

CHAPTER III

JURISDICTION OF THE NATIVE COURTS

The Native Courts has jurisdiction in the matters which are set out in Section 5(1) of the Native Court Ordinance. It has power to adjudicate

(1) in cases arising from the breach of Native Law or Customs in which all the parties are natives; and

(2) in cases arising from the breach of native law or customs, religious, matrimonial, sexual, if the sanction of the District Officer has been obtained to the institution of proceedings, where one party is a native and

(3) in other cases if jurisdiction is conferred on it by the Native Court Ordinance or any other ordinance.¹

In any matrimonial cases or sexual cases where the parties are of different sex and not of the same race the Native Court shall be guided by the law or custom of the woman's race.²

For the purposes of Section 5 the word native shall have the meaning assigned in the Interpretation (Definition of Native) Ordinance and shall further include any person within Sabah one at least of whose

¹Section 5(1) of the Native Court Ordinance.

²Section 5(3) of the Native Court Ordinance.

parents was a member of a people indigenous to Brunie, Sarawak, the States of Malaya, Singapore, the Cocos-Keeling Islands, Indonesia or the Sulu Group of the Philippine Islands.³

The case of James Lee Kui Wah⁴ explained Section 5(1)(d). In that case, the Native Court sitting at Tawau, convicted the accused James Lee of attempting to rape several immigrant Indonesian women contrary to Section 5 of the Native Courts Ordinance and sentenced him to three months imprisonment and a fine of \$100. He applied to the High Court for an order of certiorari for the purposes of quashing the conviction for want of jurisdiction. Ainley CJ was of the opinion that rape, attempted rape, indecent assault may be taken without strict proof, to be breaches of Native Custom among Indonesian natives and natives of the Colony of North Borneo. However, Section 2 of the Penal Code reads: ". . . every person shall be liable to punishment under this Code and not otherwise, for every act or omission contrary to the provision thereof of which he shall be guilty within the Colony." The offence of which the applicant has been convicted was made up of acts contrary to the provisions of the Penal Code. By Section 2 of the Penal Code therefore, any person who offends the provision of the Code shall be charged under the Code, tried by a Court with jurisdiction to administer the provisions of the Code and punished in accordance with the Code. Ainley CJ went on to say that neither the Native Court Ordinance, nor any other Ordinance confers jurisdiction upon a Native Court to administer justice under the Penal Code. However, in the present case the position is such that the act is at once an offence under the Penal Code and a breach of Native Law or custom. The law of the

³Section 5(4) of the Native Courts Ordinance.

⁴Page 37. Cases on Native Customary Law in Sabah (1953-1972) Lee Hun Hoe J., Government Printing Office, 1972.

Colonies is that every person who commits an act contrary to the provisions of the Penal Code shall be punished under that Code and not otherwise. He cannot be punished under a law which provides for the breaches of customary law and it follows that he cannot be tried by a court which has no jurisdiction to administer justice under the Penal Code. The judge then ruled that the Native Court of Tawau had no jurisdiction to try the applicant for the offence and the order of certiorari was issued to quash the conviction on that ground.

The confusion which Ainley CJ feared in James Lee's case is materialised in Benedict Tunal v. John Jomin.⁵ In that case the respondent lost a buffalo. He later learned that the appellant had taken and sold his buffalo to one Johnny. He reported the matter to the police. It was a local custom that prior to the sale of a buffalo a certificate of sale or Surat Keterangan must be obtained from an Orang Tua and duly witnessed. This the appellant failed to do. The buffalo had been slaughtered and the Native Court therefore ordered the appellant to give the respondent another buffalo in default three months imprisonment. The District Office upheld the decision and the Native Court of Appeal dismissed the Appeal. In the Native Court of Appeal the appellant raised the question of jurisdiction of the Native Court of Appeal on the ground that the matter was one of theft and as such is triable only by a Magistrate Court. However, in his judgement, Lee Hui Hoe J. said, "We consider that

⁵Page 90. Cases on Native Customary Law in Sabah.

the matter of jurisdiction should have been raised as early as possible. We do not feel any obligation to say whether or not the matter was one of theft. We are satisfied that both parties are natives and that the matter involves native customary law."

This case would seem to conflict with Re James Lee Kui Wah's case where it was held that where an act is at once an offence under the Penal Code and a breach of Native Law or custom it is the law that a person who commits an act contrary to the provisions of the Penal Code shall be punished under the Code and not otherwise.

Although the Native Courts do not follow the system of precedent strictly, it is desirable that a consistency is kept at the Native Courts. A lot of confusion is present because there is no consistency in the decisions.

When questioned on the possibility of cases like James Lee's recurring, the Resident West Coast Datuk Benedict Shim said that rape or attempted rape is a criminal offence and is usually tried by the Magistrate Court and not by the Native Court. The President of the Kota Kinabalu Native Court, Datuk O.K.K. Taib stated that to avoid such cases recurring, the practice in the District now is to report the incident to the police. The police will decide whether or not the case should be heard by the Native Court or the Magistrate Court.

The Native Court has no jurisdiction in cases which arise solely from the breach of Muslim law and custom. In Haji Abdullah

bin Damar v. Rupa binte Inal,⁶ the issue was how far Muslim law per se run in the Native Court. It was held that the law to be applied by the Native Court is native law and custom of the district in which the court sits and that Muslim law as such is not applied unless it forms part of the Native law and custom. The Native Court has no jurisdiction in cases which arises solely from the breach of Muslim law and custom. Reasons were due to the amendment made on the Administration of Native and Small Estates Ordinance by Ordinance 8/61; to the Native Courts Ordinance by Ordinance 13/61; to the Wills Ordinance and to the Muslim Ordinance by Ordinance 12/61. The Administration of Native and Small Estates Ordinance was amended in Section 2 by adding the words, in the definition of Native Estates there in contained "or of a deceased Muslim subject to the jurisdiction of the Native Court under para (c) of sub-section (1) of Section 5 of the Native Court Ordinance." Section 21 was amended by inserting the words "and shall make a distribution order having regard to the provisions of the Wills Ordinance and the law or custom having the force of law applicable to the deceased," after the word "collector" in the 5th line thereof.

The Native Courts Ordinance was amended firstly by deleting the definition of Imam contained in Section 2 thereof, secondly by deleting sub-section 2 of Section 4 which had read, "The Resident may authorise any Imam exercising functions within the territorial jurisdiction of the Native Court to be a member of such court" and thirdly and most importantly in relation to this appeal by deleting

⁶Page 65, Cases on Native Customary Law in Sabah.

paragraph (c) of sub-section (10) of Section 5 and deleting sub-section (2) of Section 5. Paragraph (c) had read, "In the case arising from the breach of Muslim law and custom in which all parties are Muslims" the Native Court would have jurisdiction and sub-section (2) provided that in such cases at least two members of the Court shall be Muslims. Section 5 of the Ordinance is the section dealing with the jurisdiction of the Native Courts.

The Wills Ordinance was amended by Ordinance 17/61 by substituting new subsections (2) and (3) in Section 1 thereof which in effect allows a Native or Muslim to make a will according to Native law or custom or Islamic law and prevents a Native disposing of his property by Will in a manner contrary to any law or custom having the force of law applicable to him at the time of his death.

The Muslim Ordinance was amended by Ordinance 12/61 by deleting the provision of Section 3 in relation to offences against Muslim Worship and remove the jurisdiction of the Native Courts in such instances.

The Native Court can deal with other matters besides those involving Native law and custom if it is conferred on them by any Ordinance. In Kigis bin Lagunta v. Lejuin binte Gumbanan,⁷ it was held that the land in dispute could be settled by the Native Court as the Administration of Native and Small Estate Ordinance (Caption 1) is one of the Ordinances which confers jurisdiction on

⁷Page 107. Cases on Native Customary Law in Sabah.

the Native Courts specially to deal with native estates of deceased natives. Two relevant sections of the Ordinance read: "20. When an application under Section 3, other than one mentioned in Section 24, relates to a Native estate, the Collector shall refer the application to the Native Court unless in his opinion the estate is of such magnitude that it should be dealt with under the Probate and Administration Ordinance in which event the Collector shall send the record of the application and his finding to the High Court.

23. Decisions of the Native Court shall be subject to appeal and revision as provided in the constitution of such court." In the same case, it was held that the case should not have been heard in the first place as it has been heard and decided over 15 years ago. The case should have been dismissed on that ground.

Where no breach of native custom or law is involved, the matter is then outside the jurisdiction of the native court and should be tried in the ordinary court. In Kalito bin Bentilan v. Chin Ah Hee,⁸ both parties claimed ownership to a buffalo. Both also claimed that the buffalo ran away. Respondent reported loss to the police. He saw the buffalo in the Government compound. After paying the pound fee, he took the buffalo back. Later he sold the buffalo to Bataasal with the knowledge of the Orang Tua Kamp. g. The appellant saw the buffalo in Bataasal's compound and claimed the buffalo to be his. Both parties called the witness to prove

⁸Page 158, Cases on Native Customary Law in Sabah.

their claim. The lower courts decided in favour of the respondent. The appellant appealed and the Native Court of Appeal allowed the appeal. It was held that no native law or custom was involved. It was a simple straightforward case of a dispute as to ownership.

The Native Court will have jurisdiction in cases arising from the breach of native law or custom, religious, matrimonial or sexual, if the sanction of the District Officer has been obtained to the institution of the proceedings where one of the party is a native.⁹ In Harley v. Onong binte Ah Hing,¹⁰ on appeal the appellant claimed that since only one party is a native, that is his wife, the sanction of the District Officer is required under Section 5(1)(b) of the Native Court Ordinance and such sanction does not appear to have been obtained to enable the Native Court to have jurisdiction in the case. In the Native Court of Appeal, Seah J., held that the legal proceedings in the Native Court of Papar was instituted when the Ketua Mahkamah Anak Negeri issued the Surat Summons Mesti Datang Bichara to the appellant dated December 15, 1972 fixing the hearing of the case on December 19, 1972. The provision of Section 5(1)(b) of the Native Courts Ordinance would appear to provide that the sanction of the District Officer must be obtained prior to the institution of the legal proceedings in the Native Court. He went on to say " . . . in order to

⁹Section 5(1) (b) of the Native Court Ordinance.

¹⁰[1976] F.M.L.J. 13.

constitute a valid sanction, all the relevant facts constituting the subject of the complaint must be placed before the sanctioning authority if the facts constituting the complaint are not shown on the face of the sanction. Needless to say, the sanctioning authority must consider and weigh the facts carefully before giving the sanction. Alternatively, the sanctioning authority knew the facts alleged which constituted a breach of native law or custom pertaining to religious, matrimonial or sexual matters before authorising the sanction. Here there is no evidence that either of these conditions have been complied with." It was then held that since the grant of a valid sanction of the District Officer is a condition precedent to the institution of legal proceedings in the Native Court under Section 5(1)(b) of the Native Court Ordinance where one party to the proceedings is not a native, the proceedings at the Native Court in Papar was held to be null and void.

The Native Court also hears all cases dealing with applications to rank as a native or Anak Negeri of Sabah. A specific form will have to be filled by the applicant. The form is then submitted to the District Officer for filing and a number will be attached to it. The date of hearing shall be fixed in the Native Court and the Court will decide the matter. The applicant must prove to the court

- (1) that he is ordinarily resident in the State,
- (2) that he is living as a member of a native community,
- (3) that one of his parents or ancestors is or was a member of a people indigenous to Sabah.

In the case of Ong Seng Kee v. District Officer, Inanam,¹¹ the appellant a Sino Kadazan succeeded in his application because there was sufficient evidence to satisfy that the applicant is and lives as a member of a native community. The Orang Tua and his predecessor had stated that the appellant had interests himself and sometimes takes part in native festivities and ceremonies in the kampung. He was also living in a predominantly native area, that is in Inanam. The case of Liew Siew Yin v. District Officer, Jesselton,¹² held that the only reason why the applicant failed in his application was because he did not take up residence in a native community.

It should be noted that religion is not an ingredient required in an application to be a native. In Kota Kinabalu Native Court Case number 173/75, Haji Mohamed Nasaruddin bin Abdullah made an application for a native certificate. He was of Chinese descent. As such his application was considered under Section 2(1)(b) of the Interpretation (Definition) Ordinance (Caption 64) under which

¹¹Page 20, Cases on Native Customary Law in Sabah.

¹²Page 4, Cases on Native Customary Law in Sabah.

the applicant must show the following

- (1) that he is ordinarily resident in the State,
- (2) that he is living as a member of a native community and
- (3) that one of his parents or ancestors is or was a member of a people indigenous to Sabah.

The applicant in the case failed to satisfy the Native Court that one of his parents or ancestors is or was a member of a people indigenous to Sabah. The applicant had no native blood in him. The Native Court found that the applicant was not entitled to claim himself as a native under the said Ordinance. The applicant based his application on the fact that he had embraced the Islamic faith. It was held however, that religion is not an ingredient required by the Ordinance. The fact that the applicant had embraced the Islamic faith and discarded his Chinese name did not make him a native. He still has to satisfy the Native Court of the three essential ingredients.

Those whose applications are successful are classified as Naturalised Natives. They will receive a certificate from the Native Court to that effect. All such natives are considered in theory to have equal rights as real natives. However, in practice, they usually rank immediately after them. However, one of the reasons for the application to be a native is because it enables the holder of such title to hold land under Native Titles. Thereby he gets many advantages.

Firstly, all dealings in land between non-natives and natives are expressly forbidden by Section 17(1) of the Sabah Land Ordinance. No such dealings shall be valid or be recognised in any court of law. Such dealings will only be recognised if it falls under Section 17(2) whereby if any non native is desirous of purchasing land from a native he has to address his application to the Resident, who if he sees fit to sanction such purchase, shall, if the native owner consent, require such native owner to execute a memorandum of surrender of the title and shall fix the premium and rent at which the land shall be leased by the Government to the applicant and such new lease shall be issued under Part II or III of the Sabah Land Ordinance.¹³

Secondly, Native titles are held in perpetuity. Customary Tenure¹⁴ confers upon the holder thereunder a permanent heritable and transferable right of use and occupancy in his land subject only to (1) the duty of preparing his padi field and planting padi, cleaning, working and cultivating his garden, orchards or sago lands in such manner as may be described; (2) the liability to give his labour free, when required by the Collector or Native Chief or Headman for the performance of such works and duties for

¹³ Part II concerns titles under Country Land and Part III Town Lands.

¹⁴ Customary tenure means the lawful possession of land held by natives either by the continuous occupation or cultivation for three or more consecutive years or by a title under Part IV of the Land Ordinance or under the Poll Tax Ordinance.

the common benefit of himself and neighbouring land holders.¹⁵

Every lease under Part II shall not be more than ninety nine years¹⁶ and every title under town land alienated under Part III shall be a town lease for a term not exceeding 99 years.¹⁷

Thirdly, all holders of Native Titles are subject to annual rent of 50 cents.¹⁸ For agricultural lease held under Part II of the Land Ordinance, annual rent is \$1 for the first six years, \$4 in the subsequent four years and \$6 after that period. For residential and commercial it is fixed at 10% of the market value of the land. Further, the Director has the power to revise annual rent for lands held under Part II and III.¹⁹ Residential leases under Part III pays an annual rent of 10% of the market value of the land. When town lands are sold on auction, the conditions of sale will stipulate the rent and the premium.

At the moment there are 378,000 acres of land held in Sabah under Natives Titles. There were 108,222 Native titles to land at the end of 1975.²⁰

¹⁵Section 66 of The Sabah Land Ordinance.

¹⁶Section 48 of the Sabah Land Ordinance.

¹⁷Section 57 of the Sabah Land Ordinance.

¹⁸Section 71(a) of the Sabah Land Ordinance.

¹⁹Section 50 of the Sabah Land Ordinance.

²⁰From the Lands and Survey Department, Kota Kinabalu.