

# Methamphetamine a dangerous drug under the *Dangerous Drugs Act*

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## Introduction

In 2021, the Royal Papua New Guinea Constabulary (police) investigated and prosecuted for the first time a methamphetamine case in Papua New Guinea (PNG) which was styled, *State v Jamie David Pang* (DC:NO:1846-1847/2021) (*Pang case*).<sup>1</sup> This was a reflection of exceptional police work, but it was not without its challenges.<sup>2</sup> The main challenges were the existence of appropriate offences to which charges could be laid, and the required advocacy skills to navigate a complex legal issue.

Being uncertain as to the charges, the National Narcotics Bureau (Bureau) was requested under the *National Narcotics Control Board Act* 1992 to provide advice. The Bureau acted independently and offered advice to police on the applicable offence provisions provided under the *Dangerous Drug Act* 1952.<sup>3</sup>

In the *Pang case*, the preliminary issue was whether methamphetamine was listed as a dangerous drug under the *Dangerous Drug Act*. This gave an opportunity to the District Court to contribute jurisprudence on matters involving a pre-independence legislation adopted under the *Constitution*. It was also a case that tested the District Court's jurisdiction, judicial temperament and capability. It also pointed significantly to the limited capacity of the police to assist the court on pertinent constitutional and legislative issues. The need for police to upskill their research and advocacy skills was evident, as well as for lawyers to supervise or assist the District Court.

This paper is a reflection on the District Courts judgement in the *Pang case*, particularly in relation to how the Magistrate could have been better assisted. As will be discussed, relevant discourse on applicable laws and the legislative process were not taken into account resulting in a virtual misapprehension of the law.

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\* Mr. Nichodemus Mosoro was the Acting Director-General of the National Narcotics Bureau from 2018 to 2022. The discussions in this article are from actual criminal investigations to which the National Narcotics Bureau provided assistance to the Police. The extracts from those investigations and legal advices have been reproduced in this article with the permission of relevant authorities.

<sup>1</sup> Zarriga, M. (21 November 2021). Hotel-turned drug lab. *The National*. Retrieved from <https://www.thenational.com.pg/hotel-turned-drug-lab/>. See also EMTV. (17 November 2021). *Pang Detained* [Video file]. Retrieved from <https://emtv.com.pg/pang-detained/> , See also ABC News. (24 November 2021). *Australian Jamie Pang caught up in drug bust, after alleged meth lab, illegal firearms discovered in his hotel* [Video file]. Retrieved from <https://www.google.com/amp/s/amp.abc.net.au/article/100643446>

<sup>2</sup> According to report however, methamphetamine had been discovered in the possession of individuals before the K90m drug bust in POM, 12 October 2021, *Post Courier*. Retrieved from <https://postcourier.com.pg/k90m-drug-bust-in-pom>.

<sup>3</sup> Chapter 228 of the Revised Laws of Papua New Guinea.

## Methamphetamine Offences

On 16<sup>th</sup> November 2021, a search of the Sanctuary Hotel in Port Moresby, National Capital District, by police with a search warrant discovered a clandestine laboratory allegedly used for the manufacture of methamphetamine.<sup>4</sup> In conducting the search, high powered firearms and ammunition were seized as well as equipment resembling a make shift laboratory. The production of methamphetamine was plausible when a white powder-like substance was obtained. There was also heavy presence of hazardous chemicals.<sup>5</sup>

The basic precursors used in the manufacture of methamphetamine are ephedrine, pseudoephedrine and 1-phenyl-2-propane (P-2-P).<sup>6</sup> These are found in decongestions such as cough syrups while the latter is used legitimately in the manufacture of medical amphetamines. These plus other chemicals such as hydrochloric acid, anhydrous ammonia, phenylpropanolamine, red phosphorus, iodine and hypo phosphorous acid are used interchangeably to make methamphetamines in various quantities and quality.<sup>7</sup> Some of those chemicals were located in the room by which the clandestine laboratory was discovered. These chemicals can be readily accessed in pharmacies, hardware or industrial outlets, and some would require a license or prescription whilst others easily purchased off the shelves or illegally sourced.

Standard police forensic analysis would later reveal that the white powder like substance was methamphetamine. According to the United Nations Office on Drugs and Crime (UNODC), methamphetamine is described as ‘part of the group of drugs called amphetamine-type stimulants (ATS). It is a synthetic drug that is usually manufactured in illegal laboratories. Methamphetamine comes as a powder, tablet or as crystals that look like shards of glass. It can be swallowed, sniffed or snorted, smoked or injected’.<sup>8</sup> It is a highly addictive stimulant that poses serious health risks to the person consuming it,<sup>9</sup> and has been reported to fuel anti-social behavior and perpetuate organized crime.<sup>10</sup>

The manufacture of methamphetamine would require independent verification that the equipment seized were in fact used for the alleged chemical process. The court would be interested in whether there were traces of methamphetamine on the equipment, finger prints, and presence of precursor chemicals.

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<sup>4</sup> Zarriga, M., n1 supra.

<sup>5</sup> Yamasombi, D., personal communication, 17 November, 2021.

<sup>6</sup> International Narcotics Control Board (2019). *Precursors and chemicals frequently used in the illicit manufacture of narcotic drugs and psychotropic substances*. Retrieved from [https://www.incb.org/documents/Publications/AnnualReports/AR2019/Precursors\\_Report/English\\_ebook\\_PRE2019.pdf](https://www.incb.org/documents/Publications/AnnualReports/AR2019/Precursors_Report/English_ebook_PRE2019.pdf)

<sup>7</sup> United Nations International Narcotics Control Board. (2017). *Extent of licit trade in precursors and the latest trends in precursor trafficking*. Retrieved from [https://www.incb.org/documents/PRECURSORS/TECHNICAL\\_REPORTS/2017/Report\\_breakdown/English/7a\\_Extent\\_of\\_licit\\_trade\\_in\\_precursors\\_2017.pdf](https://www.incb.org/documents/PRECURSORS/TECHNICAL_REPORTS/2017/Report_breakdown/English/7a_Extent_of_licit_trade_in_precursors_2017.pdf) and United Nations Office On Drugs & Crime. (2014). *Precursor Trends And Manufacturing Methods*. Retrieved from [https://www.unodc.org/documents/southeastasiaandpacific/2014/05/gsda/clean/2014\\_Global\\_Synthetic\\_Drugs\\_Assessment\\_CH9.pdf](https://www.unodc.org/documents/southeastasiaandpacific/2014/05/gsda/clean/2014_Global_Synthetic_Drugs_Assessment_CH9.pdf)

<sup>8</sup> United Nations Office On Drugs And Crime (2022). *Methamphetamine*. Retrieved from <https://www.unodc.org/drugs/en/get-the-facts/methamphetamine.html>

<sup>9</sup> American Addiction Centre. (2022). *Meth Relapse*. Retrieved from <https://drugabuse.com/drugs/methamphetamine/relapse/>

<sup>10</sup> Sousa-Santos, J. “Drug trafficking in the Pacific Islands: The impact of transnational crime.” (2022). *Lowy Institute Analysis*, 5-11.

The accused, Mr. Jamie David Pang was then arrested for possessing the marketable quantity of methamphetamine in his room at the Sanctuary Hotel. After arresting Mr. Pang, police referred to the *Dangerous Drugs Act*, but had difficulty framing the charges. This was because the offence provisions in relation to possession and manufacturing of a dangerous drug applied only to dangerous drugs that were prescribed in that Act. There had to be a list that prescribed the type of dangerous drugs, and it should include methamphetamine if the charges were to be substantiated.

Under Section 1(a) of the *Dangerous Drugs Act*, “dangerous drugs” means a substance specified in the Schedule. The offences include making or possessing a ‘dangerous drug’ and is provided under Section 3(1) of that Act. It states:

A person who-

- (a) cultivates a plant from which a dangerous drug can be made; or
  - (b) **makes** (emphasis added) a dangerous drug; or
  - (c) exports a dangerous drug; or
  - (d) is in **possession** (emphasis added) of or conveys a dangerous drug or a plant or part of a plant from which a dangerous drug can be made,
- is guilty of an offence unless he is authorized to do so by or under some other Act.

Penalty: Imprisonment of a term of not less than three months and exceeding two years.

Mr. Pang’s lawyer after reading a copy of the *Dangerous Drugs Act* from the Pacific Islands Legal Information Institute or *PacLII*, realized that methamphetamine was not listed as a dangerous drug. He then brought this to the attention of the police and stated that his client could not be charged under Section 3 of the Act. Counsel also indicated to make a no case submission if the matter proceeded.

The Bureau when consulted, advised the police that legislation accessed from *PacLII* must be confirmed with official copies of the legislation. From experience, a number of legislation accessed on *PacLII* were not updated. This has been the observation from the bench as well.<sup>11</sup> Even so, the *PacLII* website has a disclaimer stating that legislation accessed on the website must be verified with official copies from the country concerned. In PNG, official copies of legislation and other legal materials are maintained by the Department of Justice & Attorney-General (DJAG) Library, the First Legislative Counsel and the National Court Library.

In conducting further research, at the Bureau confirmed that the version of the Act on *PacLII* did not have methamphetamine listed in the Schedule. However, when consulting the official copy of the Act at the DJAG Library, the Bureau discovered a subsidiary legislation to the *Dangerous Drugs Act* which listed methamphetamine. This subsidiary legislation came into force under a Gazetttal Notice issued from the pre-independence legislation – *Dangerous Drugs Act*. Armed with this information, the Bureau, in a letter dated 30<sup>th</sup> November 2021, provided preliminary advice to the police to charge Mr. Pang given that ‘methamphetamine’ was listed in the subsidiary legislation.<sup>12</sup>

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<sup>11</sup> As a practicable illustration of *PacLII*’s operability and reliability, see the observations by Justice Cannings in the case of *Gawi v Public Service Commission* (2014) N5473 where his honor who could not be assisted by counsel, could not find a copy of the *Public Service General Orders* on *PacLII* and opted to access the Department of Personnel Management’s website, which had an official copy. Also note that *PacLII* has a disclaimer notice on the accuracy of the legislation and other legal materials provided.

<sup>12</sup> The relevant law offices that were requested to confirm the advice supplied by the Bureau were the Public Prosecutor, State Solicitor and the First Legislative Counsel. The position of the Bureau was later

The Bureau had the necessary standing to provide such advice under Section 13(1)(c) of the *National Narcotics Control Board Act* and other enabling provisions to government agencies and other organisations that required advice from it. Generally, these provisions authorize the Bureau to maintain records of precursor chemicals or dangerous drugs for policy, law reform, education and awareness purposes as well as the United Nations Convention on Narcotic Drugs 1961 and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988. This advice may be shared with other government agencies including law enforcement agencies upon request. This is a function also performed by the Pharmacy Board (established under the *Medicines and Cosmetics Act* 1999), in relation to United Nations International Narcotics Control Board reporting requirements.

### **An analysis of Pre-Independence Legislation and Methamphetamine**

The Bureau's preliminary research revealed that "methamphetamine" was declared as a 'dangerous drug' by the *Papua New Guinea Gazette No.4* dated 20<sup>th</sup> January 1972 under the *Dangerous Drugs Ordinance* 1952-68. The Bureau took the view that according to Schedule 2.6 of the *Constitution*, the *Dangerous Drugs Ordinance* was also 'adopted' in 1975 as an Act of the Parliament of PNG. The Bureau's position was based on the fact that Schedule 2.6(1)(d) defines 'pre-independence laws' to include "subordinate legislative enactments under any such laws that were in force in the country immediately before the repeal, or immediately before Independence Day, as the case may be." Also pursuant to Schedule 2.6(2), the *Dangerous Drugs Ordinance* as a 'pre-independence law' was adopted as an Act of Parliament "immediately after Independence Day". As a matter of due process, this means that the gazettal notice of the declaration which included 'methamphetamine' continued to be in force in PNG from Independence Day under the *Dangerous Drugs Act*.

Moreover, the *Constitution* intended to preserve the application of pre-independence legislation by making necessary adjustments to suit the PNG context. Schedule 2.7(1) of the *Constitution* provides that "a law adopted by Schedule 2.6 (adoption of pre-independence laws) takes effect subject to such changes as to names, titles, offices, persons and institutions, and to such other formal and non-substantive changes, as are necessary to adapt it to the circumstances of the country and the Constitutional Laws." This was to effectively facilitate the transition of pre-independence laws into the PNG legal system immediately on Independence Day. There were no material adjustments to the *Dangerous Drugs Ordinance* since its adoption as the *Dangerous Drugs Act*.

The Bureau also referred the police to relevant provisions of the *Interpretation Act* that reinforced its view that the use of 'adopted subordinate enactments' which also included 'subsidiary legislation' was valid. These provisions include:

1. The *Dangerous Drugs Ordinance 1952-1968* could be cited in formal correspondences as 'adopted' legislation. This would not derogate in any way the substantive nature of Section 61 and Section 93B & C of the *Interpretation Act*.
2. It was important to also note that Section 2 of the *Interpretation Act* applied to adopted laws.

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confirmed by the Attorney-General, the Public Prosecutor and the State Solicitor. This advice was also shared with the PNG Customs Service who were also pursuing a charge against Mr. Pang under the *Customs Act*.

3. The definitions of “adopted Act”, “adopted law”, “adopted subordinate enactment”, and “pre-independence law” were defined by the *Interpretation Act*.
4. Section 1 of the *Interpretation Act* defines “subordinate enactment” as an “instrument (whether of a legislative nature or not) made under an Act”. The subsidiary legislation falls within the meaning of ‘subordinate enactment’ or ‘subordinate legislation’.
5. Section 4(e)(iii) of the *Interpretation Act*, provides that the issue of a “Government Gazette or a Gazette of any date”...being a date not earlier than 1 July 1971 and later than 15<sup>th</sup> September 1975, shall be read as a reference to an issue of the Papua New Guinea Government Gazette of that date. This provisions clearly captures the pre-independence Gazette which was the subject of the police charge on methamphetamine.
6. Section 79 of the *Interpretation Act* states that ‘the act or thing to be done is deemed to be made under the instrument itself’. This provision clearly protects the declaration made in the Gazettal Notice in 1972.
7. Section 89(2) and in particular Section 89(4) of the *Interpretation Act* provide that any discrepancy between an instrument and a gazette itself shall not invalidate ‘the act, matter or thing’ being done in reliance of the gazettal.<sup>13</sup>

The Bureau’s support provided helpful insight into the legislative process concerning the pre-independence legislation, but in hindsight, it was limited if the court asked for further clarification from the police on how the pre-independence legislation came to be part of PNG’s legal system. So, despite the existence of the pre-independence legislation and gazettal notice explicitly making reference to methamphetamine, and the law being valid under the *Constitution*, there had to be further information of evidentiary value. There was therefore an obvious disconnection in the narrative.

The Bureau then turned to the State Solicitor for further legal analysis of the legislative process. The legal advice was unfortunately received after the conclusion of the *Pang case*. An abstract of that legal advice dated 01<sup>st</sup> April 2022 is set out below:

- a. Definition of dangerous drugs under the *Dangerous Drugs Ordinance* (“Ordinance”) passed by the pre-independence Administration in 1952 states that for a substance to be a dangerous drug:
  - (i) it must be listed in Schedule 1; or
  - (ii) it must be declared under s. 2 of the Act and published in the National Gazette;
- b. Schedule 1 of the Act did not contain Methamphetamine, so in 1972 there was a declaration made pursuant to s. 2 of the *Ordinance* and it was published in the National Gazette No.4 dated 20<sup>th</sup> January 1972. In this declaration, methamphetamine was listed. Hence, for purposes of the *Ordinance* it was a dangerous drug;
- c. The *Ordinance* was repealed by s.3 of the *Laws Repeal Act 1975* and subsequently brought back into operation by Schedule 2.6 of the *Constitution* as *Dangerous Drugs Act* Ch.288;
- d. The vacuum left by the repealed Acts was immediately filled by Sch.2.6 of the *Constitution*. By operation of subsection (2) of Schedule 2.6, all pre-Independence laws including subordinate legislative enactments are, by virtue of that section, adopted as Acts of the Parliament and apply to the extent to which they applied immediately or purported to apply before Independence Day. The Schedule itself sets out the definition of the term pre-

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<sup>13</sup> As an observation, the *Interpretation Act* is a useful piece of legislation when it comes to interpreting legislation, or when there is uncertainty arising from amendments or repeal of legislation amidst pending court proceedings.

- Independence laws namely, ‘a law that was repealed by the *Laws Repeal Act 1975* made by the pre-Independence House of Assembly of Papua New Guinea’; and
- e. This means that the *Dangerous Drugs Act* Ch.228 and its list of dangerous substances under Schedule 1 or under the declaration, continued to apply as subordinate legislative enactment under the *Dangerous Drugs Act* to the extent to which they applied immediately before Independence Day.
  5. ....[M]ethamphetamine is listed in the declaration made pursuant to s.5 of the Ordinance. This provision was adopted in s.2 of the *Dangerous Drugs Act* Ch.228. Hence, by operation of Schedule 2.6(2) of the *Constitution*, the Act and its subordinate legislative enactments remain effective.”

This legal advice made it much clearer, and could have served the foundation for a stronger argument by police had it been a part of the submissions at the District Court.<sup>14</sup>

### **Private Members Bill to amend the Dangerous Drugs Act**

In an effort to address the offences and especially the penalties in relation to dangerous drugs, a Private Member’s Bill was introduced in Parliament in September 2021. That Bill resulted in a repeal of Section 3 of the *Dangerous Drugs Act* and increased the penalty from two years to 40 years imprisonment. At the outset, that demonstrated political will and the concern in addressing the rise in hard drugs being manufactured or coming into PNG.<sup>15</sup> However, as to the operability of this legislation, it would need to be tested by criminal practitioners who might have a concern regarding the policy rationale for the offences as well as its compatibility with sentencing guidelines (i.e., a penalty must be proportionate to the offence being committed).

The problem with the penalty from the amendment is that it does not give any room for the court to decide on varying quantities of type of drugs, toxicity, cultivation, manufacturing or possession. This would mean that a person who is found guilty of cultivating three plants of marijuana or in possession of 2 grams of cocaine is liable to pay K1 million or be imprisoned for 40 years, similar to a person found guilty with significantly larger quantities. The sentencing guidelines adopted by PNG’s criminal justice system would not be able to gel well with these legislative provisions. The constitutionality of the said provision can be tested against Section 11(2) of the *Criminal Code* and Section 37(7) of the *Constitution*. This can be the subject of further debate later.

The Private Member’s Bill was developed without any legal policy process or consultations with relevant stakeholders, therefore, the effect on ongoing investigations and criminal prosecutions was not taken into account. This created much apprehension by the police on whether the accused could still be charged under Section 3 of the Act.

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<sup>14</sup> After the judgment in the Pang case was handed down and in preparation for a potential review, the Bureau formally instructed the State Solicitor for independent advice. The said advice was provided without the District Court judgment, and therefore added objectivity to the subsequent debate. As mentioned above, the State Solicitor’s advice was that the subsidiary legislation was valid.

<sup>15</sup> In 2020, PNG experienced the biggest drug bust. K160 million worth of cocaine was seized at Papa Lea Lea. The Bureau was responsible for providing legal and strategic advice to police and stakeholders on evidentiary gathering especially under a mutual assistance request to Australia with the assistance of the Legal Policy & Governance Branch of the DJAG. See Zarriga, M. (August 2020). “Drug bust”. *The National*. Retrieved from <https://www.thenational.com.pg/drug-bust/>

In terms of using the provisions of the *Dangerous Drugs Act* that have been repealed, Section 67 of the *Interpretation Act* applies. This provision states that criminal or civil matters on foot will not be affected by the amendments or repeal of such provisions and can continue. Section 65 of the *Interpretation Act* also preserves the application of the existing provisions of the *Dangerous Drugs Act* pending the bringing into operation of the new law.

The Bureau advised the police that under Section 67 of the *Interpretation Act*, the charges had been laid prior to the repeal and therefore could be sustained. This was adequately supported by Sections 63(1)(b), (c), (d) and (e) of the *Interpretation Act* with respect to “Effect of repeal” which states:

- (1) The repeal of a provision does not-
  - (a) ...
  - (b) affect the previous operation of the repealed provision, or anything duly done or suffered under the repealed provision; or
  - (c) affect any right, privilege, obligation, or liability acquired, accrued or incurred under the repealed provision; or
  - (d) affect any penalty, forfeiture, or punishment incurred in respect of an offence committed against the repealed provision; or
  - (e) affect any investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation, liability, penalty forfeiture or punishment, and any such investigation, legal proceeding, or remedy may be instituted, continued or enforced, and any such penalty, forfeiture, or punishment may be imposed, as if the repeal had not been made.

A case on point is *State v Jerry Kiwai* (2014) N5640. In that case, the court held that Section 63 of the *Interpretation Act* means that ongoing criminal proceedings initiated under a repealed offence provision can continue unaffected, provided that the offence was committed when the provision concerned was still in force. The court observed that:

In my view, therefore, the charges on indictment against the accused under the repealed provision is valid in that the provisions of section 169 of the Act, under which the accused stands charged, is saved pursuant to sections 63(1)(b), (c), (d) and (e) and 67 of the *Interpretation Act*. I will now proceed with the judgment on verdict.<sup>16</sup>

The Bureau also referred the police to Section 37(7) of the *Constitution*, as the underlying constitutional provision in such matters. This constitutional provision, usually pleaded by the defense, stipulates that:

No person shall be convicted of an offence on account of any act that did not, at the time when it took place, constitute an offence, and no penalty shall be imposed for an offence that is more severe in degree or description than the maximum penalty that might have been imposed for the offence at the time when it was committed.

This means that a person should be charged only for an act or omission if the subject of the charge is an offence under law. In the *Pang case*, Section 37(7) of the *Constitution* was complied with in that Section 3 of the *Dangerous Drug Act* was still in force. Another legislative provision relevant to the case was Section 11 of the *Criminal Code* which states that:

- (1) A person cannot be punished for doing or omitting to do an act unless—

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<sup>16</sup> Also note the case of *State v Kutetoa* (2005) N2814 and the case of *State v Kape Sulu* (2003) N2456. There are a number of useful principles stated by the court in relation to the application of those provisions mentioned.



- (a) the act or omission constituted an offence under the law in force when it occurred;  
and
  - (b) doing or omitting to do the act under the same circumstances would constitute an offence under the law in force at the time when he is charged with the offence.
- (2) If the law in force when the act or omission occurred differs from that in force at the time of the conviction, the offender cannot be punished to any greater extent than was authorised by the former law, or to any greater extent than is authorised by the latter law.

Based on the existing legal framework, the accused was arrested on the 16<sup>th</sup> November 2021 and charged for possessing a certain quantity of methamphetamine. At the material time, the possession of methamphetamine, was an offence under Section 3(1)(d) of the *Dangerous Drugs Act*. The repeal of Section 3 of the *Dangerous Drugs Act* which came into effect on 13<sup>th</sup> January 2022 did not affect the status of the offence and charge.

At the time of his arrest, Mr. Pang was found in possession of materials that are used to manufacture methamphetamine. Based on circumstantial evidence, the manufacture of the said drug did occur on or before the 16<sup>th</sup> November 2021. Mr. Pang was therefore liable to be charged under Section 3(1)(b) of the *Dangerous Drugs Act* for manufacturing methamphetamine. The accused was consequently charged on the 07<sup>th</sup> December 2021 for the production and possession of methamphetamine. This was clearly before the 13<sup>th</sup> of January 2022, the date by which the repeal came into force.

On the same occasion, the NEC also approved the *Controlled Substance Bill 2021* to be tabled in Parliament. The *Controlled Substance Bill* also had a provision to repeal Section 3 of the *Dangerous Drugs Act*. The *Controlled Substance Act* was also passed unanimously by Parliament in December 2021.

### **The Judgment in State v Jamie David Pang**

It should be noted that in the *Pang case*, a number of relevant information and documents were not tendered by the police as evidence, or through their submissions especially in relation to the application of the pre-independence law. These included: (1) the official copy of the *Dangerous Drugs Act* bearing the subsidiary legislation and the gazettal notice; (2) the legislative process in adopting pre-independence laws, or any applicable cases (that may include in affidavits from those responsible for the legislative process); (3) the legal advice from the State Solicitor which pointed out the application of the *Laws Repeal Act 1975* (which was obtained post-judgement); and (4) the Bureau's legal advice on the *Interpretation Act*.

The Magistrate in the *Pang case* had the benefit of knowing that there existed a subordinate legislation which mentioned methamphetamine. A judicial officer having gone through legal training and in that position could have been able to deduce that the matter is of significance to the legal system and warrants deliberate judgement. However, a differing view was immediately held. The ruling was that the subsidiary legislation that contained a list of drugs which included methamphetamine was invalid. His Worship could not appreciate how the subsidiary legislation came to apply under the *Dangerous Drug Act*. The concern was that there was no 'head of power' or enabling provision expressly provided in the *Dangerous Drugs Act* to make or support the existence of the subsidiary legislation. The required assistance in terms of explaining the gazettal notices or providing evidence of the legislative process was not provided.



His Worship also ruled that even the Deputy Administrator responsible for making the declarations in the said gazettal did not have the authority to make those declarations in the first place, as Section 5 of the *Dangerous Drugs Ordinance* expressly stated that any declaration was to be made by the Administrator. There was a case being referred to by his Worship regarding a contract of employment namely *Wilson Thompson v National Capital District Commission* (2004) N2686. In that case, his Honor Justice Kandakasi (as he then was) ruled the contract of employment to be invalid given that the individuals who executed it did not have the authority to do so. Whilst that point is clear, the issue here is whether the Deputy Administrator had the authority to make those declarations in the first place. Apparently, the Magistrate's consideration was only limited to what the law had expressly stated without regard to any further information that could have supported the Deputy Administrator's exercise of that power. This may have required evidence of a provision that delegated such a role or an instrument of delegation. This was not in evidence. This point of law was material to the substantive proceedings, and provided an opportunity for further deliberation.

A key evidentiary document that would have had a persuasive value was the official copy of the PNG legislation. This included a compilation of the legislation's historical developments from original enactment, gazettal, repeal or amendments. This compilation could be as thick as a text book.<sup>17</sup> According to the DJAG's Chief Librarian, such documents are bound up nicely in a thick green cover which can be easily removed to include further documents, insert amendments or repeal to the legislation by pasting or crossing out provisions or wordings with immediate references.

The official legislation was borrowed from the DJAG Law Library and given to the police with verbal advice as to how to present it to the Magistrate. Official copies of other legislation from the same period with their historical information as compiled were also provided to the police so as to demonstrate to the court the consistency and professionalism involved in maintaining official copies of PNG's legislation. Unfortunately, according to the Magistrate, this did not happen. He said:

I must first establish and acquaint myself the process involved on the transitional period from post-independence to pre-independence with laws on the face of, what is before the court, considering the fact that both parties did not guide me properly on this.

His Worship further observed that:

[i]n the absence of any gazettal notice or ministerial approval or certification to enact as subsidiary legislation, it creates doubts in the minds of the court. It was for this reason; the prosecution was asked to produce the books that she got the extracts from and to deliberate further on it, but advised court that, the books are too old and heavy to carry them.

In hindsight, case law in relation to similar circumstances, involving the application of Schedule 2.6 of the *Constitution*, the *Interpretation Act* and the *Laws Repeal Act 1975* could have helped. A case that could have potentially been referred to was *Capek v The Yacht 'Freja'* [1980] PNGLR 161. In this case, the court held that the *Colonial Courts of Admiralty Act 1980* applied to PNG immediately before Independence under 'adoption, application and continuation' under the 'combined effect' of the *Laws Repeal Act 1975*, the *Papua New Guinea Independence Act 1975* and the *Constitution*, Schedule 2.6(2).

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<sup>17</sup> Mr Raphael Luman from the Office of Public Prosecutor, personal communication (25 November, 2021).

A case that also affirmed the State Solicitor's advice (which did not refer to any case law) was *SCR No 1 of 1976 (P); Peter v South Pacific Brewery Ltd* [1976] PNGLR 537. This was an application by the District Court under Section 18 of the *Constitution* regarding the validity of Section 131 of the *District Courts Act* 1963. The issue was whether Section 131 was unconstitutional and therefore invalid to the extent that it allowed the District Court to proceed *ex-parte* to hear and determine the case in the absence of the defendant. The Supreme Court was asked to clarify whether Section 131 undermined Section 37(5) of the *Constitution* which provides for the *ex-parte* jurisdiction to hear all other summary offences. The other consequential issue that was brought up was the validity of the *District Courts Act* 1963 as a 'pre-independence legislation'. In relation to the issue in the *Pang case*, the court said:

it is important to note the legal arrangements which were made to ensure that all laws in the country must stem from its autochthonous or homegrown *Constitution*. (*Constitution*, s. 24, Report of the Constitutional Planning Committee, Chapter 15, par.14). The first step was the enactment by the pre-Independence House of Assembly of the *Laws Repeal Act* 1975 which came into operation immediately prior to the expiry of Independence Day, 15<sup>th</sup> September, 1975. The purpose of that Act, which was achieved by one simple section and without reference to particular enactments, was the repeal in bulk, as it were, of all the legislation and subordinate legislation of Papua New Guinea, and any other country applying to Papua New Guinea immediately before the commencement of the Act. It was then by force of s.20(3) and Sch.2.6 of the *Constitution*, which came into effect on 16<sup>th</sup> September, 1975, that all pre-independence laws, which means for the purposes of this case all laws repealed by the *Laws Repeal Act* 1975, were adopted as Acts of the Parliament, and were brought into application to the extent to which they applied immediately before Independence Day. Just as the repeal was of the legislation in its entirety, so also was the adoption of that legislation under the *Constitution* and, of course, the *District Courts Act* was included in that adoption. Further, as the provision contained in Sch.2.6 is expressly made subject to any Constitutional law, it is clear that the adopted laws are subject to the same constitutional limitations as an Act of Parliament, and in particular, for the purposes of this case, ss 10 and 11. Section 11 provides that the *Constitution* and the Organic Laws are the Supreme Law of Papua New Guinea and, subject to s.10 all Acts (whether legislative, executive or judicial) that are inconsistent with them are, to the extent of the inconsistency, invalid and ineffective.<sup>18</sup>

In upholding the validity of the *District Court Act* 1963, the court held that:

Immediately prior to 16<sup>th</sup> September, 1975 the *District Courts Act* 1963 (as amended) was in operation as a pre-independence Law. Section 3 of the *Laws Repeal Act* 1975 of the House of Assembly, repealed this law as at 15<sup>th</sup> September, 1975. It was adopted as an Act of the National Parliament as from 16<sup>th</sup> September, 1975 by Sch.2.6 (2) of the *Constitution*.<sup>19</sup>

An important constitutional provision which should have guided the District Court is section 24 of the *Constitution*. The Supreme Court stated that Section 24 of the *Constitution*, should always guide judicial officers in statutory interpretation and when establishing the legal basis for legislation. This was not considered in the *Pang case*. The existing guidance under the *Constitution* if referred to would have prompted the use of extraneous materials such as official records of debates and of votes and proceedings (including those from the pre-independence House of Assembly), documents, and papers or Hansards.

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<sup>18</sup> The case can be accessed at <http://www.paclii.org/pg/cases/PGSC/1976/28.html>.

<sup>19</sup> *Ibid*.

## Instructions to Review the Pang Case

When the Bureau was informed that the District Court had dismissed the case against Mr. Pang, it approached the Office of the Public Prosecutor to seek advice on the options available to the State. The Public Prosecutor's Office advised that it could not institute an *ex-officio indictment* given that the matter in question was not a result of a committal proceeding, but was within the jurisdiction of the District Court.<sup>20</sup> However, it was uncertain as to whether the District Court had exclusive jurisdiction, or that such a matter can be appealed by the State as would persons who have been convicted and sentenced. Therefore, it was considered most appropriate to seek the assistance of the Supreme Court. The Bureau therefore advised the Attorney-General to instruct the Solicitor-General under the *Attorney-General Act* to refer the matter to the Supreme Court for determination.

The Attorney General was advised through the Solicitor-General to consider the following courses of action:

1. Make an application under Section 19 of the *Constitution* for a Supreme Court Reference to determine the validity of the *Dangerous Drugs Act*, in particular the subordinate legislation.
2. Make an application to the Supreme Court pursuant to Section 26 of the *Supreme Court Act* for an opinion on the point of law in question. Expressly this provision is in relation to indictable offences, however, substantively it may be available for all criminal offences that require clarification.
3. Under Section 28 of the *Supreme Court Act*, the Attorney General could seek orders from the Supreme Court to order a new trial. This provision expressly allows for an appeal against conviction. However, can this apply to an appeal against dismissal on a point of law? Research on applicable case law will assist as well as practice directions by the Supreme Court. The case of *Oscar Tugein v Michael Gotaha* [1984] PNGLR 137 provides some main grounds for a retrial:
  - a) the public interest in bringing justice to those guilty of serious crimes and ensuring that they do not escape because of technical blunders by the trial judge in the conduct of the trial;
  - b) the expense and inconvenience to witnesses who would be involved in a new trial when weighed against the strength of the evidence;
  - c) the seriousness and prevalence of the particular offence;
  - d) the consideration that the criminal trial is an ordeal which the defendant ought not to be condemned to go through for a second time through no fault of his own unless the interest of justice require that he should do so;
  - e) the length of time elapsing between the offence and the new trial if ordered; and
  - f) the strength and availability of the evidence.<sup>21</sup>

The challenge in utilising these grounds as referred to in the *Oscar Tugen case* is that there is express reference to the National Court or trial Judge, and not the District Court. Also importantly, are such grounds applicable to District Court matters either indictable offences triable summarily or criminal matters within the District Court's jurisdiction? The Supreme Court could assist if it has jurisdiction in such matters. The Supreme Court could also issue

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<sup>20</sup> Luman R., personal communication (26 January, 2022).

<sup>21</sup> These were discussed by Mamu in Mamu, B.L. *Supreme Court (PNG) Practice & Procedure* (Port Moresby: Kairos Press, 2016)

directions under Section 185 of the *Supreme Court Act* with respect to practice or procedure where it is lacking with respect to a matter.

Another option would have been to seek a judicial review of the court's decision and have the decision quashed and reverted to the District Court for a rehearing. The Supreme Court could also be asked to clarify the following issues:

1. Is the subsidiary legislation valid?
2. What is "subsidiary legislation" compared to the definition of "subordinate enactments etc...? What is the process of making subsidiary legislation?
3. Did the Deputy Administrator have authority to make any declaration of dangerous drugs under the *Dangerous Drugs Ordinance 1952-1968*?
4. Whether a decision of the District Court in such matters can be appealed? If so, where should the matter be appealed at? The National Court, Supreme Court or the District Court comprising of different senior Magistrates?
5. Whether such District Court decisions can be reviewed pursuant to judicial review?
6. Can such matters at the District Court be stayed pending the interpretative jurisdiction of the National or Supreme Court on points of law?
7. The evidence has not been determined yet, so is the matter res-judicata? Should the police discard the evidence? In the *Pang case*, the merits of the matter were not determined. In that the matter did not proceed to trial but was dismissed by the Magistrate who took issue with the existence of the subsidiary legislation to the *Dangerous Drugs Act*.
8. What would become of all or any decision made under the subsidiary legislation in question since its inception if the subsidiary legislation is declared as invalid. As an example, the Pharmacy Board also has the responsibility to regulate the importation of narcotics and psychotropic substances used for therapeutic purposes and provide quarterly reports to the International Narcotics Control Board (INCB). In 2015, minimum requirements for a drug import certificate for Narcotic and Psychotropic Substances was issued by the National Department of Health pursuant to Section 5(2)(b) of the *Dangerous Drug Act*. By virtue of the District Court ruling, what would be the impact to these requirements and any decisions that were made?<sup>22</sup>

## Conclusion

According to legal opinion, the subordinate legislation under the *Dangerous Drugs Act* which lists methamphetamine as a dangerous drug is valid. However, the District Court in the *Pang case* did not take judicial notice of the subordinate legislation as submitted by the police prosecution and thus ruled that it was invalid *ab initio*. Technically, this means that the *Dangerous Drugs Act* and the subordinate legislation is ineffective and must not be used.

Given that the District Court ruled that the Deputy Administrator under the colonial administration did not have authority in the first place, the effect would be that the subordinate legislation containing the list of dangerous drugs never existed. This will have repercussions on other authorities that have jurisdiction under the subordinate legislation and

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<sup>22</sup> The *National Medicines Policy 2014* also has a chapter that calls for the regulation of narcotic drugs and psychotropic substances which is based on the *Dangerous Drugs Act*.

their functions concerning those various chemicals or compounds listed. These include the health sector, agriculture, food or scientific industry. The subordinate legislation falls within the portfolio responsibility of the Minister for Health. It is therefore only a matter of time when the authority of those stakeholders will be questioned. The *Peter v South Pacific Brewery Ltd* case refers to the need for judicial officers to exercise ‘judicial ingenuity’ in the dispensation of justice and not to be ‘narrowly legalistic’ which can compromise the ‘spirit of the letter of the law’.<sup>23</sup>

This is a matter worth pursuing in the Supreme Court to develop the country’s jurisprudence in legislation in particular dangerous drugs. It will give clarity to the court’s jurisdiction in such matters, restate the legislative process when pre-independence legislation is involved and give guidance to law enforcement in such matters in the future.

Finally, there are important lessons from the District Court case that actors in the criminal justice system must take note.<sup>24</sup> They must adopt appropriate interventions to address the notable capacity gaps both from an individual, systemic and policy perspective to maintain the integrity of the justice system. In that manner, other stakeholders can be assisted meaningfully in making a lasting difference in the country’s efforts against illegal drugs.

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<sup>23</sup> Supra, n17.

<sup>24</sup> The likely legal implications associated with the preliminary issue required personnel with the skills and veracity to pay attention to details. It is not insurmountable, and only takes the persistent application of sound advocacy skills and the prerequisite judicial temperament. The kind of attitude required from judicial officers in these constitutional matters is the ability to ask the right questions and seek the fullest extent of available evidentiary support to clear any doubt and dispense justice. As an observation, the type of legal issue raised could potentially be for the higher judiciary.