

Some clarification from the courts in PNG PM's 'fight to the very last breath'

Author : Bal Kama

Date : July 4, 2014

Papua New Guinea currently faces one of the toughest challenges yet again in the fight against corruption when a [warrant of arrest](#) was issued against the country's Prime Minister Peter O'Neill on allegations of official corruption. What resulted was the sacking and suspension of high ranking government officials including Attorney General Kerenga Kua and Assistant Police Commissioner Simon Kauba as the Prime Minister appeared [determined](#) to "*fight to the very last breath.*"

The Prime Minister also disbanded the Task Force Sweep (TFS), an anti-corruption body he created when he first took office in 2011. TFS had played a major role in fighting corruption in the country since its inception. One of its momentous successes was the [conviction of Paul Tiensten](#), a sitting member of the current Parliament and a former government minister and it has [recouped over \\$30 million](#) so far from corrupt dealings. [Michelle Nayahamui Rooney](#) and [Jenny Hayward-Jones](#) succinctly covered the early stages of the events in the last fortnight.

The acting [Solicitor-General Jubilee Tindiwi](#) was the latest official to be sacked. Miss Tindiwi was sacked on the basis that she did not oppose the Prime Minister's arrest warrant in court. Miss Tindiwi [responded](#) to her sacking stating: "I'm proud of upholding the rule of law in this country regardless of political intervention." Similar sentiment was shared by many of the [sacked officials](#).

This post gives an Update, focusing in particular on the role of the courts this week in dismissing claims of political motivation, and upholding the arrest warrant.

Government officials were 'politically motivated'

The main justification for these chains of events was that the arrest warrant obtained against the Prime Minister was '[politically motivated](#)' and these government officials including the court were direct or indirectly compromised. According to the Prime Minister Peter O'Neill, this is the reason for inviting Australian judges Graham Ellis (retired) and Andrew Warwick to head the [Interim Office for Anti-Corruption \(IOAC\)](#) and a [Commission of Inquiry \(COI\)](#) respectively– to maintain the impartiality of the investigations.

The Prime Minister created the IOAC as a temporary replacement for the disband Task Force Sweep and initiated the COI to make findings on the allegations against the Prime Minister's office. However, their full terms of references are yet to be published.

The challenge for the IOAC is whether it will effectively continue the success of its predecessor, the Task Force Sweep, and face the challenges of uncovering the complex web of institutionalised corruption from the highest echelons of the country's socio-political order.

As for the COI, the ultimate question is whether its findings would ever get published. The National Executive Council, chaired by the Prime Minister who is the subject of the Inquiry, has the discretion to publish the findings. It has been a practice in Papua New Guinea where many Commissioner of Inquiry reports [never get to be published](#).

Whether the investigation against the Prime Minister was 'politically motivated' is a moot point but it was raised in the National Court, allowing it to give its opinion.

Appeal to the National Court

The [Prime Minister appealed](#) to the PNG National Court to seek a restraining order against the police in exercising the warrant. It was going to be a significant decision for the Court because the events in last two weeks had created a [nationwide anxiety](#) with [protests](#) and [threats of instability](#). As Tess Newton Cain [indicated](#) earlier, it also overshadowed the meeting of the [Melanesian Spearhead Group](#) in Port Moresby last week.

Court's decision and its implications

The Court made its [ruling](#) on Tuesday 01 July 2014. It provided answers to four of the most important questions that underlie the current events:

1. Was the arrest warrant against the Prime Minister valid?
2. Should the court restrain the police from exercising the arrest warrant?
3. Were the government officials and investigators 'politically motivated'?
4. Will the Prime Minister be free from any criminal liability if the legal bills are deemed to be valid?

Was the Arrest Warrant against the Prime Minister valid?

This was the main submission by the lawyers representing the Prime Minister and consented to by the Police. They argued that *"the Warrant was wrongly issued because no arrest can be made until after a formal interview, to accord with the rules of natural justice"* (para 53). The Court however, dismissed this argument stating:

This is a misconceived submission. The Police are entitled to arrest a suspect based on evidence they possess. This evidence may or may not include any statement from the suspect by way of a record of interview or otherwise. If the law requires that an alleged offender cannot be arrested without a warrant such as pursuant to section 87(2) Criminal Code, the Police must obtain the warrant before arresting the suspect... (para 53).

Section 87(2) of the [Criminal Code](#) (PNG) states that in cases of 'official corruption,' 'a person shall not be arrested without warrant.' That warrant is to be obtained from a court after a court is satisfied by the evidence that there is a substantive case against the alleged offender.

It is an exception made for suspects of official corruption, in that *'a formal interview is not a pre-condition to effecting an arrest of such a suspect'* (para 34). The Task Force Sweep in 2012 issued a similar warrant against the former Speaker of the National Parliament [Jeffery Nape](#) and he complied.

Regarding the defence of natural justice, the Court's ruling is supported by section 59 of the [PNG Constitution](#), which states that the "principles of natural justice" are "subject to this Constitution and to any statute..." One of such 'statute' is the *Criminal Code* to which the Constitution gives power to the police to enforce.

Should the court restrain the police from exercising the arrest warrant?

The Prime Minister argued that the Court has inherent powers to do justice and in light of the circumstances, it is in the interest of justice that the arrest warrant be restrained. However, according to the Court, although it does have the power to stay a warrant, it is to be exercised *“only in the clearest case of abuse of power by the Police”* (para 51). Justice Kariko was reluctant to interfere with police functions:

I (Justice Kariko) consider an arrest to be an integral part of the investigatory functions of the Police. To my mind, the amended restraining orders sought (by the Prime Minister) would still amount to interfering with Police functions... (emphasis added, para 54).

Were the Police officers and the Task Force Sweep “politically compromised”?

As described earlier, whether the investigation against the Prime Minister is ‘politically motivated’ is arguable. This assertion was presented in Court in the form of an affidavit from the Prime Minister.

The National Court however, refused this submission. Justice Kariko was adamant:

Is there any clear abuse in this case? I find no such evidence of this abuse. There is in fact no evidence that the current criminal investigations of the plaintiffs are the work of rogue policemen or that the investigations are politically-motivated as described by the Prime Minister in his affidavit (para 52).

His Honour went on to conclude:

In my opinion therefore, there is a prima facie case, that in the interests of justice or the public interest, the balance of convenience favours the refusal of the interim restraining order sought.... (para 55)

Will the Prime Minister be free from any criminal liability if the legal bills are deemed to be valid?

The Finance Minister [James Marape](#) is currently suing Paul Paraka Lawyers in the National Court, arguing that the legal bills needed to be taxed. [Taxation of legal bills](#) is asking the court to rule whether the legal services were actually performed and whether the fees and outlays that were actually earned or incurred were reasonable.

Mr O’Neill’s lawyers argued that “that taxation is the only way the validity of the bills can be determined” and if the bills are determined to be valid, then “there can be no criminality in the payment of the bill” (para 29, 34). They therefore submitted that the Court should stay the arrest warrant until that determination is made. This argument meant that if the legal bills were to be declared by the Court in Marape’s case as valid, then whoever that had authorised the bills or had purportedly authorised the bills or facilitated the payment should not be criminally liable in anyway.

However, the Court refused these arguments. First, on whether taxation should determine the validity of the bills, Justice Kariko states:

In my view, taxation of costs is an exercise to assess whether items have been properly charged on a bill of costs and whether the cost for each item is reasonable.”... It is “not to determine whether a bill of costs is valid (para 34).

Second, on whether the validity of the bills would exonerate any acts of criminality, His Honour states:

I am not persuaded by the submissions that the validity of the bills would mean that there could be no

criminality in the payment of legitimate bills. It is not known at this stage what offence (if any) the Police will eventually charge the plaintiffs with. It would only be speculation then to say that the validity of the bills would have a bearing on the eventual charges. At this point in time, the only possible offence alleged is against Mr O'Neill for an offence under s.87 (1) Criminal Code. That offence concerns official corruption... In my view, the validity of the legal bills may or may not be material for a charge to be constituted under this section (para 38).

His Honour was careful in his response but clearly articulated that whether or not the bills are legal may not have any bearing on the current case and on whoever that is criminally implicated with its transactions.

Implicit in Justice Kariko's response is the understanding that the taxation of bills is a civil matter and may be resolved administratively but the issue before him concerning the Prime Minister is one of criminal. His Honour clarifies:

I use this simple example: If a Department of Finance officer responsible for printing out the cheque for a valid bill asked for some payment from the supplier in order to raise the cheque that may amount to official corruption (para 38).

What happens now?

Although the Court is of the opinion that "there is a *prima facie* case in the interest of justice," it recognizes the Police Commissioner as having the "ultimate control" of the proceedings against the Prime Minister (para 56).

The Police Commissioner wanted to [review the investigation](#) files before deciding on whether to call in the Prime Minister for questioning. However, the Fraud office is [reluctant](#) to release the files to the Commissioner in fear of its evidences being compromised. The Fraud office has even [attempted to arrest](#) the Commissioner after the Court decision on a second charge of perverting the course of justice.

The Prime Minister has successfully sought an [appeal](#) to the Supreme Court against the decision of the National Court. This meant that the arrest warrant is restrained [pending the appeal](#). The case will be heard next week. At the same time, the Police Commissioner is seeking to have the warrant of arrest withdrawn by the [Magistrate Court](#) that had initially issued the warrant. It appeared all possible legal avenues are explored. As the Prime Minister stated, it could be a '[fight to the very last breath](#).' Or will it?

Implications going forward

Two implications are worth noting from the Court's decision. First, the allegation that the warrant against the Prime Minister was '[politically motivated](#)' is now dismissed by the Court. This is a 'temporary relief' to the sacked Attorney General and the investigators including Sam Koim, the Chairman of Task Force Sweep. It does restore some credibility to their investigations and personal integrity.

The Prime Minister set up the [Interim Office for Anti-Corruption \(IOAC\)](#) and initiated a [Commission of Inquiry \(COI\)](#) on the premises that the police, courts and the Task Force Sweep we all [politically compromised](#). Would that position change now that the Court ruled otherwise? What would the Australian judges who have been invited to head the [IOA and COI do](#)? Both judges have accepted the invitation and are [now in the country](#). Their involvement, in light of the Court's decision, may raise [some questions](#).

The second implication is the rule of law. Many commentators [raised fears](#) on the rule of law in the country and the need for its preservation. Former Prime Minister of Australia Malcolm Fraser urged Prime Minister [Tony Abbott to respond](#). The Court's ruling provided some reassurance despite allegations against it being '[compromised](#).' Given the experiences of the 2011 [constitutional impasse](#), the judiciary is wary of the situation. It even appeared to take notice of the recent speculation of [house arrest](#) against Justice Kariko.

Conclusion

Whether the decision can be followed through by the Police Commissioner remains to be seen. Prime Minister O'Neil [pledged](#):

I will respect the decisions of the Police Commissioner in the handling of any investigation.

The Commissioner is [adamant](#) that any decision on whether to arrest the Prime Minister is "a long way down the road". Will that position change if the Supreme Court affirms the decision of the National Court on appeal next week?

The Prime Minister is excused for now, but that might not last for long as the [court hearing](#) against the Police Commissioner draws near. The Fraud officers indicated that the Police Commissioner might also be liable for [contempt of court](#).

With these pending charges against the Commissioner, it is useful to note that the PNG Supreme Court has clearly indicated, in the sentencing of the former Police [Commissioner Tom Kulunga](#), their dislike for [offences](#) committed by high ranking police officers. If that precedent is applied to Commissioner Vaki in the coming weeks, Prime Minister Peter O'Neil might not be excused for long.

The National Court decision was helpful in that it replaced some of the confusions and allegations with some clarity, in particular, that the arrest warrant against the PM is not politically motivated, and should be allowed to stand. Nevertheless, in this fight to the last breath, there is still a very long way to go.

[Bal Kama](#) is a PhD Candidate at the College of Law, Australian National University.