PAPUA NEW GUINEA

[IN THE DISTRICT COURT OF JUSTICE

SITTING IN ITS CRIMINAL JURISDICTION]

DCr. No. 2904/2014

BETWEEN

NICHOLAS NAIP

Police Informant

AND

RAPHAEL KUNA

Defendant

BOROKO, Summary Offences Court: T. GANAII

2015: 15th April

CRIMINAL LAW- Summary Offence - Summary Offences Act, Chapter No. 264 of 1977 – Section 7 (b) – Trial - Insulting Words -Whether or not the defendant said insulting words – Who to believe - Credibility of witnesses

CRIMINAL LAW – Summary Offence –Trial - What amounts to an insult? – What is "Intended to" or "likely" to cause a "Breach of Peace"? - Whether or not use of pidgin swear words "*kaikai kan*" is insulting in the circumstances of the case - Application of the objective view in all the circumstances of the case

Held:

1. Behaviour which affronts other people and evidences disrespect or contempt for their rights, behaviour which reasonable persons would foresee is likely to cause resentment and protest", is insulting behaviour. *Cozens v. Brutus*, [1972] 2 ALL E.R. 1, applied.

2. In determining what insult is, the question is not whether the recipient was insulted but whether such a person as he would tend to be insulted. The

actual reaction of the person to whom the words were directed is not considered but the reaction which one might reasonably expect." *Siwi Kurondo v. Lindsay Dabiri* [1980] PGNC, N258, applied.

3. The word "insulting" should be given its ordinary meaning and the Court must decide, not as law but as fact, whether in the whole circumstances the behaviour was insulting. *Brutus v. Cozens* [1972] 2 ALL ER 1297, applied.

4. The alleged insulting words must not be considered in isolation from the circumstances. Adequate weight must be given to events leading up to the use of the words". *Kurondo v. Dabiri* and *Ball v. McIntyre (1966) 9FLR 237,* adopted and applied.

5. The objective of section 7 (b) of the *Summary Offences Act* is to preserve public order. This section applies to general public order and not just to public order at meetings, and at political and similar demonstration and processions *Ward v. Hallman* [1964] 2 ALL ER 729.

6. Meaning of the term *"likely"* in the expression *"whereby a breach of the peace is' likely' to take place"* means *"tending towards"* or *"a real possibility of", Samana v. Waki* [1984] PNGLR 8 applied.

7. The preamble of the PNG *Constitution* embraces PNG as a Christian nation and wants all Papua New Guineans to guard and pass noble tradition and moral values upholding respect and sense of human dignity towards others in diversified cultural communities we live in. Bad language culture with use of dirty sex language expressions suppresses the spirit of the *Constitution. Manau v. Mambol* [2009] PGDC 25, applied.

8. Use of pidgin swear words that tend to name or relate to private body parts of women and girls, generally, is regarded as offensive in PNG society. In PNG, it is an unwritten social rule that women and mothers should be respected for giving birth to life. Mentioning of private body parts of women and girls when swearing is offensive and disrespectful to women. It is a breach of this commonly accepted social rule. People who breach this social rule have no respect for women and have no place in the community.

Cases Cited

1. *Anthony Willie v. Roger Taro, N526 (M), 20th November 1985*
2. *Ball v. McIntyre,* (1966) 9 FLR 237
3. The *Constitution of the Independent State of PNG*
4. *Ex Parte Maddox* (1903) 3 SR, (NSW) 648
5. *Manau v. Mambol* [2009] PGDC 25; DC917 (17th April 2009)
6. *Siwi Kurondo v. Lindsay Dabiri* [1980] PGNC, Miles J, 32, N258
7. *Utula Samana v. Demas Waki* [1984] PNGLR 8
8. *Vincent Kerry v. The State* (2007) N3127
9. *Ward v. Hallman* [1964] 2 ALL ER729

References

1. Carters Criminal Law of Queensland, R.F Carter AM, 1979, (5th ed.) at p. 204;
2. *Summary Offences Act of 1977, Chapter No. 264*
3. The *Constitution of the Independent State of Papua New Guinea*
4. The Criminal Jurisdiction of Magistrates in Papua New Guinea*,* *N.F.K.*O'Neil, N.K.F., LLB. (Melb.) LLM. (Lond.) and Desailly, R.N., LLB. (Qld.), *Sydney New South Wales Institute of Technology, 1982,* Singapore, Section 7 Breach of Peace, at 4.42

Counsel

Prosecutor: Senior Sergeant Peter Asi

Defendant: In person

RULING ON VERDICT

T. Ganaii: The defendant Raphael Kuna is charged with one count of Use of Insulting words contravening Section 7 (b) of the *Summary Offences Act (SOA)*.

The defendant pleaded not guilty to the charge and raised general denial at arraignment and during pre-trial conference. A trial was conducted during which the defendant also raised reasonable excuse, saying he did not use the alleged words. This is the ruling on verdict.

Alleged Facts:

2. On the 26th day of June 2014, the two complainants, Police women Julie Kepa and Janet Tarakai were on duty at the Boroko Police Station. The defendant, whilst off duty, under the influence of alcohol and whilst armed with a police issued rifle, approached them. Police alleged that the defendant started shouting insulting words when enquiring about his claim for Higher Duty Allowances (HDA). Police alleged that the defendant said the following words: "*Where is my HDA? What are you doing with my HDA? Fuck, kan upla, yupla kaikai kan, fuck. Fuck, yupla mekim wanem?"* The pidgin words when translated means*: "Cunt, cunt sucker, what are you doing with my HDA claim?*

Undisputed Facts:

3. A number of undisputed facts have come out from the evidence as follows:

- The defendant is a Sergeant and Shift Supervisor, and the complainants are Police Women and First Constables of Police attached to the Administration Office of the Boroko Police Station;
- The defendant had given his HDA claim earlier on to the two complainants who had then submitted to the Police Headquarters for processing and payment. The defendant had travelled out of Port Moresby on duty and had asked the complainants to follow up on the claim; and

- The defendant was in full police uniform and was armed with a police issued rifle when he approached the complainants at the administration office of the Boroko Police Station enquiring, about his HAD claim.

The issue(s):

4. The issues at trial were:

4.1. whether or not the defendant used insulting words? and

4.2. whether or not there was a likelihood of a breach of peace?

5. Resolution to this question requires a summary of the evidence for the prosecution; a summary of the evidence for the defence; a statement by the court of its findings of fact and a formal determination of the elements of the offence.

Evidence:

Prosecution Evidence:

6. The prosecutions called five (5) witnesses who gave sworn oral testimony. A record of the relevant parts of each of the prosecution witnesses" evidence is as follows:

6.1. **Julie Kepa:** This witness is one of the two complainants. She was on duty when at about 2:00 pm she heard the defendant enquire about his HDA claim, shouting and saying: *"HDA blo mi we? Fuck, fuck, kaikai kan yupla, HDA blo mi we?"* The pidgin words when translated means*: "You cunt sucker, where is my HDA?"* She turned around towards the defendant"s direction and she saw the defendant look at her and continue to say: *"Kan yupla, HDA blo mi we? Yupla paolim HDA blo mi!* Translated to mean: *"You all are cunts, where is my HDA? You have misplaced my HDA!*

6.2. The witness said when she realised that the defendant was talking to her, she told him that she had been on leave and was not at work and had not personally followed up on his claim. She advised him to direct his queries to F/C Janet Tarakai. She said the defendant did not listen and continued to say: "yupla *paolim HDA blo mi na mekim na mi go dinau"*. Translated to mean: "*You have misplaced my HDA claim and so I had to borrow some money"*. The witness said she again repeated that she was not the right person for him to direct his queries at and that he should go and see the officers concerned. She stated that the defendant became angrier and again said the following words: *"kaikai kan, fuck yupla" in pidgin and* translated to mean *"Cunt sucker, fuck you all"*.

6.3. At that time, the witness said the OIC for the Minor Crimes Unit, Police Constable Nisia Kunji came out of his office and was observing what was happening. The witness said she then left and went into the administration office to avoid further confrontations with the defendant. There she informed F/C Janet Tarakai who then went out to see the defendant. The witness stated that she heard the defendant again say the same words to F/C Janet Tarakai. The words he said were as follows: *"Kan, fuck yupla, HDA blo mi yupla paolim ah? "* Translated to mean: *"Cunt, fuck you all, you have misplaced my HDA"*.

6.4. The witness said at that instant, the defendant was shouting and the Acting Superintendent of administration Robert Kurei heard the commotion and also came out of his office. By then the defendant's shouting and swearing had attracted a lot of people.

6.5. After this the witness said both policewomen felt offended and left the police station, went home and told their husbands about what had happened. Their husbands were not happy and said they would assault the defendant. The witness stated that she and F/C Janet Tarakai managed to convince their

husbands that it was best that this matter be reported to their superiors and the defendant be dealt with administratively. The complainants then laid their complaints with their superiors. Thereafter their superiors referred the matter to the CID where the defendant was investigated, arrested and charged.

7. **Janet Tarakai** – This witness is the second complainant. She stated that she was at work at about 2:00 pm when she heard the commotion and went out of the administration office to investigate. She said she saw and heard the defendant shout out in a loud voice, asking for his HDA claim or payment. She heard him say *"Fuck yupla kaikai kan",* translated to mean:*" Fuck you all, cunt sucker".* She stated that she tried to explain to him that the claim was processed by the Police Headquarters (PHQ) but he would not listen and continued to shout obscenities. She then told him that his claim was approved by the Human Resource Division (HRD) at the PHQ and it was in the process of being paid out. She told him she had no instructions as to why he was not paid yet and when that was going to happen.

7.1. The witness stated that the defendant was on the 11pm-7am shift and was in full police uniform. He was off duty, armed with a police issued firearm and was under the influence of alcohol. The witness said she was afraid of him and felt threatened by his words and actions. She felt insulted by the obscenity made by the defendant that she cried. She said it was a first time experience for her where a senior Non Commissioned Officer (NCO) approached her in that manner and she felt offended, insulted and she cried.

8. **Robert Kurei:** This witness is an Inspector of Police attached to the Administration Office of the Boroko Police station. At the time of the incident, he recalls he was at his office which was about 5-6 meters away from where the incident took place. He stated that whilst inside his office, he heard some shouting and so he went out to investigate. He stated that he then saw the

defendant arguing with the ladies at the administration office. He approached them with the thought of stopping the commotion. He thought that the defendant‟s behaviour was improper and was getting out of hand. He then heard the defendant say: "*fuck yu, kaikai kan."* Translated to mean: "*Fuck you, cunt sucker".* He said he observed that these words were directed at the two Policewomen who were there. He said this was not proper and was insulting. Whilst walking over to stop the defendant, the witness said he heard the defendant talk about his HDA claim saying the ladies or policewomen at the Administration Office were causing the delay on his payment.

8.1. The witness stated that because he was Superintendent in charge of administration matters in NCD, where his area of responsibility included HDA; housing; maintenance etc., he felt obliged to intervene so as to avoid more serious confrontations. He explained to the defendant that all HDA claims go through a process. The process involved submission of respective claims to the Superintendent Administration‟s office where the Admin Superintendent would then make recommendations before forwarding to PHQ HR –HDA section for processing. He stated that in so far as the defendant‟s claim was concerned, he personally sighted it and made recommendations for the HDA to be paid to the defendant. He stated further that no one administration officer at the Boroko Police Station had any direction or control over when or how any claim including that of the defendants could be approved and paid.

8.2. The witness said because of his area of responsibility, he intervened to calm the situation. He observed that one of the complainants F/C Janet Tarakai was crying. He observed that the defendant had used obscenities on them within full public viewing and hearing as they were located next to the main corridor where the public had access to. He stated that there were all kinds of people accessing the police station and within the vicinity at that time. The witness

described the defendant"s behaviour as „uncontrollable". He stated that the defendant was finally brought under control and led out of the police station by police officers from another section. He stated that it was unbecoming of the defendant in his capacity as a Sergeant of Police and whilst in Police uniform and armed, to be acting in such a manner in full view and hearing of the public.

8.3. In cross-examination the witness confirmed that the defendant was directing the obscenities at Police woman F/C Janet Tarakai. He said F/C Janet Tarakai was standing in front of the administration office and the defendant was within close proximity to the complainant whilst looking and talking to her when he said the obscenities. The witness said the other police woman Julie Kepa was also there. The witness stated that he tried to calm down the defendant by saying: *"Sergeant please stop*" but it appeared he would not listen to him or anyone else who tried to calm him down.

9. **Nisia Kunji**: The witness is a Constable of Police attached to the CID Minor Crimes Unit at the Boroko Police Station. He stated that he recalls at about 2:00pm on the date he was at the Minor Crimes Office with the complainant P/W F/C Julie Kepa. He stated that the defendant approached F/C Julie Kepa and asked her about his HDA. The witness said the defendant then went on to say the following: *"fuck, fuck, fuck, fuck"*. He stated that when that happened, it appeared that F/C Julie Kepa had tears in her eyes.

10. **Nicholas Naip:** This witness is a Senior Constable of Police in charge of the Minor Crimes unit at the Boroko Police Station. He said he knows the defendant who is a shift supervisor attached also at the Boroko Police Station.

10.1 The witness recalls that on the 26th day of June 2014 at about 2:00pm, he observed that F/C Julie Kepa stepped into their office and handed his mail to him. Whilst they were conversing about work, the door was left ajar and he saw

the defendant come up to the door and say the following: "*yupla fuck, kayak kan yupla, wokim wanem lo HDA blo mi?* Translated to mean: *"Fuck you all, cunt sucker, what are you doing with my HDA?"* The witness said as the defendant uttered these words, his attention was focused on F/C Julie Kepa. He said he observed that the defendant had red eyes and his body language told that he may have been drunk. The witness said she heard F/C Julie Kepa refer the defendant to F/C Janet Tarakai and another Admin Sergeant since they were the persons responsible for such claims. He stated that he learnt that after that the complainants had submitted to their superiors a message card, which contained a complaint about the defendant. The witness said he was instructed by the Police Station Commander to then assist with the investigations, the arrest and charging of the defendant.

Defence Evidence:

11. For the defence, three (3) witnesses gave sworn oral testimony. A record and summary of the defence evidence is as follows:

11.1. **Raphael Kuna:** The witness is the defendant. He stated that he had been working at Boroko Police Station as a shift supervisor for 10 years. The nature of his duty involves attending to complaints, attending to police bail duties and others.

11.2. He stated that he filled out and left his HDA claim with F/C Julie Kepa and told her to follow up on the claim. Shortly after that the witness stated that he checked up on her about the progress and she had said that she had forwarded the claim to the PHQ HR Division for processing.

11.3. The witness said thereafter he was posted to duties outside of Port Moresby for two months. Whilst there, he stated that he would call up F/C Julie Kepa to check up on the status of his claim. He said she would tell him that the

HRD personnel at the PHQ said they would pay in the next pay day. The witness stated that since he had left his Bank (ATM) card with his family for access to his salary, his family had informed him that his normal fortnightly salary was paid and there were no payment of the HDA. He then rang F/C Julie Kepa to check up on his HDA payment. This time he stated that F/C Julie Kepa told him that the PHQ HRD personnel had lost his application and wanted a copy so she had to do a copy of same for them. The witness said he then waited patiently and when he came back to Port Moresby, he went to the Administration office several times to check. He did not go to the PHQ.

11.4. The defendant said every time he would enquire at the Boroko Police Station Administration Office, F/C Julie Kepa would keep saying that the monies would be paid. He said he never got paid. He stated that his pay was not enough and so he borrowed some money to sustain his living. When he did that, he had to repay the monies from his salaries causing great financial strain on his budget. He said because the payment wasn't made, and he paid his credits out of his salary he was left with only K150.00 to fend for his family til the next payday. He said he was frustrated and went to the Administration Office to check up on his payment. He said he peeped into the office and did not see anyone there. He then went into the Duty office and saw F/C Julie Kepa and other officers there. He then said that was when he lost his temper and this is what he said*: "yupla toktok lo HDA, na mi bukim mani, why upla giamanim mi?"* Translated to mean: "You *told me about my HDA payment and so I went ahead and borrowed some money. Why are you deceiving me?"*

11.5. He said he only shouted those words once then he went out and got into his vehicle and went to drop off his shift members. He said he didn't insult anyone in particular and to his surprise he was summoned by his boss to go and see him.

11.6. In cross examination the witness said when he said "*yupla"* or "you" he was referring to the Administration staff inclusive of Yapati, Tarakai and Kepa. He said he didn"t say those insulting words as alleged in the information and as testified by the police witnesses.

12. **Oxley Irinay:** This witness said he is a F/C of Police attached to the Boroko Police station. He works with the Public Safety unit where he attends to complaints and saves life and property. He said he was with the defendant on that day attending to a complaint at about 8:00am before heading to the police station. At the police station he was outside and heard the defendant shouting. He didn"t hear what was actually said. In cross examination he maintained that it was not 2:00pm and the time was about 8:00am.

13. **Nelson Timon Sapun:** This witness stated that he is a Constable of Police attached to the Public Safety Unit of the Boroko Police Station. His evidence is similar to Oxley Irinay"s evidence. He heard shouting but didn"t hear exact words.

Prosecution Submission on Verdict:

14. The prosecution submitted as follows:

- that the prosecution evidence establishes all the elements of charge;
- that the Prosecution witnesses' evidence were consistent throughout;
- that in cross-examination, the Police witnesses did not alter but maintained their story;
- that the defendant is a professional colleague to all the prosecution witnesses" and there is no evidence to suggest that they have a reason to lie about their fellow colleague"s actions;
- that what they all told the Court about the nature of the words uttered did in fact happen; and

- that the Court should believe the police witnesses and find that the defendant whilst off duty, in police uniform; armed with a police issued firearm, and whilst under the influence of alcohol, did say the following words: *"HDA blo mi we? Fuck, fuck, kayak kan yupla, HDA blo mi we?" or as alleged:* "Where *is my HDA? What are you doing with my HDA? Fuck, kan upla, yupla kayak kan, fuck. Fuck, yupla mekim wanem?"*

Defence Submission on Verdict:

15. The defence submitted as follows:

- that the use of the word *"yupla"* didn't mean any one person in particular and therefore could not have been directed at the two complainants; and therefore nullifies the charge;
- that the wordings of the charge for insulting words were specific to the two complainants when he did not mean to direct any words specifically at them;
- that he did not use those words as alleged by the Police and the court should not believe the Prosecution witnesses' evidence as some of their evidence were contradictory; and
- If the court finds that the defendant used the words, then the defendant submitted that the Court should find that he was provoked or had a reasonable excuse to say the insulting words

The Law:

The Charge*, Summary Offences Act, Chapter No. 264*

7. PROVOKING A BREACH OF THE PEACE.

16. A person who–

(*a*) uses threatening, offensive or insulting behaviour; or

(*b*) uses threatening, abusive or insulting words; or

(*c*) makes threatening, abusive or insulting gestures,

with intent to provoke a breach of the peace or by which a breach of the peace is likely to take place is guilty of an offence.

Penalty: A fine not exceeding K300.00 or imprisonment for a term not exceeding one year.

Elements of the Offence

17. The elements of the offence of Breach of Peace pursuant to section 7 (b) of the *SOA* are:

1. A person
2. uses
3. threatening, abusive and or insulting
4. words, behaviour or gestures
5. towards another

and further requirements are that:

6. objectively, these words, behaviour or gestures
7. intended to or is likely to provoke a breach of the peace.

Meaning of the word "Insulting"

18. In *Siwi Kurondo v. Lindsay Dabiri* [1980] PGNC, N258, Miles J, said this at page 32:

> "In this respect, I think His Worship misdirected himself in law in considering that the test of whether the words were insulting was whether the person to whom they were directed was in fact insulted.

> ….The law is [to the] contrary. The question is not whether the recipient was insulted but whether such [a] person as he would tend to be insulted. In this respect one does not look at the actual reaction of the person to whom the words were directed but to the reaction which one might reasonably expect."

19. In *Cozens v. Brutus*, [1972] 2 ALL E.R. 1, it was held that "behaviour which affronts other people and evidences a disrespect or contempt for their rights, behaviour which reasonable persons would foresee is likely to cause resentment and protest", is insulting behaviour.

20. In *Brutus v. Cozens* [1972] 2 ALL ER 1297, the House of Lords firmly rejected the notion that a court must, as a matter of law, find such behaviour insulting. The "insulting" should be given its ordinary meaning and the Court must decide, not as law but as fact, whether in the whole circumstances the behaviour was insulting.

Breach of Peace:

21. In the case of *Utula Samana v. Demas Waki* [1984] PNGLR 8, Amet, J. held that on a charge of using insulting words, whereby a breach of peace is likely to take place, the test is whether there was in fact a tending towards or a real possibility of an actual assault or public alarm taking place at the precise point in time following the use of the words and in the circumstances then existing: what may or could have taken place dependent upon the reaction of the recipient or the conduct complained of is irrelevant.

22. In the case of *Anthony Willie v. Roger Taro, N526 (M), 20th November 1985,* Amet, J. said at page 2 that:

> "The law on the proper elements and the evidence necessary to sustain a conviction under s.7(a) (b) & (c) is now quite settled in this jurisdiction,

and sufficiently published and circulated for the benefit of magistrates and police prosecutors. Yet the lower courts continue to convict people wrongly".

23. Amet, J. further stated in this same case that:

"Mere use and proof of use of threatening, abusive, insulting words, behaviour or gestures is not sufficient, it must be objectively by proper evidence proven that one intended to provoke a breach of peach or whereby a breach of peace was likely to take place.

This evidence has to be objective, that is, to others looking on, that the person speaking those words or making gestures or behaviour firstly had the immediate capacity to be able to do an overt act to effect his intention or such as was likely to lead to a breach of the peace*;* that he was shaping up and moving towards the person at the receiving end with clenched fists or stick or raised hands or picking up sticks or stones - any such overt action to manifest intentions or by which it can be inferred that a breach was likely to take place".

"Where clearly words are just uttered in the heat of argument with nothing more and shortly thereafter the person using the words walks away - again subjective apprehension is not necessarily sufficient - then clearly no breach was ever likely to take place".

24. In the case of *Samana v. Waki (supra),* Amet, J. said:

"… a breach of peace arises where there is an actual assault, or where public alarm and excitement are caused by a wrongful act. „Mere annoyance, and disturbance or insult to a person or abusive language or great heat or fury without personal violence, are not generally sufficient."" The *Siwi Kurondo's* case was cited which adopted this meaning from *Carters Criminal Law of Queensland (5th ed.)* at 204.

Objective Test:

25. In *Kurondo v. Dabiri (supra),* Miles, J. stated that:

"The question is not whether the recipient would be insulted but whether a reasonable person would be. One looks not at the actual reaction of the person to whom the words were directed but to the reaction which any one person might reasonably expect. There may be cases of course when words are addressed to a person one knows to be easily hurt or particularly susceptible. The test is whether the speaker as a reasonable person should in all the circumstances expect that the recipient would be insulted, and not merely hurt as to his feelings but insulted to the extent that he was deeply offended or outraged".

26. Miles, J. further stated in *Kurondo v. Dabiri*, at page 3 that:

"The judgment of Kerr, J. as he then was in the Supreme Court of the Australian Capital Territory in *Ball v. McIntyre (1966) 9FLR 237* is particularly helpful, even though that case involved a charge of offensive behaviour rather than insulting words, and the events took place in another country:

….conduct which offends against the standards of good taste or good manners, which is a breach of the rules of courtesy or runs contrary to the commonly accepted social rules may well be ill-advised, hurtful, not proper conduct, but it may well not be offensive conduct within the meaning of that section ... different minds may well come to different conclusions as to the reaction of the reasonable man in situations involving attitudes and beliefs and values in the community, but for my part I believe that a so-called reasonable man is reasonably tolerant and understanding and reasonably contemporary in his reactions....

The words must not be considered in isolation from the circumstances. Adequate weight must be given to events leading up to the use of the words".

27. In *The Criminal Jurisdiction of Magistrates in Papua New Guinea, N.F.K. O'Neil, LLB. (Melb.) LLM. (Lond.) and R.N. Desailly, LLB. (Qld.), Sydney New South Wales Institute of Technology, 1982, Singapore, at section 4.42 Section 7 Breach of Peace,* the authors stated that:

"The object of this section is to preserve public order. Although it is not limited to offences which occur in public place, most offences will arise out of incidents which occur in public places. The section applies to general public order and not just to public order at meetings, and at political and similar demonstration and processions *Ward v. Hallman* [1964] 2 ALL ER 729.

It is an essential aspect of the section that the ……words were intended to or likely to cause a breach of the peace. *Ex Parte Maddox* (1903) 3 SR, (NSW) 648".

What do the terms "intended to" or "likely" to cause a Breach of Peace mean?

28. Meaning of the term *"likely"* in the expression *"whereby a breach of the peace is' likely' to take place"* means *"tending towards"* or *"a real possibility of"*, as it was stated in *Samana v. Waki* (supra). Hence, *"intended to"* in its literal meaning also simply means *"tending towards".*

The *Constitution*:

29. In *Manau v. Mambol* [2009] PGDC 25; DC917 (17th April 2009), His Worship Samala, M. stated that:

"Legally, the preamble of the *Constitution* embraces PNG as a Christian nation and wants all Papua New Guineans to guard and pass noble tradition and moral values upholding respect and sense of human dignity towards others in diversified cultural communities we live as positive strength towards ethnic diversity we have.

However, bad language culture with use of dirty sex language expressions as in this case is very common here that suppresses the spirit of the *Constitution* directly challenging the freedom of conscience and expression citizens have with bad reflection on the moral decay certain communities in this country are going through which without intervention will defeat the spirit of the *Constitution* promoting and embracing Christianity, unity and respect for others. As such, the Court in considering sentence should strongly take remedial approach to stop such evil immoral behaviours and influences threatening peace, freedom of conscience and free expression.

Aitape is a small beautiful town, people generally know themselves but use of bad swears and insulting languages against innocent community, women and girls is so prevalent here resulted in several protest marches by churches and community women Advocate groups calling for police and District Administration to do something as swearing is becoming a real law and order matter in town badly affecting moral value and lives of families.

Though, I am unable to find any case authority to weight the degree of indecency in this rotten and bad insult, I am of the view the approach is a common sense one, it vary from custom to custom and place to place. Clearly Aitape people treat this insult as very shameful, so blunt and rude

in strongest customary sense of the word when young people without respect use such abusive insults against respected citizens and elders. In fact, insult and behaviour of this sort according to my opinion has no place in the society, has no exceptions in law prohibited by section 7 of *Summary Offences Act* and is incomparably worse than physical assault".

30. His Worship Samala, M. was satisfied that the use of the words *"kaikai kan"* and *"kaikai kok"* translated to mean *"cunt sucker"* and *"cock sucker*" were a bad insult. His Worship Samala, M. approached this with common sense, and applying Christian principles and values and customary ways stated that the use of vulgar language against the complainants was disrespectful against elderly citizens.

31. Given the above statement that is that the use of such swear words is generally insulting, in my respectful view, the use of such swear words by professional colleagues on fellow female colleagues is by the same token also improper in contemporary PNG society and is a breach of courtesy rules towards fellow female colleagues. This may be characterised as hurtful, and discourteous and an unexpected gross insult towards a fellow professional colleague.

32. Further, in my respectful view, although the use of the swear words ,*kaikai kan'* has become a common everyday street vocabulary and used loosely often by young men and boys, such behaviour should not be accepted as normal. I adopt the view expressed by His Worship Samala, M. in *Manau v. Mambol (supra)* that: *"Tolerance of such vulgar language as normal and non-action by Police or members of the community only makes it acceptable when it should not be".*

Which of the two versions is the true version?

33. The truthfulness of a person"s story is dependent very much on their credibility; i.e. how they appeared and reacted to certain questions; how they responded, etc. However, case authorities warn that extreme caution must be exercised when dealing with the issue of the lying and truthful witness. There is no rule of law that says that a party that calls for more witnesses and who gives consistent and almost identical stories must be believed and a party who calls only one witness must not be believed.

34. There is no rule of law that says that where two or more persons tell the same story, that story is the truth as opposed to a single witness. And in a criminal case where there is only one witness in his own trial that makes his chances of being believed non-existent. However, the authorities say that ten people giving the same story who appear to be quite convincing could all be lying. On the converse, an accused may be the only witness in the defence case and may not be as smart or convincing as the prosecution witness, yet he could be telling the truth.

35. In most cases and in a case such as this present case, the truth is not so easy to find and the court has to always do the best it can in all the circumstances of a given case to try and strike a balance between what is logical and more probable of human comprehension than what is illogical or plain fallacy. That is why there is an added safety valve in the criminal law trial and procedure, which requires that the court must be satisfied beyond reasonable doubt of the guilt of the accused before it can convict. And where there is any doubt the court must give the benefit of the doubt to the accused. (See *Woolmington v. DPP* [1935] AC 462).

36. Hence, in this case all witnesses seemed convincing and it is easier to say that all of them may be telling the truth. This Court now turns to rely on common sense and logic in the light of the whole of the evidence present in the case to try to ascertain what exact words may have been used and under what precise circumstance.

Findings of Facts:

37. The court is faced with two completely different versions of the words spoken by the defendant and the circumstances surrounding the incident at that time. Either the defendant or the complainants and prosecutions witnesses are lying about what exact words were uttered on the 26th of June 2014 and what the exact circumstances and the facts of the case were that surrounds the alleged use of the insulting words at that time. It is tempting to ask the question „who should this Court believe?" Or, the appropriate question to ask is "Has the state proven its case beyond all reasonable doubt?" And should their version be accepted? The proof beyond reasonable doubt is the highest standard of proof known to the law in *Vincent Kerry v. The State* (2007) N3127 and must be applied.

38. Having considered the application of the law to the above facts, I find that the prosecutions burden of proof has been satisfactorily discharged in this case for the following reasons:

1. The Police witnesses were more impressive witnesses than the defence witnesses because they maintained consistency throughout their story and never faltered in their story in cross-examination;
2. Both complainants" evidence corroborated each-others story and those of the other prosecutions witnesses;

3. Apart from the two complainants, the balance of the prosecution witnesses were senior Police officers whose evidence also corroborated both complainants‟ stories;

4. Prosecutions witnesses were professional colleagues of the two complainants as well as the defendant. There is no evidence suggesting that they have reasons to tell lies about the defendant‟s behaviour and use of the insulting words;

5. Prosecution witnesses are learned officers of the law and there is no evidence to suggest that they would lie to court about the actions of their colleague who is a senior Police Officer, knowing full well the consequences of being arrested, charged, found guilty and convicted for an offence; and

6. The Prosecution witnesses‟ demeanours were much more impressive than that of the defendant because they responded well; their story was consistent and made sense. Further, their evidence showed that they were genuinely concerned about the defendant‟s behaviour and reacted appropriately in the circumstance by responding well and answering the defendant‟s query, asking the defendant to stop shouting and using obscenities, and referring the defendant to appropriate persons.

39. I further find that that the burden of proof has been discharged because of the following:

- the complainants and prosecutions witnesses showed maturity and their demeanour stood out when they allowed police officers from another section to remove the defendant rather than trying to do this by themselves. This was especially a more appropriate thing to do given that the defendant was unhappy with them. By so doing, they avoided getting into any situation that may increase any tension between them and the defendant; and

- both complainants‟ demeanour again stood out when although they felt offended by the defendant‟s words, and even though they were hurt, they did the right thing by leaving this to their superiors to handle. The feeling of being hurt or not being respected was genuine as both complainants were the very officers who had assisted the defendant with the submission of his HDA claim and were following up on it. It was not proper that their colleague whom they tried to help would turn around and use obscenities on them.

40. I find that the defendant‟s actions in the whole of the circumstance was likely to provoke a breach of the peace because of the following, the defendant:

- was under the influence of alcohol;
- was armed with a police issued rifle whilst off duty;
- was in close proximity to the complainants;
- was directly facing the complainants, and whilst within the vicinity of the administration office, and public corridor, was shouting obscenities at his fellow female colleagues;
- used swear words that were insulting and behaved improperly when viewed by fellow administration officers;
- was blaming the two complainants for misplacing his application;
- was using obscenities and insulting words when he said: "*Where is my HDA? What are you doing with my HDA? Fuck, kan upla, yupla kaikai kan, fuck. Fuck, yupla mekim wanem?" Kan yupla, HDA blo mi we? and " Yupla paolim HDA blo mi?"*
- was repeating the same obscenities and swear words after several attempts were politely made by different officers to calm him down;
- would not listen the Superintendent in charge of administration matters in NCD, when he asked him politely to stop shouting and swearing;
- did not stop until other police officers from another section came in and took him away;

- used obscenities and insulting words on the complainants causing their fellow colleagues to feel that such behaviour was unbecoming; and
- used such obscenities on the complainants causing their spouses to become upset.

41. Further, I find that the defendant‟s actions under the whole of the circumstance was likely to cause a breach of the peace because although he raised reasonable excuse as his defence, the defendant‟s explanation for his actions were lame as he knew the process but did not follow it to enquire about his HDA claim application. The evidence shows that the complainants and Superintendent in charge of administration had all done their part in facilitating the submission of the defendants‟ claim for payment to the PHQ. It was then a matter for PHQ to facilitate approval and payment. For this finding, the defence of reasonable excuse is rejected.

42. Further, although this was in the Police station, the Police station counter and the public‟s entry to the Police Station were easily accessible and visible. There were some public at the counter when the insulting words were said.

43. The defendant did not take some overt acts such as cork the gun, however, his state of being under the influence of alcohol, whilst off duty and was armed with a rifle; in his state of frustrations and anger; in his persistence to demand answers; use of the swear words, and his proximity to the complainants all showed a real likelihood that a breach of peace was likely to occur.

44. I find that had the other police officers not come to take the defendant away, it was highly likely that a breach of the peace was to occur. The particular administration section was where the officers who initially assisted the defendant to submit his claim were all at. The evidence showed that the

defendant had directed the insults to them all in full public hearing and viewing. It was evident that they felt that the defendant‟s actions were improper. They too were not happy with the defendant.

45. In applying the meaning of the terms *"likely to cause a breach of the peace"* I come to the definite conclusion that the objective facts support the conclusion that there was a "tending towards" or "a real possibility" of an "actual assault" or "public alarm" or "reaction" by the defendant, complainants and or other police officers had other Police officers not come in swiftly to remove the defendant.

46. Applying the reasonable man‟s test in this situation, the reasonable man would be someone observing from the counter of the police station. Having heard a police man swear whilst armed, in uniform etc., definitely would have found the defendant‟s actions insulting in the circumstance.

Use of Pidgin Swear Words:

47. In my respectful view, the pidgin swear words "*kaikai kan"* is particularly and generally regarded as insulting. When translated, these words can literally mean or be equivalent in meaning to the words *"to eat a cunt"* or the English swear words or expression to *"Suck a Cunt".* Since use of these swear words is common on the streets and tend to name or relate to private body parts of women and girls, generally, this is regarded as offensive to women in PNG society. This is especially true because women especially mothers feel offended by the mere fact that they give birth to life and must be accorded respect for this. The existences of the social rule that all women must be respected for giving birth to life speaks against use of such swear words. It is commonly felt that naming, calling or mentioning private body parts of women especially when swearing is offensive and disrespectful to women in this

manner and is a breach to this commonly accepted social rule. In modern and traditional PNG society reasonable law abiding Papua New Guineans say that people who use such words have no respect for their mothers, grandmothers, aunties, sisters etc. and have no place in the community. This statement was expressed by His Worship Samala, M. in the case of *Manau v. Mambol (supra),* "that people who use such insulting words have no place in our society".

48. This court finds further that the defendant had no respect and courtesy towards his female colleagues and others and showed no appreciation for their efforts in assisting him with his claim. Instead, he approached them whilst off duty, was drunk, armed and used swearing and insulting words. The manner in which the defendant approached this issue showed that it was unbecoming of him as a senior, a professional policeman and a law enforcement agent.

Conclusion:

49. In the light of the above findings, and on the credibility of witnesses, and whose story is to be believed, I accept the prosecution witnesses‟ story. I consider that a more likely and truthful version of the words used and circumstances surrounding the case has been proven beyond reasonable doubt when Police witnesses corroborated each other in their story. I find that the defendant has said the insulting words as alleged and as described by the Police witnesses.

50. It follows that the State has proven that the defendant had used insulting words on both complainants and others who were there and that a breach of the peace was likely to occur. This court is convinced that the defendant did use the words as alleged and in the whole circumstances of the case, it was likely that a breach of the peace was likely to take place.

51. I convict the defendant on one count of Use of Insulting Words to Provoke a Breach of Peace.

52. Raphael Kuna having been charged with one count of Use of Insulting Words likely to Provoke a Breach of Peace, pursuant to section 7 of the *SOA* is found:

- guilty of Use of Insulting Words likely to Provoke a Breach of the Peace and
- Convicted on one count accordingly.

Police Prosecutor: **For the State**

Defendant: **In Person**