the 15 meters and 6 meter wide bridge 2 meters up from the water line of the dried creek. The cost of repair is unverified before me by independent evidence.

17. The presentence and the means assessment report ordered before the court confirmed payment of compensation. The importance of compensation was that there was peace reconciliation between the parties to the dispute. A wrong had been committed and out of genuine goodness to see it resolved the parties came voluntarily and reconciled to see lasting peace between them. Here the presentence reports confirmed in all material aspects this fact. It was important that the compensation paid was not to avoid the full force of the law. As such there would not have been real settlement. Because the problem will remain and resurface again. Underlying also is that the subject of the crime facilitates the movement and transportation between all. And destruction has meant that not only the company suffered but also the prisoners and their people in its use. No lives have been lost or put in danger as a result of that act. It is a logging access road and not in a city centre or town so that its use is to all dwellers and hence danger posed to all. That is not the situation here. But there is danger posed to employees of the logging company and those who use the road to access the logging site and vice versa.

18. Evidence before the court depicted by two photographs taken is that holes at two locations about a meter and half apart each into about the same measurement in depth have been dug into the place where vehicle tyres would be making it inaccessible for travel in and out. Logs underlying have been removed exposing

the water way underneath so any vehicle would have their tyres into the holes and inaccessibility into logging areas. Coupled with a tree which has been fallen across the road preventing travelling in and out. The road is a dirt road located in logging access area through the subject bridge. Which comprise of logs placed across the water way from one side to the other allowing travel across dirt filled atop the logs to make the access from one side to the other. The cost of the damage would not be into the hundreds of thousands as claimed by the company. But money will be paid to repair what has been damaged by the prisoners. And that is the case now it has been repaired by the Company.

Aggravation

19. All seven prisoners took the law into their own hands. They reasoned that they did what they did because the Company Cakara Alam (PNG) Limited did not observe and adhere to a court order National Court in the WS 508 of 2017, which they had served it to stop its operations and observe certain conditions under. That order dated the 9th June 2017 by this court was on foot. And its terms restricted any activities in dealing with the harvest and shipment of logs in effect maintaining status quo. And the company was defendant in that proceedings and was aware of the terms of the orders. It appears did not heed so prompted the prisoners to do what they did. Obviously wrong and unlawful as it maybe they would not have done what they did had it not being for the Company. In this regard the company is partly to blame for their actions.

20. On the other hand they were versed of the procedure to ensure compliance of the law as they no doubt went through that process to get the order. Which they contend was not honoured by the Company hence their behaviour and criminal conduct. It should have dawned on them to comply with the law than to breach it. As land owners they were entitled but the way they executed was illegal and unlawful. They exerted compliance of the court order by criminal conduct which was not right. Court orders must be properly enforced not by criminal conduct as here or by breaching the law. Court orders must be respected both against those who are sought against and by those who institute. Here also it must not be swept aside that the costs will be incurred to enforce the court order.

21. The intent to damage the bridge as they did was to enforce compliance with the court order. But in so doing they have made it dangerous to persons in motor vehicles on that logging access road. And as depicted in the photographs it is inaccessible by vehicle but by foot only. It is a commercial dispute that has gone from civil law to criminal law. And there are commercial or economic issues between the prisoners and the company at stake that will not be simply solved by imprisoning the prisoners for the offence. A balance must be drawn between deterrence of the prisoners and any others from taking the law into their own hands damaging company properties and of mending what has been destroyed and maintaining, observing and adhering to the law. Also allowing the commercial economic activities logging in particular to operate to ensure benefit to all the prisoners as well as the Company. Particularly in the light of WS No 508 of 2017

which has now by consent dated the 11th October 2017 a notice of discontinuance has been filed on basis of a consent order also of that date, that plaintiffs the prisoners who comprise by their Chairman Francis Lalio have now discontinued the proceedings against the Company effectively discharging the restraining order against the company. Given this fact which I take judicial notice of justice would be served giving effect to this fact in the sentence passed.

22. I am assisted and I take due regard and consideration of the presentence reports made out and in court for each prisoner. This is not the first time that the court has had to consider presentence reports in the determination of appropriate sentences: *State v Yokum* [2002] PGNC 24; N2337; *Rapola, The State* [1988] PGNC 89[1988-89] PNGLR 487. They will be considered amongst all before the court and given due weight and regard in the determination of appropriate sentence here section 444 (1) (5) of the *Code*.

23. All prisoners are mature persons with wives and children dependent on their provision as heads of their respective families. Their actions are not analogous to breaking or damaging a bridge to facilitate a further criminal offence, a robbery, or as defence counsel put it with explosives which are more serious warranting time in jail. They are compelled by non compliance in a commercial dispute with the company before the court and therefore they cannot be in the circumstances punished straight out with a custodial term of imprisonment per se. But sentence warning that breach of the law to settle a matter in law will not be tolerated. It must be deterred and denounced with sentence that will educate as well as prevent and settle the dispute peacefully and lawfully. All prisoners are first offenders who are mature men whose ages 32 to 55 set out above. They are settled in life and have demonstrated by taking the guilty plea and reconciling and compensating even before the court has taken the matter. It is clear evidence that there is genuine intent on the parties to make amends for the better and live a good life. In sentencing all will be treated alike in the sentence because they all played equal parts in the commission of the offence: *Gimble v The State* [1988-89] PNGLR 271.

24. The reference to National Court Interim order in WS 508 of 2017 effect of which I have set out above. Keleng Bridge has been repaired and is now useable by all. In passing it must be remembered that the Bougainville crisis started because of commercial disputes as is the case here that escalated to drawing our nation to spending lives and money to bring back peace. That is immeasurable and must be avoided at all times. Follow the law always to solve your disputes and problems.

25. Accordingly in all the circumstances the Court sentences each of the prisoners Ben Ponda, Carol Lakrek, Tony Watetio, Peter Lukaio, Sebastian Boas Sakani, Clement Kapun Ponda, and Clement Sakani to 4 years IHL.

26. In the exercise of my discretion under section 19 of the *Code*, I suspend that 4 years on Good behaviour Bond for the same period on condition that you all pay

a surety upfront of K1000 each.

27. I order that your K1000 paid as bail surety will be converted in this regard.

28. Four (4) years IHL suspended on 4 years GBB. That you all pay a total surety upfront of K7000.

Orders Accordingly

Public Prosecutor: *Lawyer for the State*

Public Solicitor : *Lawyer for the Defendant*