CRIMINAL LAW AND CUSTOM IN SOLOMON ISLANDS

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Problems and conflicts are bound to occur when an outside centralised and uniform criminal legal system is implanted onto a totally different culture with no formal unified system of law.

The purpose of this article is to examine such problems and look at how the courts have approached them generally and to consider the implications of the recent, important decision of the Solomon Islands Court of Appeal in *Loumia* v. *D.P.P.*[1]

Historical Background

Prior to being declared a protectorate in 1895, Solomon Islands had a legal system in the loose sense that custom machinery existed for solving disputes. If one defines the purpose of the law as being to regulate and control the actions and relationships of a community then custom did provide for this although customs would and did vary from district to district and island to island. In the area of what would be defined as criminal law there were methods of dealing with offenders, usually by payment of customary compensation, as there was no formal court system. Matters were usually resolved by discussion and mediation between village leaders. The advent of colonisation had a dramatic effect in that the colonising power was disinclined to recognise custom for various reasons, viz:

1. it was not uniform;
2. it had no certainty;
3. it was not written down and was accordingly not easily ascertainable;
4. their desire to strengthen their position. Having a certain system which applied throughout the Protectorate helped to achieve this.

To this end a codified system was imported. It is important to note that most Penal codes in common law countries derive from a desire to codify (with improvements) the basic principles of the common law developed over centuries. The approach following colonisation is best summed up by the statement of Ollerenshaw J. in *R* v. *Womeni Nanagano*[2] when he stated, 'Long ago it was decided, if I may so I think wisely, that the criminal law to be applied to the native populations of the territories should be substantially the law operating in our own civilisation. The Code applies here to both European and native inhabitants.' Basically, during the colonial era, custom played no part in the criminal law except in so far as it would be taken into account as a mitigating factor. 'It was doubtless considered that such standards, beliefs, customs and so forth, could and would be taken into consideration by the judge upon the question of the proper punishment in each case.'[3] Custom never absolved an offender from criminal responsibility.

Following independence there has obviously been a desire to give more recognition to custom, and most constitutions in the Pacific region provide in some form or another for customary law to be part of the law. The problem here is that, although for example, the Constitution of Solomon Islands by s.75(1) provides that 'Parliament shall make provision for the application of laws including customary law', Parliament has not yet done so particularly in the criminal field. Therefore, by virtue of s.76, the provisions of Schedule 3 of the Constitution apply for determining the applicability of laws. In so far as it relates to customary law, Schedule 3 provides as follows:

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1. Criminal Appeal 1/85.
2. [1963] P.N.G.L.R. 75.
3. *Ibid.*

(1) Subject to this paragraph, customary law shall have effect as part of the law of Solomon Islands.
(2) The preceding subparagraph shall not apply in respect of any customary law that is, and to the extent that it is, inconsistent with this Constitution or an Act of Parliament.
(3) An Act of Parliament may:-
  (a) provide for the proof and pleading of customary law for any purpose;
  (b) regulate the manner in which or the purposes for which customary law may be recognised; and
  (c) provide for the resolution of conflicts of customary law.

Unfortunately again Parliament has not passed any legislation under paragraph 3 of Schedule 3. This has naturally placed the judiciary in a difficult position when customary matters are argued. The difficulty is twofold and was well stated by Kidu C.J. in *The State* v. *Paul Pokolou*[4] as being:
(a) the failure of lawyers to prove properly the custom upon which they seek to rely; and
(b) the failure of Parliament to legislate as to the application of customary law.

The Courts have always recognised customary matters, in varying degrees, in deciding what punishment an offender shall receive. Many cases come before the Courts where prior to the Court case, the matter has been settled in one way or another by customary proceedings and compensation has been paid; or where the accused feels that what he has done is not wrong in custom. What recognition should the Courts give to such settlements or feelings when considering sentence? It seems that the approach in the Pacific has been to say that the more unsophisticated the offender, and the more customary the milieu in which he lives, then the more mitigative a custom settlement will be. There are several illustrations of this, particularly from Papua New Guinea. For example, in *Acting Public Prosecution* v. *Tumu Waria*[5] the judge emphasised that the degree of sophistication of the offender and the traditional ways of his community were important when considering sentence.

This approach reached its zenith in Papua New Guinea in the case of *R* v. *Jim Kaupa*[6] (a case of causing death by dangerous driving), where Wilson J. stated:

> It is no less important in an emerging country such as Papua New Guinea where there are strong traditional pressures upon a person responsible for the death of another man to pay compensation to the deceaseds kinsmen whatever the courts decision might be, to take into account other punishment which an offender has received such as a liability to pay compensation. Indeed, if a court feels at the time of sentencing that there has already been adequate punishment, no order of a positive aspect is normally desirable.

This represents a fairly isolated judicial view and the courts have generally tried to achieve a balance between public policy calling for punishment, whilst at the same time giving allowance in sentencing for customary factors.

Two review cases in Fiji and a recent Solomon Islands case illustrate this balanced approach.

In *R* v. *Naburogo*[7] Tuivaga C.J. reduced sentences of six months imprisonment on two offenders for minor storebreaking to binding over orders because, inter alia, compensation had been paid, and the offenders had received six strokes of corporal punishment from the village elders.

Again in *R* v. *Vodo Vuli*[8] sentence of thirty months imprisonment for committing acts of

4. P.N.G. N404 11/3/83.
5. (1977) S.C. No. 117.
6. (1973) No. 765.
7. Review Case 2/81.
8. Review Case 6/78.

gross indecency with other male persons was reduced to twelve months imprisonment. The offender had apologised to the boys' parents and made traditional Fijian peace to them by presenting a whale's tooth; the offender had thought that that was the end of the matter.

In the Solomon Islands case, *R* v. *Tovo*,[9] the accused had pleaded guilty to defilement of a girl under the age of thirteen. Following the offence there had been a semi-formal village tribunal in which a village chief looked into the matter and had ordered compensation to be paid. This had been done. The village where the offence occurred was very unsophisticated and the people there lived in a traditionally customary way. The Commissioner did not quantify exactly how much credit he gave for this, saying that in cases of customary settlement or punishment each matter must be looked at on its own facts. However, the sentence of two years imprisonment was substantially less than the usual tariff in Solomon Islands for such cases.

There have been trenchant criticisms of the mitigation of sentence approach from the Law Reform Commission of Papua New Guinea.[10] The Commission said,

> We believe it unacceptable that a person who is innocent in the eyes of his people in his community and well believes he is doing right should be convicted of an offence. To punish people by applying standards and world views of another people is inherently wrong and is fundamentally unjust.

The Commission proposed a defence of customary justification except for unlawful killing or other cases involving serious personal injury. It is interesting to note that in Papua New Guinea, provocation can be an actual defence to assault, (S.272 *Criminal Code*), a provision that runs against the common law trend that in criminal cases provocation is only a matter of extenuation.

Loumia's case: The importance of this case is that it gave the Solomon Islands Court of Appeal the opportunity to comment on the general application of laws in the country with particular reference to Schedule 3 of the Constitution. The facts of the case were complex but can be summarised briefly as follows:

There had been discord between 2 groups Kwoio (K) and Agia (A) over a land dispute which group K had won in the Courts. Following the hearing in the Customary Land Appeal Court two of group A had been sent to prison for an attack with knives on S who was Loumia's brother. Matters did not calm down as group A were reluctant to accept the Courts decision on the land issue and on 3 August 1984 13 people from group K went armed to a village where a bazaar was being held. This group was led by Loumia and his 2 brothers H and S.

The evidence of events became somewhat conflicting thereafter but group K met up with some members of group A on the village football field and fighting broke out as a result of which S (Loumia's brother was killed), H (his other brother) suffered a terrible facial wound and R, M and L of group A were all killed and found dead in various places along the beach near the village. All 13 of group K were charged on 3 counts of murder and at the trial (Sir John White A.C.J. sitting with local assessors), 11 were acquitted, H was convicted of manslaughter and sentenced to 5 years imprisonment and Loumia was convicted of murder and sentenced to life imprisonment. Loumia had always admitted killing R, M and L. (R, ironically, had just been released from prison being one of the earlier assailants on S). The defence argued that Loumia was guilty of manslaughter only, on the grounds that:

(a) Loumia's seeing his brother S killed and his other brother H maimed so provoked him that a reasonable Kwoio pagan villager would have acted as he did in the heat of the moment; and

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9. Criminal Case 16/86.
10. Working Paper No. 6. 1977, 'Criminal Responsibility: Taking Customs, Perceptions & Beliefs into Account'.

(b) that in acting as he did he could avail himself of the matter of extenuation in S.197(c) of the Penal Code. So far as relevant, S.197 provides:

> Where a person by an intentional and unlawful act causes the death of another person the offence committed shall not be of murder but only manslaughter if any of the following matters of extenuation are proved on his behalf, namely:–
> (a) ...
> (b) ...
> (c) that in causing the death, he acted in good faith and on reasonable grounds, that he was under a legal duty to cause the death or do the act which he did.

Loumia argued that by virtue of Schedule 3 the words 'legal duty' include a legal duty in custom and customary evidence was adduced by a local chief that if a close relative is killed Kwoio custom dictates the killing in turn of the person responsible even if the person under the duty thereby exposes himself to death. Davis C.J. had accepted this as a matter of extenuation in the case of *R* v. *Sade Iro*[11] (perhaps unfortunately, as no customary evidence of the existence of the duty had been presented to him) and sentenced the accused to 12 years imprisonment.

The trial judge, after directing the assessors on provocation, withdrew from them the legal argument based on S.197(c) on the grounds that it was, as a matter of law, inconsistent with Article 4 of the Constitution which reads:

(1) No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence under the law in force in Solomon Islands of which he had been convicted.
(2) A person shall not be regarded as having been deprived of his life in contravention of this section if he dies as the result of the use, to such extent and in such circumstances as are permitted by law, of such force as is reasonably justifiable –
    (a) for the defence of any person from violence or for the defence of property;
    (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
    (c) for the purpose of suppressing a riot, insurrection or mutiny; or
    (d) in order to prevent the commission by that person of a criminal offence;
    or if he dies as the result of a lawful act of war.

Loumia was consequently convicted of murder by the trial judge following the verdict of the assessors, which he accepted. It is important to note that under the *Solomon Islands Criminal Procedure Code* a judge is not bound to follow the verdict of the assessors.

Loumia's grounds of appeal were:-

(a) that the trial judge did not, in his summing up on provocation, direct the assessors on the basis of the direction suggested by Lord Diplock in *D.P.P.* v. *Camplin.*[12] The trial judge did not make it clear that the 'reasonable man' referred to was the ordinary person having the characteristics of the appellant i.e. in this case a pagan Kwoio villager. This test had been approved in the Solomon Islands in the 1981 cases of *Sale* and *Tawane*;
(b) that the judge was wrong to withdraw the matter of extenuation put forward under S.197(c) from the assessors as being inconsistent with Article 4 of the Constitution because –
    (i) the fundamental rights provisions were matters of public civil law and did not operate in private matters. (*Maharaj* v. *A.G. for Trinidad and Tobago*[13] and

11. Criminal Case 3/79.
12. [1978] A.C. 705.
13. [1979] A.C. 385.

Thornhill v. *A.G. for Trinidad and Tobago*,[14] both Privy Council cases, were relied on); and

(ii) the matter of extenuation reduced the offence from murder to manslaughter only and so did not conflict with s.4 or the provisions of the Penal Code itself.

The Court of Appeal, (Wood P., Connolly and Kapi JJ.A.), rejected these arguments for the following reasons:

(a) Provocation was rejected on the basis that although there was no specific direction as suggested in *Camplin*, the trial judge had in other parts of his summing up referred to custom and the fact that the appellant was a pagan Kwoio and that upon reading the summing up as a whole there was no real misdirection.

(b) (i) The Court (particularly Kapi J.A.) distinguished the cases of *Maharaj* and *Thornhill* on the basis that there were major differences between the Constitutions of Trinidad and Tobago, and the Solomon Islands and that it was obvious from reading Chapter II of the Solomon Islands Constitution as a whole, dealing with fundamental rights, that it could and did operate in the private as well as the public field. Kapi J.A. referred specifically to Section 4(2)(a) and S.15(3), the latter of which relates to discrimination in shops, hotels and other public places.

(ii) Connolly J.A. further commented that the purpose of Chapter II of the Constitution is to prevent the enactment of laws which infringe on or impair the rights. Parliament could not, consistently with Article 4, pass an Act imposing such a customary duty on relatives of a victim. In any event, he stated, a customary duty such as that argued on Loumia's behalf, would be part of the public law.

There can be little room to quibble with the above views. It is submitted, however, that the learned judges approached the question of the inconsistency of the alleged customary legal duty with the Constitution and the Penal Code on a policy footing rather than looking at what the Constitution was seeking to achieve. A strong legal argument could be mounted as follows:

(a) by virtue of Schedule 3 paragraph 3, customary law is part of the law of Solomon Islands; therefore

(b) the legal duty referred to in s.197(c) must include a customary legal duty if it is properly established and proved;

(c) there is no inconsistency with s.4 of the Constitution as under s.197(c) the matter raised is one of extenuation and not of defence; inconsistency would only arise if s.197(c) raised a defence;

(d) the customary legal duty argued cannot be inconsistent with the Penal Code for the simple reason that it is part of that self-same code.

It should be noted that the savings in s.4(2) of the Constitution all in effect relate to *lawful* acts.

Loumia never argued that his act was lawful and indeed the opening words of s.197(c) refer to unlawful acts.

·Both judges emphasised that this line of argument could not stand because the Penal Code was exhaustive on the matters with which it dealt. Section 3 states:

3. This Code shall be interpreted in accordance with the Interpretation and General Clauses Ordinance and the principles of legal interpretation obtaining in England, and expressions used in it shall be presumed, so far as is consistent with their context, and except as may be otherwise expressly provided, to be used with the meaning attaching

14. [1981] A.C. 61.

> to them in English criminal law and shall be construed in accordance therewith.

Obviously English law would not recognise a duty such as that argued. However in reply it could be stated that a Penal Code is in itself subject to the Constitution and that the words 'so far as is consistent with their context, and except as may be otherwise provided' allow room for a more generous interpretation.

Obviously the courts in the Pacific are reluctant to give any encouragement to what have been referred to as revenge killings, or to use the phrase adopted in Papua New Guinea, payback killings. For example Connolly J.A. says:

> The Court should not, by its decision, give any encouragement to the view that an alleged duty to maim or otherwise injure the person or property of another can render lawful that which is expressly made unlawful by the statute law of the Solomon Islands.[15]

And:-

> It is beyond question that a killing for revenge or retaliation could not have been regarded as a lawful act in the application of the Code or at Common law.[16]

It is submitted that the learned judge may have fallen into error in both the above passages in the use of the word 'lawful'. The appellant had all along accepted that his acts were unlawful.

In his judgment, Kapi J.A. states 'At the trial, counsel for the Appellant raised *the defence* under S.197(c) of the Penal Code'. This was not raised as a defence but purely as has been reiterated, as a matter of extenuation. Again, Kapi J.A. stated, '... he (L) was under a duty in accordance with customary law to kill the deceased in payback'. And referring to S.197(c), be commented, 'The essence of this defence is that etc.' These statements support the view put forward that the decision was largely a policy one and that some confusion existed between a defence and a matter of extenuation.

Conclusion:

One can readily understand the reluctance of judges to accept a customary duty to kill as a matter of extenuation and the use of such phrases as 'revenge', 'retaliation', and 'payback' shows how deep this reluctance is. Nevertheless it was clear in this case that L like all bush pagan Kwoio lived his life totally in accordance with custom principles. It cannot, it is submitted, have been the intention of the framers of the Constitution not to acknowledge these principles in some way.

The bush Kwoio, of whom Loumia was one, refuse to acknowledge Christianity in their area, refuse to have their area policed (except by themselves), and refuse to accept officialdom to the extent that they effectively prevented the 1984 General Election taking place in their area. Common sense dictates that some recognition should be given to the customary duty that the appellant was under. This duty affected his state of mind when doing the acts he did. It is submitted that the Constitution implicitly recognises this.

Counsel for the defence at the trial, and on appeal, conceded that it would be difficult for a person who had accepted Christian doctrine or accepted 'Western' standards to set up the matter of extenuation. This is not to justify Loumia's action, but it can be argued that the matter of extenuation had been properly made out and should have been accepted by the Court. The Court could then have marked their opprobrium and disapproval by the length of their sentence (which in theory could have been the life sentence the appellant actually received). This would at least have been more in keeping with some recognition of customary law and at the same time have given the court the opportunity, when sentencing, to discourage killings of this kind. The only solution now lies with Parliament. Reform in this

15. *Supra* n.1 judgment of Connolly J.A. at p.4 thereof.
16. *Ibid.*

area is necessary and quite simple, i.e. to abolish the distinction between murder and manslaughter and create one offence of 'unlawful homicide' for which the accused shall be liable to imprisonment for life and thus leave the judges free to sentence at their discretion on the particular facts of each case.

The distinction between murder and manslaughter is now anachronistic arising as it did mainly out of the need to mitigate the effects of capital punishment. It has been and will continue to be the cause of endless wasted hours of judicial and legal time.