

PAPUA NEW GUINEA  
[IN THE NATIONAL COURT OF JUSTICE]

**CR (FC) 251 of 2017**

**THE STATE**

**V**

**TRACEY TIRAN**

Waigani: Miviri AJ

2018 : 26<sup>th</sup> June

***CRIMINAL LAW – PRACTICE AND PROCEDURE – Conspiracy to defraud- Misappropriation – application admitted – dishonesty denied – no coconut plant up running – State discharged proof – dishonest application – guilty of misappropriation - s383A CCA.***

**Fact**

Accused dishonestly applied to her own use K 500, 000.00 the property of the State of Papua New Guinea

**Held**

Application of K 500, 000.00 undisputed.

Dishonesty established

No entitlement to money.

Corruptly paid K150, 000.00 to another for use of money

Expended on personal expenses not related to Project

Guilty of Misappropriation.

**Cases Cited:**

*The State v Lawi* [1987] PNGLR 183.

*State v Francis Natuwohala Laumadava* [1994] PNGLR 291

*The State v Wani* [1979] PNGLR 593

*The State v Kandakason* [1998] PGSC 20; SC558

*The State v Rokpa* [1994] PNGLR 535;

*The State v Liriope* [1990] PGNC 58; N916

**Counsel:**

Mr.T. McPhee, for the State  
Mr. D. Wapu, for the Defendant

## VERDICT

**05<sup>th</sup> July, 2018**

1. **MIVIRI AJ:** This is the verdict of a woman who dishonestly applied to her own use K500, 000.00 the property of the Independent State of Papua New Guinea.

### Short facts

2. Accused conspired with two others between the 1<sup>st</sup> day of June 2010 and the 25<sup>th</sup> day of October 2011, representing to the State through the office of the Minister for National Planning and Monitoring Department honourable Paul Tientsin MP then that a Coconut project would be set up on Manus. Pursuant to that, K500, 000.00 was paid by cheque to the accused's company Sits Up Services Limited who deposited the money into that account and used the money between the 1<sup>st</sup> day of March 2011 and 25<sup>th</sup> October 2011 personally and to the use of others. The subject coconut project was not set up.

### Charge

3. The charge is pursuant to section 383A misappropriation of the *Criminal Code* which reads; “(1) *A person who dishonestly applies to his own use or to the use of another person –*

- (a) *Property belonging to another; or*
- (b) *Property belonging to him, which is in his possession or control (either solely or conjointly with another person) subject to a trust, direction or condition or on account of any other person,*

*is guilty of the crime of misappropriation of property.*

(2) *An offender guilty of the crime of misappropriation of property is liable to imprisonment for five years except in any of the following cases when he is liable to imprisonment for ten years-*

- (a) *where the offender is a director of a company and the property dishonestly applied is company property;*
- (b) *where the offender is an employee and the property dishonestly applied is the property of his employer;*
- (c) *where the property dishonestly applied was subject to a trust.*

*Direction or condition;*

- (d) *where the property dishonestly applied is of a value of K2000 or upwards.*

(3) *For the purposes of this section-*

- (a) *property includes money and all other property real or personal, legal or equitable, including things in action and other intangible property;*
- (b) *a persons application of property may be dishonest even although he is willing to pay for the property or he intends to restore the property afterwards or to make restitution thereof to the person to whom it belongs or to fulfil his obligations afterwards in respect of the property;*
- (c) *a person's application of property shall be taken not to be dishonest, except where the property came into possession or control as trustee or personal representative, if when he applies the property he does not know to whom the property belongs and believes on reasonable grounds that such person cannot be discovered by taking reasonable steps;*
- (d) *persons to whom property belongs to include the owner, any part owner, any person having a legal or equitable interest in or claim to the property and any person who. Immediately before the offender's application of the property, had control of it. “*

The State Prosecutor has conceded that there is no basis to pursue the charges of conspiracy to defraud counts one on the indictment. Accordingly the appropriate verdict given is not guilty against the accused that she conspired with Peter Pomak and Enoch Sihil to defraud the State of K500, 000.00 the property of the State of Papua New Guinea. Leaving now the charge pending of misappropriation.

## **Elements**

4. The elements of section 383A Misappropriation are; - (a) there was dishonesty; (b) there was application of the said property to her own use or that of another; and (c) it was property belonging to another, *Lawi v The State* [1987] PNGLR 183. Dishonesty is a question of fact and would depend on the status of mind of the accused. “*And when a Judge considers the facts on how the property was applied, he uses the ‘ordinary’ standards of reasonable and honest people’ test to determine whether or not the property so applied...Dishonest is defined in the Oxford Advanced Learners Dictionary of Current English as, “intended to cheat, deceive or mislead, The State v Francis Natuwohala Laumadava* [1994] PNGLR 291 at 293.” And is that the case of the accused here did she intend to cheat or deceive or mislead here? To so answer the following are considered.

## **Undisputed Facts**

5. It is settled that K 500, 000. 00 is State Money and not the property in law of the accused. That it was paid into Sits Up Services Limited her Company and she was using that money. In fact she used up to K 365, 628.70 break up in accordance with the spending she admits to in the record of interview dated the 30<sup>th</sup> August 2012. And a further sum of K 137, 683.11 is expenses that accused cannot recall. This is “*Funding Assistance for Integrated Coconut processing project*” money that was spent that she cannot recall what they were spent on. Together this would come to a total of K503, 311.81 just slightly over by K 3311.

81 toea. In fact the entire use of the K500, 000.00 the subject of the charge. Is the entire use here dishonestly applied or only part, and if so how much?

6. Counsels on either side are in agreement that accused dishonestly applied to her use or to that of others portion of that K500, 000.00. State counsel argues further that K150, 000.00 was paid to PNG Motors nominee of Chris Hulape for the use of the money including K50, 000.00 to National Alliance Party of the Minister who authorized the payment of the money. It was the payment for the money. Defence counsel is in agreement and argues that Accused spent what was remaining of K350, 000. 00 honestly and therefore is not guilty outright of the whole sum of K 500, 000.00. Accused conceded in cross examination by state counsel that what was in place was a sham with Chris Hulape and Paul Tiensten, parties to an offence: *Wani v The State* [1979] PNGLR 593.

7. Defence counsel has argued that the corruption started in the Department of National Planning where the acting secretary together with her subordinates failed to carry out their lawful duties but heeded to Tiensten's foot note to fund. That the accused is not liable she was genuinely applying for project funding. That it was Chris Hulape and Paul Tiensten who brought her into the bad scenario.

8. Accused is the director of the company Sits Up Services Limited and the project proposal is not made by Sits Up Services Limited, but by Peter Pomak Managing Director of Ndeundeu Incorporated Land Group of the Sapulau Coconut and Cocoa Plantation P. O. Box 63, Lorengau, Manus Province. It is a Project proposal by Sapulau Integrated Coconut processing. The project proposal is agriculture based copra is. The project is to turn raw coconut into a commercial and marketable product that will bring income and generate a livelihood for the people of Manus and Sapulau. It means that there will be a processing plant set up to do this. That at the end of the project what will remain is a coconut processing plant shown out by the flow chart from raw material to a commercial marketable economic product to sustain the people there, State Exhibit A pages 10- 37.

9. That the money was for that project submission because it is approved by the minister by a footnote on it dated the 20<sup>th</sup> December 2010 for release of funding for proposal and not a feasibility Study. That is clear by the funding sought of K1.5 million in the letter attached dated 3<sup>rd</sup> June 2010 under hand of Peter Pomak on page 10 of Exhibit A. It follows that the acquittal must be on that project proposal and not a feasibility study because the money is not given for feasibility study and has never being from this evidence. It follows that defence exhibit 1 is not the basis upon which funding was approved and therefore is insignificant in the case against the accused. It does not add to her case. What are significant here are that the project funds remains to be acquitted in accordance with the Public Finance Management Act to satisfy that it has been properly spent as expended. It ties in Auditor Archie Mai relevant particulars set out below. Essentially he is saying that the money was illegally unlawfully taken out and spent. The result is clear there is no coconut processing plant to point to showing honest application as opposed to dishonesty.

10. It is also undisputed that the Sits Up Services Limited is not a company whose profile includes agriculture produce and marketing or specifically it is a company with copra marketing production and distribution. Reading its profile it is, *"We deal in supplying, Office stationaries, procurements, catering, amenities, and relief, short term, full in labour for receptionist secretaries and physical labour."* This is not the same as dealing in agriculture let alone copra. And therefore accused would be falsely representing herself as such in an endeavour to get that funding. If funding was approved by a footnote on the project proposal accompanying letter written by Peter Pomak Managing Director of Ndeundeu Incorporated Land Group of the Sapulau Coconut and Cocoa Plantation P. O. Box 63, Lorengau, Manus Province. That approval was to an agriculture orientated company and for the accused to receive that money was clearly in breach and contrary she did not possess the skills and knowledge and was falsely representing. The same is so of her company Sits Up Services Limited. This false representation enticed and she received that money. If it was not a sham which she was part of she would not have paid K100, 000.00 to Chris Hulape and then K 50, 000.00 to the National Alliance Party. The latter of which Minister Paul Tiensten was member of.

11. It is also undisputed that the money the subject of payment did not originate from agriculture allocated vote. That it came from financial assistance to churches in their implementation of education and health services to the communities vote. Sits Up Services Limited is not a faith based organization or church and would not be entitled as it is a company not an educational or health service therefrom. It was not entitled to that money in law.

12. Sits Up Services Limited is a company registered in accordance with the Companies Act 1997. Accused is a director with Enoch Sihil. This is clear by the certificate of incorporation page 53 of State Exhibit A, including the extract as at 17<sup>th</sup> October 2011 page 54 of that exhibit, page 57 still of that exhibit showing profile of the company dealing in supplying, office stationaries, procurements, catering, amenities and relief, or short term, full in labour for receptionist, secretarial and physical labour. Annual Returns Form 22 under the Companies Act 1997 of Sits Up Services Limited company number 1-66568 pages 60 to 77 for the years 30<sup>th</sup> January – 31<sup>st</sup> December 2009; 1<sup>st</sup> January -31<sup>st</sup> December 2010; 1<sup>st</sup> January -31<sup>st</sup> December 2011 all of which are filled out and lodged by Tracy Ann Hisus Tiran Director and dated on each occasion 30<sup>th</sup> May 2012. Three different year's returns for Sits Up Services Limited all lodged on the same date of 30<sup>th</sup> May 2012. That there are no company accounts and books before the court including assets and liabilities of the company tendered into court of Sits Up Services Limited. There is no company personal discharged with these specific duties to bring that evidence before the court. Which effect is that defence exhibits 1, 2, 3, and 4 could not be verified if indeed they are company records and from Company accounts and books related. What is clear is Sits Up Services Limited is a shelf a face without a body company that was purposely created to accommodate

this sham set out above and to show the false impression that it was an honest discharge application of public money. Clearly it is not by the evidence that has now come to light above.

13. In my view these are very serious issues of credibility to accept that what was done was honestly. Because the opposite is evident. Each piece of evidence originates from a particular location handled by a particular person or source, for example the Motor vehicle rental agreement of Chauka Car Rentals with Tiran Manuai Tracy. Whether this has been incurred in the run of the company and if the person is the same as the accused or another. The same ground spirals through the entire defence exhibits seriously affecting their veracity and credibility so much so that accepting the defence case would amount to an error of law. Particularly to sway that the expenditure were incurred pertaining to the discharge of duties related to the project and therefore lawfully spent. Similarly so of the other evidence relied on. They share the same fate cutting to the point that a company accountant or a person discharged with that duties in that company Sits Up Services Limited was sustain to show indeed discharge of the duties of the company towards fulfilling the call of the project and lawful expenditure and discharge of the K500, 000. 00 allocated. What this means is that these are personal expenses sourced from this K 500, 000.00 which is money designated for the project. This runs through all defence exhibits from 1, 2, 3, and 4.

14. This finding is not without support because the accused has verified both in cross examination by the Prosecuting counsel confirming the record of interview which confirms break up as K 365, 628. 70 as having being spent on personal expenses not related to the project. The particulars of Prosecuting counsel cross examination summed up to K 137, 683. 11 which are expenses that accused cannot recall including deposits into personal account Bank of South Pacific account number 1001114666.

15. Accused has no obligation to prove her innocence but she is accused of a very serious allegation and has an interest to sway out of the allegation. It is material that her evidence is corroborated in all material particulars including independent confirmation by reference to company records of the expenditure made by her Company Sits Up Services Limited. Her company is not genuine it is a sham that is why there are no employees of the company either full time or part time including an accounts personal responsible for all the supposed records she has tried to claim as of the company and spent lawfully and honestly in the discharge of the K500, 000.00 given her company. That is the reason why the company returns for the three years are lodged one and at the same time 30<sup>th</sup> May 2012 in haste to add to the sham but corroborating the truth that of deliberate calculated attempt to deceit and lie to cover a serious dishonest application of government and State funds in breach of the law: *Kandakason v The State* [1998] PGSC 20; SC558 (7 July 1998).

### **Acceptance of State Evidence**

16. The court accepts state evidence Exhibit A with an index of various documents running from pages 1 to 205 as good evidence. The evidence of the auditor Archie Mai, attaching FF3 stating it being prepared by acting principle Budget officer on the 7<sup>th</sup> January 2011, particulars of which are, *“Being Funding Assistance for Integrated Coconut processing project”*. And signed by acting secretary as section 32 officer, with a “stick on” note on the document with inscription, *“To be funded out of Strategic markets as this project is aimed at Building Buying Selling point for the Community”*. Accompanied by general expenses form undated blank form except for the particulars, *“Being Funding Assistance for Integrated Coconut processing project,”* reiterates coupled with the sum of K500, 000. 00 as the amount for the project.

17. It is safe to find beyond all reasonable doubt that K500, 000.00 was paid to the accused by Bank of Papua New Guinea cheque dated the 1<sup>st</sup> March 2011 number 00004 drawn from the Department of National Planning & Monitoring drawing account 4311-6561 addressed to Sits Up Limited P. O. Box 63 Lorengau, Manus Province. The description of the cheque is Funding assistance for Coconut Project. And it was deposited into Bank of South Pacific account number 1001531025 account name Sits Up Services Limited P. O. Box 633, Gordons NCD on the 4<sup>th</sup> March 2011. Preparatory work to open this account was done with a statutory declaration made out by the accused and co-director Enoch Sihil on the 24<sup>th</sup> February 2009.

18. And the cheque is the result of a 26 page Project Proposal dated the 3<sup>rd</sup> June 2010 by a covering letter under hand of one Peter Pomak Managing director of Ndeudeu Incorporated Land Group of Sapulau Coconut & Cocoa Plantation, P. O. Box 63, Lorengau, Manus Province, to then minister Honourable Paul Teinsten MP attaching a document titled Project Proposal with the covering letter headed, Project Proposal-Sapulau Integrated Coconut processing. It is a technical document and can only be written by one who has knowledge skills qualification necessary to be able to talk about plant location, plant layout, structures and buildings by providing detailed plans and specifications, manufacturing and production process by establishing flow charts and diagrams and specification, and capacities complete with costs, installation manuals maintenance schedules required spare parts inventory during deliveries listing of domestic and foreign machinery supplies. It is not written nor is it authored by the accused. Or is by her company Sit's Up Services Limited. Peter Pomak is not a director in Sits Up Services Limited. Sit's Up Services Limited company profile extracted shows it was incorporated on and from 30<sup>th</sup> January 2009 shareholder is the accused ordinary one share. Business Location section 504 Allotment 4 Rainbow Hohola NCD but she is not living there or operating the company from there. She lives at Manu Auto port. The second director is Enoch Sihil. In the Company profile Sits Up Services Limited professes, *“We deal in supplying, Office stationaries, procurements, catering, amenities, and relief, short term, full in labour for receptionist secretaries and physical labour.”* And it is signed by the accused as

Managing Director. Accused further confirms with a statutory declaration dated the 24<sup>th</sup> February 2009 confirming her directorship together with Enoch Sihil of Sits Up Services Limited which was established purposely as set out above.

19. The magnitude of the project viewed out by the project proposal with her skill level and her company Sit's Up Services Limited and what the company is skilled and professed to do clearly depict she could not have been awarded that money for that submission. She would not have had the necessary skills to discharge what was written in the project proposal. Her company returns for that year 2011 to the Registrar of Companies has not shown the company engaging in a project of this size and moneys paid to earning it as generated both for purposes of the companies Act and tax purposes. This is in accordance with section 215 of the *Companies Act* 1997 read together with schedule 6 of that *Act*. In each case the annual returns do not show that the company has number of employees, including part time employees as at the date of each return.

20. Fundamentally what needs verification is how a company with two directors could carry out a project that they had submitted and got a cheque of K500, 000.00 work to attain that? Yet she has produced invoices dealings in spending money to K365, 628. 70 which is not the subject of her company annual returns, if indeed they were company expenses as she professed in court. She does not have an asset register to show the assets that the company has. Books of the company to show the accounts upkeep and maintenance of the company accounts. At item 12 of the company annual return activities undertaken including principle activities of the company both for Annual returns for 2010 and 2011 both do not contain any evidence of this matter. At item 27 of the form states the total value of assets of the Company as at the date of the last balance and the total value of the liabilities of the company as at the last balance in both years that is blank it does not contain anything for example the vehicle or laptop computer and other assets purchased for the company.

21. It means defence exhibits lack weight in this regard to add to the defence case. They would be personal expenses more than of being incurred in the course of the project. Their veracity credibility as defence evidence would not meet the balance, if indeed it was a government sanctioned project Archie L. Mai Acting Director (auditor) of the Department of Provincial and Local Government Affairs would have cleared the funds as properly lawfully sourced and spent. He is a 36 years veteran of that department working 20 years and then graduating with a diploma in accounting at the Papua New Guinea Institute of Public Administration promoting to Assistant director since 2007. He made the audit of the K500, 000.00 payment made to Sits Up Services Limited paid by the National Planning & Monitoring Department on the 1<sup>st</sup> March 2011 for purposes of a coconut project in Manus Province.

### **Cheque Raised in breach of law.**

22. In his audit report the project proposal was not done in the project



formulation documents. And the project was not deliberated and approved by the joint District Planning and Budget Priority Committee at district level and approved by the Provincial Executive Council. Payment was done on the basis of a letter dated the 3<sup>rd</sup> June 2010 with approval by a footnote on the letter by the Minister then Honourable Paul Tiensten MP. Both finances forms FF3 and FF4 were not signed by the Financial Delegate and the commitment clerk. And were not filled out according to law to be able to raise that money. The process taken to raise the subject cheque of K500, 000. 00 was by breach of the law. The money the subject of payment was not for agriculture but for faith based organization which did not include companies as in the case of the accused company. It was an irregular and unlawfully payment as the expenditure was from social Development appropriation vote which was to be paid by grants or transfers to public authorities. These included financial assistance to churches in their implementation of education and health services to the communities. Rightly it should have been under the National Agriculture Development Program vote which payments were to public authorities not private as was the case here.

23. Her situation is likened to the case of *Yaip Avini v The State* [1997] PNGLR 212 (15 July 1997) where the appellant got K100,000 for road in Hapohandong – Makini Road but the road was never built but defendant used the money personally. Her company Sits Up Services Limited was not engaged to provide supplying of office stationaries or procurements catering amnesties or relief short term labour in receptionist in the coconut project. She was engaged according to her evidence to do feasibility studies for the project. But her company does not profess that in the profile of the company nor has there being evidence led of the skills professionalism she possessed to be able to carry out what was called for by that project.

24. Defence Exhibit 3 is Phone to Phone banking with writings in pen alongside the printed items from 31<sup>st</sup> March to 29<sup>th</sup> April 2011. These writings in pen are not verified by the evidence that defence has led as to who made these writings in pen on the face of the document. Why they are in that manner and form. If they are indeed official company records of the Sits Up Services Limited how is it verified that that is so. A company without official company record keeper is one without any records. What is seen on the face of this exhibit is that it has been tampered with in the way that writings by pen have been inscribed alongside the computer print. It cannot be considered as genuine as it is a photocopy and its origin cannot be ascertained either by reference to the person who is in charge of keeping it. No evidence has been led as to its veracity or authentication in these respects.

## **Issue**

25. Whether or not accused was dishonest in the application of K500, 000 to her use or to the use of others?

## Findings of Fact

26. I find as a fact that the Accused with Chris Hulape and Minister then Paul Tiensten were part of a sham to misappropriate or dishonestly apply to their use or to the use of others government funds.

27. I find as a fact that to give root to this accused set up a shelf company or a face without a body company Sits Up Services Limited. Which had as a fact no assets no liabilities no employees either permanent or casual except for two directors with a project of K500, 000.00 to implement with no company accountant no accounts books either cash book or journal to record and upkeep the company accounts which are not the records intended before court in defence.

28. I further find as a fact that a project proposal “Sapulau Integrated Coconut Processing” was submitted to Minister Paul Tiensten on the 3<sup>rd</sup> June 2010 received by the minister’s office on the 11<sup>th</sup> June 2010 who footnoted approval on the 20<sup>th</sup> December 2010 in breach of the law.

29. I further find as a fact that in breach of law and financial management a cheque number 000048 dated the 1<sup>st</sup> March 2011 of K500, 000. 00 from the Department of National Planning and Monitoring drawing account 4311-6561 was addressed payable to Sits Up Limited P. O. Box 63 Lorengau Manus.

30. I further find as a fact this cheque was deposited into the account at Bank of South Pacific named Sits Up Services Limited account number 1001531025 and the accused made withdrawals and used the money personally and to the use of others not for the expenditure of the project proposal approved on the 20<sup>th</sup> December 2010 by the Minister Paul Tiensten.

31. I further find as a fact that the accused was dishonest given all the findings of fact and evidence set out above in law.

32. Accordingly I find the accused Tracy Tiran of Pak Island, Lorengau, Manus Province guilty of misappropriating the sum of K500, 000. 00 the property of the Independent State of Papua New Guinea between 1<sup>st</sup> March 2011 and the 25<sup>th</sup> day of October 2011.

33. This was public money that was allocated for a specific purpose not executed and therefore amounts to misappropriation: *Rokpa v The State* [1994] PNGLR 535; *State v Liriope* [1990] PGNC 58; N916 (1 October 1990). Using the test of ordinary reasonable persons it is evident in my view without any doubt that the conduct of the accused was dishonest and therefore I return a guilty verdict on the indictment of misappropriation.

34. Verdict of the court Guilty of Misappropriation.

*Ordered Accordingly.*

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Public Prosecutor: *Lawyer for the State*

Punau & Co Lawyers: *Lawyer for the Defendant*